

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**July 19, 2016 at 1:30 p.m.**

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1. <a href="#"><u>16-90103</u></a> -E-7 MDE-1	<b>JOSE MERCADO</b> Nelson Gomez	<b>CONTINUED MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY 4-26-16 [28]</b>
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**Final Ruling:** No appearance at the July 19, 2016 hearing is required.  
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Local Rule 9014-1(f)(1) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 26, 2016. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Confirm Termination or Absence of Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

**The Motion to Confirm Termination or Absence of Stay is dismissed without prejudice and removed from calendar.**

Wells Fargo bank, N.A. ('Movant') seeks to confirm that the automatic stay terminated respect to the real property commonly known as 775-777 South Orange Street, Turlock, California (the "Property").

**PRIOR BANKRUPTCY FILINGS BY DEBTOR**

A review of the court's files discloses the prior bankruptcy cases filed by Debtor which have been pending and dismissed in the one-year period prior to February 10, 2016.

**July 19, 2016 at 1:30 p.m.**

**- Page 1 of 16 -**

Chapter 13 Case No. 15-14152	Filed.....October 23, 2015 Dismissed.....January 13, 2016
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Thus, in the one-year period preceding the February 10, 2016 filing of this case, Debtor has had one case which was dismissed: Prior Chapter 13 Case No. 15-14152, dismissed January 13, 2016. The prior case being dismissed within the one-year period prior to the filing of this case brings into play the statutory provisions of 11 U.S.C. § 362(c)(3)(A) [emphasis added], which provides

(c) Except as provided in subsections (d), (e), (f), and (h) [not applicable to subparagraph (c)(3)] of this section-

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)-

(A) the stay under subsection(a) with respect to any action taken with respect to a debt or property securing such a debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;...

Thus, it appears that the automatic stay was terminated as of March 11, 2016.

Debtor is not left without possible relief, as 11 U.S.C. § 362(c)(3)(B) provides that court may impose a stay, if the Debtor, by **clear and convincing evidence**, can rebut the statutory presumption that the filing of the current case, in light of the prior pending and dismissed cases, is in bad faith. 11 U.S.C. § 362(c)(3)(C). Debtor has not requested that the court impose a stay.

No evidence has been presented to the court with the present Motion. Debtor does not even allege as to why the court should find that this case can Be filed in good faith.

## DISCUSSION

Upon commencement of a bankruptcy case, the bankruptcy estate, into which all property of the debtor is transferred by operation of law is created. 11 U.S.C. § 541(a). Property of the bankruptcy estate is not property of the Debtor unless abandoned by the Trustee (either as approved by order of the court, upon dismissal of the case, or closing of the bankruptcy case). 11 U.S.C. §§ 554(a) or (b), 349 (b)(3), 554(c).

The Supreme Court has been very clear in reading and applying the “plain language” stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings*

*Association of Texas v. Timbers of Inwood Forest Associates, LTD.*, 484 U.S. 365, 371 (1988).

In 11 U.S.C. § 101 Congress has defined “debtor” as a person, whether living or entity such as a corporation, partnership, or limited liability company, (11 U.S.C. § 101(13)); estate and property of the estate (11 U.S.C. § 541(a)); and exempt property (11 U.S.C. § 522). These terms for individuals, entities, estate, and property are all defining different things. The terms “debtor,” “estate,” “property of the estate,” and “property of the debtor” are not terms describing the same thing.

Congress created the automatic stay as specified in 11 U.S.C. § 632(a). The automatic stay applies and stays actions with respect to a number of persons, items, and acts, including:

- A. Commencement or continuation of action **against the debtor** [11 U.S.C. § 362(a)(1)];
- B. Enforcement of judgment obtained prior to the commencement of the case against,
  - 1. **Property of the Debtor** or
  - 2. **Property of the Estate** [11 U.S.C. § 362(a)(2)];
- C. Any act to obtain possession of **property of the estate, property from the estate**, or exercise control over **property of the estate** [11 U.S.C. § 362(a)(3)];
- D. Any act to create, perfect, or enforce any lien against **property of the estate** [11 U.S.C. § 632(a)(4)]; and
- E. Any act to create, perfect, or enforce a lien, which secures a claim which arose before the commencement of the case, against property of the debtor [ 11 U.S.C. § 362(a)(5)].

As shown in 11 U.S.C. § 362(a), Congress recognized that the debtor, property of the debtor, and property of the estate are different.

In 11 U.S.C. § 362(c) Congress provides that the automatic stay terminates, without order in the following circumstances:

- a. As to property of the estate, when such property is no longer property of the estate [11 U.S.C. § 362(c)(1)];
- b. The stay of any other act until the earlier of:
  - I. The case is closed;
  - ii. The case is dismissed; or
  - iii. The time the debtor is granted or denied a discharge [11 U.S.C. § 362(c)(2)(A), (B), and (C)].

To address a perceived abuse of the Bankruptcy Code by repeat filers, Congress provides in 11 U.S.C. § 362(c)(3) that the automatic stay shall be terminated on the 30th day after the filing of the later case if there was a case filed by the debtor which was dismissed within one year of the bankruptcy case then before the court. The language used by Congress in § 362(c)(3) is that “the stay under subsection [362](a) with respect to any action taken with respect to a debt to property securing such a debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case [then before the court].” Congress clearly provides that the entire stay provided for in 11 U.S.C. § 362(a) will not go into effect.

The court construes the instant Motion pursuant to 11 U.S.C. § 362(c)(3)(A) for and order confirming that the automatic stay terminated on the 30th day after the filing of the later case.

### **CONTINUED HEARING**

The above analysis was stated by the court at the June 16, 2016 hearing. Movant requested that the court continue the hearing to allow Movant the opportunity to address the issue of the scope of 11 U.S.C. § 362(c)(3) and to file an amended motion or supplemental motion seeking relief from the stay as to the Trustee and estate.

The court continued the hearing.

### **MOVANT’S WITHDRAWAL**

The Movant having filed a Withdrawal of the Motion, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion was dismissed without prejudice, and the matter is removed from the calendar.**

2. **16-21305-E-13      RODERICK/ROSEMARIE TAPNIO    MOTION FOR RELIEF FROM**  
**MRG-1                      Peter Macaluso                      AUTOMATIC STAY**  
**6-20-16 [63]**

**PARTNERS FOR PAYMENT RELIEF  
DE II, LLC VS.**

**Tentative Ruling:** 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 20, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<b>The Motion for Relief From the Automatic Stay is granted.</b>
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Payment Relief DE II, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 518 Kinsale Ct, Vacaville, California 95688(the "Property"). The moving party has provided the Declaration of John Sweeney to introduce evidence as a basis for Movant's contention that Roderick A. Tapnio and Rosemarie A. Tapnio ("Debtors") do not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a post-dismissal Trustee's Sale on April 4, 2016. Based on the evidence presented, Debtor is alleged to be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County unknown, on April 12, 2016. Exhibit B, Dckt. 67. The Movant filed the proof of service for the Unlawful Detainer Action with this court, however,

the court has not received a copy of the actual complaint.

Movant has provided a properly authenticated copy of the Trustee's Deed Upon Sale to substantiate its claim of ownership. The copy provided as Exhibit A does not appear to be recorded with the County of Solano. Dckt. 67 Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

## **DEBTOR'S OPPOSITION**

The Debtor asserts that the attached Trustee's Deed Upon Sale does not reflect that the document was recorded by the County, only that there was a successful bidder on April 4, 2016. According to the Debtor, there is a lack of evidence that the sale was recorded on April 4, 2016 and ample evidence that the dismissal was vacated on April 5, 2016. Thus, the Debtor contends that the sale was not completed and the sale was therefore invalid. The Debtor claims that the automatic stay went back into effect once this court issued the Order Vacating Order Dismissing Case For Failure to Timely File Documents.

The Debtor also claims that the property is necessary for effective reorganization because the Debtors' Chapter 13 plan pays the Class 2 claims of the car and property taxes, strips the Movant's claim to unsecured, remains current on the first deed of trust, and pays no less than 0% to the unsecured claims. While the Debtor concedes that the property is severely under-collateralized, the Debtor claims that the equity is found at the end of the case after the claim has been paid as an unsecured claim.

## **TRUSTEE'S RESPONSE**

The Trustee filed a response on July 1, 2016. Dckt. 76. The Trustee states that the Motion fails to comply with Local Bankr. R. 9004-1 and inappropriately filed all documents as a single document. However, the Trustee does not oppose the Motion based on this.

The Trustee reports that the Debtor's plan is not confirmed and the Debtor's are current under the proposed plan. The Trustee has filed an opposition to the Debtor's proposed plan.

The Trustee has made no disbursements in this case. Trustee fees of \$81.00 have been paid and \$1,359.00 is the balance on hand.

Lastly, the Trustee states that based on the time lines presented in the Motion with regard to actions taken against the subject property, the stay was still in effect as to property of the estate. The subject property was scheduled by the Debtor, and since the closing of the case never took place, the property was in effect not abandoned and accordingly remained property of the estate.

## **APPLICABLE LAW**

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

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

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

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

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

(A) the time the case is closed;

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

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

11 U.S.C. § 362(c) (emphasis added).

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

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

(1) reinstates--

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

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

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

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

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

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of March 31, 2016, the automatic stay as it applies to the Property, and as it

applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The order vacating the dismissal was not entered until April 5, 2016. Dckt. 27.

## DISCUSSION

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at \*8-\*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

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. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *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 which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). [Based upon the evidence submitted to the court, and no opposition or showing having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case.

11 U.S.C. § 362 states:

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

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

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

(A) the time the case is closed;

(B) the time the case is dismissed; or

(A) if the case is a case under chapter 7 of this title concerning an



individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

Pursuant to 11 U.S.C. §362(c)(2)(B), the stay of any other act under subsection (a) continued until the case was dismissed on March 31, 2016 for failure to timely file documents. On April 5, 2016, this court entered an Order Vacating Order Dismissing Case for Failure to Timely File Documents. It follows that between March 31, 2016 and April 5, 2016 the automatic stay as to the Property was not in effect because it terminated on the date of dismissal. See *Aheong v. Mellon Mortg. Co. (In Re Aheong)*, 276 B.R. 233 (9<sup>th</sup> Cir. 2002) (Upon dismissal, avoided transfers are reinstated, certain voided liens revive, all property of the estate reverts in the entity in which such property was vested immediately before bankruptcy, and the automatic stay against interests other than property of the estate terminates...Retroactive relief from the Bankruptcy Code's automatic stay should be applied only in extreme circumstances. However, the bankruptcy court has wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay. Cause to annul the stay may exist where the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors. Ultimately, the decision is left to the sound discretion of the bankruptcy court.)

The Movant provides facts and evidence to support the contention that there was no automatic stay in effect at the time of the Trustee sale on April 4, 2016. An Order Dismissing the Case for Failure to Timely File Documents was entered on March 31, 2016. Dckt. 18. The Order was not vacated until April 5, 2016. Dckt. 27. The Movant filed the Trustee's Deed Upon Sale and, although it does not appear to be recorded with Solano County, the Deed is authentic and was executed on April 4, 2016. Dckt. 67. The Movant also filed a Notice to Quit that was sent to the Debtor on April 8, 2016. Dckt 67.

In opposing the Motion, Debtor does not the court with legal authority for the contention that the transfer of title through a nonjudicial foreclosure sale is not "completed" until the trustee's deed is recorded.

Surprisingly, Movant does not provide the court with its analysis of the legal effect of the trustee's sale having been conducted, but the trustee's deed not being recorded until after the automatic stay went (back into) effect. This situation is similar to that of a foreclosure sale being conducted at 10:00 a.m. but the debtor being delayed in traffic and the bankruptcy petition (intended to be filed at 9:00 a.m.) was not filed until 11:00 a.m. on the day of the foreclosure sale.

Movant requests that the court not only grant relief from the automatic stay prospectively, but to annul the stay. Motion, Dckt. 63. It is argued that the stay should be "annulled" because Movant asserts that it is the owner of the Property. The annulment appears to be limited to the conduct relating to giving the three-day notice to Debtors. No clear showing of nonsensical results or unwarranted hardships on Movant if it was required to give a new three-day notice after the automatic stay is terminated.

### **Relief Granted**

The court shall issue an order terminating and vacating the automatic stay to allow Payment Relief DE II, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 518 Kinsale Ct., Vacaville, California including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

Movant does not provide the court with any statutory or contractual basis for an award of attorneys' fees in connection with this Contested Matter.

The Movant has not alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3). The parties may well want to use the fourteen day stay to address the effect of the foreclosure sale conducted when the automatic stay had terminated and the recording of the trustee's deed after the automatic stay went into effect. FN.1.

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FN.1. A review of the Schedules filed in this case raises an intriguing set of possibilities. On Amended Schedule A Debtor states the property has a value of \$401,000.00. Dckt. 48 at 4. This case was filed March 2, 2016, so this value is relatively current. On Original Schedule D Debtor lists Ocwen Loan Servicing, LLC having a claim in the amount of \$480,000 secured by the Property. This appears to be the senior deed of trust. Then, FCI Lenders is listed as having a junior lien on the Property.

It appears that Movant is in the position of having purchased the Property; see Trustee's Deed, Exhibit A, Dckt. 67; which is subject to a senior lien which exceeds the value of the Property. Movant now has the *privilege* of insuring the Property, caring for the Property, and figuring out how to pay the senior lien and still make a buck.

From the Debtor's perspective, the loss of the property relieves them of a substantial financial burden. While not being able to keep the Property, they are no longer servicing a debt which, by their calculations is twenty percent underwater.

Possibly rational financial minds might find a common ground by which Movant can be convinced Debtor offers a better "bird in the hand" than gambling on how long it can delay the senior from foreclosing, and what it will cost to stave off that foreclosure.

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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 Payment Relief DE II, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Payment Relief DE II, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 518 Kinsale Ct., Vacaville, California.

**IT IS FURTHER ORDERED** that the fourteen (14) day stay of

enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

**IT IS FURTHER ORDERED** that the Movant party not having provided the court with a contractual or statutory basis for an award of attorneys' fees, none are awarded.

No other or additional relief is granted.

3. [11-45395](#)-E-13      **NADER SHAHCHERAGHI**  
APN-1                      **Peter Macaluso**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY AND/OR  
MOTION FOR RELIEF FROM  
CO-DEBTOR STAY  
4-21-16 [\[84\]](#)**

**LAKESIDE GREENS HOMEOWNERS  
ASSOCIATION VS.**

**Tentative Ruling:** 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.**

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 21, 2016. By the court's calculation, 33 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

<b>The Motion for Relief From the Automatic Stay is denied without prejudice</b>
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Lakeside Greens Homeowners Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3401 Bermuda Ave, Apt. 26, Davis, California (the "Property"). Movant has provided the Declaration of Peg Hart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Hart Declaration states that there are 54 post-petition defaults in the payments on the obligation

secured by the Property, with a total of \$23,649.08 in post-petition payments past due.

According to the Declaration of Peg heart, the manager of Lakeside Green Homeowners Association, the defaults date back to November 1, 2011. Declaration, Dckt. 86. She testifies that the Homeowners' Association suffered,

- A. The first post-petition default in November 2011, and Movant did nothing;
- B. Then the second post-petition default in December 2011, and Movant did nothing;
- C. Then the third post-petition default in January 2012, and Movant did nothing;
- D. Then the fourth post-petition default in February 2012, and Movant did nothing;
- E. Then the fifth post-petition default in March 2012, and Movant did nothing;

these monthly now, in April 2016, defaults continued, with;

- F. The twelfth post-petition default in October 2012, and Movant did nothing;
- G. Then the thirteenth post-petition default in November 2012, and Movant did nothing;

these monthly now, in December 2012, continued, with;

- H. The twenty-fourth post-petition default occurring in October 2013, and Movant did nothing;
- I. Then continuing monthly, with the thirty-sixth post-petition default occurring in October 2014, and Movant did nothing;
- J. Then continuing monthly, with the forty-eight post-petition default occurring in October 2015, and Movant did nothing; until
- K. The fifty-fourth continuing monthly default which occurred in April 2016, when Movant "sprung" to action.

The Hart Declaration fails, or is careful to not provide, any explanation as to why and how, if there is a bona fide obligation owing, the Homeowner's Association failed to act.

The court notes that after slumbering for fifty-four months, for which there are alleged to be association dues owing, Movant demands that the court waive the normal fourteen-day stay of enforcement, because now, years later, Movant claims that it is not adequately protected.

The Movant is seeking relief from the automatic stay as well as relief from the co-debtor stay pursuant to 11 U.S.C. § 1301.

## **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on May 10, 2016. Dckt. 90. The Trustee states that the Debtor is \$1,700.00 delinquent under the plan. The Creditor is included in Class 2A to be paid a monthly dividend of \$264.47 with an interest rate of 4.75%. The Creditor has filed Proof of Claim No. 7 in the amount of \$14,135.31 for pre-petition HOA Assessments. The Trustee has disbursed \$12,784.46 principal and \$1,775.66 interest on the claim. The Debtor's confirmed plan does not contain any provisions regarding post-petition HOA assessments.

## **DEBTOR'S OPPOSITION**

The Debtor filed an opposition to the Motion on May 17, 2016. Dckt. 93. The Debtor states that the plan provides for the pre-petition arrears. The Debtor incorrectly made the assumption that the ongoing, post-petition payments to Creditor were covered in the plan.

While Debtor is delinquent in payments to Creditor, Debtor argues that he should not be penalized with the loss of his property for the way the Plan was proposed and confirmed. The Debtor seeks a provision that will allow him to cure the post-petition delinquency.

The Debtor asserts that he will be current on or before the hearing.

## **MAY 24, 2016 HEARING**

At the hearing, both Parties requested that the court continue the hearing so that they and their clients could further pursue a settlement to address the underlying issues. The court continued the hearing to 1:30 p.m. on June 14, 2016.

## **DISCUSSION**

To date, no supplemental papers have been filed in connection with the instant Motion.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$241,984.08 (including \$23,649.08 secured by Movant's assessment lien), as stated in the Hart Declaration and Schedule D filed by Nadar Shahcheraghi ("Debtor"). The value of the Property is determined to be \$385,295.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Property for Movant's claim provides adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

With respect to the present Motion, Movant has shown that it is adequately protected. First, it has a lien in property with more than enough value to pay any debt – so long as such debt is actually owing and enforceable. Second, Movant has shown that it is adequately protected by choosing not to act for almost five years.

Movant's conduct is inconsistent with that of a homeowner's association which is actually providing

services for which dues are owing. It is inconsistent with a creditor who is actually owed a debt. Movant, while having the opportunity to explain to the court some reasonable basis for the financial somnolence, if there is actually a debt owing, has chosen not to do so.

### **Debtor's Opposition**

Debtor's opposition is equally lacking. First, Debtor fails (or refuses) to provide any evidence to support the arguments advanced by his current attorney in opposing the Motion. All that is argued is that Debtor "assumed" that the future, post-petition dues would (somehow) be paid as part of a pre-petition claim. Debtor does not (or will not) so testify, but merely this is argued by his counsel.

Next, Debtor's counsel assures that court that Debtor will find almost \$24,000.00 between the May 17, 2016 filing of the Opposition and the May 24, 2016 hearing. Opposition, p. 2:7-8; Dckt. 93. If the Debtor has access to such a large sum of money, then the financial information provided to the court under penalty of perjury to support a less than 100% plan appear suspect.

As between Debtor and Movant, Debtor's argument is less non-credible then Movant's arguments and evidence.

### **JUNE 14, 2016 HEARING**

At the hearing, the parties agreed to continue the matter to 1:30 July 19, 2016, to allow them to document a settlement.

### **DISCUSSION**

To date, no supplemental papers have been filed in connection with the instant Motion.

The court denies the Motion without prejudice. With just months left in the current Chapter 13 Plan, it appears doubtful that Debtor can cure the arrearage, if one actually exists. If Debtor can produce the money to cure the almost \$24,000.00 arrearage in one fell swoop, then the Chapter 13 Trustee and creditors have some time to investigate further and determine whether the current plan is in good faith and consistent with the Bankruptcy Code.

Therefore, the Motion is denied without prejudice.

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 Lakeside Greens Homeowners Association ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, the Parties jointly requesting that the hearing be continued, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion for Relief From the Automatic Stay is

denied without prejudice.