

**UNITED STATES BANKRUPTCY COURT**  
Eastern District of California

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Sacramento, California**

**May 11, 2021 at 1:30 p.m.**

---

<b>1.</b>	<b><u>19-24051</u>-E-13      ERIC/ROSALIA FUEGA</b> <b><u>KMM</u>-1              Jeffery Ogilvie</b> <b>THE MONEY SOURCE INC. VS.</b>	<b>MOTION FOR RELIEF FROM</b> <b>AUTOMATIC STAY</b> <b>3-30-21 <a href="#">[61]</a></b>
-----------	---	---

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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 30, 2021. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

<b>The Motion for Relief from the Automatic Stay is granted.</b>
--

The Money Source Inc. ("Movant") seeks relief from the automatic stay with respect to Eric Ali'i Fuega and Rosalia Theresa Inez Fuega's ("Debtor") real property commonly known as 2938 Nicolet Lane, Redding, California ("Property"). Movant has provided the Declaration of Ashley Reza 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 three (3) post-petition payments, with a total of \$6,775.74 in post-petition payments past due. Declaration, Dckt. 63.

## CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick (“the Chapter 13 Trustee”) filed an Opposition on April 26, 2021. Dckt. 67. Trustee asserts that Debtor is delinquent one plan payment in the amount of \$3,582.30 and that Movant is included under the confirmed plan as a Class 4 claim. Trustee has not disbursed any payments to Movant.

### 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 \$332,581.84 (Declaration, Dckt. 63), while the value of the Property is determined to be \$357,000, as stated in Schedules A/B and D filed by Debtor.

As noted by the Trustee in his response, Movant’s Secured Claim is provided for the confirmed Chapter 13 Plan as a Class 4 Claim. Class 4 Claim treatment requires that the payments on the claim be made directly by Debtor, and that the automatic stay is terminated for that creditor:

3.11. Bankruptcy stays.

(a) **Upon confirmation** of the plan, the **automatic stay of 11 U.S.C. § 362(a)** and the **co-debtor stay of 11 U.S.C. § 1301 (a)** are . . . ; (2) **modified** to allow the holder of a **Class 4 secured claim to exercise its rights against its collateral** and any nondebtor in the event of a default under applicable law or contract; . . .

Confirmed First Amended Plan, ¶ 3.11; Dckt. 31 (emphasis added).

Though Movant has had the stay modified by confirmation of the Plan, the court appreciates that an order confirming such relief having been granted may need to have that documented when the collateral is real property. Additionally, Movant may desire obtaining such relief to allow for a possible conversion of the case and the Chapter 13 Plan no longer being in effect.

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

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

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

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by The Money Source Inc. (“Movant”) having been presented to the court, the automatic stay having been modified to allow Movant to exercise its rights against its collateral and any nondebtor, 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) have been modified by the confirmation of the Chapter 13 Plan and are vacated by this Order 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 2938 Nicolet Lane, Redding, California (“Property”) to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

No other or additional relief is granted.

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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, Office of the United States Trustee on March 12, 2021. By the court’s calculation, 39 days’ notice was provided. 28 days’ notice is required.

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

<p><b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXX</span>.</b></p>
--

NewRez LLC d/b/a Shellpoint Mortgage Servicing (“Movant”) seeks relief from the automatic stay with respect to David Emberlin’s (“Debtor”) real property commonly known as 669 Madere St, Rio Vista, California (“Property”). Movant has provided the Declaration of Sandra McCoy 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 (4) post-petition payments, with a total of \$7,957.08 in post-petition payments past due. Declaration, Dckt. 60.

**CHAPTER 13 TRUSTEE’S NON-OPPOSITION**

David Cusick (“the Chapter 13 Trustee”) filed a Non-Opposition on March 29, 2021 asserting that the Debtor is delinquent under the confirmed plan with the last payment having posted on October 6, 2020. Dckt. 66.

**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 \$301,002.23 (Declaration, Dckt. 60), while the value of the Property is determined to be \$347,038.00, 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).

### **April 20, 2021 Hearing**

At the April 20, 2021 hearing, the Parties requested a one month continuance as they address questions concerning whether a loan modification application is in process.

### **May 11, 2021 Hearing**

As of the court’s review of the docket in preparation for this pre-hearing disposition, no other pleadings or documents have been filed for this matter.

The Chapter 13 Trustee has filed a Motion to Dismiss for delinquency, which has been set for hearing on May 19, 2021 at 9:00 a.m.

At the hearing **xxxxxxx**

**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 Objection. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----

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

Sufficient Notice Provided. The Proof of Service states that the Objection and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 5, 2021. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the Objection, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the Objection.

<p><b>The Objection to Confirmation of Plan is sustained.</b></p>
---

Wells Fargo Bank, N.A. ("Creditor") holding a secured claim opposes confirmation of the Plan on the basis that:

- A. The plan was not filed in good faith, and
- B. The plan is not feasible.

## DISCUSSION

Creditor's objections are well-taken.

## Good-Faith Filing

Creditor alleges that the Plan was not filed in good faith. *See* 11 U.S.C. § 1325(a)(3). Good faith depends on the totality of the circumstances. *In re Warren*, 89 B.R. 87 (9th Cir. BAP 1988). Thus, the Plan may not be confirmed. Factors to be considered in determining good faith include, but are not limited to:

- 1) The amount of the proposed payments and the amounts of the debtor's surplus;
- 2) The debtor's employment history, ability to earn, and likelihood of future increases in income;**
- 3) The probable or expected duration of the plan;
- 4) The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;**
- 5) The extent of preferential treatment between classes of creditors;
- 6) The extent to which secured claims are modified;
- 7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
- 8) The existence of special circumstances such as inordinate medical expenses;
- 9) The frequency with which the debtor has sought relief under the Bankruptcy code;**
- 10) The motivation and sincerity of the debtor in seeking Chapter 13 relief;**  
and
- 11) The burden which the plan's administration would place upon the trustee.

*In re Warren*, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (quoting *In re Brock*, 47 B.R. 167, 169 (Bankr. S.D. Cal. 1985) (emphasis added).

Here, Creditor argues that the plan was not proposed in good faith because Debtor has filed three bankruptcies in the last six years. Creditor states that the first case was filed shortly after a notice of default on the Property was recorded. Then Debtor filed a second and a third case shortly after each dismissal which has made the property subject to the automatic stay for over five years. Creditor asserts that Debtor's Chapter 13 Plan would extend that to an additional 5 years – which amounts to a 10 year reorganization. Thus, Creditor alleges this is an abuse of the Bankruptcy Code, and prejudicial to Creditor.

## **Feasibility**

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). According to Creditor, Debtor's Plan depends on a \$500.00 contribution by her son. Debtor does not offer any admissible evidence pursuant to a declaration under penalty of perjury indicating an ability or willingness on the part of her son to make this contribution for the next 60 months. The feasibility of the Plan is dependent on this contribution. Without an accurate picture of Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

Additionally, in looking at Schedule I, Debtor states under penalty of perjury of having \$4,500.00 wages as a caregiver, \$239 a month from EDD, \$334.00 in trust distributions, \$2,000 in rental income from the Hillcrest Property, and \$750.00 a month in rental income from boarders in her residence, for a total of \$7,823.00 in income. Dckt. 1 at 33-34.

On Schedule J Debtor lists \$504 a month in expenses for "caregiver 1099 taxes." *Id.* at 36. However, no expenses are shown for maintaining, repairing, and upkeep for either the rental property or the residence. No expenses are shown for being a residential landlord, including liability insurance, property taxes, rental taxes, repairs, and the like.

At the hearing, Debtor's counsel stated that on the totality of the circumstances Debtor is proceeding in good faith. In prior cases, Debtor has made substantial payments, totaling in excess of \$200,000.

Objecting Creditor has pending a Motion for Relief From the Stay. The court continues the hearing on the Objection so that it may be heard in conjunction with the Motion for Relief as Debtor works to address these issues. Additionally, this affords Debtor the opportunity to file amended Schedules I and J clearly stating income, personal and rental expenses, and providing the court with credible evidence in support of confirmation and that addresses Creditor's feasibly concerns.

## **Debtor's Opposition**

In her Opposition, Debtor acknowledges the prior defaults and two prior cases being dismissed. Dckt. 29. She also points the court to having funded the prior case with \$220,097.78, and Objecting Creditor having received \$28,367.79 in payments to the prior arrearage amount of (\$38,460.98) and \$101,408.22 in ongoing currently monthly payments.

## **May 11, 2021 Hearing**

As of the court's May 8, 2021 review of the Docket, no amended Schedules have been filed.

Under the terms of the proposed Chapter 13 Plan, Objecting Creditor is to be paid its current monthly mortgage payment of \$3,577.52, plus a \$1,034.48 monthly payment to cure the pre-petition arrearage of (\$30,000). Proposed Plan, ¶ 3.07(c); Dckt. 3.

Objecting Creditor has filed Proof of Claim 1-1, which asserts a secured claim in the amount of (\$438,405.80), with there being a pre-petition arrearage of (\$35,327.99). POC 1-1, § 9. On the Mortgage Proof of Claim Attachment, Part 1, to Proof of Claim 1-1, Objecting Creditor states that the



current monthly post-petition payment (including monthly escrow amounts), is \$3,583.62. POC 1-1, p. 4.

As provided in Plan ¶ 3.02, absent an order of the court, the amounts stated in proof of claim controls with respect to treatment in the plan. While close, the court considers this Plan using \$3,583.62 as the current monthly plan payment and an arrearage of (\$35,327.99) as the prepetition arrearage to be cured. Spread over sixty months of a plan, to cure a (\$35,327.99) prepetition arrearage, the monthly cure payment (fully amortized over 60 months) is \$588.80 a month.

The Proposed Chapter 13 Plan requires Debtor to make monthly plan payments of \$6,610.00. Proposed Chapter 13 Plan, ¶ 2.01; Dckt. 3. The court first considers whether the Plan is adequately funded. The flow of payments monthly, using the amounts stated in Objecting Creditor's Proof of Claim and other claims filed (as noted below), as set forth in the Plan are be:

<b>Monthly Plan Payment</b>	\$6,610.00	
<b>Chapter 13 Trustee Fee of 10%</b>	(\$661.00)	
	=====	
	\$5,949.00	Monthly Plan Proceeds For Disbursement
<b>Monthly Disbursements</b>		
<b>Debtor's Counsel's Fee Balance</b> of \$2,997, amortized over 60 months	(\$49.95)	For this Analysis, the court amortizes Counsel's fees over the sixty months, notwithstanding the Additional Provisions stating: "7.01 attorneys' fees shall be paid before priority taxes"
<b>Class 1 Secured Claims</b>		
Citibank, N.A. Trustee POC 5-1		
Current Post-Petition	(\$1,135.18)	
Arrearage Cure (\$8,579.57) arrearage	(\$143.00)	Less than the \$275.86 Arrearage Dividend in the Proposed Plan
Wells Fargo, N.A. POC 1-1		
Current Post-Petition	(\$3,583.62)	\$6 greater than amount stated in Plan
Arrearage Cure (\$35,327.99) arrearage	(\$588.80)	Less than the \$1,034.48 Arrearage Divided in the Proposed Plan

<b>Class 2 Secured Claims</b>		
Peritus Portfolio Services II Wolleni, POC 3-1 (\$5,622.97) Secured Claim	(\$107.41)	This is computed using the 5.5% interest rate provided in the Proposed Plan, the (\$5,622.97) secured claim amount stated in POC 3-1
<b>Class 5 Priority Unsecured</b>		
IRS Priority Unsecured POC 4-1 (\$25,408.14)	(\$423.47)	This is greater than the (\$14,585.51) stated in the Plan.
<b>Class 7 General Unsecured Claims</b>		
Debtor has listed the general unsecured claims for which there will be a 100% dividend to total (\$27,899.93)	(\$465.00)	Debtor lists (\$27,899.93) in general unsecured claims. The non-governmental deadline expired on May 5, 2021, with only (\$8,464.23) in general unsecured claims filed. The governmental unit claims deadline expires August 19, 2021, with the IRS having filed a general unsecured claim of (\$1,994.20)
	=====	
	(\$547.43)	Monthly Surplus/(Under) Funding of Chapter 13 Plan

It appears that Debtor's Plan is Under Funded by (\$547.43) a month, which results in the Plan being underfunded by (\$32,845.80).

If one assumes that the actual unsecured claims are only (\$10,458.43), the monthly dividend to pay that reduced amount is only \$174.30. But that only reduces the monthly shortfall to (\$373.13), which totals the Plan being underfunded by (\$22,387.80) for the 60 month Plan.

Based on the financial information provided and the claims to be paid, the Proposed Plan is not feasible. Additionally, as discussed above, there are some other questions concerning Debtor's expenses, including no home maintenance expenses, including the expenses of having boarders in Debtor's residence, and no medical/dental expenses.

Further, Debtor shows no expenses - insurance, utilities, maintenance, liability insurance, state and federal taxes, and others - for the Hillcrest rental property for which she shows \$2,000 in monthly income on Schedule I (Dckt. 1 at 34).

At the hearing **xxxxxxx**

4. [21-20582-E-13](#) ANNE HARPER  
[AP-1](#) Joseph Canning  
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
3-30-21 [\[15\]](#)

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

-----

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 30, 2021. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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

<p><b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXXXX</span>.</b></p>
--

Wells Fargo Bank N.A. ("Movant") seeks relief from the automatic stay with respect to Anne M. Harper's ("Debtor") real property commonly known as 179 East Tennys Drive, Benicia, California ("Property"). Movant has provided the Declaration of Rodney O'Neil Coaxum-Richardson 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 one (1) post-petition payments, with a total of \$3,583.62 in post-petition payments past due. Declaration, Dckt. 18. Movant also provides evidence that there are ten pre-petition payments in default, with a pre-petition arrearage of \$35,327.99. *Id.*

#### CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on April 26, 2021. Dckt. 26. Trustee asserts that Debtor is current in plan payments and that Trustee has disbursed the post-petition mortgage payments and as such Trustee does not believe that Debtor is post-petition delinquent as asserted by Movant.

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on April 27, 2021. Dckt. 29. Debtor asserts that given the history of payments as discussed below, the Motion should be denied recognizing that Debtor has actively prosecuted her cases, made plan payments, and continued to address any defaults despite the challenges faced because of the pandemic.

## 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 \$413,736.91 (Declaration, Dckt. 18), while the value of the Property is determined to be \$691,000, as stated in Schedules A/B and D filed by Debtor.

### 11 U.S.C. § 362(d)(4)

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Here, Movant argues that a series of bankruptcy filings starting in 2015 affecting the Property shows Debtor's scheme to delay, hinder, or defraud Movant.

- A. Case No. 15-26661
  - 1. Filed: August 24, 2015
  - 2. Chapter 13
  - 3. Dismissal Date: January 22, 2018
  - 4. Reason for Dismissal: Delinquency
- B. Case No. 18-20627
  - 1. Filed: February 5, 2018
  - 2. Chapter 13
  - 3. Dismissal Date: December 23, 2020
  - 4. Reason for Dismissal: Delinquency and failure to file a new plan
- C. Case No. 21-20582
  - 1. Filed: February 20, 2021
  - 2. Chapter 13
  - 3. Dismissal Date: Instant Case

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

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation.

Here, the court does not find an intent to hinder or delay Movant from asserting its rights. Since 2015, Debtor has attempted to continue making payments to Movant. Even when her case would get dismissed, Debtor would again try to address her finances and confirm a plan and make payments. The pattern of the cases does not show that Debtor simply wants to live in the Property for free and stop a foreclosure. Debtor has continuously made payments even if at times she has missed a few. Moreover, Debtor has also tried to address the arrearage by requesting a loan modification which Movant granted.

Further, the evidence presented shows that from February 5, 2018 through December 23, 2020, Debtor paid a sum totaling \$220,097.78 into Case No. 18-20627, of which Movant received a sum totaling \$28,367.79 toward the pre-petition arrearage claim of \$38,460.98, and a sum totaling \$101,408.22 in ongoing mortgage payments. In that case, Debtor defaulted in plan payments after being affected by the COVID-19 pandemic. Debtor in turn filed the instant case so that she could continue saving her home and pay Movant. Trustee has stated that she is current in plan payments and in post-petition mortgage payments.

In reviewing the prior cases, the court notes under the proposed Chapter 13 Plan Movant is to receive regular monthly post-petition payments of \$1,124.99 and a pre-petition arrearage cure of \$275.86. Proposed Plan, ¶ 3.07(c); Dckt. 3.

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

### **No Other Relief Requested**

In the Motion, Movant states with particularity (Fed. R. Bank. P. 9013) that:

Wells Fargo Bank, N.A. ("Movant or Creditor") will and hereby does move, pursuant to 11 U.S.C. § 362(d)(4), for an order terminating the automatic stay of 11 U.S.C. § 362(a) as it applies to Movant and the real property located at 179 East Tennys Drive, Benicia, California 94510 (the "Property").

Motion, p. 1:19-22, Dckt. 15. Additionally,

This motion is made pursuant to 11 U.S.C. § 362(d)(4). Debtor's filing of the petition was part of a scheme to delay, hinder, or defraud Movant that involved multiple bankruptcy filings affecting the Property.

*Id.*, p. 3:8-10.

Movant only seeks relief pursuant to the 11 U.S.C. § 362(d)(4) grounds. As explained above, though there have been several bankruptcy cases filed, the court concludes that they were not done as “[p]art of a scheme to delay, hinder, or defraud creditors that involved either — . . .(B) multiple bankruptcy filings affecting such real property.” 11 U.S.C. § 362(d)(4).

The court cannot manufacture other requested relief for Movant, such as termination of the stay pursuant to 11 U.S.C. § 362(d)(1) for cause. However, it appears that possible cause grounds and relief could be stated to have the stay modified/terminated, and then obtain relief pursuant to 11 U.S.C. § 362(d)(4) to have that order effective for two years in future filed cases as well as in the current case.

At the hearing, **XXXXXXX**