

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

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

**July 14, 2020 at 1:30 p.m.**

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<b>1.</b>	<b><u>18-20665</u>-E-13</b> <b><u>GMK-1</u></b>	<b>LINDA MCINNES</b> <b>Julius Cherry</b>	<b>MOTION FOR RELIEF FROM</b> <b>AUTOMATIC STAY</b> <b>6-15-20 [93]</b>
<b>SHARON CARLSON VS.</b>			

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

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

Sufficient Notice **Not** Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee on June 15, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

Additionally, the Motion was served on Linda J.L. Sharpe from the Law Offices of John A. Hauser on June 15, 2020.

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

<b>The Motion for Relief from the Automatic Stay is denied without prejudice.</b>
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Sharon Carlson ("Movant") seeks relief from the automatic stay to allow state court personal injury claim stemming from a motor vehicle accident against "Linda McGinnis" so that Movant can settle the claim with Ms. McGinnis' insurance carrier, The Harford Insurance (the "State Court Litigation").

Movant alleges that on August 22, 2016, Linda McGinnis struck Movant's vehicle in the rear, and Movant subsequently suffered "significant bodily injuries and damages." Movant argues that relief is needed so that she may pursue a personal injury claim against Linda McGinnis only pursuing the insurance proceeds, and not seeking relief from the Debtor, the bankruptcy estate, or any subsequent bankruptcy trustee of the estate.

## CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on June 24, 2020. Dckt. 97. The Chapter 13 Trustee asserts that Debtor does not provide for Movant in her Schedules or Confirmed Plan, and Movant has not filed a Proof of Claim.

Moreover, while Trustee does not oppose Movant's pursuit of insurance proceeds, the Motion identifies Debtor's last name as McGinnis, and that name does not appear in the Amended Petition. *See* Dckt. 29. Additionally, Movant has not provided a Declaration in support of the Motion.

## DISCUSSION

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

Unfortunately, the court cannot grant the relief requested for several reasons.

First, the court finds that it cannot provide the relief requested on the basis that it appears service was not provided to the Debtor of the Motion and supporting pleadings. Though Debtor's counsel may have been served electronically, service must also be made on the Debtor. Fed. R. Bankr. P. 7004(a)(9) and (g), 9014(b).

Second, while the Motion is full of factual allegations, no evidence has been presented to support such allegations. While one may argue that these are "simple facts" for which no evidence "should be required," the court evenly and fairly applies the rules and laws to all parties.

Third, though it appears to be a clerical error, the Motion seeks relief from someone named Linda “McGinnis.”

Though these may well be mere “clerical errors,” if service was not properly made and the court were to issue an order granting relief to pursue the claims in state court with respect to a Linda “McGinnis,” the stay would not be modified as to the Debtor Linda McInnes and Movant and Movant’s counsel could well be violating the automatic stay when they attempted to proceed against Linda McInnes in state court.

Without the court having all the necessary information, the Motion is denied.

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 Sharon Carlson (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief is denied without prejudice.

**DEUTSCHE BANK NATIONAL TRUST  
COMPANY VS.**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 16, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

Deutsche Bank National Trust Company, as trustee for Soundview Home Loan Trust 2006-NLC1, Asset-Backed Certificates, Series 2006-NLC1 ("Movant") seeks relief from the automatic stay with respect to Timothy A. West and Rosa Meria West's ("Debtor") real property commonly known as 1162 West El Camino Avenue, Sacramento, California ("Property"). Movant has provided the Declaration of Marilyn Solivan to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

PHH Mortgage Corporation (formerly known as Ocwen Loan Servicing) services the underlying mortgage loan and note for the property referenced in this Motion for Movant.

Movant argues Debtor has not made four post-petition payments, with a total of \$4,632.82 in post-petition payments past due. Declaration, Dckt. 23.

**CHAPTER 13 TRUSTEE'S RESPONSE**

David Cusick ("the Chapter 13 Trustee") filed a Response on June 24, 2020. Dckt. 27. The Chapter 13 Trustee asserts that Debtor provides for Ocwen Loan Servicing regarding the Property in Schedule D and Class 4 of the Plan. *See* Dckts. 1, 3. Movant filed a Proof of Claim on October 2, 2019 in the amount of \$277,284.93. Proof of Claim, No. 14.

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on June 30, 2020. Dckt. 29. Debtor asserts that at the time of petition filing, Debtor was current on mortgage payments and provided for Ocwen Loan Servicing, who held the first deed of trust against the Property in the plan as a Class 4 claim to be paid directly by Debtor.

To cure the delinquent post-petition arrearages, Debtor will file a modified plan and corresponding motion to confirm to change the classification of the debt from a Class 4 to a Class 1, and the plan will provide payment in full for all post-petition arrearages and ongoing mortgage payments. Moreover, Debtor is hopeful that an alternative informal resolution will be reached with Movant as Debtor's counsel has reached out to Movant's counsel to request a continuance of this instant hearing. Movant's counsel has "indicated a willingness to stipulate to a continuance," although not yet formalized.

Alternatively, Debtor asserts that there is sufficient equity to protect Movant's interest. The Property was estimated to have a fair market value of \$310,000.00 (less cost of sale) at the time of petition filing. Declaration, Dckt. 30. Debtor testifies that home values in Debtor's neighborhood have since increased. *Id.* Debtor estimates the Property's value to currently be at least \$330,000.00 based on information obtained from zillow.com and trulia.com, and Debtor's believe that these estimates are an accurate representation of the value of their property. *Id.*; see Exhibit 3, Dckt. 24.

## 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 \$274,780.81 as of March 11, 2020 (Declaration, Dckt. 23), while the value of the Property is determined to be \$285,200.00, as stated in Schedules B and D filed by Debtor.

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

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

## 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 rehabilitation. 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); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or the Chapter 13 Trustee, the court determines that there is no equity in the Property for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

Here, Debtor presents evidence that there is equity in the property. Debtor submitted their declaration and properly authenticated exhibits to support their testimony. Debtor states that the Property's fair market value have increased from \$310,000.00 to at least \$330,000.00 since the petition filing date, and thus there is sufficient equity to protect Movant's claim.

Moreover, Debtor filed a Motion to Modify and a Modified Plan on July 9, 2020. Dckts. 38, 42. The Modified Plan provides for Movant as a Class 1 claim with \$104.00 payments to address the \$4,689.88 in arrearage. The hearing on the Motion to Confirm is set for August 25, 2020.

The Motion to Confirm the Modified Plan appears to assert that the defaults have occurred because Movant will not allow payments to be made online. After three months of trying, but being unable to pay online, they started making payments in January 2020 and have made payments each month thereafter through June 2020. Motion to Confirm, ¶ 6; Dckt. 38. The Motion to Confirm does not disclose where the monies are for the three months that Debtor repeatedly and unsuccessfully tried to pay online.

Debtor's declaration is equally cryptic and uninformative where the missing three months of payments have gone/are being held.

7. We need to modify our Plan payment to cure post-petition arrears on our home. At the time of filing our Bankruptcy Petition, we were current on our mortgage. Since filing, however, we ran into roadblocks paying ongoing mortgage obligations. PHH no longer allowed us to pay our mortgage online. After three months of trying, we finally resumed making mortgage payments in January 2020 and have made regular monthly payments from January 2020 through June 2020. Accordingly, we must modify our Plan to provide for repayment of the mortgage obligation and arrears through our Plan.

Declaration, Dckt. 40. Debtor merely states that they could not make the payment online, not that they did not have the money for some specific reason or even that they do not have the money now.

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

to obtain possession of the Property.

### **Request for Attorneys' Fees**

————— In the Motion, Movant requests that it be allowed attorneys' fees. The Motion asserts contractual grounds for the fees, specifically Movant points to the Loan Documents (Section 7(C) of the Note) which provide that Movant is entitled to its costs and expenses in enforcing its interest to the extent not prohibited by applicable law. See Exhibit 1, Dckt. 65. Movant requests \$1,231.00 in attorney's fees, including the \$181.00 filing fee.

————— Commonly a request for attorney's fees and related nontaxable expenses is made by a post-judgment (which includes an order) motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

————— However, in some contested matters, including the request with a motion for a contested matter can be a cost effective, expense reducing (for both the creditor and debtor) practice.

————— Here, the Motion clearly states the grounds upon which the request for attorney's fees is based, identifying the contractual provision. The amounts of the fees, \$1,050.00, and the costs, \$181.00 filing fee, are reasonable. Though the Declaration provided by Movant does not state that the attorney's fees incurred with connection with this Motion is at least \$1,050.00, the court will, for this motion, find the pleading in the Motion to be sufficient for the request to be for attorney's fees that Movant will actually pay its counsel.

————— Attorney's fees of \$1,050.00 and costs of \$181.00 are awarded to Movant.

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

————— Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

————— Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

————— No other or additional relief is granted by the court.

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

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

————— The Motion for Relief from the Automatic Stay filed by Deutsche Bank National Trust Company, as trustee for Soundview Home Loan Trust 2006-NLC1, Asset-Backed Certificates, Series 2006-NLC1 ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

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~~**IT IS ORDERED**~~ that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 1162 West El Camino Avenue, Sacramento, California, (“Property”) to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

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~~**IT IS FURTHER ORDERED**~~ that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

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~~**IT IS FURTHER ORDERED**~~ that Movant is awarded attorneys’ fees in the amount of \$1,081.00 pursuant to the Note.

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~~No other or additional relief is granted.~~