

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

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

**November 21, 2023 at 1:30 p.m.**

1. <a href="#"><u>23-23620</u></a> -E-11	ROBERT P. OBREGON DDS  INC. Gabriel Liberman	<b>M O T I O N   A U T H O R I Z I N G MAINTENANCE OF PREPETITION CASH MANAGEMENT SYSTEM AND MAINTENANCE OF PREPETITION BANK ACCOUNTS O.S.T 11-6-23 <a href="#"><u>[36]</u></a></b>
<a href="#"><u>GEL</u></a> -3		

**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 creditors and Office of the United States Trustee on November 7, 2023. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion Authorizing the Maintenance of Prepetition Cash Management Systems and Bank Accounts was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, 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, -----.

<b>The Motion Authorizing the Maintenance of Prepetition Cash Management Systems and Bank Accounts is granted.</b>
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The Debtor in Possession, Robert P. Obregon (“Debtor in Possession”) moves this court to authorize Debtor in Possession’s use of prepetition cash management systems and bank accounts during the duration of this Chapter 11 case. Dckt. 36. According to U.S. Trustee Guideline 3 (“Guidelines”), “[a]fter filing the bankruptcy petition, the debtor must immediately close all existing bank accounts and open new accounts.” *United States Trustee Chapter 11 Operating and reporting Guidelines for Debtors in Possession*, U.S. Department of Justice Office of the United States Trustee, <https://www.justice.gov/ust-regions-r17/file/guidelines.pdf/download> (revised March 31, 2023) (last visited November 15, 2023) .

Debtor in Possession submits his own Declaration in support of this Motion. Declaration, Dckt. 39. Debtor in Possession testifies that his prepetition cash management systems and bank accounts are essential to the seamless operation of his business, and closing those bank accounts would cause disruption. *Id.* at ¶ 9. Debtor in Possession further testifies that the U.S. Trustee provided him with a list of banks to call and inquire about opening a Debtor in Possession account; however, after contacting over 30 banks, none of them would provide a special debtor in possession account. *Id.* at ¶ 12. Finally, Debtor in Possession’s current bank, Wells Fargo, was also uncooperative in transitioning to a debtor in possession account upon request. *Id.* at ¶ 15.

No opposition has been filed as of November 15, 2023.

## DISCUSSION

11 U.S.C. § 363(c)(1) provides:

If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). This section of the Code gives a Debtor in Possession the right to operate its business in the ordinary course without notice or a hearing. Courts have granted a Debtor in Possession’s request to use its prepetition cash management systems when that use is consistent with 11 U.S.C. § 363(c)(1). *See, e.g., In re The Charter Co.*, 778 F.2d 617, 618 (11th Cir. 1985).

According to U.S. Trustee Guidelines for Region 17 (covering the Northern and Eastern districts of California and Nevada),

a. The debtor must deposit all bankruptcy estate funds in a designated DIP Account. The debtor also must open and maintain separate DIP accounts as follows: (I) one solely for monies required for timely paying taxes, including, but not limited to, federal, state, local, and payroll taxes, (ii) one for cash collateral in accordance with section 363(c)(4), and (iii) one for paying bills incurred during case administration. The debtor may also be required to open and maintain a separate DIP Account for items such as payroll and secured creditors payments.

b. The debtor must maintain each DIP Account with a financial institution that has entered into an authorized depository agreement (“ADA”) with the United States

Trustee and is designated an “Authorized Depository.” The debtor also must advise the bank that it is opening the account for a debtor in a bankruptcy proceeding so the bank properly designates each DIP account as one that is subject to the terms and conditions of the ADA. A list of each Authorized Depository for the judicial districts within Region 17 is available on the Region 17 website at: <https://www.justice.gov/ust-regions-r17/region-17-general-information>.

c. Checks for each DIP Account must be pre-numbered by the bank. The debtor must send the United States Trustee a copy of the signature card or account application that contains the name of the account for each DIP Account. Alternatively, the debtor may provide a copy of a voided original check for each DIP Account.

*United States Trustee Chapter 11 Operating and reporting Guidelines for Debtors in Possession*, U.S. Department of Justice Office of the United States Trustee, <https://www.justice.gov/ust-regions-r17/file/guidelines.pdf/download> (revised March 31, 2023) (last visited November 15, 2023). The Guidelines are in place to ensure that there is a clear demarcation between pre- and postpetition cash management systems and income while Debtor in Possession operates its business in the ordinary course, preventing mingling and confusion of pre- and postpetition funds. The court is not aware of any provision in the Bankruptcy Code requiring Debtor in Possession to open separate bank accounts postpetition, although the Code does provide that a Debtor in Possession must segregate and account for cash collateral funds postpetition. *See* 11 U.S.C. § 363(c)(4).

In this case, Debtor in Possession’s evidence reveals separate bank accounts and cash management systems are not necessary. First, such a process would hinder the normal operation of Debtor in Possession’s business. Debtor in Possession must make payments to employees and other entities in the ordinary course of business. Debtor in Possession has a process set up in his current cash management systems where necessary payments are automatically drawn. These payments would become impossible until such a reorganization is complete. Further, Debtor in Possession has provided evidence that the U.S. Trustee’s list of banks is not willing to work with the Debtor in Possession in creating postpetition bank accounts, suggesting that the Debtor in Possession would experience great difficulty in making routine payments.

On November 8, 2023, the court entered an Interim Order authorizing the Debtor in Possession to maintain the existing accounts. Order; Dckt. 49.

At the heart of the matter, Debtor in Possession provides argument that he will clearly demarcate pre- and postpetition funds in his current cash management systems and bank accounts, thus achieving the desired purpose of the Guidelines. Debtor in Possession argues that, “Debtor will advise the Bank not to honor checks issued prior to the commencement of the Chapter 11 Case, except as authorized by this Court. By so advising the Bank, Debtor will have achieved the goals of the bank-account-closing requirement--(a) establishing a clear demarcation between prepetition and post-petition checks, and (b) blocking the inadvertent payment of prepetition checks--without disrupting Debtor’s ongoing operations.” Memo, Dckt. 37, p. 5.

Based upon the information provided and the current “challenges” in establishing new debtor in possession accounts, the continued use of the existing accounts, with the Debtor in Possession having the Bank update the account holder to be the Debtor in Possession, the purposes underlying the normal requirement for establishing new accounts can be satisfied. With the Debtor in Possession establishing a

clear demarcation, the court finds it unnecessary to require Debtor in Possession to open postpetition bank accounts.

Therefore, the Motion is granted, and the Debtor in Possession is authorized to maintain prepetition cash management systems and bank accounts in his Chapter 11 case.

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 Authorization for the Debtor/Debtor in Possession to maintain the pre-petition bank accounts of the Debtor filed by Robert P. Obregon, DDS, Inc., the Debtor in Possession, 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 is granted and the Debtor/Debtor in Possession is authorized to authorized and empowered to: 1) Maintain its Cash Management System and continue to use its Wells Fargo Bank Account, acct. No. XXXXXX4003 in existence as of the Petition Date and as listed and described; 2) treat the Bank Account for all purposes as debtor-in possession account; 3) use, in their present form, existing checks and other documents related to the Bank Account; 4) pay post-petition ordinary course bank fees in connection with the Bank Account; 5) perform their obligations under the documents and agreements governing the Bank Account.

**IT IS FURTHER ORDERED** that the existing deposit agreements between the Debtor and Bank shall continue to govern the post-petition cash management relationship between the Debtor/Debtor in Possession and the Bank, and all of the provisions of such agreements, including, without limitation, the termination and fee provisions, shall remain in full force and effect. Either the Debtor or the Bank may, without further Order of this Court, implement changes to the cash management system and procedures in the ordinary course of business pursuant to the terms of those certain existing deposit agreements, including, without limitation, the opening and closing of bank accounts.

**IT IS FURTHER ORDERED** that the Bank is, and has been pursuant to the Interim Order of this Court, authorized to debit the Debtor's accounts in the ordinary course of business without the need for further order of this Court for: (i) all checks drawn on the Debtor's accounts which were cashed at such Bank's counters or exchanged for cashier's checks by the payees thereof prior to the Petition Date; (ii) all checks or other items deposited in one of Debtors' accounts with such Bank prior to the Petition Date which have been dishonored or returned unpaid for any reason, together with any fees and costs in connection therewith, to the same extent the Debtors were responsible for such items prior to the Commencement Date; and (iii) all undisputed prepetition amounts outstanding as of the date hereof, if any, owed to any Bank as service charges for the maintenance of the cash management system.

**IT IS FURTHER ORDERED** that The Bank Account shall be designated debtor-in-possession accounts by the Bank

2. [23-23131](#)-E-13  
[RAS-1](#)

DIANE GARCIA  
Harry Roth

**MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR RELIEF FROM CO-DEBTOR STAY  
10-12-23 [17]**

**WILMINGTON SAVINGS FUND  
SOCIETY, FSB VS.**

**THIS MOTION FOR RELIEF FROM THE STAY WILL  
BE HEARD ON THE COURT'S 2:00 CALENDAR ON  
NOVEMBER 21, 2023 HEARING ON THE MOVANT'S  
OBJECTION TO CONFIRMATION**

**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 October 11, 2023. By the court's calculation, 41 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 hearing on the Motion for Relief from the Automatic Stay is continued to  
XXXXXXX .**

Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust (“Movant”), seeks relief from the automatic stay and co-debtor stay with respect to Diane Garcia’s (“Debtor”) real property commonly known as 571 Daniels Street, Woodland, California 95695 (“Property”). Movant has provided the Declaration of Genevieve A. Jacobs to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Movant improperly filed this Declaration as an exhibit. Exhibit B, Dckt. 20.

In its supporting Declaration, Movant argues that the terms of the Note and Mortgage have been in default and remain in default since September 9, 2023. Exhibit B, Declaration, Dckt. 20.

## **CHAPTER 13 TRUSTEE’S OPPOSITION**

David P. Cusick (“the Chapter 13 Trustee”) filed an Opposition on November 6, 2023. Dckt. 23. The Chapter 13 Trustee asserts that the case was filed on September 29, 2023 and a plan has not been confirmed yet. Opposition, Dckt. 23. The Debtor has paid \$2,433.20 to the Trustee to date where the Plan payments are \$2,433.20 per month for 60 months with 0% unsecured creditors. Declaration, Dckt. 24. The Debtor is current under the Plan through October 2023. *Id.*

The Debtor identified the Property on Schedules A/B and identified Selene Finance on Schedule D and in Class 1 of the proposed Plan where the monthly payment is \$1,709.00 and mortgage arrears are listed as \$27,000.00. *Id.* Schedule D states the amount of the claim is \$236,537.04 and the value of the subject property is \$360,000.00. *Id.* Trustee has distributed one mortgage payment to date, on October 31, 2022, in the amount of \$1,709.00, meaning the mortgage is current under the proposed Plan. *Id.*

Additionally, the Trustee notes Movant also filed an Objection to Confirmation based on the Debtor’s Plan proposing \$27,000 in mortgage arrears, and Movant plans to file its proof of claim asserting \$41,961.98 in arrears. Movant filed its Proof of Claim on November 7, 2023, asserting \$40,914.02 in arrears. POC 2-1. Trustee further argues that because the Declaration has not been filed as a separate document but rather as Exhibit B, it is difficult to find the Declaration within the court’s docket. Opposition, Dckt. 23.

Finally, Trustee argues that the Certificate of Service shows service was accomplished on November 11, 2023, but it fails to list the Declaration as a document that was served on the parties. *Id.* Where the Electronic Record is the Official Record for eligible documents filed, LBR 5005-1(a), and the supporting Declaration does not appear in the electronic record as a separate document, the Trustee would oppose the Movant’s Motion as not sufficiently supported by evidence. *Id.*

## **DISCUSSION**

By failing to file the Declaration as a separate document, Movant has violated Local Bankruptcy Rule 9004-2(c)(1). This lack of compliance is grounds to deny the motion. Under Local Bankruptcy Rule 9004-1, all pleadings and documents shall be formatted consistent with LBR 9004-2, and any attorney or trustee who files a document in violation of this Rule may be subject to monetary or non-monetary sanctions.

Furthermore, Movant is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number for multiple separate motions. That is not correct. The court will consider the motion, but counsel

is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

At the hearing, **XXXXXXXXXX**

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 \$259,007.78. Proof of Claim 2-1. However, Movant did not provide the court with any amount owed supported by its Declaration, and the amounts listed on Proof of Claim 2-1 and Relief from Stay Information Sheet contain discrepancies. At the hearing, **XXXXXXXXXX**.

The value of the Property is determined to be \$360,000.00 as stated in Schedules A/B filed by Debtor. Schedule A/B, Dckt. 1.

### **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).

Movant asserts that cause exists to lift the stay because Debtor has not given “assurances. . . indicating that [Debtor] intend[s] to cure prior missed payments.” Dckt. 17 p. 7. This argument is without merit. Movant cites to no case law or offers any justification why a failure of assurances to cure arrears somehow gives rise to a lack of adequate protection. On the contrary and by Movant’s own admission, Debtor has \$100,110.59 of equity in the Property and is current in its proposed Plan, including on mortgage payments to Movant. These facts suggest adequate protection is present. 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).

### **Co-Debtor Stay**

Movant has not provided sufficient grounds to grant relief from the co-debtor stay under 11 U.S.C. § 1301(a) as the court did not find cause to grant relief under 11 U.S.C. § 362(d)(1).

### **11 U.S.C. § 362(d)(4)**

### **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, the Debtor does have a history of repeat filings.

- A. Case No. 13-24818
  - 1. Filed: April 8, 2013
  - 2. Chapter 13
  - 3. Dismissal Date: March 5, 2015
  - 4. Reason for Dismissal: Failure to make plan payments.
- B. Case No. 17-24058
  - 1. Filed: June 19, 2017
  - 2. Chapter 13
  - 3. Dismissal Date: September 21, 2018
  - 4. Reason for Dismissal: Failure to make plan payments.
- C. Case No. 18-27077
  - 1. Filed: November 9, 2018
  - 2. Chapter 13
  - 3. Dismissal Date: March 17, 2020
  - 4. Reason for Dismissal: Debtor failed to become current on Plan payments.
- D. Case No. 20-23209
  - 1. Filed: June 27, 2020
  - 2. Chapter 13
  - 3. Dismissal Date: June 3, 2022
  - 4. Reason for Dismissal: Failure to make plan payments.
- E. Case No. 22-22103
  - 1. Filed: August 23, 2022
  - 2. Chapter 13
  - 3. Dismissal Date: May 12, 2023
  - 4. Reason for Dismissal: Converted to Chapter 7 on March 10, 2023, then dismissed for failure to appear at §341(a) Meeting of Creditors.
- F. Case No. 23-21927
  - 1. Filed: June 13, 2023
  - 2. Chapter 7
  - 3. Dismissal Date: July 5, 2023
  - 4. Reason for Dismissal: Failure to file information.



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.

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 may have been for a *bona fide*, good faith reason in light of the fact the Debtor has made payments to the Trustee, is current with the Plan, and has appropriately listed the Movant as a Class 1 creditor.

Continuance of Hearing  
With the Concurrence of Movant

The proposed Chapter 13 Plan is to be funded with \$2,433.20 a month by Debtor. Plan; Dckt. 3. From that the following amounts are to be paid:

- A. \$1,850 to Debtor's Counsel.....(\$31) a month amortized
- B. Chapter 13 Trustee Fees .....(\$195) a month, estimated
- C. Movant, Post-Petition Payments.....(\$1,709) a month
- D. Movant, Pre-Petition Arrearage Cure.....(\$450) at estimated \$27,000 arrearage
- E. Unsecured Claim Dividend.....(\$0.00)

The above amounts total (\$2,385) a month, leaving a \$48.20 a month surplus.

In Proof of Claim 2-1 Movant asserts a pre-petition arrearage of (\$40,914.02), which is (\$13,914.02) higher than the (\$27,000) listed for its Class 1 Claim in the Plan. If there is such higher pre-petition arrearage, that would require an additional (\$231.90) a month Arrearage Cure payment to Movant. That leaves the Plan under funded by \$183.70 a month.

On Schedule I, Debtor lists having monthly take-home income of \$4,098. Dckt. 1 at 36-37. On Amended Schedule J Debtor lists having a family unit of four persons, consisting of the Debtor, two grandchildren over 18 years of age, and her Sister for which she provides care services. Dckt. 15 at 5-6.

On Amended Schedule J, Debtor lists having monthly expenses of only (\$1,238.46) for the expenses of this four person family unit (excluding mortgage payment, property taxes, and insurance). Monthly expenses of only (\$1,238) a month for expenses is questionable. Some questionable expenses for a family unit of four adults are:

- A. Electricity/Natural Gas.....(\$100)
- B. Food and Housekeeping Supplies.....(\$300); After (\$35) for housekeeping supplies, (\$66.25) per adult, which is (\$0.73) per adult per meal in a 30 day month

- C. Clothing.....(\$100)
- D. Medical and Dental.....(\$ 50)
- E. Transportation.....(\$20); Debtor lists no vehicles on Schedule A/B

It may be that Debtor, and her family unit of four adults can reasonably state monthly expenses of only (\$1,238.46) a month, or that Debtor and counsel constructed Amended Schedule I to the MAI (made as instructed) expenses to make the projected monthly disposable income to be the \$2,859 to make it appear that Debtor can fund the Plan.

While questionable, this appears to be the Debtor's last opportunity in this string of bankruptcy filings, to use Chapter 13 to cure the arrearages and prevent a foreclosure on her residence.

By continuing this hearing, Debtor can have that "last chance" and Movant can keep the issue before the court of whether Debtor's financial information is inaccurate and the Plan cannot be performed.

**Attorneys' Fees Requested**  
**Request for Attorneys' Fees**

Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion. A claim for attorney's fees and related nontaxable expenses must be made by 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.

With the court continuing the hearing, Movant will have the opportunity to request the court to order and the consideration of fees for this Contested Matter heard as part of this Motion, and the required evidence be filed for consideration at a continued hearing.

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

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court. With the hearing being continued, the court will also address this request for relief at a continued hearing.

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 Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, not individually but as Trustee for Premium Mortgage Acquisition Trust ("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 hearing on the Motion for Relief is continued to 1:30 p.m. on **XXXXXX**, 2023..

3. <a href="#"><u>23-22845-E-13</u></a> <a href="#"><u>PGM-1</u></a>	<b>GEORGENE HICKS AND RICARDO ESPARZA Peter Macaluso</b>	<b>CONTINUED AMENDED MOTION TO IMPOSE AUTOMATIC STAY 9-20-23 [42]</b>
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**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 Setting the Hearing on the Motion to Impose the Automatic Stay was served by the Clerk of the Court on Debtor (*pro se*), Creditors, and Chapter 13 Trustee as stated on the Certificate of Service on August 29 and 30, 2023. The court computes that 14 and 13 days' notice has been provided.

<p><b>The hearing on the Motion to Impose the Automatic 362(a) Stay is <b>XXXXX</b>.</b></p>
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On August 22, 2023, Debtors Georgene Hicks and Ricardo Esparza, Jr. delivered to the court a letter requesting "an automatic 30 day bankruptcy stay." The letter describes some family matters the Debtors have been addressing and difficulty using the online filing program. Additionally, it states that Debtors are seeking to engage counsel to represent them in this Bankruptcy Case.

Debtors have filed two prior cases which were pending and then dismissed within one year of the August 22, 2023 filing of the current Bankruptcy case. The two prior cases and their dismissal dates are: 23-21587, dismissed on June 14, 2023, and 22-22894, dismissed on November 21, 2022.

Congress has provided that in the event of there having been two or more bankruptcy cases of an individual debtor that were pending and dismissed within one year of the subsequently filed bankruptcy case, then no automatic stay goes into effect into the subsequently filed bankruptcy case. 11 U.S.C. § 362(c)(4)(A). The statute further provides in 11 U.S.C. § 362(c)(4)(B) and (C) that the Bankruptcy Court may impose the stay provided for in 11 U.S.C. § 362(a), stating:

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; . . . .

With respect to the obligation on the debtor or other party in interest seeking imposition of the § 362(a) stay to show that the filing of the subsequent case is in good faith, 11 U.S.C. § 362(c)(4)(D) (emphasis added) provide for a presumption of the filing not being in good faith as follows:

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(I) as to all creditors if—

**(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;**

**(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title** or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

Looking at the Debtors' two prior cases that were pending and dismissed within the prior two years: (1) case 23-21587 was dismissed due to Debtors' failure to file the Schedules, Statement of Financial Affairs, and a Chapter 13 Plan; and (2) case 22-22894 was dismissed due to Debtor's failure to file Schedules, Statement of Financial Affairs, and a Chapter 13 Plan.

The presumption of the subsequent case not being filed in good faith must be overcome by evidence demonstrating good faith filed by Debtors.

The court construes Debtor's Letter to be a Motion for the Imposition of the Automatic Stay as provided in 11 U.S.C. § 362(c)(4)(B). Such Motion must be set for noticed hearing; however, the court can consider imposing the automatic stay on an *ex parte* basis pending a hearing on the Motion. In reviewing the Motion, there is no evidence submitted in support of the Motion and it does not clearly state the grounds upon which the requested relief is proper.

### **September 12, 2023 Hearing**

The court's review of the Docket discloses that no supplemental pleadings were filed by Debtors by the September 6, 2023 deadline set by the court in the Interim Order imposing the Stay and setting the September 12, 2023 Hearing. Order; Dckt. 15.

Counsel for Debtor appeared at the hearing and explained how the diligent prosecution of this case will proceed. The court continues the hearing, with the Stay remaining in full force and effect, pending further hearing on this Motion.

### **DEBTOR'S AMENDED MOTION TO IMPOSE AUTOMATIC STAY**

Debtor filed an Amended Motion for an Order Obtaining and Imposing the Automatic Stay pursuant to 11 U.S.C. § 362(c)(4)(B) on September 20, 2023. Dckt. 42. The Debtor notes that the original motion to obtain and impose the automatic stay was filed before the expiration of the initial 30 days required by statute. Further, the Debtor argues that under 11 U.S.C. § 362(c)(3)(B), the code allows for a party to request for an extension of the automatic stay upon motion from a party in interest, and the party must show that the most recent filing was filed in good faith. *Id.*

The Debtor cites to *In re Sarafoglou*, 345 B.R. 19 (Bankr. D. Mass. 2006) for the formula to evaluate whether a second bankruptcy was filed in bad faith. Amended Motion, Dckt. 42. The court in *In re Sarafoglou* considers the following factors: (1) whether the case was filed to "obtain legitimate bankruptcy law protection; (2) whether the debtor "is eligible for such protection and relief"; (3) whether the debtor "is pursuing such protection and relief honestly"; and (4) whether the debtor "has sufficient resources to render the pursuit meaningfully." *In re Sarafoglou*, 345 B.R. 19, 24 (Bankr. D. Mass. 2006)

The Debtor states the new filing was filed in good faith, that it has not acquired any new debt since the previous cases were dismissed, and it has proposed a 100% repayment Plan. Declaration, Dckt. 45. Now having retained counsel, Debtor believes they will be able to propose a solid Chapter 13 Plan that will allow the Debtor to pay the creditors to the best of their ability. *Id.* The Debtor asks the court to grant the Motion to allow the Debtor to be protected under the bankruptcy laws, reorganize their debts, keep their home, and pay their creditors. *Id.* The court also notes that Debtor has filed its Chapter 13 Plan, Form 122C-1, Schedules A/B, C, D, E/F, G, H, I, and J, Statement of Financial Affairs, and a Summary of Assets and Liabilities, correcting that defect in the case.

### **TRUSTEE'S OPPOSITION TO DEBTOR'S AMENDED MOTION**

On October 17, 2023 Trustee filed an Opposition to Debtor's Amended Motion. Dckt. 54. In its Opposition, Trustee states:

1. Trustee notes Debtor is current under plan payments as of September 25, 2023.

2. Trustee directs the court's attention to Debtor's two previous bankruptcy cases, both filed and dismissed within a year of this case.
3. Debtor still has not filed its most recent tax return information.

Dckt. 54.

Trustee's objections are well-taken; however, Debtor has taken substantial steps toward confirmation of a viable Plan, and Debtor is current on plan payments.

#### **October 20, 2023 Opposition Filed By First Franklin**

Computershare Asset Management, LLC on behalf of First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-FFC, U.S. Bank National Association, as Trustee ("First Franklin"), filed an Opposition to the Amended Motion. Dckt. 58. On August 22, 2023, the Property was sold at a foreclosure sale to First Franklin.

It is argued that there was no automatic stay in effect when the sale was conducted on August 22, 2023. The 11 U.S.C. § 362(c)(4) "Automatic" Stay was only later entered on September 1, 2023, which cannot act retroactively.

#### **October 24, 2023 Hearing**

A review of the Debtor's proposed Chapter 13 Plan (Dckt. 38) discloses that the Debtor will fund the plan with a \$30,000 payment in month one and then \$3,000 a month for the next fifty-nine months of the Plan. The Trustee's counsel reported at the hearing that the \$30,000 has been received and is being held by the Trustee.

Counsel for the Debtor reported that he believed that the Notice of Sale provided by his client stated that the sale was not to be conducted until September 7, 2023. Counsel for First Franklin stated that she has only recently come into the case and the information provided to her was that the foreclosure sale occurred on August 22, 2023.

Counsel for Debtor and Counsel for First Franklin agreed to a continuance so that Debtor's counsel can provide the information about a Notice of Sale for a September 7, 2023 date to First Franklin's counsel. This also affords First Franklin's counsel time to further review the matter with her client.

In light of the issue of whether the Property is still owned by the Debtor and whether there is any secured claim to be paid, the Chapter 13 Trustee is authorized to hold the \$30,000.00 pending the continued hearing and further order of the court.

An unauthenticated copy of the Foreclosure Trustee's Deed has been provided by First Franklin. Exhibit 1; Dckt. 59. This Trustee's Deed has a recording date of September 15, 2023. The Trustee's Deed is dated September 7, 2023, and on page 3 of the Exhibit states that the Foreclosure Trustee's sale was conducted on August 22, 2023.

## FIRST FRANKLIN'S SUPPORTING DECLARATION

On October 30, 2023, First Franklin submitted the Declaration of Bounlet Louvan in support of its October 20, 2023 Opposition. Declaration, Dckt. 67. In her Declaration, Ms. Louvan testifies as to the details of First Franklin's foreclosure of the property commonly known as 109 Moylan Ct., Folsom, California, 95630 ("Property"). Ms. Louvan testifies the foreclosure sale indeed occurred on August 22, 2023, before the automatic stay was imposed. *Id.* at p. 3. Ms. Louvan authenticates supporting exhibits also submitted on October 30, 2023, showing the details of the foreclosure. Exhibits, Dckt. 67.

### November 7, 2023 Hearing

First Franklin outlines the time line for the nonjudicial foreclosure by which it asserts title to the Property as follows:

- Trustee's Notice of Sale was recorded on September 13, 2022.
- Debtor's prior Case #1, 22-22894, Filed on November 8, 2022.
- Trustee's Sale was set for.....November 8, 2022
- Trustee's Sale postponed to.....December 13, 2022
- Debtor's prior Case #1, 22-22894, Dismissed on November 21, 2022.
  - Trustee's Sale postponed to.....February 14, 2023
- Debtor's prior Case #2, 23-21587, filed on May 16, 2023
  - Trustee's Sale postponed to.....May 16, 2023
  - Trustee's Sale postponed to.....June 20, 2023
- Debtor's prior Case #2, 23-21587, dismissed on June 14, 2023.
- Debtor's current Case #3, 23-22845, filed on August 22, 2023.
  - Trustee's Sale postponed to.....August 22, 2023
- Trustee's Sale conducted on August 22, 2023.
  - First Franklin was the winning bid.
- Court Order Imposing Stay Entered.....August 28, 2023 (Dckt. 12)
  - Amended Order Entered.....September 1, 2023 (Dckt. 15)
- Trustee's Deed signed September 7, 2023

- On September 11, 2023, this bankruptcy case was dismissed due to Debtor’s failure to file documents.
  - Court vacated the dismissal order on .....September 13, 2023
- Trustee’s Deed recorded..... September 15, 2023

The judge in this case recently participated in a judicial panel with the Hon. Rene Lastreto, in which Judge Lastreto commented on a recent decision he issued relating to substantial changes in the California nonjudicial foreclosure laws and when a nonjudicial sale is final. *See, In re Hager*, 651 B.R. 873 (Bankr. E.D. Cal. 2023). These changes are substantial to and alter what had been a straightforward, clear, and efficient nonjudicial foreclosure process. California Civil Code § 2924h and § 2924m create a series of time periods after which a sale at a nonjudicial foreclosure sale is deemed to be final. If the purchaser is not a prospective owner-occupant, the sale is not deemed final until fifteen days after the foreclosure trustee’s sale.

Here, the sale occurred on August 22, 2023, the stay was imposed on August 28, 2023 (six days after the sale), and the fifteenth day after the nonjudicial foreclosure sale expired on September 6, 2023 (nine days after the stay was imposed). California Civil Code § 2924m(f) states, “(f) Title to the property shall remain with the mortgagee or trustor until the property sale is deemed final as provided in this section.”

Federal Bankruptcy Law has not changed with respect to when post-petition documentation or perfection of interests may be made, providing:

11 U.S.C. § 546

(b)

(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 546(b). See, 11 U.S.C. § 362(b)(3) providing an exception to the automatic stay for perfection of an interest post-petition, which states:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

...

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee’s rights and powers are subject to such perfection under section 546(b) of this title or to the



extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title; . . . .

Neither party has addressed the application of these new California laws to nonjudicial foreclosure sales, the effect of the sale not being statutorily “Final” for fifteen days in a situation where there is not an owner-occupant purchaser, and this bankruptcy case being filed and the automatic stay imposed before the expiration of the fifteen day period that applies when it is not an owner-occupier purchaser at the foreclosure sale. As the U.S. Supreme Court “noted” in its decision in *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), while the trial court has to rely upon the parties to provide the evidence, it is the for the trial court to get the law right, even if the parties do not.

At the hearing, Debtor’s counsel requested a continuance so that further discussions with Creditor may proceed for a consensual workout. Neither party addressed the applicable California law and the interim stay imposed in this case.

### **Debtor’s Supplemental Briefing**

On November 14, 2023 Debtor filed its supplemental briefing with the court to address the court’s concern over California Civil Code § 2924m(f). Dckt. 73. In its supplemental briefing, Debtor states:

1. According to California Civil Code § 2924m(f), the sale became final on September 6, 2023, 15 days after the winning bid was accepted. This is because there is a 15-day period to overbid from the date of the sale.
2. Debtor received its automatic stay on August 28, 2023, and so finalizing the sale after this date violates the stay.

Dckt. 73. Other than parroting the provision of California Civil Code § 2924m(f), Debtor offers no analysis of what it means that the sale is not “Final” for fifteen days, whether the sale becoming final is the mere passage of time, with no act or action required by any other person. Congress provides the following with the post-petition perfection of interests in property:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

. . .

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee’s rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

11 U.S.C. § 362(b)(3)

(b)

(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 546.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

11 U.S.C. § 547(e)(2)(A).

Here, Debtor is seeking to assert that the automatic stay applies, but offers the court with little legal analysis of how the 15 day delay period in the sale becoming final (it does not state that the sale is delayed for 15 days) applies in bankruptcy cases.

### **November 21, 2023 Hearing**

At the hearing, **xxxxxxx**

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

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

The Motion to Impose the Automatic Stay filed by Georgene Hicks and Ricardo Esparza, Jr. (“Debtor”) 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 hearing on the Motion to Impose the Automatic 362(a) Stay is **xxxxx**.

# FINAL RULINGS

4. [23-21552-E-13](#)  
[PLG-3](#)

RONALD RATLIFF

SCHEDULING CONFERENCE RE:  
OBJECTION TO CLAIM OF U.S. BANK  
NATIONAL ASSOCIATION, CLAIM  
NUMBER 2  
9-22-23 [\[55\]](#)

**Final Ruling:** No appearance at the November 21, 2023 hearing is required.

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Debtor's Atty: Rabin Pournazarian

Notes:

Set by order of the court dated 10/26/23 [Dckt 55]

Stipulation Withdrawing Proof of Claim 2-1 and Withdrawing Debtor's Objection to Claim filed 11/13/23 [Dckt 70]

**The Objection to Proof of Claim Number 2-1 of U.S. Bank National Association is overruled without prejudice as moot, the parties having filed a Stipulation withdrawing the Claim and dismissing without prejudice the Objection (Dckt. 70).**

Debtor Ronald LeRoy Ratliff and creditor U.S. Bank National Association having filed a Stipulation for Dismissal of Claim 2-1 and the Debtor's Objection to Claim 2-1, Dckt. 70, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Objection to Proof of Claim 2-1 is overruled as moot, and the matter is removed from the calendar.**

**CENTER STREET LENDING VIII  
SPE, LLC VS.**

**Final Ruling: No appearance at the November 21, 2023 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 Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2023. By the court’s calculation, 36 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

**The Hearing on the Motion for Relief from the Automatic Stay is continued to  
10:00 a.m. on November 30, 2023.**

**CONTINUANCE TO CHAPTER 7 HEARING  
DATE**

**November 21, 2023 Hearing**

On November 13, 2023, the court entered its Order reconverting this Case to one under Chapter 7. Order; Dckt. 188. On November 15, 2023, the Notice of Appointment of Nikki B. Farris as the Chapter 7 Trustee in this Case. Notice; Dckt. 189. The 341 First Meeting of Creditors in the Chapter 7 Case is set for December 11, 2023. Notice of Reconversion; Dckt. 190.

The court continues this hearing to 10:00 a.m. on November 30, 2023; the next available Sacramento Chapter 7 hearing date.

**REVIEW OF MOTION**

Movant Center Street Lending VIII SPE, LLC (“Movant”) seeks relief from the automatic stay with respect to Bella View Capital, LLC’s (“Debtor”) real property commonly known as 5425 Bacon Road, Oakland, California 94619 (“Property”). Movant has provided the Declarations of Luis Montero and Russell Enyart to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Declaration, Dckts. 63 & 65.

Movant asserts Debtor executed a note to Movant to borrow \$2,555,695.00 secured by the Property on May 3, 2021. Declaration, Dckt. 63. The note’s maturity date was on April 26, 2022. *Id.* Debtor subsequently defaulted on the note and Movant informed Debtor of its default on May 2, 2022, and again on October 3, 2022. Dckt. 61. Movant had scheduled a foreclosure sale on April 28, 2023. *Id.* Debtor filed its bankruptcy petition on that same day. *Id.*

### **Declaration of Russell Enyart**

The Declaration of Russell Enyart has been filed in support of this Motion, with Mr. Enyart providing expert witness testimony as to the value of the Property. Dec.; Dckt. 65. In the Declaration Mr. Enyart provides testimony of how he conducted his review and concludes that the value is \$2,199,000.00 due to the current state of the Property. He authenticates his Broker Price Opinion in which he provides the court with the information necessary to understand how he reached his opinion to assist the trier of fact in determining the value of the Property (not merely adopt the witnesses conclusion). See, Federal Rule of Evidence 702, which states:

#### **Rule 702. Testimony by Expert Witnesses**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Exhibit 1, the Broker Price Opinion, begins with the standard identification of comparable sales and then the expert’s adjustments for differences between the subject property and the comparables. Here, the Expert identifies three comparable properties, with list prices of \$1,565,000, \$1,375,000, and \$3,488,000. Exhibit 1; Dckt. 67 at 5. These three properties are listed to be in good or very good condition and are of substantial square footage. *Id.*

However, no information, other than the number of rooms, is provided for the Property that is the subject of this Motion. No adjustments are made for any differences in the location, condition, enhancements, and the like. The court is not provided with any information how the comparables are comparable to the subject Property.

In the Declaration Mr. Enyart does provide testimony of his investigation, including:

6. On or about April 29, 2023, I also walked the outside of the Bacon Property so that I could obtain exterior views. I also spoke with an occupant named Diarro Momar Foster, who came out of the Bacon Property. He expressed to me that he was living in the Bacon Property, in the downstairs portion of the property. He indicated that was the only section that was appropriate for occupancy and that the upstairs of the Bacon Property had been "gutted" and was not in good shape at the time of the visit.

Dec., ¶ 6: Dckt. 65. Most of the testimony in this paragraph is hearsay testimony about what Mr. Enyart heard the tenant say.

7. The Bacon Property was sold on May 7, 2021 for the price of \$2,750,000.00. But now, based on my research, analysis, and work in generating the above two reports, in its current state, my opinion is that the Bacon Property has a market value of only \$2,199,000 "as-is." This is due to its state of disrepair; the downstairs is original, and the entire upstairs has been gutted. The property is not move-in ready. Rather, my suggestion for the use of the property is that it is a fix-up project for potential investors looking for a project.

*Id.*; ¶ 7. The testimony in paragraph 6 is that Mr. Enyart only conducted an exterior review. The statements about the inside condition appear to be based on the hearsay that Mr. Enyart is repeating. While such hearsay can be something an expert considers, it is not credible evidence of the actual condition of the Property.

Mr. Enyart does not provide the court with any photographs of the Property.

The Expert's Declaration and Broker Price Opinion provide the court with little more than this is my opinion of value – take it or leave it.

## **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 \$2,773,730.64 (Dckt. 61). The testimony of Mr. Enyart and his Broker Price Opinion does not provide the court with sufficient information to determine the issue of fact – the value of the Property. Debtor's valuation as stated in Debtor's Schedule D, as Debtor valued the property at \$3,760,000.00. Schedule D, Dckt. 26.

### **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).

Movant also asserts that since the Debtor did not cure the default pre-petition and filed bankruptcy so that the automatic stay would prevent the foreclosure sale, such weighs in favor of terminating the automatic stay. Debtor commenced a reorganization under Chapter 11 (the case was erroneously filed with the Chapter 7 box checked, the Motion to Convert to Chapter 11 filed four days after the case was filed, and the Order converting the case Chapter 11 entered (Dckt. 15) seventeen days after the case was filed). There is no assertion that Debtor has filed a series of cases or that Debtor transferred the property around to get the automatic stay. Debtor did what many debtors unfortunately do, bury their heads in the sand and not make the decision to obtain bankruptcy relief until the eve (or in this case the day) of foreclosure.

A debtor filing bankruptcy to obtain the automatic stay to stop a foreclosure sale from occurring itself, without other factors, is not cause to terminate the automatic stay.

### **11 U.S.C. § 362(d)(2): Grant Relief for Cause**

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

The burden of proof to establish that there is no equity in the Property falls on the moving party. 11 U.S.C. § 362(g).

### **September 21, 2023 Hearing**

At the hearing, the court continued the hearing to 1:30 p.m. on November 21, 2023, to afford Movant the opportunity to file and serve supplemental pleadings in support of the Motion on or before October 21, 2023. Supplemental opposition pleadings, if any, shall be filed and served on or before November 3, 2023.

### **SUPPLEMENTAL BRIEFING IN SUPPORT OF CONTINUED MOTION**

On October 21, 2023 Movant filed supplemental briefing in support of the Motion for Relief. Dckt. 150. The Movant had the Bacon Property appraised on October 10, 2023, which included an interior and exterior inspection of the Bacon Property. *Id.* Numerous photographs, research of comparable residential property sales in the vicinity, and adjustments to the sale prices of nearby comparable properties were used for a more accurate comparison to the Bacon Property. *Id.* With these supplemental filings, Movant has provided the court with enough information to support its factual contention of the Bacon Property's value.

Based on those filings, it was determined that the Bacon's Property market value is approximately \$2,000,000.00. Declaration, Exhibit 2, pg. 4, Dckt. 151. On October 11, 2023, the Movant

generated a payoff quote for the loan secured by the Bacon Property at the request of Debtor's Counsel. Declaration, Exhibit 1, Dckt. 151. The payoff quote, which is good through the end of November 2023, shows a payoff amount of \$3,037,181.37, which is over a million dollars higher than the market value of the Bacon Property. Motion, Dckt. 150.

The Movant argues that there is no equity in the Bacon Property and, as discussed in the original motion, it is not necessary to an effective reorganization because the property does not generate income and the Debtor is in severe default of the loan secured against the Bacon Property. *Id.* Therefore, the Movant states the Court should grant Movant relief from the automatic stay. *Id.*

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 Center Street Lending VIII SPE, 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 Hearing on the Motion for Relief from the Automatic Stay is continued to **10:00 a.m. on November 30, 2023.**