

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

February 27, 2024 at 1:30 p.m.

1. **23-23131-E-13** **DIANE GARCIA** **MOTION TO DISMISS CASE**
DPC-1 **Harry Roth** **2-12-24 [45]**

1 thru 3

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, persons having filed a Request for Notice, and Office of the United States Trustee on February 12, 2024. By the court’s calculation, 15 days’ notice was provided. 14 days’ notice is required.

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

The Motion to Dismiss is **XXXXXXX .**

The Chapter 13 Trustee, David Cusick (“Trustee”), seeks dismissal of the case on the basis that:

1. The debtor, Diane Garcia (“Debtor”), is \$3,230.07 delinquent in plan payments. Debtor will need to pay \$5,663.27 to bring the Plan current by the hearing date.
2. Debtor has failed to provide Trustee with a tax transcript or a copy of her Federal Income Tax Return for the most recent pre-petition tax year.

Docket 45. Trustee submits the Declaration of Trina Hayek to authenticate the facts alleged in the Motion. Decl., Docket 47.

DEBTOR’S PROPOSED AMENDED PLAN

Debtor did not file a Response, but has filed a Motion to Confirm Amended Plan on February 15, 2024. Motion, Docket 49. The plan payments are increased to compensate for the payments that Debtor has missed. *Id.* at p. 2:2-5. It appears that this adjustment in plan payments will cure Debtor’s delinquency.

DISCUSSION

Delinquent

Debtor is \$3,230.07 delinquent in plan payments, which represents multiple months of the \$2,433.20 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

In this case, Debtor has not presented any evidence that shows the delinquency has been cured. However, Debtor has filed an Amended Plan and Motion to Confirm Amended Plan which provides for an increased payment amount to account for the delinquent plan payments. Amended Plan, Docket 54; Motion, Docket 49. The monthly plan payment is increased to \$2,700 for months 6 through 60 of the Amended Plan. This is an increase from the \$2,433.20 in the prior plan that was proposed.

In Debtor’s counsel’s Declaration in support of the Motion to Confirm the Modified Plan (Dckt. 51) that the claim of the Mortgage Holder does not state the correct amount and that Debtor will address that with the Mortgage Holder and pursue such discovery as is appropriate.

In Debtor’s Declaration in support of the Motion to Confirm the Modified Plan (Dckt. 52), she provides testimony concerning how she is able to operate under her budget. For food, both Debtor and her sister each received five lunch meals a week. Dec, ¶ 2. Additionally, food is also obtained the Food Bank. *Id.*; ¶ 3. Health care expenses are nearly all covered by Medicare or Medical. *Id.*; ¶ 4. Debtor relies on the assistance of friends for transportation, Debtor not owning a car. *Id.* ¶ 6.

Failure to Provide Tax Returns

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1)

As of February 20, 2024, no evidence has been presented to the court by either the Trustee or Debtor that indicates this issue has been resolved. At the hearing, **XXXXXXX**

Based on the foregoing, cause exists to dismiss this case. The Motion is **XXXXXXX**.

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

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

The Motion to Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick (“Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is ~~granted, and the case is dismissed.~~

2. [23-23131-E-13](#)
[RAS-2](#)

DIANE GARCIA
Harry Roth

**CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR RELIEF FROM
CO-DEBTOR STAY
10-12-23 [17]**

**WILMINGTON SAVINGS FUND
SOCIETY, FSB 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 October 11, 2023. By the court's calculation, 41 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 XXXXXXX

February 27, 2024 Hearing

At the January 30, 2024 Hearing, the court continued this matter in light of counsel for Debtor having had several disruptions in his life and practice that resulted in his focus being diverted to other matters, which prevented him from being able to address this matter. Counsel for Debtor was given one final continuance to get these matters resolved.

In this case, Debtor has not presented any evidence that shows the delinquency has been cured. However, Debtor has filed an Amended Plan and Motion to Confirm Amended Plan which provides for an increased payment amount to account for the delinquent plan payments. Amended Plan, Docket 54; Motion, Docket 49. The monthly plan payment is increased to \$2,700 for months 6 through 60 of the Amended Plan. This is an increase from the \$2,433.20 in the prior plan that was proposed.

In Debtor's counsel's Declaration in support of the Motion to Confirm the Modified Plan (Dckt. 51) that the claim of the Mortgage Holder does not state the correct amount and that Debtor will address that with the Mortgage Holder and pursue such discovery as is appropriate.

In Debtor's Declaration in support of the Motion to Confirm the Modified Plan (Dckt. 52), she provides testimony concerning how she is able to operate under her budget. For food, both Debtor and her sister each received five lunch meals a week. Dec, ¶ 2. Additionally, food is also obtained the Food Bank. *Id.*; ¶ 3. Health care expenses are nearly all covered by Medicare or Medical. *Id.*; ¶ 4. Debtor relies on the assistance of friends for transportation, Debtor not owning a car. *Id.* ¶ 6.

At the hearing, **XXXXXXX**

REVIEW OF THE MOTION

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust ("Movant"), seeks relief from the automatic stay and co-debtor stay with respect to Diane Garcia's ("Debtor") real property commonly known as 571 Daniels Street, Woodland, California 95695 ("Property"). Movant has provided the Declaration of Genevieve A. Jacobs to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Movant improperly filed this Declaration as an exhibit. Exhibit B, Dckt. 20.

In its supporting Declaration, Movant argues that the terms of the Note and Mortgage have been in default and remain in default since September 9, 2023. Exhibit B, Declaration, Dckt. 20.

CHAPTER 13 TRUSTEE'S OPPOSITION

David P. Cusick ("the Chapter 13 Trustee") filed an Opposition on November 6, 2023. Dckt. 23. The Chapter 13 Trustee asserts that the case was filed on September 29, 2023 and a plan has not been confirmed yet. Opposition, Dckt. 23. The Debtor has paid \$2,433.20 to the Trustee to date where the Plan payments are \$2,433.20 per month for 60 months with 0% unsecured creditors. Declaration, Dckt. 24. The Debtor is current under the Plan through October 2023. *Id.*

The Debtor identified the Property on Schedules A/B and identified Selene Finance on Schedule D and in Class 1 of the proposed Plan where the monthly payment is \$1,709.00 and mortgage arrears are listed as \$27,000.00. *Id.* Schedule D states the amount of the claim is \$236,537.04 and the value of the subject property is \$360,000.00. *Id.* Trustee has distributed one mortgage payment to date, on October 31, 2022, in the amount of \$1,709.00, meaning the mortgage is current under the proposed Plan. *Id.*

Additionally, the Trustee notes Movant also filed an Objection to Confirmation based on the Debtor's Plan proposing \$27,000 in mortgage arrears, and Movant plans to file its proof of claim asserting \$41,961.98 in arrears. Movant filed its Proof of Claim on November 7, 2023, asserting \$40,914.02 in arrears. POC 2-1. Trustee further argues that because the Declaration has not been filed as a separate document but rather as Exhibit B, it is difficult to find the Declaration within the court's docket. Opposition, Dckt. 23.

Finally, Trustee argues that the Certificate of Service shows service was accomplished on November 11, 2023, but it fails to list the Declaration as a document that was served on the parties. *Id.* Where the Electronic Record is the Official Record for eligible documents filed, LBR 5005-1(a), and the supporting Declaration does not appear in the electronic record as a separate document, the Trustee would oppose the Movant's Motion as not sufficiently supported by evidence. *Id.*

DISCUSSION

By failing to file the Declaration as a separate document, Movant has violated Local Bankruptcy Rule 9004-2(c)(1). This lack of compliance is grounds to deny the motion. Under Local Bankruptcy Rule 9004-1, all pleadings and documents shall be formatted consistent with Local Bankruptcy Rule 9004-2, and any attorney or trustee who files a document in violation of this Rule may be subject to monetary or non-monetary sanctions.

Furthermore, Movant is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number for multiple separate motions. That is not correct. The court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

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 \$259,007.78. Proof of Claim 2-1.

The value of the Property is determined to be \$360,000.00 as stated in Schedules A/B filed by Debtor. Schedule A/B, Dckt. 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 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).

Movant asserts that cause exists to lift the stay because Debtor has not given “assurances. . . indicating that [Debtor] intend[s] to cure prior missed payments.” Dckt. 17 p. 7. This argument is without merit. Movant cites to no case law or offers any justification why a failure of assurances to cure arrears somehow gives rise to a lack of adequate protection. On the contrary and by Movant’s own admission, Debtor has \$100,110.59 of equity in the Property and is current in its proposed Plan, including on mortgage payments to Movant.

11 U.S.C. § 362(d)(4)

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (I) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval

or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

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

- A. Case No. 13-24818
 - 1. Filed: April 8, 2013
 - 2. Chapter 13
 - 3. Dismissal Date: March 5, 2015
 - 4. Reason for Dismissal: Failure to make plan payments.

- B. Case No. 17-24058
 - 1. Filed: June 19, 2017
 - 2. Chapter 13
 - 3. Dismissal Date: September 21, 2018
 - 4. Reason for Dismissal: Failure to make plan payments.

- C. Case No. 18-27077
 - 1. Filed: November 9, 2018
 - 2. Chapter 13
 - 3. Dismissal Date: March 17, 2020
 - 4. Reason for Dismissal: Debtor failed to become current on Plan payments.

- D. Case No. 20-23209
 - 1. Filed: June 27, 2020
 - 2. Chapter 13
 - 3. Dismissal Date: June 3, 2022
 - 4. Reason for Dismissal: Failure to make plan payments.

- E. Case No. 22-22103
 - 1. Filed: August 23, 2022
 - 2. Chapter 13
 - 3. Dismissal Date: May 12, 2023
 - 4. Reason for Dismissal: Converted to Chapter 7 on March 10, 2023, then dismissed for failure to appear at §341(a) Meeting of Creditors.

- F. Case No. 23-21927
 - 1. Filed: June 13, 2023
 - 2. Chapter 7
 - 3. Dismissal Date: July 5, 2023
 - 4. Reason for Dismissal: Failure to file information.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case may have been for a *bona fide*, good faith reason in light of the fact the Debtor has made payments to the Trustee, is current with the Plan, and has appropriately listed the Movant as a Class 1 creditor.

Continuance of Hearing
With the Concurrence of Movant

The proposed Chapter 13 Plan is to be funded with \$2,433.20 a month by Debtor. Plan; Dckt. 3. From that the following amounts are to be paid:

- A. \$1,850 to Debtor’s Counsel.....(\$31) a month amortized
- B. Chapter 13 Trustee Fees(\$195) a month, estimated
- C. Movant, Post-Petition Payments.....(\$1,709) a month
- D. Movant, Pre-Petition Arrearage Cure.....(\$450) at estimated \$27,000 arrearage
- E. Unsecured Claim Dividend.....(\$0.00)

The above amounts total (\$2,385) a month, leaving a \$48.20 a month surplus.

In Proof of Claim 2-1 Movant asserts a pre-petition arrearage of (\$40,914.02), which is (\$13,914.02) higher than the (\$27,000) listed for its Class 1 Claim in the Plan. If there is such higher pre-petition arrearage, that would require an additional (\$231.90) a month Arrearage Cure payment to Movant. That leaves the Plan under funded by \$183.70 a month.

On Schedule I, Debtor lists having monthly take-home income of \$4,098. Dckt. 1 at 36-37. On Amended Schedule J Debtor lists having a family unit of four persons, consisting of the Debtor, two grandchildren over 18 years of age, and her Sister for which she provides care services. Dckt. 15 at 5-6.

On Amended Schedule J, Debtor lists having monthly expenses of only (\$1,238.46) for the expenses of this four person family unit (excluding mortgage payment, property taxes, and insurance). Monthly expenses of only (\$1,238) a month for expenses is questionable. Some questionable expenses for a family unit of four adults are:

- A. Electricity/Natural Gas.....(\$100)
- B. Food and Housekeeping Supplies.....(\$300); After (\$35) for housekeeping supplies, (\$66.25) per adult, which is (\$0.73) per adult per meal in a 30 day month
- C. Clothing.....(\$100)
- D. Medical and Dental.....(\$ 50)

E. Transportation.....(\$20); Debtor lists no vehicles on Schedule A/B

It may be that Debtor, and her family unit of four adults can reasonably state monthly expenses of only (\$1,238.46) a month, or that Debtor and counsel constructed Amended Schedule I to the MAI (made as instructed) expenses to make the projected monthly disposable income to be the \$2,859 to make it appear that Debtor can fund the Plan.

While questionable, this appears to be the Debtor's last opportunity in this string of bankruptcy filings, to use Chapter 13 to cure the arrearages and prevent a foreclosure on her residence.

By continuing this hearing, Debtor can have that "last chance" and Movant can keep the issue before the court of whether Debtor's financial information is inaccurate and the Plan cannot be performed.

**Attorneys' Fees Requested
Request for Attorneys' Fees**

Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion. 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.

With the court continuing the hearing, Movant will have the opportunity to request the court to order and the consideration of fees for this Contested Matter heard as part of this Motion, and the required evidence be filed for consideration at a continued hearing.

**Federal Rule of Bankruptcy Procedure 4001(a)(3)
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. With the hearing being continued, the court will also address this request for relief at a continued hearing.

January 30, 2024 Hearing

Supplemental Pleadings in support of attorney's fees, if any, were to be filed and served on or before January 3, 2024, and Reply Pleadings filed and served on or before January 19, 2024. Order, Docket 29. No new or supplemental pleadings or other documents have been filed with the court as of January 23, 2024.

Any request for prevailing party attorney's will be by post-Order (which is a judgment, Fed. R. Bank. P. 901(7) motion. Fed. R. Civ. P. 54, Fed. R. Bankr. P. 7054 , 9014(c).

At the hearing, counsel for Debtor reported as to several disruptions in his life and practice that has resulted in his focus being diverted to other matters in his practice. Counsel further reported the steps he has taken to reduce these conflicts and get his focus on this matter.

In considering Debtor's prosecution of the case, extraordinary events impacting counsel (who has never had such issues arise in his other cases in this court), and respectful of Ninth Circuit law providing for the court to manage matters in a way to give parties (or their counsel) who have stumbled a fair opportunity to address those stumbles and have a fair opportunity to have their day in court.

The court address with counsel for Debtor the need to address this matter immediately and that it cannot be "put off till next week." That it may be necessary to bring in co-counsel to be working on this right away. Counsel for Debtor stated he understood. Additionally, at the end of the hearing a very well known Chapter 13 counsel who was at the Calendar on other matters stepped out of the courtroom as Debtor's counsel was leaving, likely offering assistance to Debtor's counsel.

While counsel for Movant was ready to proceed, she too appreciated Ninth Circuit Law and did not oppose one final continuance to afford Debtor's counsel to get these matters resolved.

The hearing on the Motion for Relief From the Stay is continued to 1:30 p.m. on February 27, 2024. Supplemental Pleadings shall be filed by Debtor on or before February 15, 2024. Supplemental Reply, if any shall be filed and served on or before February 23, 2023.

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

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

The Motion for Relief from the Automatic Stay filed by Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Relief From the Stay is **XXXXXXX**

Final Ruling: No appearance at the February 27, 2024 Hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 10, 2023. By the court’s calculation, 42 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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 offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Objection to Confirmation of Plan is sustained.

REVIEW OF THE MOTION

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust (“Creditor”) holding a secured claim opposes confirmation of the Plan on the basis that:

1. The Plan does not provide for paying all of Creditor’s arrears. The Plan provides for repayment of \$27,000 in arrears, but Creditor asserts arrears in the amount of \$40,914.02.

Dckt. 13.

Creditor has not provided a Declaration in support of its Objection. Creditor provided the Declaration of Genevieve A. Jacobs to support its Motion for Relief, which was improperly filed as an exhibit, but failed to offer evidence in support of this Objection. Exhibit B, Dckt. 20.

In its supporting Declaration, Creditor argues that the terms of the Note and Mortgage have been in default and remain in default since September 9, 2023. Exhibit B, Declaration, Dckt. 20.

DISCUSSION

Creditor is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the objecting party reused a Docket Control Number for multiple separate motions. That is not correct. The court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

Creditor's counsel filed an Objection making several factual assertions. However, no Declaration or other evidence was filed to support those assertions.

Creditor has filed Proof of Claim 2-1, which asserts a secured claim in the amount of (\$259,007.78), which includes an arrearage of (\$40,914.02). In the Objection, Creditor states that the Proof of Claim was being drafted when the Objection was filed.

The Objection continues, apparently waiving Creditor's rights under the Plan that the Proof of Claim controls a creditor's claim in the Bankruptcy Case, Plan ¶ 3.02, which provides:

3.02. The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim.

Plan; Dckt. 3. It appears that Creditor may be stipulating to the amounts stated in the Plan controlling the amount of Creditor's claim, rendering Proof of Claim 2-1 a mere informational document. The court does not deem the stated objection to be a waive of the express stated terms of the Plan in ¶ 3.02.

Creditor's Objection includes an economic analysis of the proposed Plan and the arrearage now stated in Proof of Claim 2-1. The Plan is funded with a \$2,433.20 a month payment. Creditor's Class 1 post-petition monthly payment is \$1,709.00. With a (\$40,914.02) arrearage, the monthly cure payment would be \$681.90 a month. These two total \$2,391 a month, leaving only \$42 a month to fund the balance of the Plan.

The Plan does not provide for payment of any other claims; however, Debtor's counsel is to be paid an additional \$1,850 through the Plan, which averages \$30 a month, and the Chapter 13 Trustee's fees are projected to be (estimated at 8%) to be \$194.64 a month. This leave the Plan underfunded by approximately (\$183) a month.

Review of Amended Schedules I and J

On October 10, 2023, Debtor filed Amended (which relate back to the filing of this Case) Schedule J. Dckt. 16. On Amended Schedule J, Debtor lists a family unit of four persons: Debtor, two adult children, and Debtor's sister. Dckt. 16 at 5. For these four adults, Debtor states that the monthly expenses for these four adults is (\$1,238.46) a month. Some questionable expenses include:

- A. Electricity and Natural Gas.....(\$100)
- B. Food and Housekeeping Supplies.....(\$300)
- C. Transportation.....(\$ 20)

Dckt. 16.

On Schedule I, Debtor lists having \$4,098.33 in income, including contributions from Debtor's sister. Dckt. 1 at 36-37.

November 21, 2023 Hearing

At the hearing, the court addressed with the Parties the apparent economic inability of Debtor to fund the Plan. Debtor's counsel made reference to Debtor obtaining food and other support from charitable organizations and other vague references to these four adults being able to survive on the budget and financial information provided by Debtor.

The court continues the hearing to allow Debtor one (apparently) final opportunity to prosecute a Chapter 13 Plan (Debtor having six prior cases filed and dismissed in the past decade). Creditor has pending a Motion for Relief From the Stay which includes relief requested pursuant to 11 U.S.C. § 362(d)(4).

Any request for prevailing party attorney's will be by post-Order (which is a judgment, Fed. R. Bank. P. 901(7) motion. Fed. R. Civ. P. 54, Fed. R. Bankr. P. 7054 , 9014(c).

January 30, 2024 Hearing

Supplemental Pleadings in support of attorney's fees, if any, were to be filed and served on or before January 3, 2024, and Reply Pleadings filed and served on or before January 19, 2024. Order, Docket 29. No new or supplemental pleadings or other documents have been filed with the court as of January 23, 2024.

At the hearing, counsel for Debtor reported as to several disruptions in his life and practice that has resulted in his focus being diverted to other matters in his practice. Counsel further reported the steps he has taken to reduce these conflicts and get his focus on this matter.

In considering Debtor's prosecution of the case, extraordinary events impacting counsel (who has never had such issues arise in his other cases in this court), and respectful of Ninth Circuit law providing for the court to manage matters in a way to give parties (or their counsel) who have stumbled a fair opportunity to address those stumbles and have a fair opportunity to have their day in court.

The court address with counsel for Debtor the need to address this matter immediately and that it cannot be "put off till next week." That it may be necessary to bring in co-counsel to be working on this right away. Counsel for Debtor stated he understood. Additionally, at the end of the hearing a very well known Chapter 13 counsel who was at the Calendar on other matters stepped out of the courtroom as Debtor's counsel was leaving, likely offering assistance to Debtor's counsel.

While counsel for Movant was ready to proceed, she too appreciated Ninth Circuit Law and did not oppose one final continuance to afford Debtor's counsel to get these matters resolved.

The hearing on the Objection to Confirmation is continued to 1:30 p.m. on February 27, 2024. Supplemental Pleadings shall be filed by Debtor on or before February 15, 2024. Supplemental Reply, if any, shall be filed and served on or before February 23, 2023.

February 27, 2024 Hearing

At the January 30, 2024 Hearing, the court continued this matter in light of counsel for Debtor having had several disruptions in his life and practice that resulted in his focus being diverted to other matters, which prevented him from being able to address this matter. Counsel for Debtor was given one final continuance to get these matters resolved. As of February 20, 2024, Debtor has filed both an Amended Plan and a Motion to Confirm Amended Plan. Amended Plan, Docket 54; Motion, Docket 49.

Additionally, Debtor has filed an Opposition to this Objection and agrees with Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust that the plan payments are insufficient. Opposition, Docket 57. In her Opposition, Debtor states she does not oppose the Objection to the previous Plan because Debtor has an Amended Plan on file. *Id.* at p. 2:7-9.

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 Objection to Confirmation filed by Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation is sustained.

This Matter is to be heard at 2:00 p.m. on February 27, 2024 in conjunction with the other Derek Wolf matter.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, attorneys of record, and Office of the United States Trustee on July 21, 2023. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Objection to Notice of Mortgage Payment Change 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 Objection to Notice of Mortgage Payment Change is ~~xxxxxxx~~.

February 27, 2024 Hearing

The court's review of the docket on February 20, 2024 revealed that U.S. Bank National Association ("Creditor") filed a Status Conference Statement. Docket 266. This statement reports that in December 2023, Debtor and Creditor reached an agreement, in principle, to resolve Debtor's Objection to Notice of Payment Change and other loan servicing issues raised by Debtor. *Id.* at 1:24-28. The reported terms of the agreement are stated to be:

1. As of November 1, 2023, Debtor's current post-petition mortgage payment, subject to change pursuant to the terms of the Note and Deed of Trust, is \$792.89, which sum includes a current escrow of \$419.06 and a principal and interest payment of \$373.83 at the current rate of interest of 4.125%.

2. As of November 1, 2023, the unpaid, interest-bearing principal balance of Debtor's loan is \$78,096.20.
3. As of November 1, 2023, the deferred principal balance due and owing under Debtor's loan is \$36,400, which sum is in addition to the outstanding principal balance above, and is non-interest bearing.
4. As of November 1, 2023, the total principal balance, including both the interest bearing and deferred non-interest bearing principal, is \$114,496.20.
5. All issues regarding the application of payments made and received, have been accounted for and applied by the Creditor and resolved between Debtor and Creditor.
6. All issues regarding the receipt and application of Grant/loan monies received by or on behalf of the Debtor have been resolved.
7. Each party to bear their own attorney's fees and costs with regard to the Debtor's Objection to the Notice of Mortgage Payment Change and ancillary issues raised thereby.

Docket 266 ¶¶ 1-7.

Creditor further states that as of February 20, 2024 Debtor has not provided a signed stipulation reflecting this agreement and has not requested any revisions to the proposed agreement. *Id.* at 2:18-19. Creditor states that the Court has provided multiple continuances to allow Debtor time to execute the stipulation, and Debtor still has not done so, and Debtor has not articulated any factual basis as to why he believes any funds were improperly applied. *Id.* at 3:1-4.

At the hearing, **XXXXXXX**.

REVIEW OF OBJECTION

Derek Wolf, the Debtor, filed an Objection to Notice of Mortgage Payment Change that has been filed by Creditor U.S. Bank, N.A. Obj.; Dckt. 183. The Objection focuses on whether Grants obtained by Debtor to be applied to arrearages on Creditor's loan have been properly applied, as well as post-petition payments made pursuant to the proposed Plan.

As the court has observed with the Parties at prior hearings on this and related matters, it does not appear that there is any significant factual dispute about the underlying debt, grants obtained and payments made, but arguing about prior statements, letters, notes, and computations by some predecessors in interest who have communicated directly with the Debtor.

Fortunately, it appears that Debtor, Creditor, and their counsel appreciate that rather than arguing about what others have said, done, and computed, the Parties and their counsel can prepare their joint accounting/application of the grants and payments, interest computation. By focusing on the actual facts and computation, these Parties can get these matters promptly resolved or the actual issues identified and those actual, material disputes litigated..

STIPULATION TO CONTINUE HEARING

On August 11, 2023, Derek L. Wolf (“Debtor”) and US Bank, National Association (“Creditor”) filed a Stipulation to continue the hearing on Debtor’s Objection to Mortgage Payment Change to October 3, 2023 at 2:00 p.m. The court construes the document to be an *Ex Parte Motion* (as required by Fed. R. Bankr. P. 9013) and Stipulation to continue the hearing.

Federal Rule of Bankruptcy Procedure 9013 requires the filing of a motion or application when requesting an order from the court. Once a matter is set to the court's calendar, it may be continued by the court, not unilaterally by the parties. See, 8 Moore's Federal Practice - Civil § 40.02[5], L.B.R. 9014-1(j).

At the August 22, 2023 hearing, counsel for the Debtor notified the court that Creditor filed a “Withdrawal” of the Notice of Mortgage Payment Change. It appears that Creditor believes that it can unilaterally dismiss contested matters pending before this court. It cannot. See Fed. R. Civ. P. 41(a) and Fed. R. Bankr. P. 7041, 9014 providing how matters before the federal court may be dismissed.

The court continues the hearing on the Objection to Notice of Mortgage Payment Change to 2:00 p.m. on October 3, 2023.

At the August 22, 2023 hearing, the Debtor and counsel reported that they had not yet been provided a clear accounting and computation of Creditor’s Claim. Reviewing the Original Proof of Claim 2-1 and the two Amended Claims filed by Creditor raise issues concerning the amounts stated. The court by separate order shall order an in-person Status Conference concerning Creditor’s Claim in this Case.

On September 26, 2022 Debtor submitted to the court a Reply to Creditor stating this matter is a continuation of another matter in this case, docket control number RHS-1. Debtor asserts RHS-1 should be resolved before this matter can be resolved.

October 3, 2023 Hearing

At the hearing, the Parties agreed to continue this hearing, to be conducted in conjunction with the Status Conference regarding Creditor’s claim, docket control number RHS-1.

November 7, 2023 Hearing

Ex Parte Joint Motion to Continue November 7, 2023 Hearing

On November 2, 2023, Debtor Derek L. Wolf and Creditor Mr. Cooper filed an Ex Parte Motion requesting the court continue the hearing on the Objection to Notice of Mortgage Payment Change to December 5, 2023. The Motion does not state the reason for the requested continuance, but in light of the efforts of the Parties and their counsel to address the issues between the Parties, obtain documentation from predecessors in interest, their focus on these matter, the court grants the *ex parte* request.

December 5, 2023 Hearing

On December 1, 2023, a Notice of Mortgage Payment Change was filed by Creditor U.S. Bank, N.A., Trustee, stating that the Debtor's monthly payment to Creditor is \$792.89. It states that the escrow payment amount is reduced to \$419.06.

Attached to the Notice of Mortgage Payment Change is a letter dated November 27, 2023. It states that Debtor's monthly mortgage payment to Creditor (principal, interest, escrow) is reduced from (\$1,274.20) to (\$792.89). Notice, p. 5.

At the hearing, counsel for the Debtor reported that a final set of financial terms has been reached, and need to get that documented, including an order thereof.

The Parties agreed to a further continuance as Debtor and Creditor work to get a stipulation documenting the resolution of the dispute.

January 17, 2024 Hearing

The court's review of the Docket on January 16, 2024 reveals no new documents have been uploaded, apart from a Motion to Substitute Attorney (Docket 253).

At the hearing, counsel for the Debtor reported that they are still working on getting these numbers determined by agreement. The only dispute from the Debtor is how the grant was applied to determine the principle balance. A proposed stipulation has been drafted.

The hearing is continued to 1:30 p.m. on February 22, 2024, to allow the parties to continue with the analysis of the application of the grant monies.

The Hearing is continued to 2:00 p.m. on January 23, 2024.

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 Objection to the Mortgage Payment Change filed by Derek L. Wolf ("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 hearing on the Objection to Notice of Mortgage Payment Change is **XXXXXXX**.

5. [23-22845-E-13](#) **GEORGENE HICKS AND**
[RHS-1](#) **RICARDO ESPARZA**
 Peter Macaluso

C O N T I N U E D S T A T U S
CONFERENCE RE:
ORDER ON MOTION TO IMPOSE
AUTOMATIC STAY ORDER RE:
PLAN
1-11-24 [101]

Debtors' Atty: Peter Macaluso

Notes:
Continued from 1/30/24

[PGM-2] Supplemental Order to Confirmation Order for Chapter 13 Trustee to Hold Funds for Class 1 Payment and Class 2 Payment Pending Adjudication of Rights and Interests in Property That Was Subject of a Post-Petition Foreclosure Sale Before the Section 362 Stay Was Imposed filed 2/4/24 [Dckt 116]

[PGM-2] Order Confirming First Amended Plan filed 2/7/24 [Dckt 118]

<p>The Status Conference is xxxxxxx</p>

FEBRUARY 27, 2024 STATUS CONFERENCE

As of the court's February 23, 2024 review of the Docket, no Status Reports or motions (or any other pleadings) have been filed since the February 6, 2024 confirmation of the Plan in this Case. There is no indication of what Debtor is doing to address the issues concerning the pre-petition nonjudicial foreclosure sale and the sale being deemed "final" after the court has imposed the 11 U.S.C. § 362 stay in this case.

The court entered its Amended Order Imposing the Automatic Stay and Setting an initial hearing on the Motion on September 12, 2023. Dckt. 15. On January 11, 2024, the court issued a Final Order imposing the 11 U.S.C. § 362 stay in this case, in full force and effect, until terminated by operation of law or further order of the court. Final Order; Dckt. 101.

As the court addressed in the Civil Minutes (the court's findings of fact and conclusions of law) for the January 9, 2024 final hearing on the Motion to Impose the Stay, the court noted:

Need for Determination of California Law and the Rights and Interests of the Parties

As the court addresses below, what may have been perceived to be a "simple plain language

statutory analysis,” the California Legislature has made some sweeping changes to the nonjudicial foreclosure statutes in the past several years (amending the same statutory provisions multiple times).

In simple terms, the Legislature has expressed an intent to promote purchasers at foreclosure sales to be people who intend to occupy the properties rather than large corporate real estate holding companies. While simple in concept, the courtroom is where the legislative rubber meets the adjudication road.

...

Post-Petition Interests In the Property

At the heart of the dispute is what is the effect of a foreclosure sale conducted before the bankruptcy case is filed and what occurs when, statutorily, that sale is not “deemed final” until after the expiration of a time period. As has been well known, prior California law provided that so long as the trustee’s deed was timely filed (former Cal. Civ. § 2924h), the perfection of such title by recording the trustee’s deed was permitted pursuant to 11 U.S.C. § 362(b)(3).

...

Here, it is disputed that First Franklin is the owner of the Property. Rather, Debtor asserts that the Debtor/Bankruptcy Estate own it and First Franklin is “merely” an oversecured creditor. Additionally, there is some other creditor (only identified by the name of a loan servicer) who holds an even larger oversecured claim in the Bankruptcy Case.

In the past, when the bankruptcy stay is being used in place of a preliminary injunction while a debtor diligently adjudicates disputes over ownership and obligations, the court has required the debtor to self fund an injunction bond and/or make adequate protection payments. Here, Debtor’s First Amended Plan has been funded with \$33,000.00 through December 2023 (which the Chapter 13 Trustee should be holding) and will be funded with \$6,900 a month for 56 months. For the Select Portfolio Servicing Class 1 Secured Claim, Debtor is allocating \$2,850.07 a month in payments. For the First Franklin Class 2(A) Secured Claim, Debtor allocates another \$3,115.00 a month.

Thus, it would appear that adequate protection could be set up where the portion for the Class 1 Claim will be held, subject to award by the court to First Franklin, for damages caused by the injunction and then the \$3,115.00 a month could be paid on the First Franklin Claim. Even if First Franklin is correct and it has purchased the property and it’s claim set forth in Proof of Claim 6-1 is a foreclosed out junior, the Plan still provides for payment of its (\$150,379.06) unsecured claim in full. Over 60 months, that would average approximately \$2,510 a month.

Therefore, in light of the open question of law as to the effect of California Civil Code § 2924m as amended to delay the foreclosure sale being “final,” the post-sale contingencies prior to it being final consisting of persons other than the Debtor being able to put forward bids on the Property, and the apparent ability of Debtor to fund adequate protection payments, the Motion is granted and the automatic stay is imposed pending further order of the court.

Minutes; Dckt. 99 at 9, 11, 13.

It is unclear to the court what actions the Debtor is pursuing to address the disputed title in this Case. No adversary proceeding, no motion for the court to approve a stipulation resolving this dispute, or other document or pleadings addressing this ownership issue has been filed with the court.

At the Status Conference, **XXXXXXX**

OVERVIEW OF PROCEEDINGS

On January 12, 2024, the court entered its order granting the Motion to Confirm the Amended Chapter 13 Plan in this Bankruptcy Case. Order; Dckt. 102. On that same day, the court conducted a hearing on the Debtors’ Motion to Impose the Automatic Stay in this Case. As discussed in the Civil Minutes from the hearing on the Motion to Impose the Automatic Stay, some very “interesting” questions arising under California Civil Code § 2924m exist in this case which bears on the effect of a pre-petition nonjudicial foreclosure sale and the sale being “deemed final” fifteen days after the filing, which fifteenth day ran after the court imposed the automatic stay on an interim basis. Civ. Min.; Dckt. 99.

When the court was addressing the confirmation of the Amended Plan and terms thereof, the court did not link the Amended Plan to the Order Imposing the Stay and the California Civil Code § 2924m issues. The Amended Plan provides for payments to be made to the Class 1 Creditor for whom the foreclosure sale was conducted (which was not the highest bidder at the pre-petition foreclosure sale). However, that Creditor has not filed a proof of claim in this case. As the court addressed in the Civil Minutes, there appeared to be ways that the Debtors could provide adequate protection for the highest bidder at the nonjudicial foreclosure sale (for whom the 15-day period specified in California Civil Code § 2924m did not expire until after the § 362 stay was imposed in this case).

The court schedules this Status Conference so the Debtors and Chapter 13 Trustee can address with the court supplemental orders or joint *ex parte* motions (possibly orally placed on the record at the Status Conference) for plan modifications which may be necessary for the Trustee to hold the substantial monies to be paid on the Class 1 Claim (for which there is no proof of claim) and the Class 2 Claim of U.S. Bank, N.A. (the junior lien holder and highest bidder at the prepetition nonjudicial foreclosure sale). The Parties appearing in this Case to date have clearly demonstrated their good faith and efforts to “take on” these California Civil Code § 2924m issues (the statute having been recently amended and presenting the court and parties with an untilled field to interpret).

The court intends this Status Conference (and as it may be continued) to provide a simplified process for proper *ex parte* or limited notice stipulations to address some more administrative issues for the Chapter 13 Trustee holding monies in this case and adequate protection issues as the parties “fire up their tractors” to begin plowing the new § 2924m fields.

January 30, 2024 Status Conference

The Court's January 29, 2024 review of the Docket disclosed that no Status Conference statements have been filed stating how the Debtor and the Chapter 13 Trustee intend to address the issues relating to the changes in the California nonjudicial foreclosure sale law and how to adequately protect the interests of the purchaser at the nonjudicial foreclosure sale and the creditor having the nonjudicial sale conducted.

At the Status Conference, counsel for the Debtor reported he is planning on attempting over the next 30 days to try and communicate with both the junior lien creditor, the purchaser at the nonjudicial foreclosure sale, and the foreclosing creditor. Further, he discussed getting on file and adversary proceeding to determine the rights, title, and interest in the Property that was the subject of the Foreclosure Sale.

The Trustee requested that the court issue a supplemental order for the Trustee to hold the payments under the Confirmed Amended Plan (Dckt . 81) due under the Plan for named creditor Select Portfolio Servicing, and Class 2 creditor US Bank, National Association given that: (1) only the junior, foreclosed out creditor US Bank, National Association purchaser at the foreclosure sale having filed a secured claim (which would appear to be a foreclosed out lien if the nonjudicial sale is valid, and (2) that is not yet determined if they are creditors after the nonjudicial foreclosure sale.

Debtor's counsel concurred in the Trustee's request for a supplemental order providing for such monies to be held pending further order of the court.

The court will issue such supplemental order, using the Docket Control No. PGM-2 (the docket control number for the Motion to Confirm First Amended Plan).

The Status Conference is continued to 1:30 p.m. on February 27, 2024.

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 Post Confirmation Status Conference having been conducted by, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Status Conference is **XXXXXXX**.

6 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.

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 Not Provided. There is no Proof of Service filed in this case, so the court is unable to tell who has been served and on which date. Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

Further, in accordance with this court’s Interim Order (Docket 25), counsel for Debtor was to serve a copy of that Order, the Motion and Supporting Pleadings, and Notice of Hearing on or before February 9, 2024, and provide notice that Written Oppositions, if any, shall be filed and served on or before February 23, 2024; and Replies, if any, may be presented orally at the hearing. Debtor did not comply with this timeline, serving the present Motion on February 13, 2024, setting the Motion as a Local Bankruptcy Rule 9014-1(f)(2) motion, and not filing the required Certificate of Service sheet.

On February 6, 2024, two Certificates of Service (Dckt. 21, 22) were filed attesting to service of the Notice of Hearing, Motion, Declaration, and Points and Authorities were served on the parties in interest.

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

The Motion to Extend the Automatic Stay is granted, with the automatic stay is extended as provided in 11 U.S.C. § 362(d)(3)(B) .

Kenneth Koch (“Debtor”) seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(a) extended beyond thirty days in this case. This is Debtor’s second bankruptcy petition pending in the past year. Debtor’s prior bankruptcy case (No. 23-24236) was dismissed on December 27, 2023, after Debtor failed to file the required schedules and documents. *See* Order, Bankr. E.D. Cal. No. 23-24236, Dckt. 22, December 27, 2023. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because he filed the case to stop the foreclosure of his home, but he was unable to procure an attorney to assist him at that time. Decl., Docket 36 ¶ 4. Now, Debtor has the assistance of counsel, and Debtor pledges to diligently prosecute his case in an effort to save his home which he, his wife, and their two young children currently reside in. *Id.* at ¶ 10. Debtor’s Memorandum further states grounds, as supported by Debtor’s declaration, which include:

- A. The previous case filed in 2023 by Debtor in *pro se* was filed under the wrong Chapter and quickly dismissed. (Case 23-24236 was filed as a Chapter 7 case.)
- B. Debtor’s prior case was not dismissed due to Debtor failing to make payments, but because of his inability, being in *pro se*, to get all of the required documents filed.
- C. Debtor has substantial net income to fund a Plan.
- D. Debtor’s proposed plan will not seek to modify secured claims of creditors, but to provide for the cure of the arrearage and bring such secured claims current.
- E. Debtor and Debtor’s counsel will get the Debtor’s Schedules, Statement of Financial Affairs, and other related documents promptly filed.

Memo, Docket 35 ps. 1:9–2:6.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). As this court has noted in other cases, Congress expressly provides in 11 U.S.C. § 362(c)(3)(A) that the automatic stay **terminates as to Debtor**, and nothing more. In 11 U.S.C. § 362(c)(4), Congress expressly provides that the automatic stay **never goes into effect in the bankruptcy case** when the conditions of that section are met. Congress clearly knows the difference between a debtor, the bankruptcy estate (for which there are separate express provisions under 11 U.S.C. § 362(a) to protect property of the bankruptcy estate) and the bankruptcy case. While terminated as to Debtor, the plain language of 11 U.S.C. § 362(c)(3) is limited to the automatic stay as to only Debtor. The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor’s cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

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

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

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

Debtor has sufficiently demonstrated the case was filed in good under the facts of this case and the prior case for the court to extend the automatic stay. Debtor has complied with court orders in filing this present Motion and procuring counsel to diligently prosecute the case. Debtor has also provided in his testimony real life reasons for why he has filed bankruptcy, and how he plans to use bankruptcy to restructure his debts. *See* Decl., docket 36. A review of the docket on February 21, 2024 reveals that Debtor has filed the required schedules and other documents, as well as a Chapter 13 Plan on February 20, 2024, showing this case is moving forward. Dockets 39-41.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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

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

The Motion to Extend the Automatic Stay filed by Kenneth Koch (“Debtor”) having been presented to the court, the court having entered an interim order extending the automatic stay pursuant to the prior Motion to Extend the Stay, DCN: SLF-1, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

7. [24-20252-E-13](#) **KENNETH KOCH**

**M O T I O N T O E X T E N D
AUTOMATIC STAY
2-6-24 [14]**

[SLF-1](#)

Jessica Galletta

Final Ruling

The Motion to Extend Automatic Stay has been refiled on February 13, 2024, at Docket Control Number GLF-1, using the same documents and pleadings as filed under this Docket Control Number, No. SLF-1.

The Motion to Extend the Automatic Stay (DCN: SLF 1) has been replaced by the refiling of the Motion to Extend the Automatic Stay (which is effectively an Amended Motion) filed on February 13, 2024, and has been rendered moot thereby.

This Matter is removed from the Calendar.

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.

This Motion to Extend the Automatic Stay (DCN: SLF-1) having been replaced by effectively an “Amended Motion” (DCN: GLF-1) filed by Debtor Kenneth Ryan Koch, the court having issued an interim order extending the stay on February 6, 2024, (Dckt. 25) and setting the hearing for the Motion to Extend the Stay (DCN: SLF-1), the court granting the relief to extend the Automatic Stay as provided in 11 U.S.C. § 362(c)(3)(B), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is concluded, with the final order extending the Automatic Stay pursuant to the Motion to Extend the Automatic Stay (GLF-1), and this matter is concluded and removed from the calendar.

FINAL RULINGS

8. [23-23834-E-13](#)
[MJH-1](#)

ANTONETTE TIN
Peter Macaluso

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-30-24 [44]

MICHAEL HARRINGTON VS.

Final Ruling: No appearance at the February 22, 2024 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 7 Trustee, parties requesting special notice, and Office of the United States Trustee on January 30, 2024. 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). 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.

Creditors Alexander G. Fabros, Carlota Serame, and their counsel Michael J. Harrington (“Movant”) seek relief from the automatic stay to allow *Fabros v. Retreat at Royal Green, LLC*, Sacramento County Superior Court, Case No. 34-2018-00239030 (the “State Court Litigation”) to be concluded. Movant has provided the Declaration of Michael J. Harrington to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Antonette Tin (“Debtor”). Docket 47.

Movant asserts that they received a default judgment on December 2, 2022 against Debtor in the amount of \$672,096.19 (Case no. 34-2018-00239030, Sacramento County Superior Court). Motion, Docket 44 p. 3:14-15. Movant then filed their first motion for award of post judgment collection fees, costs, and interest. *Id.* at 3:24-26. On June 22, 2023, the state court awarded Movant the sum of \$183,246.48. *Id.* at 3:25-27.

On August 4, 2023, after unsuccessfully collecting on the first judgment for collection fees and costs, Movant filed a second motion for award of post judgment collection fees and costs, which was originally set for hearing in state court on October 31, 2023. *Id.* at 4:3-6. Movant files this present Motion with the court to grant relief from stay to pursue the second motion for award of post judgement collection of fees and costs. Debtor filed bankruptcy on October 27, 2023 and did not alert the court or interested parties. *Id.* at 4:13-16. On October 31, the state court granted the motion for award of new post-judgment fees in the amount of \$342,247.59. *Id.* at 4:19-21. This order is null and void as being in violation of the automatic stay.

Movant argues that Debtor’s bankruptcy petition is a misuse of the automatic stay privilege because Debtor filed both Chapter 7 and 13 petitions in bad faith to delay collection efforts. *Id.* at 5:7-10. With relief from the automatic stay, Movant would be able to proceed under applicable non-bankruptcy law to request that the Sacramento County Superior Court re-evaluate the second motion for award of fees and costs and interest. *Id.* at 6:12-16.

Movant finally argues that Rule 4001(a)(3) should also be waived because there could be significant delay in this case caused by the Debtor’s improper last minute filings of the Chapters 7 and 13 petitions just to try and block the first and second fee awards. *Id.* at 6:4-7.

CHAPTER 13 TRUSTEE’S NONOPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed a Statement of Non-opposition on February 13, 2024. Dckt. 59. Trustee asserts that Debtor does not provide for Creditor in their proposed Plan as secured.

DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine “whether cause exists to allow litigation to proceed in another forum, ‘the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.’” *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int’l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass’n v. Sanders (In re Santa Clara Cty. Fair Ass’n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

The court finds that the nature of the State Court Litigation warrants relief from stay for cause. The issues have been litigated already, as the Movant obtained a default judgment and award against Debtor. Exhibits 3-4, Docket 46 ps. 26-45. Therefore, judicial economy dictates that the state court ruling be allowed to continue after the considerable time and resources put into the matter already.

The court shall issue an order modifying the automatic stay as it applies to Debtor to allow Movant to continue the State Court Litigation. The automatic stay is not modified with respect to enforcement of the judgment against Debtor, David Cusick (“the Chapter 13 Trustee”), or property of the bankruptcy estate. Any judgment obtained shall be submitted to this court for the proper treatment of any claims arising under the Bankruptcy Code.

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. The grounds stated in the Motion are:

c) Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure should also be waived because there could be significant delay in this case caused by the Debtor’s improper last minute filings of the Chapters 7 and 13 petitions just to try and block the first and second fee awards.

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 Creditors Alexander G. Fabros, Carlota Serame, and their counsel Michael J. Harrington (“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 modified as applicable to Antonette Tin (“Debtor”) 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 to proceed with litigation in *Fabros v. Retreat at Royal Green, LLC*, Case No. 34-2018-00239030, Sacramento County Superior Court.

IT IS FURTHER ORDERED that the automatic stay is not modified with respect to enforcement of any judgment against Debtor, David Cusick (“the Chapter 13 Trustee”), or property of the bankruptcy estate. Any judgment obtained by Movant shall be submitted to this court for the proper treatment of any claims arising under the Bankruptcy Code.

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.