

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Wednesday June 29, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [21-11814](#)-A-11 **IN RE: MARK FORREST**
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V
VOLUNTARY PETITION
7-22-2021 [[1](#)]

LEONARD WELSH/ATTY. FOR DBT.

NO RULING.

2. [21-11814](#)-A-11 **IN RE: MARK FORREST**
[LKW-13](#)

CONTINUED MOTION TO CONFIRM CHAPTER 11 PLAN
3-23-2022 [[165](#)]

MARK FORREST/MV
LEONARD WELSH/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

3. [22-10629](#)-A-12 **IN RE: LUIS/ANGELA OLIVEIRA**
[RDW-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY, MOTION FOR ADEQUATE PROTECTION,
MOTION FOR ORDER CONFIRMING THAT NO STAY IS IN EFFECT AS TO THE
SUBJECT PROPERTY DUE TO THE PRIOR RECORDED ORDER
6-15-2022 [[41](#)]

ACM INVESTOR SERVICES, INC./MV
DAVID JOHNSTON/ATTY. FOR DBT.
JOSHUA SCHEER/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with respect to the alternative relief.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The Moving Party shall submit a proposed
order after the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion with respect to the alternative relief. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

ACM Investor Services, Inc. ("Movant") seeks an order confirming that no automatic stay is in effect as to real property commonly known as 25469 and 25471 West Hearst Road, Gustine, California (the "Hearst Property") and 20096 & 20104 3rd Avenue, Stevinson, California (the "3rd Avenue Property" and, together with the Hearst Property, the "Properties"). Doc. #41, 45. In the alternative, Movant seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(4) with respect to the Properties. Doc. #41.

As an initial matter, this court may take judicial notice of and consider the records in other bankruptcy cases filed in this court. Fed. R. Evid. 201; Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court also may take judicial notice of facts that are not subject to reasonable dispute because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. With respect to this motion, this court takes judicial notice of the following facts: (a) January 16, 2021 was a Saturday; (b) January 18, 2021 was a Monday and a federal holiday (Martin Luther King Jr. Day); (c) January 19, 2021 was a Tuesday; and (d) January 27, 2021 was a Wednesday.

I. RELEVANT FACTS

A. Loan and Collateral

Movant is the beneficiary of a promissory note (the "Loan") secured by a first priority deed of trust against the 3rd Avenue Property and another piece of real property ("Hussman Property"). Decl. of Bruce Fonarow ¶ 6, Doc. #43; Exs. 1-3, Doc. #44. The promissory note was executed by Luis M. Oliveira and Angela Oliveira (together, "Debtors") in favor of Movant on October 3, 2005. Fonarow Decl. ¶ 6, Doc. #43; Ex. 1, Doc. #44.

The Loan matured on or around November 1, 2010, when a large balloon payment came due. Fonarow Decl. ¶ 7, Doc. #43. Movant and Debtors entered into a loan modification extending the maturity date on the Loan to June 1, 2011 and granting a temporary reduction of interest. Fonarow Decl. ¶ 7, Doc. #43; Ex. 4, Doc. #44. Debtors granted a deed of trust on the Hearst Property to Movant as part of this transaction. Fonarow Decl. ¶ 7, Doc. #43; Exs. 5-6, Doc. #44.

Debtors are in default on the Loan. Fonarow Decl. ¶¶ 17, 19, Doc. #43. Movant holds a junior deed of trust on the Hearst Property. Fonarow Decl. ¶ 23, Doc. #43. The senior deed of trust on the Hearst Property is held by Harry Kaye, Trustee of First American Mortgage Company Retirement Trust, et al. ("Senior Lienholder"). Fonarow Decl. ¶ 24, Doc. #43.

Debtors' Schedule A/B lists both Properties. Schedule A/B, Doc. #13. Debtors' Schedule D asserts that Senior Lienholder holds the first deed of trust on the Hearst Property and Movant holds a second deed of trust on the Hearst Property. Schedule D, Doc. #13. Debtors value the Hearst Property at \$1,800,000, and schedule the Senior Lienholder's secured claim at \$938,070. Id. On June 20, 2022, Senior Lienholder filed a proof of claim in the amount of \$917,991.38, noting that the claim continues to accrue interest. Claim #8. Debtors schedule Movant's secured claim at \$421,704. Schedule D, Doc. #13. On June 21, 2022, Movant filed a proof of claim in the amount of \$462,793.06, noting that the claim continues to accrue interest. Claim #9. Movant's secured claim is cross collateralized by a first deed of trust on the 3rd Avenue Property. Schedule D, Doc. #13. Debtors value the 3rd Avenue Property at \$1,173,731. Id. In addition, on June 10, 2022, Merced County Tax Collector filed a proof of claim asserting pre-petition real property taxes owing on Hearst Property for the 2016 tax year

in the amount of \$75,540.41,¹ and pre-petition real property taxes owing on 3rd Avenue Property for the 2016 and 2021 tax years in the amount of \$26,950.24. Claim #5. No objections to any proofs of claim have been filed in this bankruptcy case.

Debtors' Schedule G indicates that (i) a tenant leases a dairy facility and approximately 16 acres of the Hearst Property while Debtors retain about 82 acres of the Hearst Property for row crop farming, and (ii) two tenants lease the 3rd Avenue Property. Schedule G, Doc. #13. Debtors receive approximately \$25,000 per month from rental income for leasing a portion of the Properties as well as a duplex owned by Debtors. Schedules G & I, Doc. #13. Debtors expend \$11,200 every month on mortgages on real property other than their residence, including the Properties. Schedule J, Doc. #13. Debtors also spend \$12,083 every month on interest accruing on matured debt. Schedule J, Doc. #13.

B. Prior and Current Bankruptcy Cases

1. First Bankruptcy Case

This is Debtors' fifth bankruptcy case. On September 17, 2012, Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code (the "First Case"). See Bankr. E.D. Cal. Case No. 12-17910. The First Case was filed to avoid foreclosure proceedings initiated by Movant against the Properties. Fonarow Decl. ¶ 8, Doc. #43.

The bankruptcy court dismissed the First Case upon granting a motion to dismiss filed by the Office of the United States Trustee under 11 U.S.C. § 1112(b). See First Case Doc. ##149, 158, 159. In the First Case, the court determined that Debtors failed to propose a plan after 8 months in chapter 11 and had a history of failing to file monthly operating reports. First Case Doc. #158. The Order of Dismissal, entered in the First Case on June 6, 2013, barred Debtors from filing a subsequent chapter 11 petition for a period of 180 days. Order of Dismissal, First Case Doc. #159.

During the First Case, at the request of Debtors, Movant and Debtors negotiated a Debt Restructure and Forbearance Agreement by which Debtors were to sell the Hussman Property to pay down loans owed to Movant and the maturity date of the Loan was extended to April 1, 2016. Fonarow Decl. ¶ 9, Doc. #43. The Hussman Property was sold and no longer serves as security for the Loan. Id.

2. Second Bankruptcy Case

Debtors failed to repay the Loan by April 1, 2016. Fonarow Decl. ¶ 9, Doc. #43. Debtors spoke with Movant on multiple occasions and requested additional time to pay the Loan in full. Fonarow Decl. ¶ 10, Doc. #43. Movant waited several months to commence foreclosure proceedings. Id. Debtors' second bankruptcy case was filed under chapter 12 on February 8, 2017 (the "Second Case"), immediately prior to a scheduled foreclosure sale set by Senior Lienholder. Id.; see Bankr. E.D. Cal. Case No. 17-10427. Debtors received an extension of time to file schedules and other documents in the Second Case. Second Case Doc. #22.

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¹ This amount is calculated by adding up the unpaid real estate taxes listed on the attachment to the proof of claim filed by Merced County Tax Collector for the APNs listed in Movant's legal description of their collateral (APN 070-080-041; 070-080-042; 070-080-045 and 070-080-046). Ex. 5, Doc. #44; Claim #5.

On July 31, 2017, Debtors' chapter 12 plan was confirmed and provided for Movant in Class 3.2. Order, Second Case Doc. #183. Movant agreed to extend the maturity date of the Loan to May 31, 2020. Fonarow Decl. ¶ 11, Doc. #43. The order confirming the chapter 12 plan in the Second Case stated that Debtors waived their right to extend the chapter 12 plan beyond 36 months and would not refile a bankruptcy case sooner than 180 days after July 31, 2020. Order, Second Case Doc. #183 at 6:16-19; Fonarow Decl. ¶ 16, Doc. #43.

The confirmation order further provided for relief from the automatic stay as to Movant if Debtors failed to pay the Loan in full by May 31, 2020. Order at 5:26 - 6:15, Second Case Doc. #183. Debtors failed to pay Movant in full by May 31, 2020 and, on June 26, 2020, Movant filed a Notice of Termination of Stay as to the Properties. Fonarow Decl. ¶ 13, Doc. #43; Ex. 10, Doc. #44; Second Case Doc. #227.

On September 2, 2020, Debtors moved for entry of discharge in the Second Case even though Debtors were unable to pay their secured claims in full by the maturity date in their confirmed chapter 12 plan. Second Case Doc. ##229-231. Senior Lienholder subsequently sought relief from the automatic stay to foreclose on the Hearst Property, which the court granted on November 13, 2020 under § 362(d)(1). Second Case Doc. ##236, 250.

3. Third Bankruptcy Case

Notwithstanding Debtors' agreement in the Second Case not to refile a bankruptcy case sooner than 180 days after July 31, 2020, which was January 27, 2021, Debtors commenced their third bankruptcy case on December 8, 2020 (the "Third Case"). See Third Case, Bankr. E.D. Cal. Case No. 20-90783. The voluntary chapter 12 petition in the Third Case was not filed with the required schedules or statement of financial affairs. Third Case Doc. ##3, 5.

Debtors sought an extension in time to file the required documents, explaining that the Third Case "was filed on an emergency basis on December 8, 2020 due to at least two foreclosure sales scheduled for the following day, December 9, 2020." Decl. of David C. Johnston at ¶ 3(d), Third Case Doc. #19. The court granted Debtors' request for an extension, requiring the missing documents to be filed by January 5, 2021. Third Case Doc. #23. Debtors never filed any schedules, but instead moved to voluntarily dismiss the Third Case on Saturday, January 16, 2021. Third Case Doc. #28. The order dismissing the Third Case was entered on the next business day, Tuesday, January 19, 2021, because Monday, January 18, 2021, was Martin Luther King Jr. Day, a federal holiday. Third Case Doc. #30.

4. Fourth Bankruptcy Case

Eight days after the entry of the order dismissing the Third Case, on January 27, 2021 - the 180th day after July 31, 2020, Debtors filed yet another voluntary chapter 12 petition (the "Fourth Case"). See Bankr. E.D. Cal. Case No. 21-10163. Debtors again did not file the required schedules, statement of financial affairs, or attorney's disclosure statement, and a Notice of Incomplete Filing and Notice of Intent to Dismiss ("NOID") was issued by the court on January 29, 2021. Fourth Case Doc. #7. Debtors again sought an extension to file schedules and other required documentation, which the court granted on February 10, 2021. Fourth Case Doc. #18. Debtors had until February 24, 2021 to file the required missing documents identified in the NOID. Id. Debtors filed the documents on February 24, 2021 and listed the Properties on their Schedule A/B. Schedules, Fourth Case Doc. #23.

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On March 5, 2021, Movant moved for relief from the automatic stay to commence or complete foreclosures with respect to the Properties and in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Fourth Case Doc. #26. Movant's motion was unopposed, and the court granted the motion at the 11:00 a.m. hearing on April 8, 2021, finding cause to lift the stay pursuant to 11 U.S.C. § 362(d)(1) and grant in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Civil Minutes, Fourth Case Doc. #35. The court determined that the filing of the Fourth Case was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting the Properties. Id.

After the 11:00 a.m. hearing, at 1:04 p.m. on April 8, 2021, Debtors moved to dismiss the Fourth Case. Fourth Case Doc. #36. The court entered the Order Dismissing Chapter 12 Case on April 9, 2021, before the order granting Movant relief from the automatic stay ("In Rem Order") was entered on April 12, 2021. Fourth Case Doc. #38, 42. The court did not retain any jurisdiction in the order dismissing the Fourth Case. Fourth Case, Doc. #38. Movant recorded the In Rem Order in Merced County on April 16, 2021. Fonarow Decl. ¶ 17, Doc. #43; Ex. 14, Doc. #44.

5. Current Bankruptcy Case

Almost exactly one year later, on April 12, 2022, Debtors filed a voluntary petition under chapter 12 of the Bankruptcy Code initiating this bankruptcy case. Doc. #1. Again, no schedules, statement of financial affairs, summary of assets and liabilities or attorney's disclosure statement were filed with the petition. On April 15, 2022, the clerk entered an NOID stating that Debtors' bankruptcy case may be dismissed if Debtors failed to submit the forms by April 26, 2022. Doc. #8. Debtors did not file schedules and other missing documents until May 1, 2022, nineteen days after their voluntary chapter 12 bankruptcy petition was filed. Doc. #13. The current bankruptcy case was filed to prevent a foreclosure sale of Hearst Property by Senior Lienholder that was scheduled for April 13, 2022. Decl. of Mark Parsons, Jr. ¶ 9, Doc. #16.

At a status conference in this bankruptcy case held on June 1, 2022, counsel for Debtors stated on the record that Debtors are not eligible to be debtors under chapter 12 of the Bankruptcy Code. To date, Debtors have not filed any pleadings seeking to convert this bankruptcy case to another chapter of the Bankruptcy Code. In addition, Debtors have not filed any monthly operating reports, which were due on May 14, 2022 and June 14, 2022 pursuant to the Order Setting Chapter 12 Status Conference filed on April 29, 2022 and LBR 2015-1(c). Order, Doc. #10. Debtors also have not filed any application to employ any real estate brokers to market any of Debtors' real properties. Debtors also did not appear at the initial meeting of creditors held on June 21, 2022, although counsel for Debtors did appear. See Docket Entry 6/21/2022.

II. LEGAL ANALYSIS

A. 11 U.S.C. § 362(b)(20) Analysis

Movant asks the court to confirm that the automatic stay is inoperative with respect to the Properties pursuant to 11 U.S.C. § 362(b)(20) based on the In Rem Order. Section 362(b)(20) states that the filing of the bankruptcy petition does not operate as a stay under § 362(a) "of any act to enforce any lien against or security interest in real property following entry of the order under § 362(d)(4) as to such real property in any prior case under this title for a period of 2 years after the date of the entry of such an order[.]" 11 U.S.C. § 362(b)(20). However, the Fourth Case was dismissed prior to the entry of the written In Rem Order.

As the Ninth Circuit stated in a case with facts similar to those before this court:

Under the law of this circuit, the bankruptcy court retains subject matter jurisdiction to *interpret* orders entered prior to dismissal of the underlying bankruptcy case, and to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action. The bankruptcy court does not have jurisdiction, however, to grant new relief independent of its prior rulings once the underlying action has been dismissed.

Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 481 (9th Cir. 1989) (emphasis in original) (internal citations omitted).

In Taylor, a debtor filed a chapter 13 bankruptcy case on June 26, 1985. Creditors Tsafaroff and Simbas filed an adversary action for relief from the automatic stay on September 6, 1985. On September 23, 1985, a bankruptcy judge, Judge Lasarow, held a hearing in the debtor's chapter 13 bankruptcy case and dismissed that bankruptcy case orally on the record. The debtor filed a second bankruptcy case on September 27, 1985. Taylor, 884 F.2d at 481-82.

On October 2, 1985, another bankruptcy judge, Judge Russell, held a hearing in the adversary action. After being told that the debtor's first bankruptcy case had been dismissed, Judge Russell indicated that he would grant relief from stay and such relief would be binding in subsequent chapter 13 cases for six months. The next day, on October 3, 1985, Judge Lasarow issued a written order dismissing the debtor's first bankruptcy case and all adversary proceedings pending in that case. On October 11, 1985, Judge Russell filed a written order lifting the automatic stay in the debtor's first case and any subsequent chapter 13 cases for a period of six months. Taylor, 884 F.2d at 480 n.1 and 482.

The Ninth Circuit concluded "that the bankruptcy court exceeded its jurisdiction and that the stay lift order Judge Russell entered on October 11, 1985, was not a 'valid judgment' for purposes of preclusion law, but rather a 'legal nullity[,]' and agreed with the Ninth Circuit Bankruptcy Appellate Panel's determination "that Judge Russell's order was not res judicata in Taylor's second bankruptcy case." Taylor, 884 F.2d at 482. As the Ninth Circuit explained:

In this case, the bankruptcy court lacked subject matter jurisdiction to render a valid judgment granting Tsafaroff's request for relief from the stay that arose upon the filing of Taylor's first bankruptcy petition, because Judge Russell did not enter his "default judgment" in the adversary action until after *both* the adversary action and the underlying bankruptcy petition had been dismissed by final order of Judge Lasarow. . . . Judge Russell exceeded his jurisdiction in granting Tsafaroff's request for stay relief.

Taylor, 884 F.2d at 481 (emphasis in original) (footnote omitted). Similar to Taylor, in this case, Judge Lastreto signed the written order under § 362(d)(4) after Debtors' Fourth Case was dismissed.

Movant cites to Cruz v. Strauss (In re Cruz), 516 B.R. 594 (B.A.P. 9th Cir. 2014), in support of its assertion that a "bankruptcy court retains jurisdiction to enter orders re relief from stay and annulment" after a bankruptcy case is dismissed. Movant's Reply to Opposition to Senior

Lienholder's Stay Relief Motion, 3:1-2, Doc. #51. However, in Cruz, the bankruptcy court specifically "retained jurisdiction 'on all issues arising under Bankruptcy Code § 110, 329 and 362'" in the dismissal order. Cruz, 516 B.R. at 597. With respect to Debtors, Judge Lastreto did not retain such jurisdiction in the order dismissing the Fourth Case.

Based on relevant Ninth Circuit authority, this court holds that the automatic stay in Debtors' current case is in place as to the Property because the written order under § 362(d)(4) had not been entered when Debtors' Fourth Case was dismissed and the dismissal order did not retain any jurisdiction for the court to enter the written In Rem Order after dismissal.

B. 11 U.S.C. § 362(d)(1) Analysis

Section 362(d)(1) of the Bankruptcy Code allows the court to grant relief from the stay for cause. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985). A debtor's lack of good faith in filing a bankruptcy petition alone can constitute cause for lifting the automatic stay. State of Idaho v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir. 1986). As explained by the Ninth Circuit:

If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist. But if it is apparent that the purpose is not to delay or defeat creditors but rather to [. . .] attempt to effect a speedy efficient reorganization, on a feasible basis . . . good faith cannot be denied.

Arnold, 806 F.2d at 939 (citation omitted).

After consideration of the evidence, it is apparent to this court that Debtors filed this bankruptcy case to unreasonably deter and harass Movant in its bona fide efforts to realize upon its security, the Properties, rather than attempt to effect a speedy efficient reorganization.

By the Loan, Debtors first agreed to pay Movant in full on November 1, 2010, for monies Movant lent to Debtors in October 2005. Instead of paying Movant as promised in the loan documents, Debtors negotiated an extension to June 1, 2011. When Debtors could not pay at the extension, Debtors filed two bankruptcy cases and confirmed a chapter 12 plan in the Second Case through which Debtors extended the date to pay Movant in full to May 31, 2020.

As part of their confirmed chapter 12 plan in the Second Case, Debtors agreed not to file another bankruptcy case between July 31, 2020 and January 27, 2021. Since Movant was not paid in full as required by the confirmed chapter 12 plan, Movant filed a Notice of Termination of Stay as to the Properties and scheduled a foreclosure sale of the Properties for December 9, 2020.

Notwithstanding a court order prohibiting Debtors from filing a bankruptcy case between July 31, 2020 and January 27, 2021, Debtors filed the Third Case on December 8, 2020 to prevent Movant from foreclosing on the Properties on December 9, 2020. Debtors kept the Third Case in place for 39 days without filing schedules or other required documents, until Saturday, January 16, 2021, when Debtors requested dismissal of the Third Case. The Third Case was dismissed on the next business day, Tuesday, January 19, 2021. Debtors filed the Fourth Case eight days later, on Wednesday, January 27, 2021, further preventing Movant from foreclosing on the Properties.

On March 5, 2021, Movant moved for relief from the automatic stay in the Fourth Case to commence or complete foreclosures with respect to the Properties and also sought in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Movant's motion was unopposed, and the court granted the motion at the 11:00 a.m. hearing on April 8, 2021, finding cause to lift the stay pursuant to 11 U.S.C. § 362(d)(1) and grant in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Approximately two hours later, at 1:04 p.m. on April 8, 2021, Debtors moved to dismiss the Fourth Case. The court entered the order dismissing the Fourth Case before the In Rem Order was entered on April 12, 2021.

To prevent Senior Lienholder from foreclosing on the Hearst Property, Debtors yet again filed a bankruptcy case on the eve of a foreclosure sale, and in this case, the bankruptcy case was filed under a chapter for which Debtors are not eligible. At a status conference in this bankruptcy case held on June 1, 2022, counsel for Debtors stated on the record that Debtors are not eligible to be debtors under chapter 12 of the Bankruptcy Code. To date, Debtors have not filed any pleadings seeking to convert this bankruptcy case to another chapter of the Bankruptcy Code.

Debtors are not diligently prosecuting the current bankruptcy case in other ways. First, Debtors filed their schedules, statement of financial affairs, summary of assets and liabilities, and attorney's disclosure statement nineteen days after filing their bankruptcy petition, which was five days after the deadline set by Federal Rule of Bankruptcy Procedure 1007(c) and this court's NOID. Moreover, a review of the filed schedules shows that Debtors failed to "[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income" in support of their scheduled \$25,430 in monthly "[n]et income from rental property and from operating a business, profession, or farm[,]" which represents the majority of Debtors' monthly income. Schedule I, Doc. #13. No amended schedules providing that information has been filed. Second, Debtors have not filed any monthly operating reports, which were due on May 14, 2022 and June 14, 2022, pursuant to the Order Setting Chapter 12 Status Conference filed on April 29, 2022 and LBR 2015-1(c). Third, a review of Trustee's § 341 meeting report docket entry shows that Debtors did not appear at the initial meeting of creditors held on June 21, 2022, although counsel for Debtors did appear. Fourth, Debtors have not filed any application to employ any real estate brokers to market the Properties or any other of Debtors' real properties.

In sum, Debtors owed the entire amount to Movant as of May 31, 2020 pursuant to a chapter 12 plan Debtors confirmed in the Second Case. Instead of paying Movant in full as provided in the confirmed chapter 12 plan and honoring an agreement not to file another bankruptcy case between July 31, 2020 and January 27, 2021, Debtors filed the Third Case to prevent Movant from foreclosing on the Properties. Instead of paying Movant and Senior Lienholder over the course of the last year, Debtors filed yet another bankruptcy case under a chapter for which Debtors are not eligible and which Debtors are not diligently prosecuting the day before Senior Lienholder's foreclosure sale of the Hearst Property.

Cause also exists because the court is granting Senior Lienholder's motion for relief from stay at this same calendar, see calendar matter #5. Foreclosure on the Hearst Property by the senior deed of trust holder may result in the elimination of movant's lien on the Hearst property. Robin v. Crowell, 55 Cal. App. 5th 727, 743 (2020) ("As a general rule, the purchaser at a nonjudicial foreclosure sale receives title under a trustee's deed free and clear of any right, title or interest in the trustor or junior lienholders.").

After consideration of the evidence, it is apparent to this court that Debtors filed this bankruptcy case to unreasonably deter and harass Movant in its bona fide efforts to realize upon its security, the Properties, rather than attempt to effect a speedy efficient reorganization under the Bankruptcy Code. Accordingly, the court finds that cause exists to grant Movant relief from the automatic stay under 11 U.S.C. § 362(d)(1). The court also finds cause exists to lift the automatic stay under § 362(d)(1) because the holder of the senior deed of trust on the Hearst Property has been granted relief from the automatic stay to foreclose and Movant's lien on the Hearst Property may be eliminated if the Hearst property is foreclosed by the senior deed of trust holder before Movant can foreclose on the Hearst Property.

C. 11 U.S.C. § 362(d)(4) Analysis

Section 362(d)(4) of the Bankruptcy Code allows the court to grant relief from the stay with respect to real property

if the court finds that the filing of the [bankruptcy] petition was part of a scheme to delay, hinder, or defraud creditors that involved either [] a transfer of all or part ownership of, or other interest in such real property without the consent of the secured creditor or court approval; or [] multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d)(4). To obtain relief under § 362(d)(4), the court must affirmatively find: (1) the debtor's bankruptcy filing is part of a scheme; (2) the object of the scheme is to delay, hinder, or defraud creditors; and (3) the scheme involves either (i) the transfer of some interest in real property without the secured creditor's consent or court approval or (ii) multiple bankruptcy filings affecting the property. First Yorkshire Holdings, Inc. v. Pacifica L 22 (In re First Yorkshire Holdings, Inc.), 470 B.R. 864, 870-71 (B.A.P. 9th Cir. 2011). "[T]he multiple filings thus must somehow be connected with or included in the scheme to delay, hinder and defraud creditors." In re Muhaimin, 343 B.R. 159, 168 (Bankr. D. Md. 2006).

"A scheme is an intentional construct. It does not happen by misadventure or negligence." In re Duncan & Forbes Dev., Inc., 368 B.R. 27, 32 (Bankr. C.D. Cal. 2007). Because direct evidence of a scheme is uncommon, "the court must infer the existence and contents of a scheme from circumstantial evidence. The party claiming such a scheme must present evidence sufficient for the trier of fact to infer the existence and content of the scheme." Id.; see Jimenez v. ARCPE 1, LLP (In re Jimenez), 613 B.R. 537, 545 (B.A.P. 9th Cir. 2020).

The court finds that Movant has made the requisite showing under § 362(d)(4). As discussed in detail above, the instant bankruptcy case, Debtors' fifth, is part of a scheme. The object of the scheme is to hinder or delay creditors, including Movant, for the purpose of delaying foreclosure proceedings on real property, including the Properties. Debtors filed the Second Case to prevent a foreclosure of the Hearst Property by Senior Lienholder. In the Second Case, Debtors agreed to pay Movant's claim in full by May 31, 2020 and agreed not to file another bankruptcy case between July 31, 2020 and January 27, 2021.

However, Debtors failed to abide by the court-ordered 180-day bar to refiling imposed in the Second Case and filed the Third Case 50 days prior to the expiration of the 180-day bar to prevent foreclosure sales affecting the Properties from taking place as scheduled. Debtors then kept the Third Case in place for 39 days without filing schedules or other documents and filed a request to voluntarily dismiss the Third Case on the Saturday of a three-day

holiday weekend and shortly before the deadline permitting another bankruptcy case to be filed lifted.

Debtors filed the Fourth Case only eight days after the Third Case was dismissed, and on the date the 180-day bar to refiling ordered in the Second Case lifted. Debtors then moved to dismiss the Fourth Case only hours after the court granted Movant's motion requesting in rem stay relief pursuant to 11 U.S.C. § 362(d)(4), but before the court could enter a written order granting such relief. Each of Debtors' prior bankruptcies affected the Properties, and the Properties are affected in Debtors' current bankruptcy case.

While Debtors properly used a confirmed chapter 12 plan in the Second Case to delay the date by which Debtors had to pay Movant in full, Debtors failed to honor that obligation. The court finds that the filing of the Third Case, the Fourth Case and this case constitute a scheme to prevent Movant from foreclosing on the Properties and in rem relief is warranted under 11 U.S.C. § 362(d)(4). To the extent Debtors seek dismissal of this bankruptcy case prior to the entry of a written order granting in rem relief from stay as to Movant under 11 U.S.C. § 362(d)(4), this court will retain jurisdiction to enter such an order after dismissal.

D. Waiver of 14-Day Stay

Federal Rule of Bankruptcy Procedure ("Rule") 4001(a)(3) provides for a 14-day stay of an order granting a motion made in accordance with Rule 4001(a)(1) unless the court orders otherwise. Fed. R. Bankr. P. 4001(a)(3).

Here, Senior Lienholder, which holds a senior deed of trust on the Hearst Property, has been granted relief from the automatic stay to foreclose on the Hearst Property. See calendar matter #5. If Senior Lienholder forecloses on the Hearst Property before Movant, Movant may lose its secured interest in the Hearst Property under applicable California law. Accordingly, the court finds cause exists to waive the 14-day stay under Rule 4001(a)(3).

III. CONCLUSION

For the reasons set forth above, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to foreclose on and obtain possession of the Properties pursuant to applicable law. Further, pursuant to 11 U.S.C. § 362(d)(4), the order shall be binding in any other case under Title 11 of the United States Code purporting to affect the Properties for two years after the date of the entry of the order. To the extent Debtors seek dismissal of this bankruptcy case prior to the entry of a written order granting relief from stay as to Movant under 11 U.S.C. § 362(d)(4), this court will retain jurisdiction to enter such an order after dismissal. In addition, the 14-day stay of Rule 4001(a)(3) will be ordered waived.

4. [22-10629](#)-A-12 **IN RE: LUIS/ANGELA OLIVEIRA**
[CAE-1](#)

CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION
4-12-2022 [[1](#)]

DAVID JOHNSTON/ATTY. FOR DBT.

NO RULING.

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
5-18-2022 [\[14\]](#)

HARRY KAYE/MV
DAVID JOHNSTON/ATTY. FOR DBT.
CHRISTOPHER HUGHES/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings
and conclusions. The Moving Party shall submit a proposed
order after the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2), and opposition to the motion could be raised at the hearing. At the initial hearing on the motion, Luis M. Oliveira and Angela Oliveira (together, "Debtors") opposed granting of the motion. The court continued the hearing to June 29, 2022 and required Debtors to file and serve written opposition on or before June 15, 2022, which Debtors did. Doc. ##38-40. The continued hearing on the motion will proceed as scheduled.

The following holders of fractional interests in a promissory note and deed of trust: Harry Kaye, Trustee of First American Mortgage Company Retirement Trust; Adam Rodriguez, Trustee of the Adam Rodriguez Living Trust dated January 9, 2007; June Francisco Symonds, Trustee of the June Francisco Symonds Living Trust dated March 19, 1997; William Webster Symonds, Trustee of the William Webster Symonds Trust dated October 19, 2009; Allan Locke, Patricia Locke, and William J. Creagh (hereafter collectively referred to as "Movant") seek relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(4) with respect to real property commonly known as 25469 and 25471 West Hearst Road, Gustine, California (the "Property"). Doc. ##14, 18. Movant also requests a determination that there is no automatic stay currently in place as to the Property. Doc. #14.

As an initial matter, this court may take judicial notice of and consider the records in other bankruptcy cases filed in this court. Fed. R. Evid. 201; Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court also may take judicial notice of facts that are not subject to reasonable dispute because they can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. With respect to this motion, this court takes judicial notice of the following facts: (a) January 16, 2021 was a Saturday; (b) January 18, 2021 was a Monday and a federal holiday (Martin Luther King Jr. Day); (c) January 19, 2021 was a Tuesday; and (d) January 27, 2021 was a Wednesday.

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I. RELEVANT FACTS

A. Loan and Collateral

Movant is the beneficiary of a promissory note secured by a deed of trust against the Property (the "Loan"). Decl. of Mark Parsons Jr. ¶¶ 4-5, Doc. #16; Exs. 2 & 3, Doc. #17. The promissory note was executed by Debtors in favor of Movant's predecessor in interest, Cal Vista Home Loans Inc., on May 17, 2007. Parsons Decl. ¶ 5, Doc. #16; Ex. 2, Doc. #17. Pursuant to the promissory note, the Loan was due and payable in full on June 1, 2012. Ex. 2, Doc #17. The full amount owed to Movant was due on February 8, 2020, under a confirmed chapter 12 plan. Memorandum of Points & Authorities ("MPA") at 1:22-23, Doc. #18.

Debtors are currently in default on the Loan and have not made a payment on the Loan to Movant since 2020. Parsons Decl. ¶ 6, Doc. #16. On November 19, 2021, a Notice of Default and Election to Sell Under Deed of Trust with respect to the Loan was recorded in Merced County. Ex. 5, Doc. #17. On or about February 22, 2022, Movant caused a notice of trustee's sale to be transmitted to Debtors, scheduling a trustee's sale of the Property for April 13, 2022. Parsons Decl. ¶ 9, Doc. #16; Ex. 6, Doc. #27. Debtors filed their voluntary petition under chapter 12 of the Bankruptcy Code on April 12, 2022. Doc. #1.

Debtors' Schedule A/B lists the Property. Schedule A/B, Doc. #13. Debtors' Schedule D asserts that Movant holds the first deed of trust on the Property and ACM Investor Services, Inc. ("ACM") holds a second deed of trust on the Property. Schedule D, Doc. #13. Debtors value the Property at \$1,800,000, and schedule Movant's secured claim at \$938,070. Id. On June 20, 2022, Movant filed a proof of claim in the amount of \$917,991.38, noting that the claim continues to accrue interest. Claim #8. Debtors schedule ACM's secured claim at \$421,704. Schedule D, Doc. #13. On June 21, 2022, ACM filed a proof of claim in the amount of \$462,793.06, noting that the claim continues to accrue interest. Claim #9. ACM's secured claim is cross collateralized by a first deed of trust on other property owned by Debtors (the "3rd Avenue Property" and, together with the Property, the "Properties"). Id. In addition, on June 10, 2022, Merced County Tax Collector filed a proof of claim asserting pre-petition real property taxes owing on the Property for the 2016 tax year in the amount of \$75,540.41.¹ Claim #5. No objections to any proofs of claim have been filed in this bankruptcy case.

Debtors' Schedule G indicates that a tenant leases a dairy facility and approximately 16 acres of the Property while Debtors retain about 82 acres of the Property for row crop farming. Schedule G, Doc. #13. Debtors receive approximately \$25,000 per month from rental income for leasing a portion of the Property and other properties owned by Debtors. Schedules G & I, Doc. #13. Debtors expend \$11,200 every month on mortgages on real property other than their residence, including the Property. Schedule J, Doc. #13. Debtors also spend \$12,083 every month on interest accruing on matured debt. Schedule J, Doc. #13.

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¹ This amount is calculated by adding up the unpaid real estate taxes listed on the attachment to the proof of claim filed by Merced County Tax Collector for the APNs listed in Movant's legal description of their collateral (APN 070-080-041; 070-080-042; 070-080-045 and 070-080-046). Ex. A, Doc. #17; Claim #5.

B. Prior and Current Bankruptcy Cases

1. First Bankruptcy Case

This is Debtors' fifth bankruptcy case. On September 17, 2012, Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code (the "First Case"). See Bankr. E.D. Cal. Case No. 12-17910. The First Case was filed to avoid foreclosure proceedings initiated by ACM against the Properties. Decl. of Bruce Fonarow ¶ 8, Doc. #43.

The bankruptcy court dismissed the First Case upon granting a motion to dismiss filed by the Office of the United States Trustee under 11 U.S.C. § 1112(b). See First Case Doc. ##149, 158, 159. In the First Case, the court determined that Debtors failed to propose a plan after 8 months in chapter 11 and had a history of failing to file monthly operating reports. First Case Doc. #158. The Order of Dismissal, entered in the First Case on June 6, 2013, barred Debtors from filing a subsequent chapter 11 petition for a period of 180 days. Order of Dismissal, First Case Doc. #159.

2. Second Bankruptcy Case

Debtors' second bankruptcy case was filed under chapter 12 on February 8, 2017 (the "Second Case"), immediately prior to a scheduled foreclosure sale set by Movant. Fonarow Decl. ¶ 10, Doc. #43; see Bankr. E.D. Cal. Case No. 17-10427. Debtors received an extension of time to file schedules and other documents in the Second Case. Second Case Doc. #22.

Debtors' chapter 12 plan was confirmed on July 31, 2017 and provided for Movant in Class 3.1. Order, Second Case Doc. #183. Pursuant to the plan and confirmation order, Debtors were to pay Movant's claim in full in 36 months following the petition date for the Second Case. Plan. Ex. 1, Second Case Doc. #110. The order confirming the chapter 12 plan in the Second Case stated that Debtors waived their right to extend the chapter 12 plan beyond 36 months and would not refile a bankruptcy case sooner than 180 days after July 31, 2020. Order, Second Case Doc. #183 at 6:16-19. The confirmation order further stated that "[t]he pending foreclosure commenced by FCI [Movant's agent at the time] is cancelled." Id. at 5:5.

On September 2, 2020, Debtors moved for entry of discharge in the Second Case even though Debtors were unable to pay their secured claims in full by the maturity date in their confirmed chapter 12 plan. Second Case Doc. ##229-231. Movant subsequently sought relief from the automatic stay to foreclose on the Property, which the court granted on November 13, 2020 under § 362(d)(1). Second Case Doc. ##236, 250.

3. Third Bankruptcy Case

Notwithstanding Debtors' agreement in the Second Case not to refile a bankruptcy case sooner than 180 days after July 31, 2020, which was January 27, 2021, Debtors commenced their third bankruptcy case on December 8, 2020 (the "Third Case"). See Third Case, Bankr. E.D. Cal. Case No. 20-90783. The voluntary chapter 12 petition in the Third Case was not filed with the required schedules or statement of financial affairs. Third Case Doc. ##3, 5.

Debtors sought an extension of time to file the required documents, explaining that the Third Case "was filed on an emergency basis on December 8, 2020 due to at least two foreclosure sales scheduled for the following day, December 9, 2020." Decl. of David C. Johnston at ¶ 3(d), Third Case Doc. #19. The court granted Debtors' request for an extension, requiring the missing documents to

be filed by January 5, 2021. Third Case Doc. #23. Debtors never filed any schedules, but instead moved to voluntarily dismiss the Third Case on Saturday, January 16, 2021. Third Case Doc. #28. The order dismissing the Third Case was entered on the next business day, Tuesday, January 19, 2021, because Monday, January 18, 2021, was Martin Luther King Jr. Day, a federal holiday. Third Case Doc. #30.

4. Fourth Bankruptcy Case

Eight days after the entry of the order dismissing the Third Case, on January 27, 2021 – the 180th day after July 31, 2020 – Debtors filed yet another voluntary chapter 12 petition (the “Fourth Case”). See Bankr. E.D. Cal. Case No. 21-10163. Debtors again did not file the required schedules, statement of financial affairs, or attorney’s disclosure statement, and a Notice of Incomplete Filing and Notice of Intent to Dismiss (“NOID”) was issued by the court on January 29, 2021. Fourth Case Doc. #7. Debtors again sought an extension to file schedules and other required documentation, which the court granted on February 10, 2021. Fourth Case Doc. #18. Debtors had until February 24, 2021 to file the required missing documents identified in the NOID. Id. Debtors filed the documents on February 24, 2021 and listed the Property on their Schedule A/B. Schedules, Fourth Case Doc. #23.

On March 5, 2021, ACM, the holder of the second deed of trust on the Property, moved for relief from the automatic stay to commence or complete foreclosures with respect to the Property and in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Fourth Case Doc. #26. ACM’s motion was unopposed, and the court granted the motion at the 11:00 a.m. hearing on April 8, 2021, finding cause to lift the stay pursuant to 11 U.S.C. § 362(d)(1) and in rem stay relief pursuant to 11 U.S.C. § 362(d)(4). Civil Minutes, Fourth Case Doc. #35. The court determined that the filing of the Fourth Case was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting the Properties. Id. After the 11:00 a.m. hearing, at 1:04 p.m. on April 8, 2021, Debtors moved to dismiss the Fourth Case. Fourth Case Doc. #36. The court entered the Order Dismissing Chapter 12 Case on April 9, 2021, before the order granting ACM relief from the automatic stay (“In Rem Order”) was entered on April 12, 2021. Fourth Case Doc. #38, 42. The court did not retain any jurisdiction in the order dismissing the Fourth Case. Fourth Case, Doc. #38. ACM recorded the In Rem Order in Merced County on April 16, 2021. Fonarow Decl. ¶ 17, Doc. #43; Ex. 14, Doc. #44.

5. Current Bankruptcy Case

Almost exactly one year later, on April 12, 2022, Debtors filed a voluntary petition under chapter 12 of the Bankruptcy Code initiating this bankruptcy case. Doc. #1. Again, no schedules, statement of financial affairs, summary of assets and liabilities or attorney’s disclosure statement were filed with the petition. On April 15, 2022, the clerk entered an NOID stating that Debtors’ bankruptcy case may be dismissed if Debtors failed to submit the forms by April 26, 2022. Doc. #8. Debtors did not file schedules until May 1, 2022, nineteen days after their voluntary chapter 12 bankruptcy petition was filed. Doc. #13. The current bankruptcy case was filed to prevent a foreclosure sale of Property by Movant that was scheduled for April 13, 2022. Parsons Decl. ¶ 9, Doc. #16.

At a status conference in this bankruptcy case held on June 1, 2022, counsel for Debtors stated on the record that Debtors are not eligible to be debtors under chapter 12 of the Bankruptcy Code. To date, Debtors have not filed any pleadings seeking to convert this bankruptcy case to another chapter of the Bankruptcy Code. In addition, Debtors have not filed any monthly operating

reports, which were due on May 14, 2022 and June 14, 2022 pursuant to the Order Setting Chapter 12 Status Conference filed on April 29, 2022 and LBR 2015-1(c). Order, Doc. #10. Debtors also have not filed any application to employ any real estate brokers to market any of Debtors' real properties. Debtors also did not appear at the initial meeting of creditors held on June 21, 2022, although counsel for Debtors did appear. See Docket Entry 6/21/2022.

II. LEGAL ANALYSIS

A. 11 U.S.C. § 362(b) (20) Analysis

Movant asks the court to confirm that the automatic stay is inoperative with respect to the Property pursuant to 11 U.S.C. § 362(b) (20) based on the In Rem Order. Section 362(b) (20) states that the filing of the bankruptcy petition does not operate as a stay under § 362(a) "of any act to enforce any lien against or security interest in real property following entry of the order under § 362(d) (4) as to such real property in any prior case under this title for a period of 2 years after the date of the entry of such an order[.]" 11 U.S.C. § 362(b) (20). However, the Fourth Case was dismissed prior to the entry of the written In Rem Order.

As the Ninth Circuit stated in a case with facts similar to those before this court:

Under the law of this circuit, the bankruptcy court retains subject matter jurisdiction to *interpret* orders entered prior to dismissal of the underlying bankruptcy case, and to dispose of ancillary matters such as an application for an award of attorney's fees for services rendered in connection with the underlying action. The bankruptcy court does not have jurisdiction, however, to grant new relief independent of its prior rulings once the underlying action has been dismissed.

Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 481 (9th Cir. 1989) (emphasis in original) (internal citations omitted).

In Taylor, a debtor filed a chapter 13 bankruptcy case on June 26, 1985. Creditors Tsafaroff and Simbas filed an adversary action for relief from the automatic stay on September 6, 1985. On September 23, 1985, a bankruptcy judge, Judge Lasarow, held a hearing in the debtor's chapter 13 bankruptcy case and dismissed that bankruptcy case orally on the record. The debtor filed a second bankruptcy case on September 27, 1985. Taylor, 884 F.2d at 481-82.

On October 2, 1985, another bankruptcy judge, Judge Russell, held a hearing in the adversary action. After being told that the debtor's first bankruptcy case had been dismissed, Judge Russell indicated that he would grant relief from stay and such relief would be binding in subsequent chapter 13 cases for six months. The next day, on October 3, 1985, Judge Lasarow issued a written order dismissing the debtor's first bankruptcy case and all adversary proceedings pending in that case. On October 11, 1985, Judge Russell filed a written order lifting the automatic stay in the debtor's first case and any subsequent chapter 13 cases for a period of six months. Taylor, 884 F.2d at 480 n.1 and 482.

The Ninth Circuit concluded "that the bankruptcy court exceeded its jurisdiction and that the stay lift order Judge Russell entered on October 11, 1985, was not a 'valid judgment' for purposes of preclusion law, but rather a 'legal nullity[.]" and agreed with the Ninth Circuit Bankruptcy Appellate Panel's determination "that Judge Russell's order was not res judicata in

Taylor's second bankruptcy case." Taylor, 884 F.2d at 482. As the Ninth Circuit explained:

In this case, the bankruptcy court lacked subject matter jurisdiction to render a valid judgment granting Tsafaroff's request for relief from the stay that arose upon the filing of Taylor's first bankruptcy petition, because Judge Russell did not enter his "default judgment" in the adversary action until after *both* the adversary action and the underlying bankruptcy petition had been dismissed by final order of Judge Lasarow. . . . Judge Russell exceeded his jurisdiction in granting Tsafaroff's request for stay relief.

Taylor, 884 F.2d at 481 (emphasis in original) (footnote omitted). Similar to Taylor, in this case, Judge Lastreto signed the written order under § 362(d)(4) after Debtors' Fourth Case was dismissed.

In its reply to Debtors' opposition to Movant's motion for relief from stay, ACM cites to Cruz v. Strauss (In re Cruz), 516 B.R. 594 (B.A.P. 9th Cir. 2014), in support of its assertion that a "bankruptcy court retains jurisdiction to enter orders re relief from stay and annulment" after a bankruptcy case is dismissed. ACM Reply at 3:1-2, Doc. #51. However, in Cruz, the bankruptcy court specifically "retained jurisdiction 'on all issues arising under Bankruptcy Code § 110, 329 and 362'" in its dismissal order. Cruz, 516 B.R. at 597. Here, Judge Lastreto did not retain any jurisdiction in the order dismissing the Fourth Case, which makes the facts in this case distinguishable from those in Cruz.

Based on relevant Ninth Circuit authority, this court holds that the automatic stay in Debtors' current case is in place as to the Property because the written order under § 362(d)(4) had not been entered when Debtors' Fourth Case was dismissed and the dismissal order did not retain any jurisdiction for the court to enter the written In Rem Order after dismissal.

B. 11 U.S.C. § 362(d)(1) Analysis

Section 362(d)(1) of the Bankruptcy Code allows the court to grant relief from the stay for cause. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985). A debtor's lack of good faith in filing a bankruptcy petition alone can constitute cause for lifting the automatic stay. State of Idaho v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir. 1986). As explained by the Ninth Circuit:

If it is obvious that a debtor is attempting unreasonably to deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist. But if it is apparent that the purpose is not to delay or defeat creditors but rather to [. . .] attempt to effect a speedy efficient reorganization, on a feasible basis . . . good faith cannot be denied.

Arnold, 806 F.2d at 939 (citation omitted).

After consideration of the evidence, it is apparent to this court that Debtors filed this bankruptcy case to unreasonably deter and harass Movant in their bona fide efforts to realize upon their security, the Property, rather than attempt to effect a speedy efficient reorganization.

By the Loan, Debtors first agreed to pay Movant in full on June 1, 2012 for monies Movant lent to Debtors in May 2007. Instead of paying Movant as promised in the loan documents, Debtors filed two bankruptcy cases and confirmed a chapter 12 plan in the Second Case through which Debtors extended the date to pay Movant in full to February 8, 2020.

Debtors have made no payments to Movant on the loan since 2020 and have submitted no evidence in opposition to the motion for relief from stay showing Debtors' efforts to pay amounts due Movant as of February 8, 2020. Instead, the docket in the Second Case shows that Debtors received a discharge of debts notwithstanding the fact that Debtors failed to pay Movant and ACM in full as provided in their confirmed chapter 12 plan.

As part of their confirmed chapter 12 plan in the Second Case, Debtors agreed not to file another bankruptcy case between July 31, 2020 and January 27, 2021. Since Movant was not paid in full as required by the confirmed chapter 12 plan, Movant obtained relief from the automatic stay and scheduled a foreclosure sale of the Property for December 9, 2020.

Notwithstanding a court order prohibiting Debtors from filing a bankruptcy case between July 31, 2020 and January 27, 2021, Debtors filed the Third Case on December 8, 2020 to prevent Movant from foreclosing on the Property on December 9, 2020. Debtors kept the Third Case in place for 39 days without filing schedules or other required documents, until Saturday, January 16, 2021, when Debtors requested dismissal of the Third Case. The Third Case was dismissed on the next business day, Tuesday, January 19, 2021. Debtors filed the Fourth Case eight days later, on Wednesday, January 27, 2021, further preventing Movant from foreclosing on the Property. The Fourth Case was dismissed on April 9, 2021, at the request of Debtors.

Notwithstanding that in November 2021 Movant initiated new foreclosure proceedings of the Property by recording a notice of default, Debtors have not taken sufficient action to pay Movant in full and prevent foreclosure of the Property. Instead, Debtors yet again filed a bankruptcy case on the eve of a foreclosure sale of the Property scheduled by Movant and filed for bankruptcy under a chapter for which Debtors are not eligible. At a status conference in this bankruptcy case held on June 1, 2022, counsel for Debtors stated on the record that Debtors are not eligible to be debtors under chapter 12 of the Bankruptcy Code. To date, Debtors have not filed any pleadings seeking to convert this bankruptcy case to another chapter of the Bankruptcy Code.

Debtors are not diligently prosecuting the current bankruptcy case in other ways. First, Debtors filed their schedules, statement of financial affairs, summary of assets and liabilities, and attorney's disclosure statement nineteen days after filing their bankruptcy petition, which was five days after the deadline set by Federal Rule of Bankruptcy Procedure 1007(c) and this court's NOID. Moreover, a review of the filed schedules shows that Debtors failed to "[a]ttach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income" in support of their scheduled \$25,430 in monthly "[n]et income from rental property and from operating a business, profession, or farm[,] " which represents the majority of Debtors' monthly income. Schedule I, Doc. #13. No amended schedules providing that information have been filed. Second, Debtors have not filed any monthly operating reports, which were due on May 14, 2022 and June 14, 2022 pursuant to the Order Setting Chapter 12 Status Conference filed on April 29, 2022 and LBR 2015-1(c). Third, a review of Trustee's § 341 meeting report docket entry shows that Debtors did not appear at the initial meeting of creditors held on June 21, 2022, although counsel for Debtors did appear. Fourth, Debtors have not filed any application to employ

any real estate brokers to market the Property or any other of Debtors' real properties.

Debtors' opposition does not change the court's determination. In their opposition, Debtors state that "Movant is adequately protected while the Debtors sell the property and pay all claims against them." Opposition at 3:13-14, Doc. #38. However, notably absent from Debtors' written opposition is a declaration from Debtors as to what efforts Debtors have made to pay Movant since their loan became fully due and payable on February 8, 2020 under the confirmed chapter 12 plan in the Second Case as well as what Debtors intend to do in this bankruptcy case to repay Movant promptly. As noted above, Debtors have been in this bankruptcy case for two and one-half months and have yet to file any application to employ any real estate broker(s) to market the Property or any other of Debtors' real properties. Debtors have owed the entire amount of the Loan to Movant as of February 8, 2020 pursuant to a confirmed chapter 12 plan and have not paid Movant since 2020. Instead of paying Movant in full as provided in the confirmed chapter 12 plan and honoring an agreement not to file another bankruptcy case between July 31, 2020 and January 27, 2021, Debtors filed the Third Case to prevent Movant from foreclosing on the Property. Notwithstanding Movant's notice of default in November 2021 commencing new foreclosure proceedings, Debtors still have not paid Movant in full. Instead, Debtors filed the day before Movant's foreclosure sale yet another bankruptcy case under a chapter for which Debtors are not eligible and which Debtors are not diligently prosecuting.

Debtors further assert in their opposition, again without any supporting declaration from either Debtor, that "[a]lthough the Debtors have always desired to retain the farmland in issue, they understand the Court will likely set definite deadlines for them to sell the farmland or substantial other assets in order to pay the secured claims against the farmland." Opposition at 4:22-25, doc. #38. However, the time for Debtors to sell the Property or take other action to pay Movant in full has long passed. The court will not grant Debtors additional time to pay Movant in full.

After consideration of the evidence, it is apparent to this court that Debtors filed this bankruptcy case to unreasonably deter and harass Movant in Movant's bona fide efforts to realize upon their security, the Property, rather than attempt to effect a speedy efficient reorganization. Accordingly, the court finds that cause exists to grant Movant relief from the automatic stay under 11 U.S.C. § 362(d) (1).

C. 11 U.S.C. § 362(d) (4) Analysis

Section 362(d) (4) of the Bankruptcy Code allows the court to grant relief from the stay with respect to real property

if the court finds that the filing of the [bankruptcy] petition was part of a scheme to delay, hinder, or defraud creditors that involved either [] a transfer of all or part ownership of, or other interest in such real property without the consent of the secured creditor or court approval; or [] multiple bankruptcy filings affecting such real property.

11 U.S.C. § 362(d) (4). To obtain relief under § 362(d) (4), the court must affirmatively find: (1) the debtor's bankruptcy filing is part of a scheme; (2) the object of the scheme is to delay, hinder, or defraud creditors; and (3) the scheme involves either (i) the transfer of some interest in real property without the secured creditor's consent or court approval or (ii) multiple bankruptcy filings affecting the property. First Yorkshire

Holdings, Inc. v. Pacifica L 22 (In re First Yorkshire Holdings, Inc.), 470 B.R. 864, 870-71 (B.A.P. 9th Cir. 2011). "[T]he multiple filings thus must somehow be connected with or included in the scheme to delay, hinder and defraud creditors." In re Muhaimin, 343 B.R. 159, 168 (Bankr. D. Md. 2006).

"A scheme is an intentional construct. It does not happen by misadventure or negligence." In re Duncan & Forbes Dev., Inc., 368 B.R. 27, 32 (Bankr. C.D. Cal. 2007). Because direct evidence of a scheme is uncommon, "the court must infer the existence and contents of a scheme from circumstantial evidence. The party claiming such a scheme must present evidence sufficient for the trier of fact to infer the existence and content of the scheme." Id.; see Jimenez v. ARCPE 1, LLP (In re Jimenez), 613 B.R. 537, 545 (B.A.P. 9th Cir. 2020).

The court finds that Movant has made the requisite showing under § 362(d)(4). As discussed in detail above, the instant bankruptcy case, Debtors' fifth, is part of a scheme. The object of the scheme is to hinder or delay creditors, including Movant, for the purpose of delaying foreclosure proceedings on real property, including the Property. Debtors filed the Second Case to prevent a foreclosure of the Property by Movant. In the Second Case, Debtors agreed to pay Movant's claim in full by February 8, 2020 and agreed not to file another bankruptcy case between July 31, 2020 and January 27, 2021.

However, Debtors failed to abide by the court-ordered 180-day bar to refiling imposed in the Second Case and filed the Third Case 50 days prior to the expiration of the 180-day bar to prevent a foreclosure sale affecting the Property from taking place as scheduled. Debtors then kept the Third Case in place for 39 days without filing schedules or other documents and filed a request to voluntarily dismiss the Third Case on the Saturday of a three-day holiday weekend and shortly before the deadline permitting another bankruptcy case to be filed lifted.

Debtors filed the Fourth Case only eight days after the Third Case was dismissed, and on the date the 180-day bar to refiling ordered in the Second Case lifted. Debtors then moved to dismiss the Fourth Case only hours after the court granted ACM's motion requesting in rem stay relief pursuant to 11 U.S.C. § 362(d)(4), but before the court could enter a written order granting such relief. Each of Debtors' prior bankruptcies affected the Property, and the Property is affected in Debtors' current bankruptcy case.

While Debtors properly used a confirmed chapter 12 plan in the Second Case to delay the date by which Debtors had to pay Movant in full, Debtors failed to honor that obligation. The court finds that the filing of the Third Case, the Fourth Case and this case constitute a scheme to prevent Movant from foreclosing on the Property and in rem relief is warranted under 11 U.S.C. § 362(d)(4). To the extent Debtors seek dismissal of this bankruptcy case prior to the entry of a written order granting in rem relief from stay as to Movant under 11 U.S.C. § 362(d)(4), this court will retain jurisdiction to enter such an order after dismissal.

D. Waiver of 14-Day Stay

Federal Rule of Bankruptcy Procedure ("Rule") 4001(a)(3) provides for a 14-day stay of an order granting a motion made in accordance with Rule 4001(a)(1) unless the court orders otherwise. Fed. R. Bankr. P. 4001(a)(3). The court finds cause exists to waive the 14-day stay under Rule 4001(a)(3) based on the numerous attempts by Debtors to hinder and delay the rights of Movant.

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III. CONCLUSION

For the reasons set forth above, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to foreclose on and obtain possession of the Property pursuant to applicable law. Further, pursuant to 11 U.S.C. § 362(d)(4), the order shall be binding in any other case under Title 11 of the United States Code purporting to affect the Property for two years after the date of the entry of the order. To the extent Debtors seek dismissal of this bankruptcy case prior to the entry of an order granting relief from stay as to Movant under 11 U.S.C. § 362(d)(4), this court will retain jurisdiction to enter such an order after dismissal. In addition, the 14-day stay of Rule 4001(a)(3) will be ordered waived.

6. [22-10778](#)-A-11 **IN RE: COMPASS POINTE OFF CAMPUS PARTNERSHIP B, LLC**
[CAE-1](#)

STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
5-8-2022 [\[1\]](#)

NOEL KNIGHT/ATTY. FOR DBT.

NO RULING.

1. [17-10106](#)-A-7 **IN RE: RANDEEP SINGH**
[TMT-5](#)

MOTION FOR COMPENSATION FOR TRUDI G. MANFREDO, CHAPTER 7 TRUSTEE(S)
1-17-2019 [\[127\]](#)

TRUDI MANFREDO/MV
PATRICK GREENWELL/ATTY. FOR DBT.
PETER FEAR/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Trudi G. Manfredo ("Former Trustee"), the former chapter 7 trustee, requests allowance of final compensation and reimbursement for expenses for services rendered as trustee in this case. Doc. #127. Former Trustee provided trustee services valued at \$1,000.00, and requests compensation for that amount. Doc. #127. Former Trustee requests reimbursement for expenses in the amount of \$402.96. Doc. #127. Former Trustee was appointed to this case on January 17, 2017 and resigned on December 21, 2018. Doc. #127; Decl. of Former Tr., Doc. #129. While appointed to this case, Former Trustee administered the estate, resolved discharge issues, filed a motion for relief from stay, conducted general case administration, and prepared the fee and employment application. Ex. A, Doc. #128.

Peter Fear ("Successor Trustee") was appointed as successor trustee in this case on December 26, 2018. Doc. #125. Bankruptcy Code section 326(c) provides: "[i]f more than one person serves as trustee in the case, the aggregate compensation of such persons for such services may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be." 11 U.S.C. § 326(c). The Trustee's Final Report submitted by Successor Trustee states the maximum compensation allowable to the chapter 7 trustee under § 326(a) is \$2,750.00. Doc. #163. The summary of the trustee's final report and application for compensation shows that Successor Trustee has requested only \$1,750.00 in fees and \$62.66 in expenses, leaving

\$1,000 in fees available to pay Former Trustee pursuant to 11 U.S.C. § 326(c). Doc. #164.

Section 330(a)(1) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a chapter 7 trustee. 11 U.S.C. § 330(a)(1). In determining the amount of reasonable compensation to be awarded a chapter 7 trustee, the court shall treat such compensation as a commission, based on § 326 of the Bankruptcy Code. 11 U.S.C. § 330(a)(7). Here, Former Trustee demonstrates reasonable compensation in accordance with the statutory framework of § 326. Ex. A, Doc. #128; Former Tr. Decl., Doc. #129. Further, the court finds Former Trustee's services and requested expenses were actual and necessary to the administration of this estate.

This motion is GRANTED. The court allows statutory compensation in the amount of \$1,000.00 and reimbursement for expenses in the amount of \$402.96.

2. [19-15233](#)-A-7 **IN RE: MARISOL PEREZ-ABURTO**
[DMS-1](#)

MOTION TO SELL
5-27-2022 [[19](#)]

DAVID SOUSA/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
DAVID SOUSA/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

David M. Sousa ("Trustee"), the chapter 7 trustee of the bankruptcy estate of Marisol Perez-Aburto ("Debtor"), moves the court pursuant to 11 U.S.C. § 363 for an order authorizing the sale of the bankruptcy estate's interest in a 2008 Nissan Altima automobile (the "Vehicle") to Debtor for the purchase price of \$1,608.00. Doc. #19.

Pursuant to 11 U.S.C. § 363(b)(1), the trustee, after notice and a hearing, may "use, sell, or lease, other than in the ordinary course of business, property

of the estate." Proposed sales under § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. In re Alaska Fishing Adventure, LLC, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) (citing 240 N. Brand Partners, Ltd. v. Colony GFP Partners, L.P. (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996)). "In the context of sales of estate property under § 363, a bankruptcy court 'should determine only whether the trustee's judgment [is] reasonable and whether a sound business justification exists supporting the sale and its terms.'" Alaska Fishing Adventure, 594 B.R. at 889 (quoting 3 COLLIER ON BANKRUPTCY ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.)). "[T]he trustee's business judgment is to be given great judicial deference." Id. at 889-90 (quoting In re Psychometric Sys., Inc., 367 B.R. 670, 674 (Bankr. D. Colo. 2007)).

Trustee believes that approval of the sale on the terms set forth in the motion is in the best interests of creditors and the estate. Doc. #19, 21. Trustee's proposed sale to Debtor is made in consideration of the full and fair market value of the Vehicle. Doc. #21. Trustee believes the Vehicle's fair market value of \$2,889, less Debtor's allowed exemption of \$1,281, renders the \$1,608 purchase price reasonable. Doc. #19. Debtor offered to buy the Vehicle for the net purchase price of \$1,608.00. Doc. #19. The court recognizes that no commission will need to be paid because the sale is to Debtor.

It appears that the sale of the estate's interest in the Vehicle is in the best interests of the estate, the Vehicle will be sold for a fair and reasonable price, and the sale is supported by a valid business judgment and proposed in good faith.

Accordingly, the motion is GRANTED. Trustee is authorized to sell the estate's interest in the Vehicle to Debtor on the terms set forth in the motion.

3. [20-11367](#)-A-7 **IN RE: TEMBLOR PETROLEUM COMPANY, LLC**
[DMG-7](#)

MOTION TO EXTEND DEADLINE TO ASSUME EXECUTORY CONTRACTS AND LEASES
6-1-2022 [\[404\]](#)

JEFFREY VETTER/MV
LEONARD WELSH/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted. Time will be extended to a date to be determined at the hearing

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order after the hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). Creditor Kings County Development Limited ("Creditor") timely filed written opposition on June 15, 2022. Doc. #410. The failure of other creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as

required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the non-responding parties in interest are entered.

Jeffrey M. Vetter ("Trustee"), the chapter 7 trustee of the bankruptcy estate of Temblor Petroleum Company, LLC ("Debtor"), moves to extend time to assume or reject non-operator interests in various oil and gas leases identified as the "Witter Field" ("Working Interests"). Doc. #404. Trustee moves the court for an order extending the deadline to assume or reject the Working Interests to permit objections to Trustee's notice of abandonment to be resolved before the deadline expires. Doc. #404.

Under 11 U.S.C. § 365(d)(1), in a chapter 7 bankruptcy case, an executory contract is deemed rejected if not assumed or rejected within 60 days from the order for relief unless the court, for cause, extends the time to assume or reject within that 60-day period. In this case, the time to reject or assume was previously extended to June 1, 2022. Order, Doc. #403. Trustee filed the instant motion to extend the deadline on June 1, 2022, while simultaneously filing a Notice of Intent to Abandon any and all oil, gas, and/or mineral interests claimed by Debtor, including the Working Interests. See Doc. #408.

Under § 554(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure ("Rule") 6007, when a party in interests timely objects to a notice of proposed abandonment, "the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct." Fed. R. Bankr. P. 6007(a).

Creditor timely objected to Trustee's Notice of Intent to Abandon and has requested a hearing on the proposed abandonment pursuant to Rule 6007. Doc. #410. Neither Trustee nor Creditor have scheduled a hearing on Creditor's objection to the proposed abandonment.

The court finds cause to extend the time to assume or reject the Working Interests to allow a hearing to be held on Creditor's objection to Trustee's proposed abandonment. At the June 29 hearing, Trustee and Creditor shall be prepared to set a hearing date and briefing schedule with respect to Creditor's objection to Trustee's proposed abandonment.

Accordingly, this motion is GRANTED.