

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**August 21, 2018, at 1:30 p.m.**

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1. **18-24930-E-13**      **JOSEPH BOCHNER**      **MOTION FOR RELIEF FROM**  
**RPH-1**      **Pro Se**      **AUTOMATIC STAY**  
           **8-7-18 [\[10\]](#)**

**RONALD KOEPP 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.

**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).**

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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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on August 7, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the 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. At the hearing, -----.

**Review of Motion for Relief from the Automatic Stay**

Ronald & Marcia Koepp ("Movant") seeks relief from the automatic stay with respect to Joseph Michael Bochner's ("Debtor") real property commonly known as 1024 O'Malley #1, South Lake Tahoe, California; ("Property"). Movant has provided the Declaration of Robert P. Huckaby to introduce evidence to authenticate the documents upon which it bases the claim and the ownership of the Property.

The Huckaby Declaration states Debtor is merely a lessor of the Property. Dckt. 13. Movant commenced an unlawful detainer action in California Superior Court, County of El Dorado and received a judgment for possession, with a Writ of Possession having been issued by that court on August 6, 2018. Exhibit 1, Dckt. 14.

## **TRUSTEE'S RESPONSE**

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a response to this Motion on August 13, 2018. Dckt. 19. Trustee indicates he does not oppose the Motion, and adds that Debtor has yet to submit Schedules or a proposed Plan. *Id.*

## **DEBTOR'S RESPONSE**

Debtor filed a response to this Motion on August 15, 2018. Dckt. 21. Debtor requests a continuance to have more time to file a formal response.

Debtor states Movant is attempting to evict him from his home-office, which if successful would preclude him from having a successful reorganization (noting that relief from stay should only be granted if property is not necessary to an effective reorganization). Debtor references Local Rule 9014-1(f)(1)(b) and states a written opposition would have been due the day the Motion was submitted (14 days before hearing). Debtor then seeks to present arguments under Local Rule 9014-1(f)(2)(c). Debtor is in *Pro Se* and does not understand that these code sections are alternative forms of notice, and that no written opposition was required based on notice Movant provided.

## **DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, it is determined that Debtor is merely a lessee of the Property and has no property interest.

### **The Court Finds Cause to Grant Relief Under 11 U.S.C. § 362(d)(1)**

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.

Debtor asserts that the Property is his home-office and essential to his Chapter 13 Plan. However, he has not actually pleaded facts to enlighten the court as to what his line of work is, and why he is only able to perform work at the Property. Debtor has not filed Schedules or a proposed Plan, either of which the court could use to determine his ability to provide for Movant's claims.

### **The Court Does Not Find Equity in the Property per 11 U.S.C. § 362(d)(2)**

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). As a lessee, Debtor does not have any interest or equity in the Property. Debtor argues the Property is necessary for an effective reorganization, but does not plead specific facts and therefore fails to carry his burden.

In a letter the court deemed a Motion for Continuance (Dckt. 21) Debtor states that if the Movant is allowed to enforce the state law rights and judgment for possession of the property it will “destroy my [Debtor's] ability to reorganize under Chapter 13.” This Motion having been filed under Local Bankruptcy Rule 9014-1(f)(2), Debtor explained his opposition grounds, stating **XXXXXXXXXXXXXXXXXXXXXXX**

Debtor has not yet filed his Schedules or Statement of Financial Affairs. The court does not have information from such documents to consider Debtor's business and how this property in which Debtor does not have an interest can be necessary for an effective reorganization.

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 Prospective Injunctive Relief**

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

[A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.

Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

*In re Van Ness*, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the “silly” request for unnecessary relief may well be ultimately deemed an admission by Ronald Marcia Koepp and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Ronald Marcia Koepp and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

### **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.

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 Ronald Marcia Koepp (“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 Ronald Marcia Koepp and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 1024 O’Malley #1, South Lake Tahoe, California, California.

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

No other or additional relief is granted by the court.

2. [16-20743-E-7](#) ANNA PETERSON  
[17-2234](#) Pro Se  
RHS-1  
THOMPSON V. PETERSON

**ORDER TO SHOW CAUSE**  
**8-1-18 [40]**

**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. If the court’s tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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The Order to Show Cause was served by the Clerk of the Court on Debtor (Pro Per) and other such other parties in interest as stated on the Certificate of Service on August 1, 2018. The court computes that 20 days’ notice has been provided.

<b>The Order to Show Cause is <span style="color: red;">XXXXXXXXXXXXXXXXXX</span>.</b>
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The Order to Show Cause was issued due to the failure of Anna Krin Peterson, Defendant-Debtor in Pro Per (“Debtor” or “Defendant”) to appear at regularly noticed hearing in this Adversary Proceeding.

Dckt. 40. The Order instructs Debtor to appear in person at the August 21, 2018, hearing and show cause why the court should not impose sanctions. *Id.*

Kevin Thompson, Plaintiff in Pro Se ("Plaintiff") filed the Complaint in this Adversary Proceeding on December 8, 2017 seeking determination of nondischargeability of Debtor's child support obligations. Dckt. 1. Debtor had previously filed a Chapter 7 case on February 10, 2016, and was granted a Chapter 7 discharge on December 19, 2017. 16-20743; Discharge Order, Dckt. 138. Debtor failed to appear at either the February 21, 2018, or May 30, 2018, hearings set for this Adversary Proceeding. Dckt. 9, 24.

## **DEBTOR'S OPPOSITION TO ENTRY OF DEFAULT**

While Debtor has apparently not filed any responsive pleadings or made any appearance, she did file an opposition to Plaintiff's Motion for Entry of Default summarized as follows:

- A. The Pleading is titled "Objection to Notice of Adverse Action." Dckt. 22 at 1.
- B. Debtor states that United Law Center formerly represented her as counsel in Debtor's related bankruptcy case, but is no longer representing Debtor. *Id.*, ¶ 2.
- C. Debtor states that she does not have a PACER Account. *Id.*, ¶ 5.
- D. Through an online search, Debtor discovered that this Adversary Proceeding is pending. *Id.*, ¶ 6.
- E. Debtor states that she has not been "personally served" with the Complaint, summons, or any other document. *Id.*, ¶ 7.
- F. Debtor then requests that the court order Plaintiff to properly serve the summons and Complaint as required by Federal Rule of Bankruptcy Procedure 7004. *Id.*, ¶ 6. The court notes that Debtor manifests a knowledge of the Federal Rules of Bankruptcy Procedure, a level of sophistication not shown by many pro se debtors and defendants who appear in this court.
- G. In paragraphs 9, 10, 11, and 12 Debtor makes some factual arguments about the debt that is the subject of the Complaint. *Id.*, at p. 2.
- H. In her prayer, all Debtor "requests" is that the court order Plaintiff to "personally serve" the summons and complaint, the court continue proceedings, and the court allow Debtor to appear telephonically. *Id.*, at p. 2:25–26, 3:1–5.

The date and time listed for the Objection to Notice of Adverse Action is stated to be May 30, 2018 at 2:00 p.m. Id. at 1. No notice of hearing was filed, and Debtor did not set a hearing on the request for relief from the court. Local Bankr. R. 9014-1.

The pleading does not appear to be an answer or motion in response to the Complaint. Rather, Debtor, who expressly cites to Federal Rule of Bankruptcy Procedure 7004, believes that she can require "personal service" to be made, rather than the rules for service as enacted by the Supreme Court in the Federal Rules of Bankruptcy Procedure.

As Debtor is aware from reviewing Federal Rule of Bankruptcy Procedure 7004, service may be made several ways in an adversary proceeding, and provides, as relevant to this Adversary Proceeding:

(a) Summons; service; proof of service.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)–(j), (l), and (m) F. R. Civ. P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F. R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

(b) Service by first class mail. Except as provided in subdivision (h) [federally insured financial institutions], in addition to the methods of service authorized by Rule 4(e)–(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

...

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing. . . .

Fed. R. Bankr. P. 7004(a)(1), (2) & (b)(1) (9) [emphasis added].

In the Objection to Notice of Adverse Action, Debtor lists her address on her pleading for this Adversary Proceeding to be P.O. Box 469, Carmichael, California. The post office address is an address designated by Debtor in this Adversary Proceeding. In her Chapter 7 bankruptcy case (originally filed as a Chapter 13 case and converted to Chapter 7 by Debtor), 16-20743, Debtor listed in her Petition a street address as 5105 Fair Oaks Blvd, 101-251, Carmichael, California. 16-20743, Dckt. 1. Debtor was represented by counsel in filing the Petition. Using Google Maps, 5105 Fair Oaks, Blvd, 101, Carmichael, California is identified as a UPS Store which has mail boxes in addition to its shipping services.

The address shown by the court for Debtor in her bankruptcy case is:

Anna Krin Peterson  
PO Box 469  
Carmichael CA 95609  
Date Added: 2/10/2016  
(Debtor)  
(aka) Krin Peterson  
Clerk's Records, 16-20743.

On Schedule A/B, Debtor does not list any interests in real property. *Id.* at 11. For her personal property, Debtor states that it is located at 5150 Fair Oaks Blvd. 101-251, Carmichael CA 95608. *Id.* On Schedule G, Debtor states that she has no unexpired leases. *Id.* at 38.

On Schedule I, when the bankruptcy case was filed, Debtor stated that her occupation was a paralegal at United Law Center (her attorneys in the bankruptcy case). *Id.* at 41. Debtor working as a paralegal at a consumer bankruptcy firm may explain her knowledge of Federal Rule of Bankruptcy Procedure 7004 and bankruptcy court proceedings.

Debtor's Chapter 7 case has not been closed.

The Certificate of Service for the Reissued Summons and Complaint is stated to be Post Office Box 469, Carmichael, CA 95609. Dckt. 17. That is the address designated by Defendant Debtor in her bankruptcy case and now in this adversary proceeding (Dckt. 22).

For purposes of entering the Default, it appears that Debtor has been served at the address that she has designated in this Adversary Proceeding and her related bankruptcy case.

Debtor, though filing an Objection to Notice of Adversary Proceeding and requesting that the court make the provisions of Federal Rule of Bankruptcy Procedure 7004(b)(1) and (9) ineffective in this Adversary Proceeding, rather than filing an answer or motion, Debtor may intend to diligently prosecute any actual opposition or defense she may have to the claims asserted in the Complaint. Though Debtor appears to have specialized knowledge (having worked as a paralegal for a bankruptcy law firm), this ineffective Objection may be by mistake and not part of an intentional strategy to abuse the federal judicial process to cause unnecessary expense and improper delay. This led to the court sua sponte setting this Conference on the Notice of Objection.

## **SUPPLEMENTAL PLEADINGS**

Debtor has not filed any additional pleadings.



## **DISCUSSION**

At the August 21, 2018 hearing, Debtor xxxxxxxxxxxxxx

The court shall issue a minute 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 Order to Show Cause 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 Order to Show Cause is **xxxxxxx**

3. [18-23072](#)-E-13      STEVEN/SHARON COLLINS      MOTION FOR RELIEF FROM  
JCW-1      Pro Se      AUTOMATIC STAY  
6-26-18 [\[32\]](#)  
WELLS FARGO BANK, N.A. VS.

**Final Ruling:** No appearance at the August 21, 2018, hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Sharon Lavette Collins and Steven Ray Collins (collectively “Debtor”) and Chapter 13 Trustee on June 26, 2018. Subsequently, parties were served with an Amended Notice of Hearing on June 28, 2018. By the court’s calculation, 56 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, with the court granting the additional relief pursuant to 11 U.S.C. § 362(d)(4)**

Wells Fargo Bank, N.A. (“Movant”) seeks relief from the automatic stay with respect to Debtor’s real property commonly known as 5543 Danjac Circle, Sacramento, California (“Property”). Movant has provided the Declaration of Peggy Morrow to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. The grounds stated with particularity include:

1. “Secured Creditor holds the original Promissory Note dated 11/12/2004, in the principal amount of \$185,000.00, which is secured by the Deed of Trust of the same date as signed by Steven Ray Collins and Sharon Lavette Collins, (“Debtors”).” Motion, p. 2:9-11; Dckt. 32.

2. “This subject Bankruptcy case is the sixth Bankruptcy filed to unfairly delay Secured Creditor from proceeding with the foreclosure of the subject Property.” *Id.*, p. 2:18-19.

3. “Secured Creditor is precluded from proceeding with the foreclosure of the subject Property because of the bad faith bankruptcy filings by the Debtors in the prior cases referenced in this motion.” *Id.*, p. 2:21-23.

4. “As stated in the attached Declaration, the Debtors have failed to make seventy-eight contractual payments (01/15/12 through 06/15/18).” *Id.*, p. 2:26-27.

5. “The current market value of the Debtors' subject property is \$680,000.00, based upon a current Appraisal. See Exhibit “4”.” *Id.*, p. 2:28-29.

6. “Multiple Bankruptcies

Debtors filed a previous bankruptcy petition in the above-entitled Court on 08/05/2011 as Case Number 11-39208. Said case was subsequently dismissed on 10/14/2011. A true and correct copy of the PACER Docket is attached hereto as Exhibit “5”.

Debtors filed a previous bankruptcy petition in the above-entitled Court on 11/07/2011 as Case Number 11-46417. Said case was subsequently dismissed on 07/03/2013. A true and correct copy of the PACER Docket is attached hereto as Exhibit “5”.

Debtors filed a previous bankruptcy petition in the above-entitled Court on 05/31/2014 as Case Number 14-25862. Said case was subsequently dismissed on 11/03/2014. A true and correct copy of the PACER Docket is attached hereto as Exhibit “5”.

Debtors filed a previous bankruptcy petition in the above-entitled Court on 12/12/2014 as Case Number 14-32084. Said case was subsequently dismissed on 01/25/2016. A true and correct copy of the PACER Docket is attached hereto as Exhibit “5”.

Debtors filed a previous bankruptcy petition in the above-entitled Court on 02/14/2018 as Case Number 18-20835.

Said case was subsequently dismissed on 03/15/2018. A true and correct copy of the PACER Docket is attached hereto as Exhibit “5”.”

*Id.*, p. 3:1-16.

7. “This is the second bankruptcy filed by Debtors in which a prior case was pending and dismissed within a twelve (12) month period. Debtor’s prior case was filed on 02/14/2018 and was dismissed on 03/15/2018. The instant case was filed on 05/16/2018. Debtors, in this bankruptcy, has not yet brought a motion to extend the stay. The stay is set to expire on 06/15/2018 as to the Debtors.” *Id.*, p. 22-26.

8. “Due the above multiple bankruptcy filings, Secured Creditor has been delayed from proceeding with foreclosure. Accordingly, cause exists under 11 U.S.C. § 362(d)(1) and (d)(4) for relief from the automatic stay.” *Id.*, p. 3:27-29.

The Morrow Declaration states that there is 1 post-petition default in the payments on the obligation secured by the Property, with a total of \$1,779.32 in post-petition payments past due. The Declaration also provides evidence that there are 77 pre-petition payments in default, with a pre-petition arrearage of \$143,621.80.

## **TRUSTEE’S RESPONSE**

Chapter 13 Trustee David Cusick (“Trustee”) filed a Response to the present Motion on August 3, 2018. Dckt. 54. Trustee does not oppose the Motion, and notes that Movant holds a class 2A claim with a current monthly dividend of \$0.00. Trustee also states Debtor has had multiple bankruptcy filings, including one case filed within a year of the present case (18-20835), dismissed March 15, 2018 for failure to file documents timely. Trustee asserts that Debtor’s Plan fails to provide for Movant’s arrears of \$186,320.13. Trustee also notes a pending Motion to Dismiss or Convert Case to Chapter 7 set for hearing September 5, 2018, filed based on Debtor’s serial filings and non-exempt equity in the Property. *See*, Dckt. 20.

## **DEBTOR’S REPLY**

Debtor filed a Reply to this Motion on August 13, 2018. Dckt. 66. Debtor’s new counsel, who states he was engaged to represent Debtor on August 10, 2018, requests a continuance to meet with Debtor, draft and then file an amended plan. *See*, Dckt. 59, Substitution of Attorney.

## **REVIEW OF PRIOR BANKRUPTCY CASES**

The court has reviewed its files concerning Debtor’s prior bankruptcy cases. Some significant points include the following.

Chapter 13 Case 18-20835

Filed.....February 14, 2018  
Dismissed.....March 15, 2018  
Debtor's Counsel of Record.....Gary Fraley, Esq.

Filing of Schedules and Statement of Financial Affairs Extended to March 14, 2018. 18-20835, Dckt. 14.

Case Dismissed for Failure to File Schedules, Statement of Financial Affairs and Plan.

Chapter 13 Case 14-32084

Filed.....December 12, 2014  
Dismissed.....January 25, 2016  
Debtor's Counsel of Record.....Gary Fraley, Esq., Brian Turner, Esq., Dana Wares, Esq.

No Chapter 13 Plan Confirmed.

Grounds for Dismissal of bankruptcy case are stated in the Civil Minutes for the hearing on the Trustee's Motion to Dismiss to include:

“The Trustee seeks dismissal of the case on the basis that the Debtor is \$11,349.00 delinquent in plan payments, which represents multiple months of the \$3,895.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

...

Additionally, the Trustee asserts that the Debtor has refused to cooperate with the Trustee. The Debtor has not provided a full set of four years of tax returns. The Debtor only provided a copy of their 2013 tax return and appears to have not filed it with the Internal Revenue Service. Furthermore, the Trustee asserts that the Debtor failed to provided the Trustee with Business Documents including a questionnaire, two years of tax returns, profit and loss statement, bank account statements, nor proof of license and insurance. Lastly, the Debtor failed to report prior filings. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

...

Debtor has failed to provide the Trustee with copies of tax returns as required by the Bankruptcy Code. Debtors also failed to disclose the 2011 bankruptcy filings on the current Petition. Dckt. 1; top of page 2 of Petition requiring disclosure of all cases filed in the prior eight years.”

14-32084, Civil Minutes.

Chapter 13 Case 14-25862

Filed.....May 31, 2014  
Dismissed.....November 3, 2014  
Debtor's Counsel of Record.....Scott Sagaria, Esq.

No Chapter 13 Plan Confirmed. In sustaining the Objection to Confirmation of the proposed Amended Chapter 13 Plan, the court's findings include:

“First, the plan is not feasible as required by 11 U.S.C. § 1325(a)(6) because the monthly plan payment of \$4,151 is less than the \$5,375 in dividends and expenses the plan requires the trustee to pay each month.

Second, the debtor has failed to fully and accurately provide all information required by the petition, schedules, and statements. Specifically, the debtor failed to attach to Schedules I and J detailed statements of the debtor's business income and expenses. This nondisclosure is a breach of the duty imposed by 11 U.S.C. § 521(a)(1) to truthfully list all required financial information in the bankruptcy documents. To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Third, the debtor has failed to corroborate the value of the debtor's real estate. This is a breach of the duties imposed by 11 U.S.C. § 521(a)(3) & (a)(4). To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3). And, the failure to establish such values means the debtor cannot demonstrate that the plan complies with 11 U.S.C. § 1325(a)(4).”

14-25862; Civil Minutes, Dckt. 25.

The case was dismissed when Debtor failed to file and prosecute a plan for confirmation within 75 days after the court denied confirmation of the Amended Plan. *Id.*; Order, Dckt. 28.

#### Chapter 13 Case 11-46417

Filed.....November 7, 2011  
Dismissed.....July 3, 2013  
Debtor's Counsel of Record.....Scott Sagaria, Esq.

Chapter 13 Plan confirmed March 7, 2012. 11-46417; Order, Dckt. 50. The terms of the Plan required \$2,660 a month plan payments for 60 months. *Id.*; Plan, Dckt. 35. Plan payments of \$1,565.24 were required monthly for the claim secured by the Danjac Circle property.

The Chapter 13 case was dismissed because the Plan was not adequately funded to be completed within 60 months, but would require 127 months. *Id.*; Motion to Dismiss, Dckt. 56, and Civil Minutes, Dckt. 61.

#### Chapter 13 Case 11-39208

Filed.....August 5, 2011  
Dismissed.....October 14, 2011  
Debtor's Counsel of Record.....Scott Sagaria, Esq.

No Chapter 13 Plan Confirmed.

The Chapter 13 case was dismissed due to Debtor being ineligible for such relief. 11-39208; Order, Dckt. 42. The Motion to Dismiss due to ineligibility was based on Debtor not having filed all tax returns in the four year preceding the commencement of the bankruptcy case. *Id.*; Motion, Dckt. 28.

Debtor has tried, assisted in each attempt by knowledgeable, well recognized consumer bankruptcy counsel in this District, to prosecute a Chapter 13 case over the past seven years. Debtor has been unsuccessful.

## REVIEW OF SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS

Debtor, who has filed and participated in multiple bankruptcy cases these past seven year, chose to file the current case in *pro se*. Schedules and the Statement of Financial Affairs were filed on May 16, 2018. Dckt. 1. For the Schedules, the information concerning assets on Schedule A/B provided under penalty of perjury is summarized as follows:

### Real Property

Danjac Circle Property.....FMV \$726,143

### Personal Property

2 Cars.....	\$12,449
1 Motorcycle.....	\$ 1,000
Personal Clothing and Jewelry.....	\$ 560
Furniture, Electronics.....	\$ 3,100
Cash.....	\$ 300
Bank Accounts.....	\$0.00
401(k).....	\$ 500
Accounts Receivable.....	\$43,000
Life Insurance.....	\$35,000
Tools of Trade.....	\$ 1,200

Dckt.1 at 13 - 19.

On Schedule D, Debtor shows the 2012 vehicle and the Motorcycle to be fully or over encumbered. *Id.* at 22. For the real property, Debtor states that the obligations secured by the Danjac property total \$421,560.70. *Id.* at 23.

On Schedule I Debtor states having \$0.00 in monthly income. *Id.* at 30-31. Debtor's Schedule J form is incomplete, showing only the first page. *Id.* at 32.

On the Chapter 13 Statement of Current Monthly Income (Form 122C-1) Debtor's state that Debtor's income for the six months preceding the filing of the current bankruptcy case was \$0.00. *Id.* at 42-44.

## **DISCUSSION**

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 \$394,176.68 (including \$342,690.26 secured by Movant's First Deed of Trust and \$51,153.24 secured by a recorded tax lien). Schedule D, Dckt. 1; Declaration of Peggy Morrow, Dckt. 34; Proofs of Claim 5-1. The value of the Property is determined to be \$726,143.00, as stated in Schedules A and D.

### **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.

Here, Movant's grounds are based on Debtor's repeated failures to prosecute a Chapter 13 plan (or even confirm a plan in prior cases). Though there appears to be an equity in the property, Debtor has demonstrate that Debtor is incapable of preserving that value for the estate.

Accepting Debtor's value of \$726,143 for the Property, the secured claims asserted by Movant total \$578,402.99. There are set forth in the following two Proofs of Claim:

Proof of Claim No. 5 has been filed by Movant in the amount of (\$342,690.26). The pre-petition arrearage on this claim is stated to be (\$186,320.13). In the Attachment to Proof of Claim No. 5, the portion of the arrearage for principal and interest payments is stated to be (\$80,990.98). There is a (\$103,320.72) amount shown for "Escrow Deficiency." The Attachment includes a payment history commencing in July 2008. Serious defaults in payments are show beginning in April 2009, with only two payments having been



made in 2010, none in 2011, several payments in 2012, several lump sum payments in 2014, and two payments in 2016 - 2018.

Proof of Claim No. 7 has been filed by Movant in the amount of \$235,712.73. The pre-petition arrearage is stated to be \$48,240.06. The Attachment to Proof of Claim 7 states that the entire arrearage is for principal and interest payments. This Attachment includes a payment history commencing in April 2017. No payments are shown having been made by Debtor on this obligation.

In the Morrow Declaration (Dckt. 34), Movant's witness testifies that the contractual arrearage amount for missed payments of principal, interest, and escrow payments total \$145,401.12. Since January of 2012, Ms. Morrow's testimony is that Debtor has defaulted in 78 monthly payments - all payments which have come due since January 2012.

Exhibit 6 is identified as a payment history of all payments made by Debtor since January 2012. Dckt. 37 at 53-55. This history shows no payments having been made by Debtor during the past six and one-half years.

The court has reviewed the Chapter 13 Trustee Final Reports in the prior Chapter 13 bankruptcy cases. For those cases in which Debtor made plan payments, the Chapter 13 Trustees report the following payments having been made to Movant on its secured Claim.

Chapter 13 Case 14-32084

Movant Paid.....\$ 6,440.17  
Movant Paid.....\$11,700.36

14-32084; Trustee Final Report, Dckt. 110

Chapter 13 Case 14-25862

Movant Paid.....\$ 4,875.15

14-25862; Trustee Final Report, Dckt. 31.

Chapter 13 Case 11-46417

Movant Paid.....\$14,985.00  
Movant Paid.....\$ 8,253.85  
Movant Paid.....\$ 3,207.42  
Movant Paid.....\$ 9,824.33

11-46417; Trustee Final Report, Dckt. 66.

As shown from Debtor's unsuccessful efforts over the past seven years, Debtor is unable to prosecute a Chapter 13 case and complete a Chapter 13 Plan. Debtor has successfully used the Chapter 13 process, with the assistance of counsel, to fend off Movant foreclosing on the Property.

In one sense, the unsuccessful Chapter 13 Plan strategy has been very financially successful for Debtor. When Debtor and counsel commenced the first unsuccessful Chapter 13 case in August 2011, the Danjac property was stated to have a value of only \$414,958. 11-3920; Schedule A, dckt. 20 at 3. Debtor stated the secured claim of Movant to be (\$398,575), rendering no recoverable value for Debtor and yielding a homestead exemption of \$0.00.

In 2018, Debtor states that the value of the property has almost doubled to \$726,143. Schedule A/B, Dckt. 1 at 13. With secured claims of (\$578,402.99) (as stated in Proofs of Claim Nos. 5 and 7), after allowing for 8% costs of sale, the rise in real estate values has created an equity of around \$90,000 which did not exist in 2011. Debtor could sell the property, pay the secured claims, and retain all of the \$90,000 as Debtor's homestead exemption – if Debtor would and could prosecute a plan to preserve the value and not merely perpetuate further defaults.

Cause has been shown for granting relief from the automatic stay pursuant 11 U.S.C. § 362(d)(1). Debtor has tried, with the assistance of counsel, multiple times to prosecute a Chapter 13 case and failed. Debtor has substantially defaulted to payment of Movant's obligations during the seven years of failed bankruptcy cases. Fortunately, the rising real estate market has bailed Debtor out and "created" value so that Movant's claim can be paid and Debtor can now realize a formerly non-existent homestead exemption.

During the seven years of Debtor's, with the assistance of counsel, Chapter 13 failures, Movant's secured claim has grown from (\$398,575) to (\$578,402.99) – a 45% increase in debt.

Debtor now comes in, with a new attorney, offering nothing more than a statement to allow the new attorney (who is also a known, established consumer attorney) time to amend the schedule and file a plan. Nothing is presented about what plan, if any, could be proposed after seven years of failures. Debtor, and the latest counsel, offer no adequate protection payments or any amounts notwithstanding Debtor not having made payments to Movant. It appears that no payments have been made by Debtor to the Trustee given that Debtor's proposed Chapter 13 Plan provides for \$0.00 in monthly plan payments. Plan, Dckt. 6.

Debtor is not prosecuting this bankruptcy case in good faith. Debtor is not performing Debtor's duties required under the Bankruptcy Code. Debtor and the current counsel, showing up at the hearing on the Motion for relief and merely asking for further delay does not demonstrate good faith. It does not demonstrate feasibility of a plan in this case.

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.

## Prospective Relief from Future Stays

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

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Here, Debtor has filed six bankruptcies since 2011. Dckt. 37 at 48-52. The most recent petition before the instant petition was filed on February 14, 2018 and dismissed on March 15, 2018. Dckt. 37 at 52.

- A. Case No. 11-39208
  - 1. Filed: August 5, 2011
  - 2. Chapter 13
  - 3. Dismissal Date: October 14, 2011
  - 4. Reason for Dismissal: Dismissed for ineligibility.
  
- B. Case No. 11-46417
  - 1. Filed: November 7, 2011
  - 2. Chapter 13
  - 3. Dismissal Date: July 3, 2013
  - 4. Reason for Dismissal: Motion to Dismiss based on material default under terms of the Plan and exceeding the maximum time allowed under 11 U.S.C. § 1322(d).
  
- C. Case No. 14-25862
  - 1. Filed: May 31, 2014
  - 2. Chapter 13
  - 3. Dismissal Date: November 3, 2014
  - 4. Reason for Dismissal: Debtor failed to comply with Order that Debtor obtain confirmation of an amended plan within 75 days of the order's entry date.
  
- D. Case No. 14-32084
  - 1. Filed: December 12, 2014
  - 2. Chapter 13
  - 3. Dismissal Date: January 25, 2016
  - 4. Reason for Dismissal: Motion to Dismiss based on delinquency under the Plan, failure to file and confirm an amended plan, failure to provide business documents, and failure to report prior filings.
  
- E. Case No. 18-20835

1. Filed: February 14, 2018
2. Chapter 13
3. Dismissal Date: March 15, 2018
4. Reason for Dismissal: failure to timely file documents

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtors to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case cannot have been for any bona fide, good faith reason in light of persistent serial filings. In effect, this is a series of bankruptcy attempts by Debtors. Each successive filing over the past seven years, followed each time by the dismissal of Debtor's petition on other grounds, is indicative of a scheme to hinder and delay Movant with each successive stay triggered by their petitions.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.

### **Request for Attorney's Fees**

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorney's fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorney's fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorney's fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put

on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

The court may consider the award of attorney's fees as a post-judgment motion (Federal Rule of Civil Procedure 52(b) and Federal Rule of Bankruptcy Procedure 7052, 9014). However, in doing so, the court will consider what are the reasonable fees for the motion for relief, and not include otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorney's fees due to the failure to state such fees and provide evidence for the court to consider at the time of the hearing on the Motion. Clearly Movant knew it wanted to recover attorney's fees and could have provided the basis for such an award with this Motion.

### **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.

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

The Court's Findings of Fact and Conclusions of Law are Stated in the Civil Minutes from the hearing on this Motion.

The Motion for Relief from the Automatic Stay filed by Wells Fargo, N.A. 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 Wells Fargo, N.A., 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 5543 Danjac Circle, 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.

**IT IS FURTHER ORDERED** that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:

“If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.”

**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.

No other or additional relief is granted.