

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

December 4, 2018 at 1:30 p.m.

1.	<u>18-25729-E-13</u> <u>NLL-1</u>	KATHRYN MONDS Gary Fraley	MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY 10-29-18 <u>[23]</u>
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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.

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, and Chapter 13 Trustee on September 11, 2018. By the court's calculation, 84 days' notice was provided. 28 days' notice is required.

The Motion To Confirm Termination Or Absence Of Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 To Confirm Termination Or Absence Of Stay is denied.
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Wells Fargo Bank, N.A. ("Movant") seeks relief in the form of an order confirming that there is no automatic stay in effect in this bankruptcy case, including with respect to the property for the bankruptcy estate commonly known as 40 Hollenbeck Lane, Auburn, California ("Property"). The relief is sought pursuant to the provisions of 11 U.S.C. § 362(c)(3)(A) [emphasis added] that provides that upon the specified provisions: "(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate **with respect to the debtor** on the 30th day after the filing of the later case;

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Movant asserts that the specified conditions have been met and therefore, “there is currently **no stay in place as to the Debtor.**” Motion, p. 2:30; Dckt. 23 (emphasis added).

Then Movant advances a contention that by the stay terminating as to the Debtor it could possibly be arguable that Congress stating that the stay will “terminate as to the debtor” could mean that the provisions of the automatic stay that apply to protect rights and interests other than “with respect to the debtor” could cause the automatic stay rights of other persons, entities, and the bankruptcy estate to be terminated or forfeited based on the inaction of the Debtor:

Furthermore, according to a 9th Circuit Bankruptcy Appellate Decision, it is arguable that the stay expired in its entirety on the 30th day as well. The court held in *In re Reswick* that the automatic stay in a second consecutive case within 1 year by the same debtor that was previously dismissed is terminated completely. *See Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (B.A.P. 9th Cir. 2011). Thus, the automatic stay in this case expired on 10/11/2018.

Id., p. 2:21-25; *Id.* No other legal authorities are stated for the proposition that the provisions of 11 U.S.C. § 362(c)(3)(A) works to terminate or forfeit the automatic stay protections of the rights and interests of the bankruptcy estate and other parties in interest by the inaction of the Debtor.

Though asserting that the stay has been terminated or forfeited in the case as to all persons and the bankruptcy estate, Movant then requests, apparently based only on the provisions of 11 U.S.C. § 362(c)(3)(A), that in addition to the court finding that the stay is not in effect as to the Debtor, that the court further order “that the stay be terminated as to the estate.” *Id.*, p. 2:26-27. ^{FN.1.}

FN.1. After Movant fulfilling its obligation of stating with particularity adequate grounds for requested relief from the automatic stay, (FED. R. BANKR. P. 9013) and fulfilling the certifications made pursuant to Federal Rule of Bankruptcy Procedure 9011, Movant has the burden of proof with respect to the value of the property and Debtor has the burden on all other issues (11 U.S.C. § 362(g)). The allocation of the burden of proof once a movant states adequate grounds with particularity does not alleviate Movant’s obligation to state sufficient grounds with particularity and the certifications made with respect to such grounds.

The only grounds stated in the Motion for terminating the stay as to the estate, if the court does not accept Movant’s contention that the words, “terminates as to the debtor” does not conflate the “bankruptcy estate” with the Debtor, is that the stay has terminated as to the Debtor under 11 U.S.C. § 362(c)(3)(A).

Movant offers no declarations in support of the Motion. The only documentary evidence is a copy of the Pacer Docket for Debtor’s prior bankruptcy case. Dckt. 25.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 20, 2018. Dckt. 27. The Response notes that Debtor is current under the proposed plan, having paid in \$5,336.00 to date, of which \$2,973.76 was disbursed to Movant.

Trustee also notes that *In Re Reswick*, the authority relied on by Movant is a Bankruptcy Appellate Panel Decision and therefore not binding authority.

DEBTOR'S RESPONSE

Debtor filed a Response on to the Motion on November 20, 2018. Dckt. 30. Debtor states that "Debtor does not contend that a motion to extend the automatic stay was not filed timely." Debtor notes that cause is determined on a case by case basis, that the party seeking to preserve the stay has the burden, and that Trustee has confirmed Debtor is current under the proposed plan.

Debtor's counsel notes that he has been unable to contact Debtor but will propose a viable plan within the next 45 to 60 days. Debtor's counsel requests this court continue the hearing on this Motion to January 19, 2019, to allow for a plan to be filed, and then continue the hearing again to be heard alongside a prospective motion to confirm Chapter 13 plan.

DISCUSSION

Debtor's Opposition does not contain the "magic words" that Debtor opposes the motion. However, it does state that Debtor is prosecuting a plan, counsel believes that the plan is confirmable, but that there are communication problems with the Debtor. It is requested that the hearing be continued to be conducted in conjunction with a future hearing on a motion to confirm a plan.

Movant does not assert that grounds exist for termination of the automatic stay, other than to ask the court to terminate the stay based on the "grounds" that it could be argued that the stay has terminated in the bankruptcy case in its entirety based on 11 U.S.C. § 362(c)(3).

At the hearing, Movant's counsel explained XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Consideration of Movant's Asserted Grounds That it Could be Argued Termination of the Stay as to the Debtor Terminates the Stay as to Property of the Bankruptcy Estate

It is interesting that Movant states with particularity that the grounds for the contention that the automatic stay "arguably" exist based on the bankruptcy Appellant Panel *Reswick* decision. Movant makes no attempt to analyze the grounds, the statutory language, or provide the court with legal authorities to

support the contention that the plain language of 11 U.S.C. § 362(c)(3)(A) that “terminates the automatic stay with respect to the debtor” also terminates the automatic stay as to the bankruptcy estate and every other party in interest in the world. Rather, Movant chooses to just make the contention and then leave it to the court and judicial staff (rather than Movant incurring the reasonable and necessary legal expenses) to determine whether the basis exists for granting the requested relief asserted by Movant. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

In considering the only grounds asserted by Movant, the court begins with the one authority and legal basis stated by Movant - *In re Reswick*.

In *Reswick* the Bankruptcy Appellate Panel grappled with what it thought to be confusing language in 11 U.S.C. § 362(c)(3), concluding that the minority view of interpreting this language to mean that the term “with respect to the debtor” actually means “with the respect to the debtor and property of the bankruptcy estate.” At the core of the Bankruptcy Appellate Panel concluding that there was not “plain language” to be interpreted, the panel in *Reswick* stated:

If the phrase "with respect to the debtor" meant that the automatic stay only terminated as to the debtor personally and as to non-estate property, the opening clause of section 362(c)(3)(A) would be surplusage. There would be no reason for section 362(c)(3)(A) to reference actions "with respect to a debtor or property securing debt or with respect to any lease" if the interpretation of the Debtor and the majority were correct.

Reswick v. Reswick (In re Reswick), 446 B.R. 362, 368, (B.A.P. 9th 2011). The language at issue stated in 11 U.S.C. § 362(c)(3) is:

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

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

The BAP panel’s conclusion that the reference to “property” must refer to property of the bankruptcy estate assumes that all property of a debtor is “property of the bankruptcy estate.”

This court, as with the admitted majority of other decisions, does not find such confusion or improbability of using such language as it relates only to the debtor. 11 U.S.C. § 362(a) provides complementary stay provisions which give rights and protections to the debtor on the one hand, and the bankruptcy trustee and bankruptcy estate.

Also, Congress recognizes that a debtor filing a second case may be improperly attempting to use a bankruptcy trustee as a front for an automatic stay. The trustee may quickly and readily either stipulate to relief from the stay or abandon the property (so it is no longer protected by the stay for property of the bankruptcy estate) securing the debt. For a creditor and trustee who so reasonably act, the debtor is then prevented from then contending he or she has a stay, forcing needless time and expense of stay litigation.

Collier on Bankruptcy provides the following discussion and citations supporting this treatise with respect to the scope of the termination of the automatic stay “as to the debtor” as provided in 11 U.S.C. § 362(c)(3):

[a] Scope of Stay Limitation

There are certain limitations arising from the express wording of subsection (c)(3). First, the stay terminates under this provision only “with respect to the debtor.” **As in other provisions in section 362, Congress sought in subsection (c)(3) to distinguish between actions taken against property of the debtor and property of the estate.** [18] This intent to **limit the stay termination to actions against the debtor** is made **abundantly clear when the language in subsection (c)(3) is compared to the much broader scope of the parallel stay termination provision in subsection (c)(4)** [19] for a debtor who has had two dismissed cases within the prior year, particularly since both provisions were enacted at the same time as part of the 2005 amendments. [20] Thus, **if there has been a stay termination based on the operation of subsection (c)(3) in a case filed within a year of a prior dismissal, the automatic stay provided under section 362(a) continues to apply in that case as to actions taken against property of the estate**, but not as to actions against the debtor or property of the debtor that is not property of the estate. [21]

Second, as a result of the absence in the 2005 amendments of any express or implied limitation on section 1301, subsection (c)(3) **does not prevent the application of the codebtor stay in a chapter 13 case**. Thus, the stay provided under section 1301 applies irrespective of subsection (c)(3) as to any consumer debt of the debtor with respect to actions taken against a codebtor on the debt. [22]

[18] *See, e.g.*, 11 U.S.C. § 362(a)(1) (“against the debtor”), 362(a)(2) (“against the debtor or against property of the estate”), 362(a)(3) (“property of the estate or of property from the estate”), 362(a)(4) (“against property of the estate”), 362(a)(5) (“against property of the debtor”), 362(a)(6) (“against the debtor”).

[19] 11 U.S.C. § 362(c)(4)(I); *see* ¶ 362.06[4] *infra*.

[20] *See In re Moon*, 339 B.R. 668, 671 (Bankr. N.D. Ohio 2006) (“Had the drafters of this provision intended that the whole of the automatic stay would terminate, they could have easily just referenced § 362(a) as they did in § 362(c)(4)(A) (‘the stay under subsection (a) shall not go into effect upon the filing of the later case’).”).

[21] *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008); *In re Jumpp*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); *In re Scott-Hood*, 473 B.R. 133 (Bankr. W.D. Tex. 2012); *In re Alvarez*, 432 B.R. 839 (Bankr. S.D. Cal. 2010); *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006). But see *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); *St. Anne's Credit Union v. Ackell*, 490 B.R. 141 (D. Mass. 2013); *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009); *In re Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006).

[22] See *In re Lemma*, 393 B.R. 299 (Bankr. E.D.N.Y. 2008) (despite termination of stay under section 362(c)(3)(A), mortgage creditor's scheduling of foreclosure sale violated codebtor stay under section 1301).

3 COLLIER ON BANKRUPTCY P 362.06 (16TH 2018) (emphasis added).

In reviewing the Legislative History of 11 U.S.C. § 362 in considering the effect of Congress choosing to state in 11 U.S.C. § 362(c)(3)(A) that the stay “terminates as to the debtor” and in 11 U.S.C. § 362(c)(4)(A) that “the stay under subsection (a) shall not go into effect upon the filing of the later case,” and whether the specific reference to “the debtor” works to terminate the stay in its entirety in the bankruptcy “case,” the court notes the following:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 340-344.

As stated by Congress, the automatic stay does not exist merely to protect the debtor. The stay protects interests even beyond the bankruptcy estate, reaching out to protect the creditor body as a whole. When one interprets 11 U.S.C. § 362(c)(3) statement of termination of the automatic stay “as to the debtor” to be “and as to the bankruptcy estate and all other creditors,” it works to punish creditors, especially the creditors holding general unsecured claims.

In addressing the contention that “as to the debtor” means as to the “estate and all other parties in interest,” parsing through the language of 11 U.S.C. § 362(c)(3) proceeds as follows:

Congress creates in 11 U.S.C. § 362(a) a stay, applicable to all entities which are summarized as follows:

- (1) stays commencement or continuation, of judicial, administrative, or other **action** or proceeding **against the debtor** which was or could have been commenced prior to commencement of the bankruptcy case or recover a claim that arose prior to the commencement of the bankruptcy case;
- (2) enforcement against the **debtor or property of the estate** a judgment obtained before the commencement of the bankruptcy case;
- (3) act to obtain possession of **property of the bankruptcy estate, from the bankruptcy estate, or exercise control over property of the bankruptcy estate**;
- (4) act to create, perfect, or enforce any lien against **property of the bankruptcy estate**;
- (5) act to create, perfect, or enforce **against property of the debtor** any lien that secured a claim that arose before the commencement of the bankruptcy case;
- (6) act to collect, assess, or recover a **claim against the debtor** that arose before the commencement of the bankruptcy case;
- (7) setoff any debt owing to the debtor that arose before the commencement of the case against any claim against the debtor;

11 U.S.C. § 362(a)(1)-(7).

Congress has clearly created four provisions that expressly apply to “the debtor” and three that expressly related to property of the bankruptcy estate. Congress clearly distinguishes between the “debtor” and the bankruptcy estate when imposing the automatic stay.

Congress does not leave who or what is a “debtor” for argument of parties and to be divined by the court, but defines “debtor” in 11 U.S.C. § 101(13) to be:

- (13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

Person is further defined by Congress in 11 U.S.C. § 101(41) to be:

- (41) The term "person" includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that— . . .

Congress then defines what is the “bankruptcy estate” and what property is included in the bankruptcy estate, beginning with 11 U.S.C. § 541(a), which is summarized as follows (using the paragraph and subparagraph designations .of § 541(a)):

(a) The commencement of a bankruptcy case creates the bankruptcy estate, which is comprised of all the following property:

- (1) All legal or equitable **interests of the debtor in property** as of the commencement of the case (with specified exceptions in 11 U.S.C. § 541(b) and (c));
- (2) **All interests of the debtor and the debtor’s spouse** in community property as of the commencement of the case that is (A) subject to management and control of the debtor or (B) liable for claims against the debtor;
- (3), (4) Any interest in property recovered by the trustee under specified bankruptcy provisions;
- (5) **Property acquired by the debtor** by bequest, devise, inheritance, marital settlement or dissolution, life insurance or death plan, which debtor becomes entitled to within 180 days after the commencement of the bankruptcy case;
- (6) Proceeds, product, offspring, rents, or profits of or from property of the estate; and;
- (7) Interests in property that the bankruptcy estate acquires after the commencement of the case.

11 U.S.C. § 541(a)(1)-(7).

It is clear that the bankruptcy estate is not the debtor, and the debtor is not the bankruptcy estate. Though acquired by operation of law from the debtor, the property of the bankruptcy estate is not property of the debtor. Exclusions from the above are found in 11 U.S.C. § 541(b) and (c), including properties that the debtor holds for others (such as trustee of a trust), terminated leases, specified retirement accounts, education accounts, and spendthrift trust interests. For these property interests, they continue to be property of the debtor (and are not property of the bankruptcy estate) and protected by the automatic stay protections granted the debtor - to the extent that the automatic stay has not been terminated as to the debtor.

Denial of Relief

With respect to the contention that it could be “argued” that the Bankruptcy Appellate Panel decision in *Reswick* could arguably be asserted for the proposition that termination of the stay with respect to the Debtor pursuant to 11 U.S.C. § 362(c)(3) terminates the other provisions of 11 U.S.C. § 363(a) that apply to property of the bankruptcy estate, the court finds the argument to be without merit.

First, Movant provides the court with no legal arguments, authorities, or analysis for a such a contention - other than a passing reference to *Reswick*. Second, the analysis in *Reswick* dumped on the court by Movant is not persuasive.

Second, the term with “respect to the debtor” as used in 11 U.S.C. § 362(c)(3)(A) modifies the termination of the stay as to “a debt or property securing such debt or with respect to any lease,” limiting it as to the debtor’s stay. The bankruptcy estate’s rights and those of the bankruptcy trustee and creditors for the proper administration of the estate are not forfeited by one prior bankruptcy case filing.

As to the passing reference in the Motion that the court terminate the stay, the Motion fails to state any grounds with particularity for such relief. Instead, the Motion merely requests/demands that the stay is terminated becausecounsel and Movant so demand it.

The Motion is denied.

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

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

The Motion To Confirm Termination Or Absence Of Stay and Requesting that the Automatic Stay be Terminated filed by Wells Fargo Bank, N.A. (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is Denied.

2. [18-27039](#)-E-13 **NADIA KOSTYUK**
Julia Young

**MOTION TO SET ASIDE TRUSTEE
SALE, MOTION TO IMPOSE
AUTOMATIC STAY O.S.T.**
11-14-18 [\[11\]](#)

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The court set the hearing for November 20, 2018. Dckt. 16.

The Motion To Set Aside Trustee Sale & Motion To Impose Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 -----.

**The Motion To Set Aside Trustee Sale & Motion To Impose Automatic Stay is
XXXXXXXXXXXXXXXXXXXX.**

On November 8, 2018, Nadia Kostyuk, the Chapter 13 Debtor ("Debtor"), commenced this bankruptcy case. Ms. Kostyuk has filed two recent prior bankruptcy cases, which are:

Chapter 13 Case 18-26000 Represented by Counsel	Filed: September 23, 2018 Dismissed: October 12, 2018
Chapter 13 Case 18-25398 In <i>Pro Se</i>	Filed: August 28, 2018 Dismissed: September 17, 2018

In case 18-26000 Debtor was represented by the same counsel as in the present bankruptcy case.

MOTION TO SHORTEN TIME

On November 14, 2018, the Debtor filed a Motion to Shorten Time for hearing on Debtor's Motion for the substantive relief discussed below. Dckt. 10. Debtor requests the court conduct a hearing on November 20, 2018, because Debtor is seeking to have the court impose the automatic stay in this case pursuant to 11 U.S.C. §362(c)(4)(B). There are stated to be a number of "threatened" state court actions relating to a non-judicial foreclosure sale which occurred on November 9, 2018, one day after the current bankruptcy case was filed.

The court issued an Order granting the Motion To Shorten Time on November 15, 2018. Order, Dckt. 16.

MOTION TO SET ASIDE TRUSTEE SALE & MOTION TO IMPOSE AUTOMATIC STAY

On November 14, 2018, Debtor filed a multifaceted pleading titled "Notice of Motion and Motion to Set Aside Trustee Sale; Motion by Debtor for an Order Obtaining and Imposing the Automatic Stay Pursuant to 11 U.S.C. § 362(c)(4)(B), Memorandum of Points and Authorities, Declaration of Julia M. Young, Declaration of Nadia Kostyuk, and Declaration of Alex Kostyuk." Dckt. 11.

The Motion requests the court impose and extend the automatic stay in this case, as well as set aside a trustee sale that took place on November 9, 2018.

NOVEMBER 20, 2018 HEARING

At the hearing, Debtor's husband and Debtor's counsel stated their pleas that the foreclosure sale should be set aside. Initially, Debtor's counsel stated that if the court imposed the stay it would relate back to the commencement of the case and render the sale void. The court reviewed the provision of 11 U.S.C. § 362(c)(4)(C), which was included in the court's tentative ruling posted for review the day before the hearing, and that the stay imposed under § 362(c)(4)(B) is effective from the day imposed, not the commencement of the case.

The court discussed the use of the automatic stay in lieu of a state court or federal court injunction, and the requirement for the Debtor to fund an adequate protection/claim payment fund that would serve in the place of an injunction bond. Additionally, the court reviewed the Debtor's need to prosecute (whether in the state court, district court, or adversary proceeding in this court) whatever claims it believes provide for avoiding the foreclosure sale. (Debtor's counsel, without citation to any legal authority, suggested that this court, on motion, could avoid the sale since it was "unfair" in light of the purported equity in the property.)

As discussed by the court at the hearing, imposition of an interim stay that will delay Creditor for several weeks in acting on its trustee's deed will be of little negative impact on Creditor. However, it may

well be the difference between Debtor acting to enforce any rights Debtor may have and Debtor continuing in what appears to be a downward spiral of loss.

The court addressed with Debtor's counsel the need to present how the Debtor will be prosecuting this case, including a Chapter 13 Plan, consistent with the Bankruptcy Code if the court will further extend the stay. A bankruptcy case does not exist, and is not being properly prosecuted if it exists merely to obtain a stay (which may not actually apply to Creditor) and not otherwise diligently prosecute the case.

NOVEMBER 26, 2018 ORDER & AMENDED ORDER

After the November 20, 2018, hearing the court issued an Order granting the Motion on an interim basis, and imposed the stay effective through 11:59 p.m. on December 14, 2108 unless terminated by operation of law or further order of this court, or further extended by the court. Order, Dckt. 33. The court denied without prejudice the Debtor's request to set aside the trustee's sale. Order, Dckt. 33, 34. The court further continued the hearing on the Motion to December 4, 2018, and Ordered Debtor to file supplemental pleadings on or before December 30, 2018. *Id.*

The court issued an Amended Order on November 28, 2018, revising the Order to require supplemental pleadings be filed on or before November 29, 2018. Order, Dckt. 34

APPLICABLE LAW

When stay has not gone into effect pursuant to 11 U.S.C. § 362(c)(4), a party in interest may request within 30 days of filing that the stay take effect 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. 11 U.S.C. § 362(c)(4)(B).

For purposes of subparagraph (B), a case is presumptively filed not in good faith 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; . . .

11 U.S.C. § 362(c)(4)(D).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). An important indicator of good faith is a realistic prospect of success in the second case, contrary to the failure of the first case. *See, e.g., In re Jackola*, No. 11-01278, 2011 Bankr. LEXIS 2443, at *6 (Bankr. D. Haw. June 22, 2011) (citing *In re Elliott-Cook*, 357 B.R. 811, 815–16 (Bankr. N.D. Cal. 2006)). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

DISCUSSION

Supplemental Pleadings were filed by the Debtor on November 29, 2018. These Supplemental Pleadings are considered by the court in evaluating the extent to which Debtor has been able to rebut the presumption of bad faith in the filing of this third bankruptcy case in the past year. 11 U.S.C. § 362(C)(4)(b).

Debtor's Chapter 13 Plan has been filed, which terms are summarized as follows:

- A. The Plan payments are one lump sum payment of \$10,000 in month one of the Plan and then payments of \$2,000 a month for each of the remaining fifty-nine months of the Plan.
- B. For Class 1 Claims, no monthly payments will be made on the claim of Capital Mortgage and a \$1,759.00 a month post-petition payment will be made on the Mortgage Lender Services' secured claim (for which there is no stated Class 1 arrearage to be cured).
- C. There are no Class 2, 3, or 4 secured claims provided for in the Plan.
- D. There are no Class 5, 6, or 7 priority, special treatment, or general unsecured claims to be paid for through the Plan.

- E. There are no other provisions for payment of claims, providing adequate protection payments, or prosecuting claims and rights of the estate (including the alleged right to set aside a foreclosure sale).

Chapter 13 Plan, Dckt. 46.

An Amended Petition, Amended Schedules, and Amended Statement of Financial Affairs have been filed several times. Dckts. 47, 48. Included in the refilings is a “Chapter 13 Plan - Amended.” Dckt. 48 at 1-8. The terms of the “Amended Plan” are the same as the above reviewed plan.

On November 29, 2018, the Debtor filed a pleading titled “Supplemental Motion to Continue the Automatic Stay.” Dckt. 49. This appears to be a supplement to the existing motion now before the court to impose the stay - which has been imposed on an interim basis. The grounds advanced by Debtor in this Supplemental Pleading are:

- A. Debtor’s only creditor is BBV Profit Sharing Plan (“BBV”), the obligation of Debtor and her husband owing to BBV secured by the junior deed of trust on Debtor’s residence.
- B. Debtor is current on the payments due on the claim secured by the senior deed of trust on Debtor’s residence.
- C. Debtor has sufficient income to pay the obligation owed to BBV secured by the junior deed of trust through a Chapter 13 Plan.
- D. The Amended Chapter 13 Plan provides for paying BBV \$10,000 in the first month of the plan and then \$2,000 a month for the remaining fifty-nine months of the Plan.

As noted in the summary above, no provision is made for paying BBV \$10,000 in the first month and then \$2,000 a month for fifty-nine months. The only provision is for paying Mortgage Lender Services \$1,759.00 a month.

- E. The Debtor is identified as working as a caregiver and is also the president of her own real estate company, Nako Investments.
- F. The Supplemental Pleading then misstates the provisions of 11 U.S.C. § 362(c)(4)(A), asserting that it “limits the automatic stay to thirty days after the filing of the later case when the Debtor has filed two or more single or joint cases that have been dismissed without prejudice within the past year.”

As discussed at the prior hearing, the provisions of 11 U.S.C. § 362(c)(4)(A) state:

(4) (A) (I) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter

other than chapter 7 after dismissal under section 707(b), **the stay under subsection (a) shall not go into effect upon the filing of the later case;**

11 U.S.C. § 362(c)(4)(A) [emphasis added]. Contrary to what is stated in the Supplemental Pleadings, 11 U.S.C. § 362(c)(4)(A) provides that there is no automatic stay that goes into effect upon the filing of a bankruptcy case when two prior cases were pending and dismissed in the one year period preceding the filing of the then current case.

G. Debtor needs bankruptcy relief to pay the obligation to BBV because it came due in full in December 2017, and Debtor and her husband have been unsuccessful in negotiating with BBV to agree to extend the payment terms.

On the latest Amended Schedule I filed by Debtor (Dckt. 48 at 33-34) Debtor states that her income and her husband's income consists of the following:

A.	Debtor's Gross Wage Income.....	\$2,451.00
B.	Debtor's Net Income From Her Business.....	\$7,653.13
C.	Debtor's Husband's Wage Income.....	\$2,545.00

No provision made for any federal, state, or self-employment taxes is shown on Amended Schedule I. Debtor fails to provide the required statement of gross business income and the itemized expenses by which Debtor computes her net income from her real estate business.

On Amended Schedule J, *Id.* at 35-36, Debtor lists the reasonable and necessary expenses for a family unit of four persons: Debtor, Debtor's spouse, teenage son, and Debtor's mother (for whom no income or contribution is shown on Amended Schedule I). No provision is made on Schedule J for the payment of federal or state income or self-employment taxes. On Amended Schedule J Debtor states that the family unit of four has no medical or dental expenses, and transportation expenses of \$50 a month.

The court notes that in her prior bankruptcy case, Debtor stated under penalty of perjury that her monthly net business income was \$3,000.00. 18-26000; Schedule I, Dckt. 1 at 28. That Schedule I was filed on September 24, 2018, two months before the Amended Schedule I in this case was filed.

DECISION

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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 Motion to Impose the Automatic Stay filed by Nadia Kostyuk ("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 **XXXXXXXXXXXX**.

No other further relief is granted.

3. 11-44540-E-13 **MERCEDES PEREZ** **CONTINUED STATUS CONFERENCE**
 18-2041 **Peter Cianchetta** **RE: COMPLAINT**
 4-5-18 [1]
PEREZ V. STOCKTON MORTGAGE

Final Ruling: No appearance at the December 4, 2018 Status Conference is required.

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 4/5/18
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

The Status Conference is continued to 2:00 p.m. on February 20, 2019.
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Notes:

Continued from 11/14/18. Plaintiff-Debtor to file and serve a motion for entry of default judgment, evidence, and certificate of service on or before noon on 11/28/18 or the court may dismiss the Complaint with prejudice.

[PLC-1] Motion for Default Judgment filed 11/27/18 [Dckt 17]

DECEMBER 4, 2018 CONTINUED STATUS CONFERENCE

On November 27, 2018, Plaintiff-Debtor filed a motion for entry of default judgment. Dckt. 17. Hearing on the Motion is set for January 9, 2019.

4. [11-44540-E-13](#) **MERCEDES PEREZ**
[18-2042](#) **Peter Cianchetta**

CONTINUED STATUS CONFERENCE
RE: COMPLAINT
4-5-18 [1](#)

PEREZ V. CAMP

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 4/5/18
Answer: none

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

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Notes:

Continued from 11/14/18. Plaintiff-Debtor to file and serve a motion for entry of default judgment, evidence, and certificate of service on or before noon on 11/28/18 or the court may dismiss the Complaint with prejudice.

DECEMBER 4, 2018 CONTINUED STATUS CONFERENCE

The Plaintiff-Debtor has not filed a motion for entry of a default judgment in this Adversary Proceeding. At the Continued Status Conference counsel for the Plaintiff-Debtor reported **XXXXXXXXXXXX**

5. [18-21644](#)-E-13 ANGELO/LISA OLIVA
[JHW-1](#) Anh Nguyen

**MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-25-18 [\[57\]](#)**

**SANTANDER CONSUMER USA, INC.
VS.**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 25, 2018. By the court's calculation, 40 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.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Santander Consumer USA Inc., dba Chrysler Capital ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2013 Jeep Wrangler, VIN ending in 9847 ("Vehicle"). The moving party has provided the Declaration of Brandi Brown to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Angelo Aroldo Stefano Oliva and Lisa Renee Oliva ("Debtor").

The Brown Declaration provides testimony that Debtor has not made 7 post-petition payments, with a total of \$4,441.15 in post-petition payments past due.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 20, 2018. Dckt. 64. Trustee notes that Debtor's Plan was confirmed September 18, 2018, Debtor is delinquent \$1,455.50 under the Confirmed Plan, and Debtor has paid \$36,291.50 into the Plan to date.

Trustee notes further that Movant is provided for as a Class 4, with the Confirmed Plan indicating that Debtor's daughter makes the payments.

STIPULATION

Movant and Debtor filed a Stipulation on November 20, 2018. Dckt. 67. The Stipulation proposes to resolve this Motion, and has the following essential terms:

1. Beginning November 29, 2018, Debtor will make monthly post-petition payments of \$634.45.
2. Debtor shall cure the post-petition default through November 2, 2018, by making equal monthly payments of \$1,691.87 from November 29, 2018 through January 29, 2019.
3. Debtor shall maintain insurance on the Vehicle.
4. In the event of default, Movant must issue a notice of default. After notice is issued, Debtor has 10 days to cure default. If default is not cured, Movant may lodge an order for relief with the court allowing Movant to repossess the Vehicle.
5. In the event Debtor defaults and Movant issues notice of default three times, Movant is no longer required to provide notice of default before lodging an order for relief.
6. Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived if Movant obtains relief after lodging an order for relief.
7. The hearing on this Motion may be taken off calendar.

TRUSTEE'S OPPOSITION TO STIPULATION

Trustee filed an Opposition to the Stipulation on November 21, 2018. Dckt. 70. Trustee opposes the Stipulation on the grounds that the payments provided for in the Stipulation exceed Debtor's ability to pay reflected on Schedule J. Trustee recognizes it is likely Debtor's daughter is meant to make the payments under the Stipulation, but requests the Stipulation is rejected unless that point is clarified.

DISCUSSION

Stipulation

Trustee's arguments are well-taken. The Stipulation provides for a total payment of \$2,326.32 from November 2018 through January 2019, and a payment of \$634.45 thereafter. Debtor's Amended Schedules I and J reflect a disposable income of \$6,641.00. Debtor's current monthly payment under the Confirmed Plan is \$6,640. *See* Amended Plan, Dckt. 38. Debtor is not capable of making any additional payments towards Movant's claim. While it is likely that Debtor's daughter is intended to make the ongoing cure and post-petition payments to Movant, no such clarification is provided in the Stipulation.

Motion For Relief

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 \$31,879.23, as stated in Proof of Claim, No. 2, while the value of the Vehicle is determined to be \$25,000.00, as stated in Schedules B and D filed by Debtor.

In the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) for which the requested relief is based asserted by Movant are:

- A. Debtor claims an interest in a 2013 Jeep Wrangler.
- B. Movant is a lien holder on the Vehicle.
- C. Movant is not required to provide Debtor with any monthly invoices or payment coupons (for an unspecified obligation).
- D. Prior to filing the Motion, Movant's counsel sent counsel for the Debtor and the Chapter 13 Trustee a notice of the amount past due.
- E. Debtor's Chapter 13 Plan provides for direct payments on Movant's claim by Debtor's daughter.
- F. The obligation is now seven months past due, and it is alleged that this now seven model year old Jeep is "a depreciating asset."
- G. Movant needs relief from the stay given the defaults by Debtor's daughter and the automatic stay in Debtor's case.

H.

Motion, Dckt. 57.

On September 20, 2018, the court granted Debtor's Motion to confirm the Amended Chapter 13 Plan in this case. Dckt. 56. The terms of that Chapter 13 Plan are, as is relevant to this Motion, as follows:

- A. Debtor's Monthly Plan Payment is:

1. Months 1-6 of the Plan.....\$5,184.50
 2. Months 7-60 of the Plan.....\$6,640.00
- B. Class 1 Secured Claim of Deutsche Bank Nat Trust Co
1. Current Post-Petition Installment.....(\$2,059.66)
 2. Arrearage Cure (\$52,507.89).....(\$1,029.56)
- C. Class 2 Secured Claims
1. Internal Revenue Service (\$75,236.93).....(\$1,475.23)
 2. Von Housen Motors (2007 Chev Tahoe).....(\$ 180.00)
- D. Class 3 Surrender Claims.....None
- E. Class 4 Direct Pay Secured Claims
1. Chrysler Capital (Movant), Daughter operates the vehicle and pays all financing.
 - a. Upon confirmation, the Class 4 Claim treatment includes modification of the automatic stay as follows (emphasis added):

3.11. Bankruptcy stays.

(a) Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are (1) terminated to allow the holder of a Class 3 secured claim to exercise its rights against its collateral; (2) **modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract**; and (3) modified to allow the nondebtor party to an unexpired lease that is in default and rejected in section 4 of this plan to obtain possession of leased property, to dispose of it under applicable law, and to exercise its rights against any nondebtor.
- F. Class 5 Priority and Class 6 Special Treatment Unsecured Claims.....None
- G. Class 7 General Unsecured Claims
1. Dividend on \$36,954.48 in claims.....100% Dividend (0% interest)

Amended Plan, Dckt. 38.

In confirming the Amended Chapter 13 Plan, the court relied upon the testimony of Debtor, which includes:

- A. Debtor Angelo Oliva is a part owner and president of Timeless Homecare, Inc., a senior home care business that employs the two debtors in this bankruptcy case.
- B. Effective July 1, 2018, Timeless Homecare increased Mr. Oliva's compensation to \$9,000 a month and Mrs. Oliva's compensation to \$3,000 a month. Having obtained these compensation increases from the company that Mr. Oliva is the president of, Debtor could then afford to perform the Amended Plan.
- C. Even though the compensation had been increased, the two debtors would not receive the increase for six months due to the business not having the income to pay the (purported) compensation increase.
- D. Though unable to pay the increase compensation, allegedly due to a slow down in summertime business, Mr. Oliva testifies that "Given Timeless Homecare's strong growth rate, I do not expect a seasonal decline in revenues will have any effect on my salary in future years.

This testimony actually appears to say that Mr. Oliva's compensation will grow substantially in the future, well in excess of what is now being stated.

Declaration, Dckt. 45.

On Amended Schedule I Debtor lists having combined monthly income of \$12,000 from wages working at Timeless Homecare, Inc. Dckt. 37 at 22. For this gross \$12,000 in wages, Timeless Homecare, Inc. does not have any withholding for federal income tax, state income tax, Social Security, or any other purposes. *Id.* at 23. Debtor states under penalty of perjury that there is combined take-home income of \$12,000 a month.

On Schedule J Debtor lists there being a family unit of five persons - the two debtors, two teenage children, and an adult child. *Id.* at 24. Debtor's expenses include paying Self-Employment Tax of \$3,000 a month, but no provision is made for payment of income tax. *Id.*

On Amended Schedule I Debtor states that both of the debtors are "employed" by the same corporation. Neither Debtor purports to be "self-employed."

On Schedule A/B Debtor lists owing 50% of the common stock in the corporation Timeless Homecare, Inc., a California Corporation. On the Statement of Financial Affairs Debtor states that they have not had a business that was a sole proprietorship, self-employed, limited liability company, limited liability partnership, or a partnership. Dckt. 9 at 31-32.

Stipulation for Financial Impossibility

Amended Schedules I and J, using the anticipated future wage increase, shows that Debtor, at best (and assuming that Debtor does not pay income taxes), will have projected disposable income of \$6,641.00. Dckt. 37 at 25. Every penny of that is required to make the increased plan payment in order for Debtor to cure the substantial arrearage and make the monthly installment payment on Debtor's residence. There is no money for payment of any additional amounts.

Notwithstanding there being no additional income, the Stipulation purports to commit Debtor personally to make an additional payment of \$634.45 for the "regular" monthly payment on their daughter's car and an additional payment of \$1,691.87 to cure the \$5,075.60 in defaults. Such \$2,326.33 additional payment by Debtor is financially impossible – If Debtor has provided truthful testimony of their income and expenses.

The court in good conscious cannot commit Debtor to such a financially impossible stipulation.

Re-Granting Relief From the Stay

As stated above, confirmation of the Chapter 13 Plan terminates the automatic stay as to Movant and its collateral. Though Debtor's motion to confirm was granted, the proposed order confirming the Plan has not been lodged with the court.

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.

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

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 because the Vehicle is a depreciating asset and the account is seven months past due.

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

No other or additional relief is granted by the court.

The court shall issue 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 Motion for Relief from the Automatic Stay filed by Santander Consumer USA Inc., dba Chrysler Capital ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2013 Jeep Wrangler, VIN ending in 9847 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

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

No other or additional relief is granted.

6. [18-24490-E-13](#) **DONNA BROUSSARD**
[DJD-1](#) **Aubrey Jacobsen**

**MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-25-18 [\[60\]](#)**

**SPECIALIZED LOAN SERVICING,
LLC VS.**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Co-Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 25, 2018. By the court's calculation, 40 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.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Specialized Loan Servicing, LLC, as servicing agent for HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc., Mortgage Pass-Through Certificates Series 2006-AR3 ("Movant") seeks relief from the automatic stay with respect to Donna Marie Broussard's ("Debtor") real property commonly known as 414 College Park Dr, Frankfort, Kentucky 40601 ("Property"). Movant has provided the Declaration of Shane Ellis to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Ellis Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$1,324.44 in post-petition payments past due.

CHAPTER 13 TRUSTEE'S NONOPPOSITION

David Cusick ("the Chapter 13 Trustee") filed an Opposition on November 20, 2018. Dckt. 71. Trustee does not oppose the Motion and notes that Debtor is current under the Confirmed Plan which provides for Movant's claim as a Class 3.

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 \$61,186.50, as stated in Proof of Claim, No. 1. The value of the Property is determined to be \$112,676.00, as stated in Schedule A.

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 and Debtor's providing for Movant's claim as a Class 3 indicating intent to surrender the collateral. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based on the evidence provided, the Property being worth \$112,676.00 and Movant's claim amounting to \$61,186.50, significant equity exists in the Property. Therefore, 11 U.S.C. § 362(d)(2) does not provide grounds for granting this Motion.

Movant also seeks relief from the co-debtor stay under 11 U.S.C. § 1301(a). Movant has established, pursuant to 11 U.S.C. § 1301(a), that the Confirmed Plan proposes not to pay Movant's claim, electing to satisfy the claim by surrendering the collateral. Therefore, this part of the requested relief is granted.

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 Waiver of Fourteen-Day Stay of Enforcement

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

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

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Specialized Loan Servicing, LLC, as servicing agent for HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc., Mortgage Pass-Through Certificates Series 2006-AR3 (“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 Specialized Loan Servicing, LLC, as servicing agent for HSBC Bank USA, National Association as Trustee for Deutsche Alt-A Securities, Inc., Mortgage Pass-Through Certificates Series 2006-AR3 (“Movant”), its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 414 College Park Dr, Frankfort, Kentucky 40601 (“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 request to terminate the co-debtor stay of Gregory Broussard of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the forgoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

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.