UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 23, 2018, at 1:30 p.m.

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1. **17-27202-E-13** **CRYSTAL JOHNSON** **MOTION FOR RELIEF FROM**
EJS-1 **Pro Se** **AUTOMATIC STAY**
12-13-17 [28]

NORTH AVENUE APARTMENTS, LP
VS.

Final Ruling: No appearance at the January 23, 2017 hearing is required.

The case having previously been dismissed, the Motion is dismissed as moot.

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

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

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

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

2. **17-24205-E-13** **MARK BRADY** **MOTION FOR RELIEF FROM**
EAT-1 **Dale Orthner** **AUTOMATIC STAY**
12-26-17 [29]

WELLS FARGO BANK, N.A. VS.

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 26, 2017. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxxxxxx.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Mark Brady's ("Debtor") real property commonly known as 4837 Propitious Court, Sacramento, California ("Property"). Movant has provided the Declaration of LaKeidra Barber to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The LaKeidra Barber Declaration states that there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of $2,385.81 in post-petition payments past due.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on January 8, 2018. Dckt. 35. The Chapter 13 Trustee states that Debtor is delinquent on plan payments, that the Plan includes Movant in Class 1, that $4,621.92 has been disbursed to Movant for ongoing mortgage payments, and that $0.00 in principal has been disbursed on Movant's pre-petition arrears.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on January 9, 2018. Dckt. 38. Debtor asserts that there is no legal basis to support Movant's Motion for Relief from the Automatic Stay, including that there is no Local Bankruptcy Rule 4001-1(b)(C), Movant's claim of default relates only to pre-bankruptcy arrears and four regularly scheduled mortgage payments due post-petition, and that a debtor's material default constituting cause to terminate an automatic stay is not supported by 11 U.S.C. § 362(d)(1). Additionally, Debtor's confirmed plan allows for $18,903.00 in arrears and Movant's claim states only $16,670.27 in arrears.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $193,730.00 (including $192,480.00 secured by Movant's first deed of trust), as stated in Schedule D. The value of the Property is determined to be $294,400.00, as stated in Schedules A and D.

Debtor's counsel argues in the Opposition (no evidence having been submitted) that the grounds for the Motion are asserted "only" as to three pre-petition arrearages and four post-petition arrearages. Opposition ¶¶ 3, 4, Dckt. 38. The Motion alleges:

> "6. As of November 28, 2017, the loan is in default for the months of September 01, 2017 through and including November 01, 2017 at $1,170.45 each, less suspense of $1,125.54, for a total of $2,385.81. Another payment of $1,170.45 will come due on December 01, 2017."

Motion ¶ 6, Dckt. 29. With this bankruptcy case having been filed on June 26, 2017, September and November 2017 are post-petition months in which there is an alleged default. It is asserted that these alleged post-petition defaults constitute "cause" for termination of the automatic stay pursuant to 11 U.S.C. § 362(d)(1).

The post-petition default allegation is supported by evidence consisting of LaKeidra Barber's testimony under penalty of perjury. Declaration, Dckt. 31. Ms. Barber's testimony includes:

> 7. The following sets forth the post-petition payments, due pursuant to the terms of the Debt Agreement that have been missed by the Debtor as of November 28, 2017:

Number of Missed Payments	From	To	Missed Principal and Interest	Missed Escrow (if applicable)	Monthly Payment Amount	Total Amounts Missed
3	09/01/17	11/01/17	$820.11	$350.34	$1,170.45	$3,511.35
Less post-petition partial payments (suspense balance): ($1,125.54)						
					T otal:	$2,385.81

> 8. As of November 28, 2017, the total post-petition arrearage/delinquency and amount necessary to cure the post-petition default alleged in the Motion is $2,385.81, consisting of (I) the foregoing total of missed post-petition payments in the amount of $2,385.81, . . .[1]
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> ---
>
> [1] The total of missed post-petition payments for this impounded loan include any missed escrow payments. Such missed escrow payments include amounts assessed for taxes and insurance and any previously assessed escrow shortage amount (if applicable). To avoid duplication, post-petition advances (if any) made for insurance, real estate taxes, or similar charges are not listed separately to the extent such advances would have been paid from the missed escrow payments. . . ."

Id., ¶¶ 7, 8.

The Chapter 13 Trustee has weighed in on the Motion, stating that Debtor is $7,275.00 delinquent under the confirmed plan, with required monthly plan payments being $2,425.00. Reply and Declaration, Dckts. 35, 36. A $7,275.00 delinquency represents three monthly plan payments being in default. This is consistent with the allegations in the Motion and testimony in support of the Motion that there are three post-petition payments in default.

There is no dispute that three post-petition defaults exist. Debtor's confirmed Chapter 13 Plan requires Debtor to make the monthly plan payment, and from said payment, Movant will be paid $1,155.48 (or such amount as updated under the terms of the note) for its current mortgage payment and a $315.05 monthly payment on the pre-petition arrearage. Plan ¶ 2.08(c), Dckt. 7. Those have not been made.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][I] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.*

Here, Debtor does not argue that the equity cushion is adequate, but only "There is no legal basis to support Creditor's Motion for Relief from the Automatic stay." Opposition ¶ 7, Dckt. 38. Other than that legal conclusion, Debtor offers no legal arguments as to why the failure to make three post-petition plan payments is not cause for terminating the automatic stay.

A review of the Docket in this case does not show any proposed modified plan being filed, no motion to confirm a modified plan, nor any action being taken to address a three-month default in Plan payments.

Conceivably, Debtor may have argued that because the value of the property securing Movant's claim is $294,000 (Schedule A/B, Dckt. 1 at 11) and because Movant's secured claim is only ($117,135.70), the amount stated on the non-evidentiary Relief from Stay Summary Sheet, the apparently $177,264.30 in "equity" provides Movant with adequate protection while Debtor diligently prosecutes this bankruptcy case.

But Debtor has not made that argument. Whether this is because Debtor now questions the value or does not intend to diligently prosecute the bankruptcy case, Debtor has chosen not to make that argument.

Debtor had a prior Chapter 13 case, No. 17-20245, ("First Bankruptcy Case") that was filed on January 16, 2017. On April 14, 2017, the Chapter 13 Trustee filed a Motion to Dismiss the First Bankruptcy Case, asserting that Debtor was $1,490.00 (approximately one month) in default in monthly Plan payments. No opposition was filed to the Motion (Debtor being represented by different counsel than in the present case), and the court dismissed the case. 17-20245; Order filed June 5, 2017, Civil Minutes, Dckts. 45, 43.

Debtor then commenced this bankruptcy on June 26, 2017, and promptly confirmed his Chapter 13 Plan. Order filed August 7, 2017, Dckt. 24. The court also extended the automatic stay as to Debtor pursuant to 11 U.S.C. § 362(c)(3)(B), concluding that Debtor had resulted the presumption of bad faith flowing from the dismissal of the First Bankruptcy Case under 11 U.S.C. § 362(c)(3)(C). Order, Civil Minutes, Dckts. 22, 20. The findings of the court include:

> "Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay. Debtor alleges that there was miscommunication with his prior attorney that caused him to miss payments, but now, Debtor is represented by another attorney."

Civil Minutes, Dckt. 20.

Under the Debtor's confirmed Plan in this case, the first Chapter 13 payment was due in July 2017. As of the December 26, 2017 filing of the Motion for Relief from the Automatic Stay there were five monthly plan payments that had come due for disbursement through the Chapter 13 Trustee (July—November 2017). Debtor had defaulted in three of the five payments (60% of the payments that had come due), having made only one payment.

Under the Chapter 13 Plan there are three debts provided for. First, Movant's. Then for Sacramento County for the property taxes on Movant's collateral. Third, payments on the secured claim of "Santander" for which Debtor's vehicle is the collateral. There is also a 2% dividend for creditors, which is a *de minimis* amount. Essentially, the focus of the Plan is to pay Movant.

Debtor's financial information upon which the Chapter 13 Plan was confirmed includes the Income and Expense information on Schedules I and J. Dckt. 1 at 30–31 and 32–33. For Income on Schedule I, Debtor states that he has take-home pay of $3,226.18 and $1,100.00 in net rental income. That rental income is for the recent rental of a "portion of his house for $1,100 per month. . . ." Schedule I, Question 13.

Moving to Schedule J, Debtor lists having two dependents, two minor children. The expenses listed on Schedule J do not appear to be unrealistic, though no provision is made for taxes on rental income of $13,200.00 per year. For a family of three, Debtor lists monthly expenses (excluding mortgage, taxes, and insurance) of ($1,901.00). With those expenses and the additional rental income, Debtor was able to show having $2,425.18 of Net Month Income to fund the Plan.

Something has happened, and Debtor does not have $2,425.18 to fund his Chapter 13 Plan.

In light of the defaults in plan payments that directly cause the defaults in post-petition payments due to Movant, cause exists to terminate the automatic stay. While there is an equity cushion, Debtor has taken no steps to save that equity cushion, but instead appears to have the "plan" of living in the house payment free protected by his confirmed Chapter 13 Plan (which he has breached 60% of the time since this case was filed).

~~Cause pursuant to 11 U.S.C. § 362(d)(1) exists to modify the automatic stay to allow Wells Fargo Bank, N.A. and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 4837 Propitious Court, Sacramento, California , 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 not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Request for Prospective Injunctive Relief

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

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. That 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 are 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 Wells Fargo Bank, N.A. and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Wells Fargo Bank, N.A. and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

ADDITIONAL ACTION BY DEBTOR

At the hearing, Debtor's counsel advanced the following with respect to Debtor's multiple defaults under the Plan and the action to be taken not to lose the equity in the Property for Debtor. **Xxxxxxxxxxxxxx**

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 Wells Fargo Bank, N.A. ("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 Wells Fargo Bank, N.A. and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 4837 Propitious Court, Sacramento, 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.~~

3. 17-25627-E-13 **LINDA HUSS** **MOTION TO SUBSTITUTE ATTORNEY**
Eric Schwab **1-8-18 [48]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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)(3) 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 January 12, 2018. By the court's calculation, 11 days' notice was provided. The court set the hearing for 1:30 p.m. on January 23, 2018. Dckt. 49.

The Motion to Substitute Attorney was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion to Substitute Attorney is xxxxx.

Linda Huss ("Debtor"), filed a Motion to Substitute Attorney seeking to replace her counsel and proceed in *pro se* in this bankruptcy case. The Motion does not provide any grounds for the request.

Instead, it states "Debtor(s) herein, hereby substitute(s): Linda Anne Huss . . . in place and stead of the present attorney: Eric Schwab." The Substitution Motion is signed by Debtor, but is not signed by any other party.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. LOCAL BANKR. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. CAL. LOCAL R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, No. 1:08cv01523 OWW GSA, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. June 23, 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 26 Cal. Rptr. 2d 554 (Cal. Ct. App. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 559.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. CAL. LOCAL R. 180(e).

Termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdraw from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. CAL. R. PROF'L CONDUCT 3- 700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. CAL. R. PROF'L CONDUCT 3-700(B).

DISCUSSION

The Substitution Motion was not set for hearing, and it was not served on anyone. It appears that Debtor wishes to proceed in this bankruptcy case as her own legal counsel. She has not provided any reason why she wants to make that switch, however.

No party has responded since the court issued an order setting this matter for hearing. The court does not have any information about whether substitution is appropriate in this case. Since filing to substitute her attorney, Debtor also filed another unnoticed, unserved motion—a motion to dismiss this bankruptcy case. Dckt. 50. That motion has not been set for a hearing yet.

Possible Purported Transfer of Property by Debtor

In a Response to the Substitution, the Chapter 13 Trustee comments that Debtor may have purported to transfer property to the Warren Lane Property post-petition in January 2018 without court authorization. It may be that Debtor has entered into an escrow to sell the property (and is now desperate to get the bankruptcy case closed to dismiss) and the escrow will be hung up when the title company does its review of the public records, including pending bankruptcy cases. Or it may be that the title company allowed the sale to close, with a seller not authorized to issue a deed and not authorized to transfer property from the bankruptcy estate.

At the hearing, the parties reported that xxxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Substitute Attorney filed by Linda Huss ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Substitute Attorney is xxxxxxx.

4. **17-27751-E-13** **MISAEL/LUZ BAUTISTA** **CONTINUED MOTION FOR RELIEF**
LHL-1 **Harry Roth** **FROM AUTOMATIC STAY**
12-1-17 [9]

MORTGAGE RELIEF SERVICE, 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,, and Office of the United States Trustee on December 1, 2017. By the court's calculation, 18 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.

Mortgage Relief Services, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 205 Anderson Avenue, Winters, California ("Property"). The moving party has provided the Declaration of Laurie Howell to introduce evidence as a basis for Movant's contention that Misael Bautista and Luz Bautista ("Debtor") do 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 commenced an unlawful detainer action in California Superior Court, County of Yolo. Exhibit B, Dckt. 12.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on December 11, 2017. Dckt. 17. He states that he does not oppose the Motion.

DECEMBER 19, 2017 HEARING

Debtor's counsel appeared at the hearing and advised the court that Debtor opposed the Motion on the grounds that no legal foreclosure sale had occurred, and that any asserted Trustee's Deed was void. Dckt. 35. In addition to filing an opposition, Debtor promised to file a plan, which includes the prosecution of an adversary proceeding to adjudicate the dispute concerning the alleged void Trustee's Deed.

Consistent with Local Bankruptcy Rule 9014-1(f)(2)(C), Debtor presented a colorable opposition for which the court set a briefing schedule and final hearing at 1:30 p.m. on January 23, 2018. Opposition was ordered to be filed by January 5, 2018, and Replies, if any, by January 12, 2018. Dckt. 40.

DISCUSSION

No further pleadings have been filed as set forth in the briefing schedule. Debtor has not opposed the Motion and has not proposed an amended plan that provides for prosecuting the dispute about the validity of the Trustee's Deed.

Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2).

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

The court shall issue an order terminating and vacating the automatic stay to allow Mortgage Relief Services, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 205 Anderson Avenue, Winters, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof. FN.1.

FN.1. Though not opposing this Motion, Debtor has filed other pleadings, which are not asserted as a basis for opposing the present Motion. The Plan provides for Movant's claim as a Class 1 claim to be paid $400.00 per month. That is inconsistent with the Motion that asserts that Movant owns the Property, not that it has a secured claim. No adversary proceeding has been filed to quiet title, to the extent that Debtor disputes Movant's contention that it is the owner of the Property. The Chapter 13 Plan, Dckt. 21, does not provide for Debtor to diligently prosecute any ownership rights or interests in the property.

To the extent that Debtor may have negotiated a settlement with Movant, no motion to approve a compromise (FED. R. BANKR. P. 9019) has been filed, this Motion has not been dismissed, and Movant has not filed a proof of claim.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Request for Prospective Injunctive Relief

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

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

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

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.

> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

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

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Mortgage Relief Services, LLC and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Mortgage Relief Services, LLC 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 Mortgage Relief Services, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Mortgage Relief Services, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 205 Anderson Avenue, Winters, 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.

5. **16-23476-E-13** **FELIPA DE JIMENEZ** **MOTION FOR RELIEF FROM**
TJS-1 **C. Anthony Hughes** **AUTOMATIC STAY**
12-12-17 [19]

LOBEL FINANCIAL CORP. 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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 12, 2017. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is denied.

Lobel Financial Corp. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2004 Infiniti G35, VIN ending in 0490 ("Vehicle"). The moving party has provided the Declaration of Heidi Viramontes to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Felipa Martin De Jiminez ("Debtor").

The Heidi Viramontes Declaration provides testimony that Debtor has not made four post-petition payments, with a total of $1,104.93 in post-petition payments past due. Another payment will be due on December 12, 2017.

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 $3,109.49, as stated in the Heidi Viramontes Declaration, while the value of the Vehicle is determined to be $7,650.00, as stated in Schedules B and D filed by Debtor.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on January 08, 2018. Dckt. 28. The Chapter 13 Trustee asserts that Debtor is $520.00 delinquent under the confirmed plan where the last

payment posted December 12, 2017, in the amount of $390.00. Debtor's plan payments are $390.00 for thirty-six months beginning June 25, 2016. A total of $5,510.00 in ongoing payments have disbursed to the creditor with a current principal due of $290.00.

DISCUSSION

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][I] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion in the Vehicle for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

The Motion is denied.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Lobel Financial Corp. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** and the Motion for Relief from Automatic Stay is denied.