

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Bankruptcy Judge  
Sacramento, California

**March 7, 2023 at 1:30 p.m.**

1. [22-22405](#)-E-13      **BARBARA MANNING**  
[KR-1](#)      **Ashley Amerio**

**MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
2-15-23 [[45](#)]**

**THE GOLDEN 1 CREDIT UNION  
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).**

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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 February 15, 2023. By the court's calculation, 20 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, -----

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**The Motion for Relief from the Automatic Stay is XXXXXXX.**

The Golden 1 Credit Union (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2014 Nissan Armada, VIN ending in 1098 (“Vehicle”). The moving party has provided the Declaration of Karl Williams to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Barbara Ann Manning (“Debtor”).

### **Review of Minimum Pleading Requirements for a Motion**

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to “read every document in the file and glean from that what the grounds should be for the motion.” That “state with particularity” requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. See 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. See 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the “state with particularity” requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor’s secured claim, determination of a debtor’s exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought.” The standard for “particularity” has been determined to mean “reasonable specification.”

*Martinez v. Trainor*, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

### Ground Stated in Motion

Movant has not provided any grounds, merely unsupported conclusions of law. The insufficient statement made by Movant is:

- A. Movant moves the court for an order terminating or modifying the stay in regard to the Property pursuant to 11 U.S.C. Section 362.

That “ground” is merely a conclusion of law by Movant. Presumably, Movant believed that the court would make those conclusions, but the “grounds” cannot merely state the anticipated conclusions.

Movant is reminded that “[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys’ fees and costs, and other lesser sanctions.” LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion states that grounds are found in (instructing the court to canvas those documents and assemble the grounds to be stated in the Motion for Movant):

- A. Memorandum of Points and Authorities; and
- B. The Declaration of Karl Williams.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is “really” the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9014-1(d)(4), a motion and a memorandum of points and authorities are separate documents. The court has not waived that Local Rule for Movant.

## **REVIEW OF POINTS AND AUTHORITIES AND DECLARATION**

In the Points and Authorities, the pleading providing the court with the statutes, case law, and legal principles and argument as to why this is a basis for the relief from the grounds stated in the Motion, includes in the following:

### **OBLIGATION AT ISSUE**

The account records show that on or about September 17, 2020, Debtor executed and delivered a Closed-End Note, Disclosure, Consumer Loan and Security Agreement (“Contract”) for the finance and purchase of certain personal property described as a 2014 Nissan Armada(“Collateral”), VIN: 5N1BA0NE6EN611098.

Debtor agreed to pay for the finance and purchase of the Vehicle in monthly payments of \$497.45, including applicable finance charges, beginning October 25, 2020 and thereafter on the 25th day of every month for 59 months.

Movant's legal ownership in the Vehicle is evidenced by Electronic Title.

On or about September 25, 2022, Debtor, BARBARA ANN MANNING defaulted by failing to make the payment then due and owing under the Contract. Due to the default in payments, Movant has elected to declare all unpaid sums immediately due and payable.

The records show a payoff balance to Movant in the amount of \$17,318.49. The Debtor is in arrears for the September 25, 2022 through January 25, 2023 payment in the amount of \$2,487.25, plus attorney fees and costs in the amount of \$688.00 for a total owing in the amount \$3,175.25.

According to Debtor's Schedule D, the vehicle has an estimated value of \$19,341.00

11 U.S.C. section 362(d) provides that the court shall grant relief from the automatic stay for cause, including lack of adequate protection, or if the Debtor does not have any equity in the property, and if the property is not necessary for the effective reorganization of the Debtor.

Debtor is currently in possession of the Collateral.

Points and Authorities, p. 2:11-26, 3:4-7; Dckt. 50. This presents the court with about 90% of the grounds that would be stated in the Motion. Movant does not tie together whether the lack of adequate protection, cause, or lack of equity and not necessary for a reorganization is the legal basis.

The court has also looked at the Declaration provided in support of the Motion. Dckt. 49. The testimony authenticates the exhibits (loan and lien interest documents), that (\$17,318.49) is the amount of the obligation owed movant, the Debtor is in default in the amount of (\$2,487.25), there is an additional (\$688) in attorneys' fees owed, and that the collateral has a value of \$19,341.00 based on Debtor's Schedules.

## **DISCUSSION**

Even if the court were to take the assignment to assemble the grounds upon which Movant seeks relief and then states those for Movant, it is unclear why Movant believes it is entitled to relief. Movant does not assert that Debtor is not providing for the cure of the defaults through a plan. Movant does not assert that it is not adequately protected by the vehicle which has a value slightly higher than the obligation.

The court has confirmed a Chapter 13 Plan in this Case, which Plan (Dckt. 35) provides for Movant's claim in Class 2, to be paid through the Chapter 13 Plan.

At the hearing, **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 for Relief from the Automatic Stay filed by The Golden 1 Credit Union ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that **XXXXXXX**

DEBTOR DISMISSED: 1/30/23

LOGAN PARK APARTMENTS, LP  
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.

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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 (*pro se*) and Chapter 13 Trustee on January 20, 2023. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

#### NO OFFICIAL CERTIFICATE OF SERVICE SHEET USED

Though notice was provided, 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 insure 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).

At the hearing, **XXXXXXX**

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 denied without prejudice as moot, the automatic stay having been terminated by dismissal of this bankruptcy case.**

Logan Park Apartments, LP (“Movant”) seeks relief from the automatic stay with respect to Marie Jackson’s (“Debtor”) real property commonly known as 4141 Palm Avenue, #113, Sacramento, California (“Property”).

### **Pleading Filed**

Movant has filed a large, thirty-six page, multi-document pleading. Dckt. 9. This pleading consists of a Motion, Declaration, and twenty-eight pages of exhibits. Local Bankruptcy Rule 9004-2(c) requires that:

#### **(c) Organization.**

- 1) Filing of Separate Documents. Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.

This is also stated in Local Bankruptcy Rule 9014-1(d)(4).

### **Bankruptcy Case Has Been Dismissed and Automatic Stay has Been Terminated by Operation of Law**

This Bankruptcy case was dismissed was dismissed on January 30, 2023, for failing to timely file documents. Order; Dckt. 15.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) and (2). That section provides:

In relevant part, 11 U.S.C. § 362(c) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such **property is no longer property of the estate;**

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) *the time the case is dismissed;* or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) ***revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.***

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of January 30, 2023, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The court shall issue an order confirming that the automatic stay was terminated and vacated as to Debtor and the Property on January 30, 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 Logan Park Apartments, LP (“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 is denied without prejudice as moot, this bankruptcy case having been dismissed on January 30, 2023 (prior to the hearing on this Motion). The court, by this Order, confirms that the automatic stay provisions of 11 U.S.C. § 362(a) were terminated pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the January 30, 2023 dismissal of this bankruptcy case.

3. [21-23539](#)-E-13      **DEREK WOLF**  
[DVW-1](#)                      **Peter Macaluso**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
10-19-21 [11]**

**U.S. BANK, NATIONAL  
ASSOCIATION, 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).**

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on October 19, 2021. By the court's calculation, 14 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. The court continued the hearing, opposition and reply briefs were filed, and the final hearing set for December 14, 2021.

<b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXXXXXXXXX</span></b>
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**FEBRUARY 7, 2023 HEARING  
RESET HEARING ON THE MOTION FOR RELIEF FROM STAY**

Movant filed a Notice on January 23, 2023, "restoring" the Motion for Relief. Dckt. 136. Movant states, in their notice, that cause exists to grant the relief from the automatic stay as Debtor is post-petition delinquent for November 1, 2022 and January 1, 2023 mortgage payments. The amount of the default is stated to be \$3,346.35. Movant states the Motion is based on the Declaration filed in Support of Restored Motion. Dckt. 137.

The court order from August 3, 2022, Dckt. 135, states this Motion may be reset if Movant files a supplemental pleading stating additional grounds with particularity.

### **Movant's Declaration in Support of Restored Motion**

Anselm Joseph, Bankruptcy Specialist for Movant, filed a Declaration on January 23, 2023. Dckt. 137. Mr. Joseph states Debtor has again defaulted on their obligations due and owing to Movant by failing to make payments for November 1, 2022 through and including January 2023. Dckt. 137.

He testifies that the last partial payment of \$459.74 was received from the Debtor on December 8, 2022.

At the hearing, counsel for the Debtor appeared, asserting a defense and a "plan" to address any shortfall in payments caused by the increase in the current monthly mortgage payment. Counsel for the Trustee reported that the Debtor is in default in the Plan payments, having not increase the monthly Plan payment when Movant's monthly payment increase due to a change in the escrow account for the secured claim.

Given the Debtor's oral opposition, the court sets a briefing scheduling and set the matter for a continue hearing.

### **Debtor's Supplemental Opposition**

Debtor filed a Supplemental Opposition on February 21, 2023. Dckt. 144. Debtor states they are only \$2,196.00 delinquent in post-petition payments and \$199.67 owing in arrears to Movant. Debtor states their arrearages are not significant enough to justify the relief requested.

Additionally, Debtor requests ability to object to the Amended Proof of Claim, as "costs" were added without court approval. Proof of Claim 2-3.

### **Trustee's Nonopposition**

Trustee filed a nonopposition on February 27, 2023. Dckt. 150 Trustee states Debtor is currently delinquent \$13,345.14. Trustee reflects the following arrearages owed to Movant:

Post-petition Mortgage Payments.....\$4,255.36

Pre-petition Mortgage Arrears.....\$29.92

Post-petition Mortgage Arrears.....\$526.05.

Trustee requests the Motion be granted, and notes they filed a Motion to Dismiss, Dckt. 146, which is set to be heard on April 5, 2023.

## **MARCH 7, 2023 HEARING CONTINUED HEARING ON THE RESET MOTION FOR RELIEF FROM STAY**

At the hearing, ~~XXXXXXXXXX~~

## **REVIEW OF MOTION AND PRIOR PROCEEDINGS IN THIS CONTESTED MATTER**

U.S. Bank, N.A. as Legal Title Trustee for Truman 2016 SC6 Title Trust (“Movant” or “Creditor”) seeks relief from the automatic stay with respect to Derek Wolf’s (“Debtor”) real property commonly known as 7995 Alta Vista Lane, Citrus Heights, California (“Property”). Movant has provided the Declaration of Brian Gaske to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues on October 12, 2021, without any notice of filing of Debtor’s fourth consecutive bankruptcy case, Movant conducted its foreclosure sale on the property. Motion, Dckt. 11. At the time of the foreclosure sale, Debtor was due 25 months worth of mortgage payments, with a total of (\$25,150.25) in payments past due. Declaration, Dckt. 19. Movant specifies that due to the three prior consecutive bankruptcies prior to this one—all of which were dismissed—the nature of these payments as post or pre petition is not clear.

Movant requests several types of relief in this case. First, the annulment of the stay to make the foreclosure sale valid. Second, to terminate the stay going forward. Third, that the court order pursuant to 11 U.S.C. § 362(d)(4) that the automatic stay in a future filed case in the next two years will not automatically go into effect.

As the Civil Minutes for this Motion document, this matter has been a long and winding trail of issues, points, and ongoing disagreement. During this process Debtor has obtained counsel, a Plan confirmed, a Plan defaulted, and a related dispute now to be adjudicated in an Objection to Claim over the amount of the debt and application of payments.

Credit for the length of these proceedings does not go solely to the Parties, but the court has contributed significantly. Part of this has focused on insuring that Debtor, first attempting to prosecute this case in pro se and now with counsel, was afforded not only the opportunity to present and have his rights with respect to this Motion properly adjudicated, but that he also understood the process and that he has been afforded such opportunity, what the outcome from this litigation.

As this Contested Matter developed, it appeared to the court that a core dispute Debtor has asserted over the amount of the claim and proper application of payments should be “easily determined” through a “simple spreadsheet” computing the claim and payments made since the 2015 loan modification.

### **Trustee’s Non-Opposition**

Trustee initially filed a non-opposition to this motion on October 26, 2021 (Dckt. 21). Trustee non-opposition was based on Debtor, in *pro se*, not getting documents filed.

### **Summary Relief From Stay Proceeding**

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). This was restated recently by the Bankruptcy Appellate Panel in *Harms v. Bank of N.Y. Mellon (In re Harms)*, 603 B.R. 19, 27 (B.A.P. 9th Cir. 2019), including:

Relief from stay proceedings are primarily procedural. *Veal v. Am. Home Mortgage Serv., Inc. (In re Veal)*, 450 B.R. 897, 914 (9th Cir. BAP 2011). They typically determine whether the equities justify releasing the moving creditor from the legal effect of the automatic stay. *Id.* Because of the limited scope of inquiry, neither the movant's claim nor its security should be litigated in the relief from stay proceeding. *Id.* (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740-41 (9th Cir. 1985)); see also *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing on a motion for relief from stay is merely a summary proceeding of limited effect. . . ."). "Given the limited nature of the relief, . . . the expedited hearing schedule § 362(e) provides, and because final adjudication of the parties' rights and liabilities is yet to occur, . . . a party seeking stay relief need only establish that it has a colorable claim . . . ." *In re Veal*, 450 B.R. at 914-15 (emphasis added) (citing *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n.14 (9th Cir. BAP 2009)).

Though the court has discussed, and prodded the parties to address, some substantive matters such as proper computation of the secured claim and document the computation of the claim through a "simple spreadsheet," those issues are not adjudicated in this Motion for Relief From the Stay.

## REVIEW OF FILE

Debtor commenced this case on October 12, 2021. On October 27, 2021, a chapter 13 Plan was filed by Debtor in *pro se*. Dckt. 24. The Plan provides for monthly payments by Debtor of \$1,500 for sixty (60) months. Plan, Nonstandard Provisions; Dckt. 24 at 7. Additionally, Debtor will pay the Plan off early "if awarded settlement from Social Security." *Id.*

The only claim provided for in the Debtor's *pro se* Plan was Movant's, for which Debtor is to pay \$500 a month toward the \$29,254.55 arrearage and \$1,016.32 for the post-petition monthly payment. These two payment total \$1,516.32, which is slightly more than the \$1,500 a month plan payment.

As addressed in the prior Civil Minutes, there appeared to be some significant financial feasibility issues with such Plan. The court noted that on Schedule J filed by Debtor in *pro se*, it included the statement, "If Rushmore will finally be fair and recognize my Mod Package that they have on file." In retrospect, this appears to be a reference to the 2015 Loan Modification.

## REQUESTED ANNULMENT OF STAY

At the first hearing on this Motion Movant notified the court that the buyer at the foreclosure sale has terminated the contract in light of the circumstances, and Movant was no longer seeking to annul the stay.

## **JANUARY 25, 2022 HEARING**

Debtor's newly obtained counsel appeared at the January 25, 2022 hearing on this Motion. He reported the efforts being made in the prosecution of this case and now a Chapter 13 Plan set for hearing in March 2022. Counsel also discussed his work with the Debtor to insure that Debtor understood that this case, in light of the many prior cases filed by Debtor in *pro se* that have been dismissed, is his final "fish or cut bait moment."

Debtor's counsel also noted that if the Debtor were to sell the residence now, he would have to repay the grant received, it not being forgiven for nine more years. The court projects that the recoverable equity for Debtor would be lower than previously appearing, but could still be \$25,000+ cash.

From a review of the Supplemental Schedules I and J (Schedule I being incomplete and not including the gross income from Debtor's business and rental property), it appears that performing a plan for five years may be problematic.

However, the court notes that Debtor's counsel (Debtor previously having commenced this case in *pro se*) substituted in only two weeks prior to the hearing, this may well be part of the "more work to be done" by Counsel working with Debtor.

The Trustee confirmed that he now has the correct address for Movant and the payment of the amounts in the proposed plan, including past payments, will be made from the funds available to the Trustee.

The court continues this hearing to afford Debtor and his new counsel to "fish" (whether through curing the arrearage through the Plan or selling the Residence and obtaining \$25,000+ of exempt proceeds), rather than merely "cutting bait" and losing the house (and any exempt value) through a foreclosure.

## **MARCH 25, 2022 Hearing**

At the hearing on the Motion to Confirm, the Trustee reported that Debtor had not provided all of the information. After an extensive discussion in connection with the Motion to Confirm, the court concluded that for this case Debtor was at the "put up or shut up phase." He has promised to make certain payments, he is curing the default (a cashier's check in Debtor's counsel's hand) and has provided to make the payments electronically. Debtor should be allowed to show he can perform the plan in this case and not have it dismissed out from under him. The court granted the Motion to Confirm the Chapter 13 Plan, as it was amended at that hearing.

However, it also appears, as requested by counsel and the creditor seeking relief from the stay, that Debtor's performance bears close watching. Additionally, Debtor may benefit from knowing that there is a motion to dismiss and a motion for relief from stay pending, which he is fending off by performing the Plan.

## **SUPPLEMENTAL PLEADINGS FILED AND EVOLUTION OF ISSUES**

The Parties have filed various pleadings and supplemental pleadings as the court brought them through the trail of this Contested Matter. The court summaries them as follows.

### **Debtor's Opposition**

On November 19, 2021, Debtor, in *pro se*, filed an opposition to the Motion for Relief. Debtor states they need more time to reconcile their mortgage with U.S. Bank. Additionally, Debtor states they are missing accounting for \$91,600.00 that Keep Your Homes California granted him in 2018. Debtor also disputes penalties and fees of Rushmore and provides exhibits.

### **Movant's Response**

Movant filed a reply in response to Debtor's opposition to the Motion for Relief from Automatic Stay on December 2, 2021. Dckt. 33. Movant states the Debtor has had the opportunity in his three prior bankruptcy filings to object to Movant's Proof of Claim or reconcile his mortgage, but has not done so.

Also, Debtor asserts that payments were made to Movant in his prior case. In Debtor's Case No. 20-22852, no pre-petition arrears were paid to Movant. Movant also believes the Mortgage Assistance loan received which was sufficient to bring the Debtor's loan current as of February/March 2018, "was in the sum of only \$61,131.14, and NOT the entire \$91,700 as alleged by the Debtor, and that the Debtor's account was credited for that amount on or around March 20, 2018 by U.S. Bank, the then servicer of Debtor's loan. Movant has to date been unable to locate any evidence that the sum of \$91,700 was received from the Mortgage Assistance loan/program."

Movant concludes that Debtor has set forth no substantive Opposition to Movant's request to terminate and/or annul the stay and as such the Motion should be granted as requested. Movant requests (I) *in rem* relief from the automatic stay, as set forth in its Motion, to proceed to conduct another sale of the Property and (ii) a finding that Movant's previously conducted sale of the Property did not violate the automatic stay.

The Court has now continued this hearing several times. As event have transpired, Debtor has confirmed a plan, and then defaulted on the plan.

### **Trustee's Status Report**

On December 29, 2021, Trustee David P. Cusick filed a status report stating Debtor is delinquent \$1,500.00 in Plan payments and Debtor has failed to provide verification of income, 2 years of tax returns, 6 months of profit and loss statements and 6 months of bank statements.

### **Movant's Supplemental Pleadings for January 11, 2022 Hearing**

For the January 11, 2022 hearing, Movant filed Supplemental Pleadings. Dckts. 43, 44. In the Supplemental Declaration, the testimony includes (identified by paragraph number in the Declaration):

5. Debtor states that he received a \$91,600.00 loan in approximately February 2018 from the California Help to Homeowner's Program.

6. A prior loan servicer was responsible for the loan that is the subject of this Motion at that time.

8., 9. Rushmore, the current loan servicer, has provided Debtor and the proposed counsel for Debtor with documents and records (including those from the period when the prior loan servicer was responsible for this loan), which include:

a. The sum of \$61,131.14 was received and applied to Debtor's loan in 2018.

b. Upon further review of the prior loan servicer's files, additional information has been provided Debtor and Debtor's proposed counsel showing that the \$91,700 was received in 2018 and applied to Debtor's loan. Exhibit A, Dckt. 44, is a printout of the loan history from the prior loan servicer's records (which unfortunately is not clearly set out in a set of tables, but consists of a lot of words and number squeezed on each page - with the court clearing noting that this is not the records of the current loan servicer, but what they received from the prior loan servicer.

9a. In the Declaration the obligation under the loan and application of the \$91,700 is stated as follows:

Principal Balance 1 <sup>st</sup> Lien	(\$170,465.08)		(\$36,400.00)	Deferred Principal 2 <sup>nd</sup> Lien
Application of March 20, 2018 \$97,700				
Due Date June 2015	\$7,292.61			
Due Date March 2016	\$1,620.58			
Due Date May 2016	\$1,639.91			
Due Date July 2016	\$4,904.70			
Due Date January 2017	\$4,904.70			
Due Date July 2017	\$4,465.50			
Due Date December 2017	\$4,465.50			
Due Date May 2018	\$256.35			
Due Date May 2018	\$1,019.00			
Due Date May 2018	\$61,131.14			
Total Monies Applied	\$91,699.99			

11. The \$91,700 was applied to the delinquent mortgage payments due for the months of June 1, 2015 through and including May 1, 2018.

In the Motion for Relief, Movant asserts that the arrearage at the time of the foreclosure sale was not less than \$25,150.24, which Movant states is for the period October 1, 2019 through October 1, 2021. Motion, ¶ 7; Dckt. 11.

### **Supplemental Pleadings for May 10, 2022 Hearing**

On May 6, 2022, counsel for the Chapter 13 Trustee provided a Supplemental Declaration providing testimony concerning Debtor's performance under the confirmed Chapter 13 Plan. Dckt. 13. That testimony, identified by paragraph number in the Supplemental Declaration includes:

3. and 4. The Trustee received initial payments totaling \$1,500 and then payments in March and April 2022 totaling \$2,810.00, with a payment scheduled through TFS in the amount of \$1,100.00 which is anticipated to be received by May 11, 2022.
5. The Trustee computes Debtor to be delinquent \$3,069.00 in plan payments, with an additional payment of \$1,960.00 coming due on May 25, 2022.

The Trustee's counsel also notes that there is an Objection to Creditor's Claim pending, with a hearing set for June 28, 2022.

### **Supplemental Pleadings for June 1, 2022 Hearing**

On May 25, 2022, Movant filed the Declaration of Brian Gaske, an Assistant Vice President for Rushmore Loan Management Services, LLC, the loan servicer. Dckt. 107. With respect to the receipt and applicant of the Save Your Home California monies, he states (identified by paragraph number of the Declaration, with the court paraphrasing unless test is shown with "quotation marks"):

8. \$91,700.00 was received and applied to Debtor's loan in 2018, as identified on Exhibit 1 filed with the Declaration. Also, that Exhibit 1 states the application of payments received by Debtor after May 2018 until the filing of the current Bankruptcy Case.
9. The \$91,700.00 was received on March 20, 2018 and first applied to the payments due June 1, 2015 through April 1, 2018, a period of 35 months in an amount totaling \$29,283.04.
10. After the \$29,283.04 was applied as above, Debtor and the prior loan servicer subsequently (to April 1, 2018) agreed that the principal balance of the loan would be "recast."
- 10 (cont.). The "recasting" of the loan was to apply the remaining \$61,481.20 of the Save Your Home California monies to first reduce the principal, which when combined with the payments for June 1, 2015 through April 1, 2018, by \$90,764.24, and then "935.76 for "corporate advances."



11. After application of the Save Your Home California monies in March of 2018, the principal balance of the loan was reduced from (\$170,465.08) to (\$161,874.80). The court is directed to review Exhibit 1 to see how the application of the \$91,700.00 in March 2018 resulted in a principal reduction of \$8,590.28.

The Declaration directs the court to Exhibit 3 (Dckt. 106) for the Principal Reduction and Recast Agreement (HFA Modification Assistance). With respect a principal reduction and recasting, it's provisions include (identified by paragraph number of this Agreement:

(2.) Debtor deposits \$61,141.14 with Creditor, which is to be applied to the “president balance due on principal.”

(2. cont.) This payment of \$61,141.14 is to be made as of the effective date of this Agreement.

(3.) Debtor agrees that the terms of the mortgage are modified as follows:

- ◆ (\$100,743.66) is to be paid, with interest, (the Interest Bearing Principal Balance) in monthly installments of \$325.29.
- ◆ The first \$325.29 payment is due May 1, 2018.
- ◆ The final payment will be due August 1, 2054.

Exhibit 1 (Dckt. 106) is a spreadsheet beginning with a March 2018 payment of \$91,700, and showing the application of the payment first to the monthly amounts June 1, 2015, with a starting principal balance of \$170,226.53 through April 1, 2018 with a principal balance of (\$161,874.80) (the monthly principal, interest, and escrow portion of each monthly payment shown).

### Modification of Loan

Before looking the numbers on Exhibit 1, the court goes back to the 2014 Loan Modification to which the subsequent 2018 recast and Save Your Home California monies relate.

In POC 2-1 filed by Creditor Debtor's 2015 Chapter 13 Case, 15-20683, there is attached a Document titled Home Affordable Modification Agreement (“Modification Agreement”). The provisions of the Loan Modification Agreement are summarized as follows:

- A. Dated August 4, 2014.
- B. The Modification Terms are stated in ¶ 3 of the Modification Agreement, and include (identified by the paragraph number in the Modification Agreement):
  - 1. The Loan is modified effective September 1, 2014. ¶ 3.
  - 2. The first payment due under the loan modification is due September 1, 2014.  
*Id.*

- a. The maturity date is August 1, 2054. ¶ 3.A.
3. Modified Principal Balance is (\$208,994.25) (“New Principal Balance”). ¶ 3.B.
4. (\$36,400.00) of the New Principal Balance is deferred [Non-Interest Bearing Principal Balance], with no interest or monthly payments. ¶ 3.C.
5. (\$172,594.25) is the “Interest Bearing Principal Balance” on which interest will accrue and payments will be made by Debtor. *Id.*
6. The monthly payments and interest rates on the Interest Bearing Principal Balance are, ¶ 3.C.,:
  - a. For Years 1-5 of the Modified Loan
    - (1) Interest is 2%
    - (2) Principal and Interest Payment is \$522.66/month
    - (3) Escrow Payment is \$275.14 (subject to adjustment)
  - b. For Year 6 of the Modified Loan
    - (1) Interest is 3%
    - (2) Principal and Interest Payment is \$607.21/month
    - (3) Escrow Payment is as adjusted
  - c. For Year 7 of the Modified Loan
    - (1) Interest is 4%
    - (2) Principal and Interest Payment is \$607.21/month
    - (3) Escrow Payment is as adjusted
  - d. For Years 8-40 of the Modified Loan
    - (1) Interest is 4.125%
    - (2) Principal and Interest Payment is \$677.80/month
    - (3) Escrow Payment is as adjusted
7. The Modified terms “superseded any provisions to the contrary in the Loan Documents, including but not limited to, provisions for an adjustable, step or simple interest rate.” *Id.*
8. If a default rate of interest is permitted in the Loan Documents, then in the event of a default, the interest due will be that provided in ¶ 3.C. of the Loan Modification. ¶ 3.F.

POC 2-1 filed by Creditor in the 2015 Chapter 13 Case is signed by John R. Callison, as the Authorized Agent for U.S. Bank National Association. POC 2-1, § 4, states that:

- A. Pre-Petition Arrearage as of the January 30, 2015 filing of Chapter 13 Case 15-20683 was (\$3,177.95).
- B. The Amount of the secured claim was (\$209,166.89).
- C. The Interest Rate was currently 2.00%

Additionally, on the Mortgage Proof of Claim Attachment to POC 2-1 filed in the 2015 Chapter 13 Case it states that:

- A. The principal due on the claim was.....(\$171,888.07)
- B. The interest due as of the filing of the 2015 Case was.....(\$ 859.44)
- C. The Total Principal and Interest Due was.....(\$172,747.51)
- D. Pre-Petition Fees, Expenses, and Charges.....(\$ 1,582.35)

Exhibit 1 Application of Payments

The Spreadsheet begins March 20, 2018, with a principal balance of \$170,467. This appears consistent with the \$172,747.51 non-deferred, Interest Bearing Principal Balance stated in the Loan Modification Agreement effective September 1, 2015.

Receipt of \$91,700.00 is listed as received March 20, 2018. This is then applied first to the June 1, 2015 to April 1, 2018 monthly loan payments asserted to then have been in default. With the curing of the asserted defaults, the Interest Bearing Principal Balance is stated to be \$161,874.80.

After payment of the April 1, 2018 monthly payment, there is computed to be \$61,131.14 of the \$91,700.00 received on March 20, 2018 remaining. These monies are then applied to the April 1, 2018 Interest Bearing Principal Balance, reducing it to \$100,743.66. (There is also a referenced to the “2nd UPB 36,400.00,” which the court interprets to be the non-interest bearing, deferred portion of the principal balance under the 2014 Loan Modification.)

This Spreadsheet then shows only the following amounts received and credited to the Interest Bearing Principal Balance:

10/12/2020	\$1,075.25
10/20/2020	\$ 150.00
11/12/2020	\$2,150.50
12/10/2020	\$1,075.25
4/13/2020	\$3,225.75
5/12/2021	\$2,150.50

After application of this \$10,902.50 to principal, interest, and escrow payments during the period October 10, 2020 to August 2019, the principal balance is computed by Movant to be \$97,832.07

## **DEBTOR'S OBJECTION TO MOVANT'S PROOF OF CLAIM**

On May 2, 2022, Debtor filed an Objection to Claim filed by Movant. Dckt. 95. In the Objection it is alleged that the Proof of Claim must be reduced by a \$91,700.00 grant Debtor received and then adjusted for payments of \$10,752.50, which thereby reduces the current arrearage to \$0.00.

The Debtor's Analysis, Section IV of the Objection to Claim, begins with a "Balance" of (\$209,166.89) for the total claim, with a pre-petition arrearage of (\$3,177.95), when the 2015 bankruptcy case was filed. When one allows for the (36,400.00) non-interest bearing Deferred Principal Balance, this would result in the Interest Bearing Principal Balance being (\$172,766.89) when the 2015 bankruptcy case was filed.

Debtor then tracks the proofs of claims filed by Creditor which states the total claim amount when the various cases were filed by Debtor, which are stated in Debtor's Analysis to be:

Case 15-20683.....January 30, 2015.....(\$209,166.89)

[Between these two dates Debtor lists \$91,699.99 as being paid on Creditor's claim.]

Case 20-21485.....March 1, 2020.....(\$153,169.92) [this shows a reduction of \$55,996.97 in the claim]

[Between these two date Debtor lists \$0.00 as being paid on Creditor's claim.]

Case 20-22852.....June 1, 2020.....(\$159,190.35)

[Between these two Dates Debtor lists \$10,752.50 being paid on Creditor's claim, citing to the Trustee's Final report in Case 20-22852. See 20-22853; Trustee's Final Report, p. 1, Dckt. 231.]

Case 21-23539.....October 1, 2021.....(\$164,860.13)

These payments identified by Debtor total \$102,452.49. Debtor asserts that this documents that the \$91,700.00 Keep You Home California monies were not properly applied.

Debtor further asserts that all of the \$91,700.00 Keep Your Home California monies should have been applied to arrearages, and therefore there should be no arrearage due Creditor.

Debtor further asserts that Creditor has applied the payments to an unauthorized \$11,457.44 for attorney's fees and costs, stating that they were "not authorized by this, or any other court."

The only payments made to Creditor are stated to be those that went through the Chapter 13 Trustee in Debtor's cases and the \$91,700.00.

## **CONFIRMATION OF DEBTOR'S PLAN**

Debtor, with representation of counsel, filed his Motion to Amend Chapter 13 Plan on January 21, 2022. See Dckt. 56. As discussed in the court's tentative ruling for Debtor's Motion to Confirm, both Movant and the Chapter 13 Trustee have opposed Debtor's Motion on various grounds. See Dckt. 73 and 75.

The court issued an order confirming Debtor's First Amended Plan on April 8, 2022. *See* Dckt. 88.

### **APRIL 26, 2022, HEARING ON MOTION FOR RELIEF**

Though the Amended Plan, which addresses prior arrearages, has been confirmed, Debtor is now in default for the March and April 2022 monthly plan payments. Debtor's counsel stated that there is a TFS payment scheduled for April 27, 2022, and he will delivered to the Chapter 13 Trustee a cashier's check for \$850, which will cure the March 2022 default.

Counsel for Movant noted that this hearing has been continued multiple times and Movant has allowed Debtor to prosecute the confirmation of the Amended Plan which was to address the pre and post-petition defaults. Unfortunately, new defaults have occurred. Movant's counsel directed the court to the history of multiple, non-successful Chapter 13 filing by Debtor in this court.

At the hearing Debtor was visibly distressed at the proceedings and his view that Movant is trying to take his property. He has previously argued that Movant will not enter into a loan modification with him. As the court noted, Debtor's counsel is effectively forcing a five year loan modification on Movant though the confirmed Amended Chapter 13 Plan. However, the Debtor must be able to perform the Chapter 13 Plan and make the modified loan payments.

In light of the Chapter 13 Trustee being able to make a distribution to Movant in the near future, the court again continues the hearing. This is to afford Debtor and Debtor's counsel to have the hard economic talk about what Debtor can fund, how it can be funded, and what Debtor may need to do to save his exempt equity value in the Property.

### **JUNE 1, 2022 HEARING**

As noted above, the court does not adjudicate claims objections or other substantive disputes in the context of a relief from stay motion. In these post-confirmation settings, the "cause" question focuses on whether Debtor is prosecuting his/her case – i.e. performing the Chapter 13 plan the debtor got confirmed.

The court has "strayed" into looking at the payments and the nature of the claims objection dispute for several reasons. One, to understand the magnitude of any underlying dispute. Second, and most importantly, to afford Debtor the full opportunity to not only understand the obligation and what the parties are asserting, but to make sure that Debtor understands that he and his counsel have their opportunity to present such issues to the court.

In looking at Debtor's Analysis of the payments and total claim, the court notes that he lists there being \$91,699.99 in payments to Creditor for the period June 1, 2015 through July 1, 2018.

On Creditor's Exhibit 1, for the period June 1, 2015 to April 1, 2018, states that \$30,568.85 was applied for the payments due during that period. Then, the remaining \$61,131.14 was applied to the outstanding Interest Bearing Principal Balance of (\$161,875) as of April 2018, reducing it to (\$100,743.66). In addition, there would be the Deferred Non-Interest Principal balance of (\$36,400.00), making the total claim as of April 2018 to be approximately (\$136,400.00).

Debtor then identifies an additional payments of \$10,752.50 being made after April 2018 through the commencement of this current bankruptcy case.

#### Proof of Claim 2-1 in Current Bankruptcy Case

The current bankruptcy case was filed on October 12, 2021, which is three years and seven months after April 2018. On Proof of Claim 2-1 in the current case, Creditor states the claim has grown to (\$164,860.13). Included in this amount are (\$14,994.93) in attorney's fees and other costs, and (\$9,628.24) in escrow deficiency and shortage. These total an additional (\$24,623.17) which is added to the claim.

If one subtracts out the (\$24,623.17), which Debtor may dispute, that leaves (\$140,236.83) for the total claim, which includes the (\$36,400.00) Deferred Non-Interest Bearing Principal Balance. Removing this amount from the claim would leave (\$103,836.83) as the Interest Bearing Principal Balance, including accrued interest.

Creditor computes the April 1, 2018 Interest Bearing Principal Balance to be (\$100,743.66) after applying the \$91,700.00 payment.

As discussed above, the interest rates during the April 2018 to October 2021 were 3% and 4%. Doing a rough average of 3.5% per year, the Interest Bearing Principal Balance of (\$100,743.66) would accrue simple interest of (\$3,526.03) a year. Extrapolating that over three years and seven months from April 2018 to the October 2021 filing of the current case, that would total (\$12,634.94) in interest.

If \$10,752.50 in payments were made during the fifteen months of Debtor's bankruptcy case 20-22852, then that would result in the obligation owing on the Interest Bearing Principal Balance increasing by (\$1,882.54), for a total of (\$103,626.20). When adding the Deferred Non-Interest Bearing Principal Balance of (\$36,400) to it, the total claim, excluding costs, fees, and expenses, would appear to be around, (\$140,026.20).

The court's approximation is a little less than the claim as stated by Creditor has claimed in Proof of Claim 2-1 in this case, which, including fees, costs and expenses, is stated to be (\$164,860.13). When (\$14,994.93) for fees, costs, and expenses are backed out, Creditor's claim for the Interest Bearing Principal Balance portion and the Deferred Non-Interest Bearing Balance portion total (\$149,865.20).

This additional (\$9,000.00) amount in Proof of Claim 2-1 over the court's estimate of principal and unpaid interest appears to be the Escrow Deficiency of (\$8,410.82) and Escrow Shortage of (\$1,217.42) listed in Proof of Claim 2-1.

Thus, it does not appear that the claim amount should be reduced further by the \$91,700.00 Keep Your Home California payment and the \$10,752.50 (a more than \$100,000 “adjustment”), but whether the costs, fees, and expenses of (\$14,994.93) should be included in the arrearage to be cured.

As stated above, the court is not making any findings or rulings on the amounts of the claim and any objection thereto, but looking at to help the court and parties clarify what issues may actually be in dispute.

### **Ruling on Motion for Relief**

Debtor’s confirmed Chapter 13 Plan requires Debtor to make increased monthly plan payments of \$1,960.00 commencing with the February 2022 payment and each month thereafter during the term of the Plan. Order, Dckt. 88. Under the Plan, the arrearage claimed by Creditor is to be paid \$755.00 a month for fifth seven months (the plan not being fully funded for the first three months). If there is a bona fide dispute over the (\$14,994.92) in costs, fees, and expenses, those represent the tail end months of the Plan.

At the hearing on the Motion, Debtor’s counsel reported that he has one payment for \$1,960 and is getting the second payment shortly to cure the default. Debtor is renting more rooms in the house to increase his income, with Debtor moving into the garage.

Debtor has an application for a California grant to cure the arrearage pending.

Counsel for Movant commented that there is no evidence of the payments or other factual assertions. Counsel for Movant requested that specific information be documented, which counsel for Debtor agreed to promptly do.

The Parties agreed to continue the hearing in light of Debtor’s efforts to get the Plan back on track and provide the requested information. The hearing is continued to the same date and time which is set for the Objection to Movant’s claim, which the parties indicated may be a moot issue.

### **Trustee’s Non-Opposition to Debtor’s Objection to Claim**

On June 14, 2022, Trustee filed a Non-Opposition to Debtor’s Objection to Allowance of Claim. Dckt. 111. Trustee explains that U.S. Bank has filed a Proof of Claim which shows a secured amount of \$164,860.13 and arrears of \$40,899.99. Trustee has placed a hold on U.S. Bank’s claim until the objection has been resolved or the court clarifies how the claim will be paid.

### **JUNE 28, 2022 HEARING**

At the hearing, counsel for the Debtor reported that in light of the advances in this case, the Parties agreed to a continuance.

### **Creditor’s Exhibits**

On July 12, 2022, Creditor attached exhibits in support of its “Declaration of Loan Servicer in Support of Motion for Relief” filed “concurrently herewith.” Dckt. 119. The court notes, however, “Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence,

exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court’s expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a).

Creditor’s declaration indicates the \$91,7000 CalHFA MAC loan proceeds were received on March 20, 2018 and applied to the following contractual payments:

Payment Dates	Total Months	Payment Amount	Total
June 1, 2015 - May 1, 2016	12 months	\$810.29	\$9,723.48
June 1, 2016	1 month	\$819.16	\$819.16
July 1, 2016 - June 1, 2017	12 months	\$817.45	\$9,809.40
July 1, 2017 - April 1, 2018	10 months	\$893.10	\$8,931.00
<b>Total Payments Applied from CalHFA MAC loan</b>	<b>35 months</b>		<b>\$29,283.04</b>

Creditor indicates the remaining \$61,481.20 of the \$91,700.00 CalHFA loan were applied to the principal balance of Creditor’s loan. This resulted in a remaining principal balance of \$100,746.66. Additionally, \$935.76 were applied to corporate advances.

The payments are reflected in Creditor’s Exhibit 1. Dckt. 119.

### **July 26, 2022 Hearing**

At the hearing, the Parties agreed to a final final short continuance in light of the issues having been narrowed and the information provided by creditor.

### **AUGUST 4, 2022 HEARING AND STAYING OF PROCEEDINGS**

The Debtor having dismissed the related Objection to Creditor’s Claim and the efforts being made to address Creditor’s claim through an amended Chapter 13 Plan, Creditor requested that the proceedings on this Motion be stayed and the matter removed from the Calendar.

The Debtor concurred in this request.

The court orders that these proceedings are stayed and the matter is removed from the calendar. The matter may be returned to the Calendar by Movant if it determines that grounds exist for the requested relief. The court determines that staying this matter, rather than dismissing it without prejudice, is consistent



with the efforts of Debtor and Creditor to address this claim, Debtor pursuing an amended plan, and judicial economy.

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 Annul Automatic Stay or in the Alternative In Rem Relief From Automatic Stay filed by US Bank, NA (“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 is **XXXXXXXXXX**

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

**THE MONEY SOURCE INC., VS.**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 12, 2022. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

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

<b>The Motion for Relief from the Automatic Stay is <b>XXXXXXXXXX</b></b>
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The Money Source Inc. (“Movant”) seeks relief from the automatic stay with respect to Richard Lynn Howard and Johnna Faye Howard’s (“Debtor”) real property commonly known as 20545 Ontario

Avenue., Burney, California (“Property”). Movant has provided the Declaration of Cindy Cowden to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

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

## **CHAPTER 13 TRUSTEE’S REPLY**

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

## **DISCUSSION**

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

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

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

### **Continuance of Hearing**

At the January 10, 2023 Hearing, Movant requested the hearing be continued, reporting to the court that the Parties are exchanging financial information and working to get agreement on the amount of the debt.

The hearing is continued to 1:30 p.m. on March 7, 2023.

### **March 7, 2023 Hearing**

At the hearing, **XXXXXXXXXXXX**

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

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

The Motion for Relief from the Automatic Stay filed by The Money Source Inc. (“Movant”) having been presented to the court, Movant requesting a continuance in light of the Parties exchanging information and confirming dollar amounts of the debt, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief from the Automatic Stay is

XXXXXXXXXXXXXX

5. [21-21279-E-13](#)      **SUSAN STRAUB**      **MOTION FOR RELIEF FROM**  
[CLB-1](#)      **Mary Ellen Terranella**      **AUTOMATIC STAY**  
           **1-13-23 [76]**

**U.S. BANK NATIONAL  
ASSOCIATION 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.

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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 January 13, 2023. By the court’s calculation, 53 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.

<b>The Motion for Relief from the Automatic Stay is granted.</b>
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U.S. Bank National Association, as Trustee for MASTR Asset Backed Securities Trust 2004-HE1, Mortgage Pass-Through Certificates, Series 2004-HE1 (“Movant”) seeks relief from the automatic stay with respect to Susan Louise Straub’s (“Debtor”) real property commonly known as 105 Ventura Street, Vallejo, California (“Property”). Movant seeks relief to proceed under applicable non-bankruptcy law to foreclose and obtain possession of the Property. Movant has provided the Declaration of Lisa Rene Jones to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made four post-petition payments, with a total of \$6,981.64 in post-petition payments past due. Declaration, Dckt. 80.

## **CHAPTER 13 TRUSTEE’S RESPONSE**

David P. Cusick (“the Chapter 13 Trustee”) filed an Response on February 13, 2023. Dckt. 87. Trustee states Debtor is \$19,721.22 delinquent in Plan payments. Movant is a Class 1 claim and to date, Debtor is post-petition delinquent to Movant in the amount of \$8,727.05. Additionally, Trustee received correspondence from Debtor’s counsel on October 25, 2022 indicating that Debtor has passed away with no representative having any interest in keeping up with the bankruptcy. Trustee requests the Motion be granted.

## **DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$310,064.87 (Declaration, Dckt. 80), while the value of the Property is determined to be \$480,000.00, as stated in Schedules A/B and D filed by Debtor.

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

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

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

## **Request for Waiver of Fourteen-Day Stay of Enforcement**

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

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

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by U.S. Bank National Association, as Trustee for MASTR Asset Backed Securities Trust 2004-HE1, Mortgage Pass-Through Certificates, Series 2004-HE1 (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 105 Ventura Street, Vallejo, California (“Property”) to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.

# FINAL RULINGS

6. [22-22917-E-13](#)      **JOHN DOUGHERTY**  
[HLG-1](#)                      **Mary Ellen Terranella**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
12-15-22 [21]**

**CHERYL HENRY VS.**

**6 thru 7**

**Final Ruling: No appearance at the March 7, 2023 Hearing is required.**  
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Pursuant to court order, Dckt. 92, **the hearing on the Motion for Relief from the Automatic Stay has been continued to 2:00 p.m. on March 21, 2023**, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

Cheryl Henry's ("Movant") seeks relief from the automatic stay with respect to John Scott Dougherty's ("Debtor") real property commonly known as 1096 Vintage Court, Vacaville, California ("Property"). Movant has provided the Declaration of Cody S. Fischer ("Movant's Counsel") to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues that they have a third-position Deed of Trust in the amount of \$191,645.00 secured by Debtor's property. Declaration, Dckt. 22.

## **TRUSTEE'S RESPONSE**

The Chapter 13 Trustee, David P. Cusick, ("Trustee") filed a reply on January 4, 2023. Dckt. 44. Trustee states Debtor's proposed Plan does not provide for Movant. Additionally, Debtor is delinquent in Plan payments on the proposed Plan.

## **DEBTOR'S OPPOSITION**

Debtor filed an Opposition on January 10, 2023. Dckt. 47. Debtor asserts that Creditor does not have a Deed of Trust because Debtor did not consent or agree to sign any Note or Deed of Trust. Rather, Debtor argues Creditor's secured claim is based on an Abstract of Judgment, which is a nonconsensual lien subject to avoidance. Therefore, Creditor's interest is not subject to adequate protection.

From the court's review of Movant's exhibits in support of the Motion, Debtor never signed a promissory note or deed of trust that would give Creditor a consensual lien on Debtor's Property. Dckt. 23.

However, Movant provides the declaration of Movant's Counsel to testify under penalty of perjury that the Promissory Note and Deed of Trust were signed and notarized on June 9 and 20, 2022, respectively.

From the court's review of the exhibits (Dckt. 23) filed in support of the Motion, Movant provides the following:

**Exhibit B - Promissory Note**

Date: October \_\_, 2020, whereas Debtor promises to pay Creditor the principal sum of \$100,000.00.

Payment terms:

- (1) November 1, 2020 - May 1, 2022 - Debtor to pay Trustee, Horner Law Group, P.C., monthly payments of at least \$500.00.
- (2) On or before the May 1, 2022 payment, Debtor is to pay the remaining \$100,000.00
- (3) Late payment - \$50.00 late fee if not received by the 10<sup>th</sup> day of the month
- (4) Acceleration Clause - If Debtor fails to make a payment after the 15<sup>th</sup> day of the monthly payment is due, all outstanding settlement proceeds will become due and payable immediately and Creditor may proceed with all of their legal rights and remedies, including foreclosure proceedings.
- (5) Attorney's fees - Debtor promises to pay all reasonable costs and expenses incurred by Creditor in connection with the enforcement of the Note.

Signature: The Promissory Note is signed by a "Brian Taylor," a Clerk of Court, in lieu of Debtor, on June 9, 2022. The signature is notarized.

**Exhibit C - Recorded Deed of Trust**

Date: November 1, 2020

Trustor: Debtor, John Scott Dougherty

Beneficiary: Creditor, Cheryl Henry

Trustee: Horner Law Group, P.C.

Transferred Interest: Debtor irrevocably grants, transfer, and assigns to Trustee in Trust with power of sale the property commonly described as 1096 Vintage Court, Vacaville (“Property”).

Signature: The Deed of Trust is signed by a “Robert Oliver,” a Clerk of Court, in lieu of Debtor, on June 20, 2022. The signature is notarized.

Recording Information:

Date: June 27, 2022

County: Solano County

Document Number: 202200043969

Movant provides evidence that a Deed of Trust was recorded, securing their interest. In addition to this evidence, however, Debtor provides evidence a judgment was entered against Debtor in favor of Creditor in the amount of \$127,783.17. *Id.* An abstract of judgment was recorded with Solano County on January 24, 2022, which is prior to the date the Deed of Trust was recorded. *Id.* This would create a nonconsensual interest for Creditor on Debtor’s Property.

#### **MOVANT’S REPLY BRIEF**

In response to Debtor’s opposition, Movant filed a Reply Brief. Dckt. 58. As evidence in support of the reply brief, Movant provides the Declaration of Movant’s Counsel, Cody S. Fischer. Dckt. 59. Movant’s Counsel testifies much of the same facts testified in their prior Declaration, however, provides further evidence for the court. Dckt. 22. Under penalty of perjury, Movant’s Counsel states they have personal knowledge that:

1. The underlying secured interest arises from enforcing Debtor and Movant’s settlement agreement from September 30, 2020. Declaration, Dckt. 58 ¶ 3.
2. The settlement agreement arose from a Solano County Superior Court Case between the Movant and Debtor, Case No. FCS052751. *Id.*
3. After Debtor failed to comply with the terms of the settlement agreement, Movant filed a Motion to Enforce Settlement Agreement. *Id.* ¶ 4.
4. On November 30, 2021, Solano County Superior Court entered its Judgment in favor of Movant. Judgment was filed by the court on December 13, 2021. *Id.* ¶ 5.
5. As part of the Judgment, the court ordered Debtor to execute a Promissory Note and Deed of Trust, no later than December 29, 2021. *Id.* ¶ 6.



6. Debtor failed to comply with the court order. *Id.* ¶ 7.
7. In May of 2022, Debtor stated, with notary present, “Well I guess I’m going to jail then, because I’m not signing.” *Id.* ¶ 7. The court notes, Movant’s Counsel has not made it clear whether Movant’s Counsel was present for this statement. If Movant’s Counsel were present, the statement would be admissible evidence as an opposing party statement. Federal Rules of Evidence Rule 801(d)(2).
8. Movant requested an appointment of an Elisor (person authorized by the court to sign documents for another person; *see Blueberry Properties, LLC v. Chow*, 230 Cal. App. 4<sup>th</sup> 1017, 1020-1021 (2014)) to have the Note and Deed of Trust signed and notarized. *Id.* ¶ 8.
9. The Note and Deed of Trust were signed and notarized, and the Deed of Trust was recorded in Solano County on June 27, 2022. *Id.* ¶ 11.

It is not clear to the court how Movant’s Counsel has personal knowledge as to the facts above. As discussed in Weinstein's Federal Evidence § 602.02:

A witness may testify only about matters on which he or she has first-hand knowledge. Because most knowledge is inferential, personal knowledge includes opinions and inferences grounded in observations or other first-hand experiences. The witness’s testimony must be based on events perceived by the witness through one of the five senses.

Movant’s Counsel has not informed the court whether they represented Movant and was present at the time of the listed events.

## **JANUARY 24, 2023 HEARING**

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court addressed with counsel for Movant the need for supplemental pleadings which would include the Settlement Agreement and the Tentative Ruling in granting Movant’s Motion to Enforce Settlement which was adopted by the State Court Judge in issuing the State Court Judgment (Exhibit A; Dckt. 23 at 3-4).

At the hearing, the parties agreed to continue the hearing to March 7, 2023 to allow for the supplemental briefing.

## **MOVANT’S SUPPLEMENTAL BRIEF**

Movant filed a Supplemental Brief on February 10, 2023. Dckt. 74. Movant states the following in support of their Motion for Relief:

1. Movant promised to sign the Note and Deed of Trust but did not do so. *Id.* at 6.
2. Movant was forced to seek court intervention to order Debtor to sign the document. *Id.*
3. The Elisor's signature has the legal effect as if Debtor had signed the Note and Deed of Trust. *Id.* at 7 (citing *Blueberry Props., LLC v. Chow*, 230 Cal. App. 4th 1017, 1021 (2014)).
4. Liens created by settlement agreements are consensual liens. *Id.* (citing *Naqvi v. Fisher*, 192 B.R. 591, 596 (Bankr.D.N.H. 1995)).
5. The signing, originating from a consensual settlement agreement, indicates the Note and Deed of Trust are valid, enforceable, and consensual. *Id.*

#### **DEBTOR'S SUPPLEMENTAL OPPOSITION**

Debtor filed supplemental opposition on February 24, 2023. Dckt. 85. Debtor states:

1. Movant's claim that she is not adequately protected is not supported by evidence. *Id.* at 2.
2. Debtor passed away on January 28, 2023. *Id.* at 3.
3. An amended plan will be filed once deceased Debtor's spouse is substituted as representative which will fully address Movant's claim. *Id.*

#### **COURT'S ORDER CONTINUING HEARING**

On March 1, 2023, the court issued an order continuing the hearing on the Motion for Relief to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

**Final Ruling: No appearance at the March 7, 2023 Hearing is required.**

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Pursuant to court order, Dckt. 93, the **hearing on the Motion to Avoid Lien has been continued to 2:00 p.m. on March 21, 2023**, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

This Motion requests an order avoiding the judicial lien of Cheryl Henry (“Creditor”) against property of the debtor, John Scott Dougherty (“Debtor”) commonly known as 1096 Vintage Court, Vacaville, California (“Property”).

### **CREDITOR’S OPPOSITION**

Creditor filed an opposition on January 10, 2023. Dckt. 49. Creditor states Debtor’s Motion conceals that Creditor has a valid, enforceable, Deed of Trust in the third position against the Property.

From the court’s review, Debtor is only trying to avoid a judicial lien. Debtor provides evidence of the judicial lien as Exhibit A, Dckt. 41. Creditor does not address how having a consensual lien renders a judicial lien immune to the avoidance of avoiding of that lien as provided in 11 U.S.C. § 522(f).

Creditor’s Opposition is rich with judgmental, condemning language directed at Debtor. These include: (1) “Dougherty omits and conceals from this Court that Creditor Henry has a valid, enforceable, Deed of Trust . . .;” (2) “Dougherty essentially commits fraud on this Court by stating under penalty of perjury . . .;” (3) “Dougherty’s entire argument in his Motion is premised on omitting the Henry Note and Deed of Trust . . .;” (4) “He intentionally and fraudulently omits Henry’s third-position Note and Deed of Trust secured interest . . .;” (5) “Dougherty’s indisputably perjurious representations in his Declaration belie his credibility . . .;” (6) a long recitation of how Creditor asserts Debtor failed to comply with orders of the State Court judge; and (7) “Dougherty is well aware that his perjurious statements are intentionally misleading . . . .” In reading this Opposition and all of the extraneous personal attacks, the court is reminded of that famous quote from William Shakespear’s Hamlet:

The lady doth protest too much, methinks.

In the opposition Creditor asserts both its judgment lien and the deed of trust. In this Motion Debtor only takes action against the judgment lien asserted by Creditor and not a deed of trust.

### **DEBTOR’S RESPONSE**

Debtor filed a response on January 17, 2023. Dckt. 56. Debtor states that attached as exhibits to their Motion was an unsigned Promissory Note and unsigned Deed of Trust. The Abstract of Judgment

was recorded on January 24, 2022, and was not a consensual lien. This was two-hundred and ninety (290) days before the commencement of this Bankruptcy Case.

Debtor argues that the deed of trust lien, which Debtor consented to and then refused to sign, is a “mere” judgment lien merely because the court appointed someone else to sign for Debtor the deed of trust which Debtor agreed to give pursuant to the settlement and then was ordered to be done in the State Court Judgment. A copy of the Judgment is provided as Exhibit A by Debtor (Dckt. 41 at 5-6). The State Court Judgment includes a mandatory injunction for Debtor to execute the promissory note and deed of trust which Debtor has agreed to under the Settlement Agreement. The Note and Deed of Trust are included as attachments to the State Court Judgement.

From what Debtor presents, Debtor agreed to and gave a security interest in the property in the form of a deed of trust. Merely because he later refused to comply with the Settlement Agreement or the State Court Judge’s order, and someone had to be appointed to do the ministerial task of signing the note and deed of trust.

## **DISCUSSION**

The State Court Judgment (Dckt. 41) makes reference to there being a tentative ruling and the State Court adopting that ruling. Here is what is ordered in the State Court Judgment:

- A. Creditor is awarded a monetary judgment of \$127,783.17 against Debtor.
- B. Further, that within 30 days after the date of the State Court Judgment, Debtor will:
  - 1. Execute and notarize a promissory note and deed of trust as described in the Settlement Agreement, with a copy of the note and deed of trust being attached to the State Court Judgment.
- C. The note is in the principal sum of \$100,000 and:
  - 1. no interest accrues on the \$100,000,
  - 2. Monthly payments are specified, with a balloon payment to be paid on May 1, 2022.
  - 3. Late fees of \$50 apply.
- D. The deed of trust secures the note (not the judgment).

Creditor provides the declaration of Creditor’s Counsel to testify under penalty of perjury that the state court appointed an elisor on June 20, 2022 to sign the Deed of Trust. Declaration, Dckt. 50. Creditor’s Counsel insists the Deed of Trust was recorded in Solano County on June 27, 2022. Creditor’s Counsel has not provided the recorded Deed of Trust in the form of an exhibit to verify this information.

Upon review of Creditor’s Proof of Claim 16-1, Creditor provides the following attachments as evidence of a valid Note and Deed of Trust:

## **Attachment 2 - Recorded Deed of Trust**

Date: November 1, 2020

Trustor: Debtor, John Scott Dougherty

Beneficiary: Creditor, Cheryl Henry

Trustee: Horner Law Group, P.C.

Transferred Interest: Debtor irrevocably grants, transfer, and assigns to Trustee in Trust with power of sale the property commonly described as 1096 Vintage Court, Vacaville ("Property").

Signature: The Deed of Trust is signed by a "Robert Oliver," a Clerk of Court, in lieu of Debtor, on June 20, 2022. The signature is notarized.

### Recording Information:

Date: June 27, 2022

County: Solano County

Document Number: 202200043969

## **Attachment 3 - Promissory Note**

Date: October \_\_, 2020, whereas Debtor promises to pay Creditor the principal sum of \$100,000.00.

### Payment terms:

- (1) November 1, 2020 - May 1, 2022 - Debtor to pay Trustee, Horner Law Group, P.C., monthly payments of at least \$500.00.
- (2) On or before the May 1, 2022 payment, Debtor is to pay the remaining \$100,000.00
- (3) Late payment - \$50.00 late fee if not received by the 10<sup>th</sup> day of the month
- (4) Acceleration Clause - If Debtor fails to make a payment after the 15<sup>th</sup> day of the monthly payment is due, all outstanding settlement proceeds will become due and payable immediately and Creditor may proceed with all

of their legal rights and remedies, including foreclosure proceedings.

- (5) Attorney's fees - Debtor promises to pay all reasonable costs and expenses incurred by Creditor in connection with the enforcement of the Note.

Signature: The Promissory Note is signed by a "Brian Taylor," a Clerk of Court, in lieu of Debtor, on June 9, 2022. The signature is notarized.

Creditor provides evidence that a Deed of Trust was recorded, securing their interest. This creates a consensual interest that would not be avoidable.

Debtor, however, provides evidence a judgment was entered against Debtor in favor of Creditor in the amount of \$127,783.17. *Id.* An abstract of judgment was recorded with Solano County on January 24, 2022, which is prior to the date the Deed of Trust was recorded. *Id.* This would create a nonconsensual interest for Creditor on Debtor's Property.

Proof of Claim 16-1 filed by Creditor is in the amount (\$258,379.68). POC 16-1, § 7. Creditor then states that the claim is fully secured by a deed of trust. *Id.*, ¶ 9.

Attachment 1 to Proof of Claim 16-1 computes this claim as consisting of the following component parts:

1. Obligation secured by Deed of Trust.....(\$100,000)
2. Plus Attorney's Fees.....(\$114,174.42)
3. Plus Costs.....(\$ 44,205.25)

What is not clear to the court is whether there is a judgment obligation secured by a judgment lien and a separate promissory note obligation secured by a deed of trust, or that the note and deed of trust replaced the judgment.

Performing the "simple" 11 U.S.C. § 522(f) calculation, the number appear to line up as follows:

FMV of the Property.....\$874,000

Rocket Mortgage Deed of Trust.....(\$294,815) POC 7-1  
(March 16, 2017 Recording)

IRS Secured Claim.....(\$ 36,294) Amd. POC 13-2  
(Nov. 26, 2013 Tax Lien Recorded)

Pacific Service Credit Union  
Deed of Trust.....(\$99,670) [No Proof of Claim Filed]

Renew Financial PACE Loan.....(\$ 20,000) [No Proof of Claim Filed]

Value of Property For Judgment Lien  
and Exemption Avoidance Calculation.....\$572,891 [Assumes valid secured claims of  
Pacific Service CU and Renew Financial]

American Express Abstract of Jdgt.....(\$ 3,609) [No Proof of Claim Filed]

Credit's Judgment Lien.....(\$127,783) [principal amount of Judgment]  
[Recorded January 24, 2022]

Creditor's Deed of Trust.....(\$258,379)  
[Recorded August 27, 2022]

Debtor's bankruptcy case was filed on November 10, 2022. Creditor's Deed of Trust was recorded on August 27, 2022 - Seventy-Six (76) days before this Bankruptcy Case was filed.

What is not clear to the court is what claim or claims that Creditor has in this case. It is not clear if there is both an abstract of judgment securing a judgment or "just" a note secured by a deed of trust in place of the judgment.

### **Continuance of January 24, 2023 Hearing**

At the hearing, counsel for the Debtor reported that Debtor is suffering from a serious medical condition and that the appointment of a personal or successor representative may be required.

The court has continued the hearing on the Motion for Relief From the Stay to March 7, 2023, to allow for the filing of supplemental pleadings.

The Parties agreed to continue the hearing on this Motion to Avoid Judicial Lien to 1:30 p.m. on March 7, 2023, with Debtor filing and serving supplemental pleadings on or before February 24, 2023. No supplemental response pleadings are required, with the court to set a further filing schedule at the continued hearing if such are requested to be filed.

### **Debtor's Supplement to Motion**

Debtor filed a Supplement to Motion on February 24, 2023. Dckt. 87. Debtor states the following encumbrances are current against the Property:

- A. A first note and deed of trust in favor of Rocket Mortgage, in the amount of \$305,000.00;
- B. A second note and deed of trust in favor of Pacific Service Credit Union, in the amount of \$99,670.00;
- C. A PACE Loan through Renew Financial, in the amount of \$20,000.00;
- D. Abstract of Judgment in favor of American Express, in the amount of \$3,609.00;

- E. A third note and deed of trust in favor of Cheryl Henry, in the amount of \$100,000.00; and
- F. A secured Federal Tax Lien in the amount of \$39,294.24

Debtor requests the court grant the Motion to Avoid Judicial Lien.

### **COURT'S ORDER CONTINUING HEARING**

On March 1, 2023, the court issued an order continuing the hearing on the Motion to Avoid Judicial Lien to 2:00 p.m. on March 21, 2023, to be conducted in conjunction with the Motion to Appoint the Successor Representative.

8.	<a href="#"><u>19-27922</u></a> -E-13 <a href="#"><u>RAS-1</u></a>	<b>TANIKA HOPKINS</b> <b>Matthew Gilbert</b>	<b>CONTINUED MOTION TO DISMISS</b> <b>CASE</b> <b>11-2-22 [23]</b>
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**Final Ruling: No appearance at the March 7, 2023 Hearing is required.**

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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 Trustee, and Office of the United States Trustee on November 2, 2022. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Case 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.

<p><b>The Motion to Dismiss is itself dismissed without prejudice, and the bankruptcy case shall proceed in this court.</b></p>
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On November 2, 2022, Wilmington Savings Fund Society, FSB d/b/a Christiana Trust, not individually but as trustee for Premium Mortgage Acquisition Trust, (“Creditor”) filed a Motion to Dismiss for Failure to Make Plan Payments. Dckt. 23. In the caption of the Motion, it states that the Confirmation Hearing is set for December 13, 2022. However, there is no Motion to Confirm set in this case.

Creditor states that Debtor’s Plan was confirmed on February 24, 2020. Then, on March 5, 2020, Creditor filed its proof of secured claim.

Creditor states that Debtor is delinquent on the post-petition monthly payments due Creditor, with the last being made on June 30, 2022, in the amount of \$1,466. Motion, ¶ 6; Dckt. 23. Creditor states that the Trustee advises Creditor that Debtor has defaulted in Plan payments, and therefore that is why Creditor is not being paid on its claim. *Id.*, ¶ 7.

In violation of the Local Bankruptcy Rules requiring exhibits to be filed as a separate pleading, a payment history has been tacked on to the back of the Motion. Dckt. 23, p. 3-7.

No declaration is filed with the Motion and the Exhibit is not authenticated.

As presented, the Motion does not provide evidence and grounds for dismissing the Case. Additionally, Creditor has specially set a motion to dismiss a Chapter 13 case on a day that is not one for the court hearing motions to dismiss.

From the Proofs of Claim filed, Creditor is the only creditor in this case (there being one other proof of claim filed for \$766).

If the court has a properly authenticated exhibit, the payment report, it appears to show that payments have been made to Creditor through the month of June 2022, for a total of \$41,650.05 disbursed to Creditor.

With monthly Plan payments of \$2,071.00 required to be made by Debtor, and if June 2022 was the last month Debtor made a Plan payment, then it would appear that the Debtor is delinquent for five (5) months, for a total of \$10,355.00.

Though there would appear to be a five figure default over a period of five months, the Chapter 13 Trustee has not addressed the default.

At the hearing, counsel for the Trustee reported that Debtor has paid in \$19,000.00, and a significant portion is being paid to the Creditor. The parties agreed to a continuance of the hearing.

#### **January 24, 2023 Hearing**

At the hearing, counsel for the Trustee reported that the Debtor is current in Plan payments and has disbursed payments to Creditor. Counsel for Creditor requested on final continuance to allow Movant to confirm all payments have been received, and then Creditor will dismiss this Motion.

#### **February 14, 2023 Hearing**

At the hearing, counsel for Movant reported that the prior check was cancelled, with a new check issued on January 31, 2023, for \$7,235. Movant will deposit that check, and upon it clearing this Motion will be resolved and can be dismissed. The Hearing is continued 1:30 p.m. on March 7, 2023.

### **Creditor's Notice of Withdrawal**

Creditor filed a withdrawal of their Motion to Dismiss on February 23, 2023. Dckt. 35.

The court construes the "Withdrawal" to be an *Ex Parte* Motion to Dismiss the pending Motion. No prejudice to the responding party appearing by the dismissal of the Motion; the Creditor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition of Trustee; the *Ex Parte* Motion is granted, Creditor's Motion is dismissed without prejudice, and the court removes this Motion 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.

The Motion to dismiss this Chapter 13 Case filed by Wilmington Savings Fund Society, FSB d/b/a Christiana Trust, not individually but as trustee for Premium Mortgage Acquisition Trust, ("Creditor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is dismissed without prejudice, and the bankruptcy case shall proceed in this court.