UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

June 30, 2022 at 10:00 a.m.

1.	**22-90131-E-7** **MRH.1**	**MANUEL RIOS AND VERONICA DAVILA BEJAR** **Brian Haddix**	**MOTION FOR RELIEF FROM AUTOMATIC STAY** **5-25-22 [16]**

NEXTGEAR CAPITAL, INC. VS.

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

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's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 25, 2022. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted.

NextGear Capital, Inc. ("Movant") seeks relief from the automatic stay with respect to assets identified as eleven (11) vehicles still believed to be in the debtor's possession and the proceeds from an additional fifteen (15) vehicles believed to already have been sold by the debtors ("Property"). These assets were property of debtor Veronica Denisse Davila Bejar d/b/a "Auto Hub," a used car dealership which

appears to have been closed in April 2022, and are thus part of the estate. The moving party has provided the Declaration of Stephen Smith to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Manuel Alejandro Rios and Veronica Denisse Davila Bejar ("Debtor").

Movant argues that the total prepetition balance owed by Debtors upon filing this Chapter 7 case is $242,353.52. Declaration, Dckt. 19. In addition, Movant states that since the petition was filed, an additional $7,248.91 in interests and fees have accrued. Movant's Information Sheet, Dckt. 20. Therefore, Movant claims, the total amount owed by Debtor is $249,602.43, inclusive of all interest and fees. Declaration, Dckt. 19.

CHAPTER 7 TRUSTEE'S NONOPPOSITION

Guy Farrar ("the Chapter 7 Trustee") entered a docket entry on June 1, 2022, stating that the Chapter 7 Trustee has no opposition to this motion.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $249,602.43, while the value of the Property is determined to be $121,450.00. Declaration, Dckt. 19.

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 because Movant is not adequately protected with respect to the Property. 11 U.S.C. § 362(d)(1). Additionally, the court determines that cause exists for terminating the automatic stay because Debtor and the Estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the

Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

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 repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Federal Rule of Bankruptcy Procedure 4001(a)(3)
Request for Waiver of Fourteen-Day Stay of Enforcement

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

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

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by NextGear Capital, Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Property, under its security agreement, loan documents granting it a lien in the assets identified as:

Stock #	Vehicle Description
173	2013 Ram 1500
174	2014 Infiniti Q50
175	2012 Mercedes-Benz C Class
180	2014 Nissan Altima 4C
183	2011 Ford F150
188	2017 Nissan Sentra
189	2017 Dodge Durango
192	2008 Chevrolet Tahoe
194	2013 Mercedes-Benz C Class

193 2013 Mercedes-Benz C Class
197 2016 Hyundai Accent; and

any and all proceeds from the sale of any other vehicles that were subject to Movant's perfected security interest;

and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Property to the obligation secured thereby.

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

2. 22-21314-E-13 KSR-1 | **NADIA ZHIRY** | **Peter Macaluso** | **CONTINUED MOTION TO EXCUSE TURNOVER AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY**
5-31-22 [12]

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, on May 31, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is xxxxxxxxxx

Gerard F. Keena II ("Movant-Receiver") moves the court for an order confirming that the ongoing receivership for real properties commonly known as 1039 and 1049 Claire Ave, Sacramento, California (the "Properties") deemed a public nuisance is excused from the automatic stay in effect in this case pursuant to 11 U.S.C. § 362(b)(4). Movant-Receiver also requests they should be excused from turnover under 11 U.S.C. § 543.

In the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) include the following (as summarized by the court unless shown in "quotation marks"):

A. The Receiver was appointed in the State Court Action based on the properties being a public nuisance.

B. The Properties were littered with trash and debris. There were numerous vehicles in various states of dismantling.

C. The Properties appeared to be an automotive scrap yard.

D. The Debtor was making hazardous, unpermitted construction and renovations on the Property.

E. Debtor had excessive animals on the Properties in violation of local law, and appears to have been attempting to run a breading business

F. The Receiver was appointed "over a year ago", but have been unable to "fully rehabilitate the Properties while the Properties are subject to the jurisdiction of the Bankruptcy Court.

G. The current Bankruptcy Case was filed one week after the abandonment and the day before the hearing on the Receiver's plan in the State Court Nuisance Action.

H. The Trustee seeks to proceed to fulfill his duties in the State Court Nuisance Action.

Motion; Dckt. 12

In Movant-Receiver's Memorandum of Points and Authorities (Dckt. 19), Movant-Receiver states the Properties will likely be sold subject to State Court approval to fund and carry about their abatement. Dckt. 19 at 14. Movant-Receiver can only abate the nuisances once they receive authorization from the State Court approving their proposed receivership plan, however, Movant-Receiver can only move forward with the State Court action if they are granted relief from the automatic stay. *Id.* at 15.

Prior Bankruptcy Case

On June 29, 2021, Debtor Nadia Zhiry commenced a Chapter 7 bankruptcy. Case No. 21-22759. There, Movant-Receiver filed a Motion for relief from the automatic stay from real properties. *Id.*, Dckt. 67. Movant-Receiver's Motion was made pursuant to 11 U.S.C. § 362(b)(4) to continue the enforcement of a receivership order and abatement of a nuisance on the Properties. The Motion was granted on September 16, 2021. *Id.*, Order, Dckt. 67. The Movant-Receiver's Order granting relief in the prior case was entered seven months prior to the commencement of the Current Chapter 13 case.

Debtor received a discharge in the prior the Chapter 7 case on April 20, 2022. *Id.*, Dckt. 85. In the prior

This Chapter 13 Case was filed on May 25,2022. The prior Chapter 7 Case has not yet been closed. A review of the Docket for the prior Chapter 7 Case discloses that on May 17, 2022 the court entered an order abandoning the Properties. *Id.*; Order, Dckt. 96. However, the Order does not state to whom the Properties have been abandoned.

Debtor's Opposition

Debtor filed an opposition to this motion on June 7, 2022 (Dckt. 24). Debtor states the following to be disputed material facts:

1. The subject property is not in the same condition as the time of Receivership/Court Order on May 3, 2021.

2. There are not 13-24 vehicles on either property.

3. There are no illegal apartments on either property.

4. There are no cages nor kennels on either property.

5. The Receiver has rejected any plan to address the deficiencies and has opposed correction by the debtor.

6. The Receiver's Motion to exercise control of subject property.

Debtor states there is substantial equity in the property to remedy the issues at hand and that there is more than enough equity to pay claims by the Receiver and the City. Debtor also states the Movant is a person and not a governmental unit and therefore cannot take advantage of the police and regulatory exception. In support of the proposition that a State Court appointed receiver to address a public nuisance is a person and the provisions of 11 U.S.C. § 362(b)(4), Debtor cites to *In re Commonwealth Oil Ref. Co*, 805 F.2d 1175 (5th Cir. 1986), (without quoting the decision or providing a pin cite) which states in relevant part:

> This case presents the question of whether a debtor, who has filed a petition under Chapter 11 of the Bankruptcy Code, can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization.
> . . .
> We agree with the conclusion of the bankruptcy court and the district court that the automatic stay does not apply to the EPA's actions in this case. The EPA has the authority to enforce its regulatory power, that is, to require CORCO to comply with the federal and state environmental laws and regulations at issue in this case. The enforcement actions of the EPA in this case do not come within the ambit of § 362(a)(1) because they are actions to enforce police and regulatory powers, thus falling within the § 362(b)(4) exception to the automatic stay. The EPA's actions are not an attempt to enforce a money judgment, proscribed by § 362(b)(5), notwithstanding the fact that CORCO will be forced to expend funds in order to comply.
>
> The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where "imminent and identifiable harm" to the public health and safety or "urgent public necessity" is shown. The words of §§ 362(b)(4) and 362(b)(5) allow for no such reading. The language of these exceptions is unambiguous -- it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity.

> . . .
> We turn now to the question of whether, under the facts of this case, the bankruptcy court abused its discretion in refusing to issue a stay of EPA proceedings under 11 U.S.C. § 105.
> . . .
> The district court agreed with the bankruptcy court's conclusion that CORCO had failed to establish the prerequisites for a § 105 stay, since "they concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists." 17Link to the text of the note Slip op. at 3.

In re Commonwealth Oil Refining Co., 805 F.2d 1175 at 1171, 1183-1184, 1188, 1189.

With respect to the Receiver being a person, in the State Court Action, the Plaintiff is the City of Sacramento. Exhibit A, Order Appointing Receiver; Dckt. 14. The City obtained the appointment of a receiver to, under court supervision and providing Debtor with a forum to enforce her rights, to undertake the acts necessary to address the asserted nuisance.

Also, Debtor disputes the fact that the public nuisance is no longer at issue they believe the action should be dismissed. Additionally, Debtor states that a Chapter 13 Plan has been filed which seeks to remedy all issues through a comprehensive review plan that will allow the family to repair the home. [Fn.1.]

FN. 1. Neither in the Opposition or the Declaration in Support does Debtor address why Debtor is not in the State Court Action, demonstrating that there is no nuisance, that Debtor and Debtor's family has "seen the light," corrected some of the problems, and that the duties of a receiver to abate the nuisance will not be required, though the receiver could document Debtor and Debtor's family complying with the orders of the State Court to complete certain actions.

Evidence Presented in Opposition

Vera Zhiry, identified as the daughter of Debtor, provides her personal knowledge testimony (Fed. R. Evid. 601, 602) in a Declaration in Opposition to the Motion. Dec. Dckt. 25. In her Declaration, Vera Zhiry testifies (identified by paragraph number in the Declaration):

> 3. We have removed all the cars from the property.

The "we" is not identified, how this was accomplished is not explained, and where these cars have either been disposed of or relocated is not stated.

> 4. There are no illegal apartments on the property.

Vera Zhiry provides the court with her legal conclusion that there are no "illegal apartments" on the "property" (testifying in the singular). No information is provided as to what corrective acts were taken, whether they were done in compliance with a State Court order or violation notice from the City of Sacramento.

> 5. There are no Cages and there are no kennels on the property.

No explanation is given as to what happened to cages, kennels, and dogs on the property. How they were re-homed, or merely "temporarily relocated" and likely to return in short order.

No other evidence is provided in Opposition to the Motion.

Statement of Disputed Facts

Debtor has also provided a Statement of Disputed Facts as part of the Opposition. In looking at these "Disputed Facts," they generally appear to be "Facts" within the province of the State Court Judge in whether that Judge's receivership order should continue in force and effect, as well as whether the Receiver's proposes plan in State Court should be ordered by the State Court Judge, of should Debtor's plan of action be ordered (Debtor and Debtor's family having demonstrated that they have corrected many of the "ills" that led to the appointment of the Receiver and that such "intervention" to complete the abatement of any nuisance is no longer necessary.

The fifth stated Material Disputed Fact is that, "The Receiver Has rejected any plan to address the Properties' deficiencies" with Debtor's Counsel, and has opposed ANY corrections by the Debtor." Dckt. 26. The Receiver is not operating as an omnipotent sovereign, but only to the extent as authorized by the State Court Judge in the State Court Receivership Action. Debtor does not offer any explanation as to why Debtor and her family do not have the "access to justice" in the State Court Action by presenting any such disputes to the State Court Judge.

APPLICABLE LAW

No Existence of Automatic Stay
Under 11 U.S.C. § 362(b)(4)

The court begins with considering the provisions of 11 U.S.C. § 362(b)(4) which excepts actions and proceedings from the automatic stay to enforce police or regulatory powers of a governmental unit. 3 COLLIER ON BANKRUPTCY ¶ 362.05[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). This includes the enforcement of certain judgments other than money judgments, except those pursuant to § 362(a)(2). *Id.* at [5][a].

Legislative history indicates enforcing environmental laws is a permissive use of a governmental unit's police or regulatory powers. 3 Collier on Bankruptcy P 362.05 (16th 2022) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)). Collier on Bankruptcy goes in detail with this approach:

> In [*Penn Terra Ltd. v. Department of Environmental Resources*], the debtor had operated its coal mines in violation of state environmental protection laws. After the debtor commenced a bankruptcy case, the state Department of Environmental Resources sought an injunction directing the debtor to comply with a prebankruptcy consent order requiring it to clean up the environmental damage on its property. The debtor maintained that the action was stayed because it was in essence an attempt to enforce a money judgment. According to the debtor, because the action would require the debtor to spend money to remediate the environmental problems, the state was merely seeking to have the debtor finance the cleanup so the state would not have to do so. The court rejected that argument, finding that there is a difference between an equitable action to require or prevent particular behavior and a legal action to recover

> a money judgment. The court found that when the state sought an injunction requiring certain action, it was not seeking money, but rather was seeking performance.
>
> On the other hand, in *Ohio v. Kovacs* the Supreme Court held that an action by the State of Ohio to require an individual debtor to clean up environmental damage was a "claim" and the debtor's cleanup obligation was a "debt" that could be discharged in bankruptcy. The court found that the state did not expect the debtor to engage in the cleanup himself; rather it expected the debtor to expend funds to effect the cleanup. Since the debtor's obligation could be satisfied by the payment of funds, the state's action was a claim that could be discharged.
>
> At first blush, *Kovacs* seems at odds with *Penn Terra*. After all, *Kovacs* found that a debtor's cleanup obligation was a debt because the obligation could be satisfied by payment of money. *Penn Terra* found that an order requiring a cleanup was not a monetary judgment, even though presumably the order could be satisfied by the payment of money to finance a cleanup.
>
> Yet it is important to remember the different contexts in which the cases arose. Clearly, if the debtor's obligation can be satisfied by the payment of money, it is a claim under the definition of that term in section 101 and, therefore, is a dischargeable debt. Nevertheless, former section 362(b)(5), under which the case was decided, does not bar enforcement of a "claim"; instead, it bars enforcement of a money judgment. Thus, it would appear that the cases can be reconciled by recognizing that the state can enforce a judgment or order against the debtor requiring the expenditure of funds but that the debtor's obligation may be discharged in bankruptcy and, in any event, the state may not enforce the obligation by requiring the debtor to pay money damages for breach of the obligation.

3 Collier on Bankruptcy P 362.05 (16th 2022) (distinguishing *Penn Terra, Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267 (3d Cir. 1984) from *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

Under the current provisions of 11 U.S.C. § 362(b)(4), the fact an action may have economic consequences on a debtor is not determinative. *In re Basinger*, No. 01-02386, 2002 Bankr. LEXIS 1925, at *12 (Bankr. D. Idaho Jan. 31, 2002). Rather, two tests have been developed to determine whether the judgment will be enforced: the pecuniary purpose test and the public policy test.

Under the pecuniary purpose test, the court asks whether the governmental unit is acting pursuant to a matter of public safety and welfare rather than a governmental pecuniary interest. *Id.*; *In re Berg,* 230 F.3d 1165 (9th Cir. 2000); *In re First All. Mortg. Co.*, 264 B.R. 634 (C.D. Cal. 2001); See *generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Under the public policy test, the court asks whether the government action is designed to effectuate public policy rather than to adjudicate private rights. *Id.*; *Lockyer v. Mirant Corp*., 398 F.3d 1098 (9th Cir. 2005); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986). Actions that advantage a discrete and identifiable set of individuals would fail the public interest test. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *City & Cty. of San Francisco v. PG & E Corp*., 433 F.3d 1115 (9th Cir. 2006).

Prior cases have recognized environmental enforcement actions do not interfere with pecuniary purpose or public policy tests. *Basinger*, 2002 Bankr. LEXIS 1925, at *29; *Dykes v. TD Dev., LLC,* No. HHD-CV206126173S, 2021 Conn. Super. LEXIS 2097, at *7 ([T]he purpose of the County's wetland permitting laws, as well as the injunctive and enforcement proceedings pursuant thereto, are for the purpose of deterring the Debtor's ongoing environmental misconduct.); *In re Fernandez*, 22 Fla. L. Weekly Fed. B 367 (U.S. Bankr. S.D. Fla. 2010) ([P]laintiff, acting in her official capacity as commissioner of a governmental unit, is exercising her duty to protect the environment and Connecticut's natural resources . . . and . . . the public safety and welfare . . . ."); *Diaz v. Tex. (In re Gandy)*, 327 B.R. 796, 805 (Bankr. S.D. Tex. 2005) ("The action meets the pecuniary interest test because the governmental units were pursuing a matter of public safety and welfare through injunctive relief rather than seeking a monetary award. . . . The action also satisfies the public policy test because the purpose of the proceeding is to further public policy instead of adjudicating private rights.").

The current enforcement action at issue was brought by the City of Sacramento under California Health and Safety Code. Memorandum of Points and Authorities, Dckt. 19 at 11:11-12. The Movant-Receiver was appointed to abate the nuisances in accordance with California Health and Safety Code § 17980.7. It is more than clear to this court that the city, as a governmental unit for purposes of 11 U.S.C. § 362(b)(4), is seeking to use enforce their police and regulatory power.

At the time the enforcement action commenced, Movant-Receiver describes the Properties in:

> [D]eplorable condition, littered with trash, junk, and debris. Numerous vehicles in various states of dismantling lay about the Properties, as Debtor appears to be using (or allowing her family members to use) the Properties as an unauthorized automotive scrap yard in violation of local zoning ordinances. Debtor has also continued with hazardous, unpermitted construction and renovations at the Properties. Finally, Debtor houses excessive animals in violation of local law in gross, inhumane conditions, in what appears to be attempts to breed them.

Motion, Dckt. 12 at 2:11-18. Movant-Receiver describes the Properties presently as continuing to deteriorate and become a greater hazard to the community. Additionally, Movant-Receiver states the action is to "abate the public nuisances for the health and safety of the community, not to preserve the private pecuniary interests of any creditors or government entity." *Id.* at 2-3.

Similar to the environmental enforcement actions, here, the purpose of the nuisance enforcement action is clearly for the purpose of public safety, welfare, and policy, rather than a pecuniary purpose or adjudicating private rights. The enforcement action falls squarely into a governmental unit's police and regulatory powers. The Properties as described are not only an eye sore, but were presented in the State Court Action to present grave public health and safety concerns that should be remedied. Therefore, the enforcement action is clearly excused from the automatic stay under 11 U.S.C. § 362(b)(4).

Movant-Receiver Not a Custodian
Under 11 U.S.C. § 543

Movant-Receiver additionally contends they are not a "custodian" under 11 U.S.C. § 543. 11 U.S.C. § 543 requires a custodian with knowledge of the commencement of a case to deliver to the trustee any property of the debtor held by or transferred to the custodian.

The Bankruptcy Code defines custodian as a receiver or trustee of any property of the debtor appointed in a case or proceeding not under this title, which Congress states as:

> (11) The term "custodian" means—
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. § 101(11). On its face, the first description in § 101(11)(A) uses the simple word "receiver."

Congress provides in 11 U.S.C. § 543 for a "custodian" to turnover property of the bankruptcy estate in the custodian's possession to the trustee (which would include a Chapter 13 debtor exercising the powers, duties, and responsibilities of a trustee) unless such custodian was excused by the court as provided in 11 U.S.C. § 543(d).

In reviewing the cases, a "clear weight of authority" and legislative history establish a custodian under § 101(11) "must be primarily concerned with the prepetition liquidation of a debtor's property or the protection of creditor's rights." *MacMullin v. Poach*, No. CV-08-0768-PHX-FJM, 2009 U.S. Dist. LEXIS 19730, at *5 (D. Ariz. Mar. 4, 2009). The cases and Legislative History cited in *MacMullin v. Poach* include: (1) *Cash Currency Exchange v. Shine* (*In re Cash Currency Exchange*), 762 F.2d 542, 553 (7th Cir. 1985); (2) *In re Camdenton United Super, Inc.*, 140 B.R. 523, 525 (Bankr. W.D. Mo. 1992); (3) *In re Gold Leaf Corp.*, 73 B.R. 146, 148 (Bankr. N.D. Fla. 1987); (4) *In re Kennise Diversified Corp.*, 34 B.R. 237, 244-45 (Bankr. S.D.N.Y. 1983); and H.R. No. 95-595, 95th Cong. 1st Sess. 310 (1977),

> Paragraph (11) [enacted as (10)] defines "custodian." There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

Here, Movant-Receiver's responsibilities are to correct the various violations of California's Health and Safety Codes. Movant-Receiver's actions are not aimed at pre-petition liquidation of debtor's

property nor preserving any creditors rights. *See In re Kennise Diversified Corp.*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983). It is clear to the court that Movant-Receiver is not a custodian under 11 U.S.C. § 543, and therefore, turnover of the Properties are not required.

Review of the Current Chapter 13 Bankruptcy Case

Debtor commenced this Chapter 13 Bankruptcy Case on May 25, 2022. On June 8, 2022, Debtor filed her Schedules and Statement of Financial Affairs. Dckt. 28. In reviewing the Schedules, the court notes the following:

A. The two Properties are stated to have values of $750,000 and $300,000. Schedule A/B, ¶¶ 1.1, 2.1; Dckt. 28.

B. Debtor's cash and bank account balances total $300. *Id*., ¶¶ 16, 17.

C. Debtor's total personal property value is stated to be $6,900. *Id*., ¶¶ 55-62.

D. On Schedule C, Debtor claims a homestead exemption pursuant to California Code of Civil Procedure § 704.730 in two different properties, the 1049 Claire Ave, Sacramento, CA property, and the 1039 Clair Ave, Sacramento, CA property. Schedule C, § 2; *Id*.

E. Debtor lists the two Properties as being cross-collateralized to secure two obligations to JPMorgan Chase Bank; the first in the amount of ($173,244.94) and the second in the amount of ($83,769.34), for total debt of ($257,014.28) being secured by the two Properties. Schedule D, ¶ 2.2, 2.3; *Id*.

F. On Schedule I Debtor states that she is disabled and her only income is Social Security benefits of $505.57 a month. For her Non-Debtor Spouse, while stating that he is employed, no wage or business income is shown for him. The only income for the Non-Debtor Spouse is identified as "SSI" of $1,000.00 a month.

Debtor's aggregate household gross income is $1,505.57 a month. Schedule I; *Id*. at 19-20.

G. On Schedule J, Debtor lists as reasonable and accurate monthly expenses of ($1,005.57) for Debtor and her Non-Debtor Spouse. Schedule J; *Id*. at 21-22. The court notes these monthly expenses include:

1. Mortgage/Rental Expense.....$0.00

2. Homeowner's Insurance.....$0.00

3. Property Taxes.....$0.00

4. Home maintenance and repair.....$0.00

5. Clothing/Laundry.....($10) per month for household

6. Personal care products/services.....($10) per month for household

7. Medical/dental.....($20) per month for household

8. Transportation.....($100) (Debtor listing one vehicle on Schedule A/B)

9. Vehicle Insurance.....($50)

Debtor then concludes that Debtor's household has $500.00 of monthly net income.

On the Statement of Financial Affairs Debtor states that neither Debtor nor Non-Debtor Spouse had any gross income from wages, commissions, or operating a business in 2022, 2021, and 2020. Statement of Financial Affairs, Question 4; *Id.*

Debtor lists having only Social Security income for both Debtor and Non-Debtor Spouse, which totals $7,500 in 2022, $18,200 in 2021, and $18,000 in 2020. *Id.*, Question 5.

With respect to payments made within 90 days of filing bankruptcy, Debtor lists payments to JPMorgan Chase Bank, stating that the payments were made by her daughter. *Id.*, Question 6.

Chapter 13 Plan Filed

On June 8, 2022, Debtor filed her Chapter 13 Plan. Dckt. 29. Debtor seeks to apply her $500 monthly net income to fund the Plan for 36 months. Plan, ¶¶ 2.01, 2.03. For Administrative Expenses, Debtor is to pay the Trustee's Fees and $2,500 for her attorney's fees. *Id.*, ¶ 3.05.

The Plan provides for the following payments to creditors through the Chapter 13 Plan:

1. Class 1 Secured Claims.....$0.00

2. Class 2 Secured Claims.....$0.00

3. Class 3 Secured Claims Surrender.....None

4. Class 4 Secured Claims Paid Directly

   a. JPMorgan Chase Bank to be paid $1,500 and $250 a month by Debtor's daughter.

5. Unsecured Priority Claims.....$0.00

6. General Unsecured Claims, 100% Dividend.....$61,464

To fund the payment of the $61,464 in general unsecured claims, the Additional Provisions, § 7.01 and § 7.02 state that the Debtor's Adult Children shall purchase the "Subject Property" (not a defined

term) within eighteen months (of some non-specified date), or in the alternative sell the Property (singular) to a third party.

It further provides that Debtor's children will fund all of the cleanup of some property, intending to have it done within 60 days of filing of the bankruptcy case (July 24, 2022), then have City inspections done, Debtor will obtain permits within six months to do the work for which the inspections are to be done, and Debtor will have all of the corrective work done within twelve months.

Looking back to the prior Chapter 7 Case, Debtor stated having only $505.57 a month in Social Security income, and did not list any income information for her Non-Debtor Spouse. 21-22759; Schedule I; Dckt. 14 at 31-32. On the Statement of Financial Affairs Debtor stated that she was not married. *Id.*; Statement of Financial Affairs, Question 1; Dckt. 14 at 37. On Schedule J in the prior Chapter 7 Case, in 2021 Debtor stated under penalty of perjury that her household monthly expenses included:

1. Home maintenance.....($150)

2. Clothing/laundry.....($50)

3. Personal care products/services.....($75)

4. Transportation.....($150)

In the current Chapter 13 Case, Debtor states that now a year later, the above expenses are substantially lower. It is unclear how such conflicting statements under penalty of perjury can be made by Debtor.

It appears that a serious question exists as to whether Debtor has the financial, physical, and mental ability to engage in the property remedation, hiring the necessary construction professionals, obtaining permits, clearing inspections, and then marketing and selling the Properties in the an eighteen month period.

Debtor and her family has had the opportunity to address the problems with the Properties, deal with the City, then address them in the State Court Action, but could not do so. This raises concerns about the Debtor, her finances, and who has been (or has not been) looking out for Debtor. Debtor's current counsel likely has insights into that situation and any special needs his client may have, or which may need to be addressed.

RULING FOR JUNE 14, 2022 HEARING

The court, after substantial advocacy and interaction between the court and respective counsel, the court determined that continuation of the hearing to allow for constructive discussion between the parties and counsel to occur. While the grounds stated by the Receiver have merit, there is the question of whether a good faith Chapter 13 Plan can be prosecuted, with the court exercising the exclusive federal court jurisdiction over property of the Bankruptcy Estate. 28 U.S.C. § 1334(e).

In is clear that over the past several years that the Debtor and her family have not managed the Properties, the situation, or the State Court Action well. Debtor's daughter was at the hearing and indicated that she laid the blame (the court's characterization) on their state court counsel. However, from what has

been presented to the court, it appears that Debtor and Debtor's family continued in the use of the Properties inconsistent with not only the City ordinances, but in a manner to increase the violations which led to the State Court Action and the Receiver being appointed. This is part of what often is the redemptive process of bankruptcy

Though if Debtor was appearing on her own the conclusion would likely be that the court allow the State Court Receiver to fulfill his duties and have the State Court Action Judge "run the show." However, there has been a significant change that may offer Debtor and her family a narrow opportunity to avoid a receivership sale of the Properties. Debtor has now engaged an experienced counsel who in the past has demonstrated an ability to get previously uncooperative, set in their way debtor clients in this type of situation to toe the line, follow the law, and properly address the issues and maximize their economic return in a bad situation.

The court discussed at the June 14, 2022 hearing, how Debtor and her family could comply with the law, address the violations on the Properties, and promptly market and sell the Properties through the federal bankruptcy process.

For the City of Sacramento and the people in Debtor's neighborhood, such would be done with tight federal court orders in place for prompt performance of the corrections and marketing and sale of the Properties. Rather than the bankruptcy process being a delay of the City having its ordinances enforced, the bankruptcy process would provide the City with tight orders to get things done or the Receiver will proceed in the State Court Action. As the court noted, Congress created the bankruptcy judgeships so that bankruptcy judges have only one focus – to address the bankruptcy and bankruptcy related matters in the cases before such judges. Bankruptcy judges are not distracted by other areas of the law (such as criminal, probate, family, immigration, and the like), but are there focused and ready to address any and all issues relating to the bankruptcy case.

It appearing that there may be the seed of a good faith, rapidly performed Chapter 13 Plan the court has continued the hearing. An orderly cleanup and sale though the bankruptcy process may allow Debtor to salvage more than if the property goes through a receivership sale.

June 30, 2022 Hearing

Debtor has filed a Status Report, asserting that communications with the City of Sacramento concerning this Property and what remains to be addressed has been impaired. Status Report; Dckt. 37. The Status Report does not address what Debtor and Debtor's family members have been doing to commit the monies necessary to address the asserted remaining cleanups and corrections, nor has the Debtor sought to obtain authorization to employ a real estate broker (which broker could advise the Debtor of what improvements enhance the prompt sale value of the Property and which would be "lost value" for potential purchasers.

At the hearing, **xxxxxxx**

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

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

> The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay filed by Gerard F. Keena II ("Movant-Receiver") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is xxxxxxxxxx