



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
September 08, 2017

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No. 17-13077-MKN
	)	Chapter 11
HARKEY OPERATING TRUST,	)	
a Minnesota Business Trust,	)	
	)	Date: August 16, 2017
Debtor.	)	Time: 9:30 a.m.

**ORDER ON MOTION FOR RELIEF FROM AUTOMATIC STAY<sup>1</sup>**

On August 16, 2017, the court heard a Motion for Relief from Automatic Stay (“RAS Motion”) brought by Broker Solutions, Inc., dba New American Funding (“BSI”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On March 9, 2017, a voluntary Chapter 11 petition was filed by Harkey Operating Trust, a Minnesota Business Trust (“Debtor”), in the bankruptcy court for the District of Minnesota. (ECF No. 1).

On March 31, 2017, Debtor filed its schedule of assets and liabilities (“Schedules”). (ECF No. 12). On the same date, Debtor filed its Statement of Financial Affairs (“SOFA”). (ECF No. 17). On its property Schedule A/B, Item 55.2, Debtor listed a fee simple interest in

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the dockets maintained by the relevant clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “LR” are to the bankruptcy provisions of the Local Rules of Practice for the United States District Court for the District of Nevada.

1 certain real property located at 48 Thunder Road, Camano Island, Washington, 98282 (“Thunder  
2 Road Property”).<sup>2</sup> On Schedule A/B, Item 74, Debtor listed causes of action against third parties  
3 identified in Exhibit 2, attached to the Schedules. That Exhibit 2 lists, inter alia, an action  
4 identified as “Michael Harkey v. US Bank, N.A., et al., filed in the United States Bankruptcy  
5 Court for the Western District of Washington, as Adv. No. 16-01355 involving 48 Thunder  
6 Road, Camano Island, Washington 98282. Case of Action: Quiet Title and damages under 11  
7 U.S.C. sec. 362(k). (Motion for Relief from Order of Dismissal With Prejudice without  
8 jurisdiction - dismissal without prejudice being sought).”<sup>3</sup> In a section entitled actions “not filed  
9 yet,” Exhibit 2 also lists “Quiet Title action against Susan Kalson and William Kalson, Jr.  
10 concerning 48 Thunder Road, Camano Island, Washington 98282.”<sup>4</sup>

11 On May 17, 2017, an order was entered authorizing the Debtor to employ attorney  
12 Wayne M. Pressel as special counsel in connection with an appeal before the Ninth Circuit Court  
13 of Appeal as well as another matter pending before the United States District Court for the  
14 District of Nevada.<sup>5</sup> (ECF No. 42).

15 On June 8, 2017, an order was entered transferring the Debtor’s case from the bankruptcy  
16 court in Minnesota to the bankruptcy court in Nevada. (ECF No.59).

17 On July 14, 2017, the instant RAS Motion was brought by BSI with respect to the  
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20 <sup>2</sup> Items 55.1, 55.3, 55.4, and 55.5 lists interests in four other parcels of real property, all  
21 located in Southern Nevada. The addresses for the Nevada properties are: 2220 Village Walk  
22 Way, #3315, Henderson, Nevada; 2220 Village Walk Way, #3211, Henderson, Nevada; 2260  
23 Village Walk Way, #1300, Henderson, Nevada; and 8938 Haviland Road, Las Vegas, Nevada.

24 <sup>3</sup> Debtor’s SOFA discloses at Item 7.2, the same action that was filed in the Washington  
25 Bankruptcy Court. (ECF No. 17).

26 <sup>4</sup> Debtor’s Schedules and SOFA are submitted under penalty of perjury. (ECF No. 16).  
27 Exhibit 2 to the Schedules sets forth a list of the Debtor’s causes of action against third parties  
28 that have been filed as well as those actions it has not yet filed. A comparison of that list to the  
real property assets listed in Item 55 of the Schedules indicates that all of the real property assets  
in which the Debtor asserts an interest are the subject of existing or future claims and litigation.

<sup>5</sup> That appeal apparently is entitled Harkey v. Earl Butler, et al, Case No. 17-15421, and  
the other matter is entitled Harkey v. U.S. Bank, N.A., Case No. 2:14-cv-00177.

1 Thunder Road Property.<sup>6</sup> (ECF No. 85). The Motion is supported by the Declaration of James  
2 C. Clymer (“Clymer Declaration”). (ECF No. 89). The RAS Motion was noticed to be heard on  
3 August 16, 2017. (ECF No. 88). Under LR 9014(d)(1), opposition to the RAS Motion was due  
4 on August 2, 2107.

5 On July 28, 2017, an order was entered granting the Debtor’s application to employ  
6 David A. Riggi as Chapter 11 counsel. (ECF No. 93).

7 On August 11, 2017, attorney Riggi filed an opposition to the RAS Motion on behalf of  
8 the Debtor. (ECF No. 94).

9 On August 14, 2017, a Declaration of Michael E. Harkey (“Harkey”), as one of two co-  
10 trustees of the Debtor, was filed in response to the RAS Motion (“Harkey Declaration”). (ECF  
11 No. 95). On the same date, a Declaration of Wendy Alison Nora (“Nora”),<sup>7</sup> as the other co-  
12 trustee of the Debtor, also was filed in response to the RAS Motion (“Nora Declaration”).<sup>8</sup> (ECF  
13 No. 96).<sup>9</sup> Later the same date, and Amended Declaration of Wendy Alison Nora also was filed  
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15 <sup>6</sup> Attached to the RAS Motion is a proposed Order for Relief from Automatic Stay that  
16 contains provisions apparently applicable in other cases, but not this one. For example, it refers  
17 to the withdrawal of a proof of claim when BSI has not filed a proof of claim and is not even a  
18 creditor of the Debtor. The Order also refers to the cessation of payments by a bankruptcy  
19 trustee when there is no bankruptcy trustee appointed in this Chapter 11 case. The proposed  
20 Order appears to have been hastily slapped to together and would be rejected by the court if ever  
21 submitted.

22 <sup>7</sup> On March 30, 2017, the Debtor sought authorization to employ Nora as its Chapter 11  
23 counsel. (ECF No. 8). On April 3, 2017, the Office of the United States Trustee (“UST”) filed  
24 an objection to Nora’s employment on grounds that she is not, for a variety of reasons, a  
25 disinterested professional under Section 327(a) (“UST Employment Objection”). (ECF No. 20).

26 <sup>8</sup> Among many other things, Nora attests that the Debtor values its interest in the Thunder  
27 Road Property at \$1.5 million. See Nora Declaration at ¶ 62.

28 <sup>9</sup> Attached as exhibits to the declaration are copies of a variety of documents, including a  
copy of the trust agreement that created the Debtor. That agreement identifies Harkey and Nora  
as the only two trustees of the trust. The agreement indicates that the trust was created on April  
27, 2016, with Harkey as the sole trustor, and the initial assets consisting of, inter alia, “Any and  
all residual, contingent, inchoate and/or choate interests in real estate held by the Trustor on the  
date of the Trustee’s acceptance of the assets, whether or not preserved by lis pendens, which  
have been subjected to foreclosure and sale by mortgage servicers without lawful authority,  
wheresoever located.” Other initial assets of the trust include Harkey’s causes of action “arising

1 in response to the motion. (ECF No. 98).

2 On August 16, 2017, the RAS Motion was heard. Attorney Riggi appeared on behalf of  
3 the Debtor. Attorney Pressel also appeared. Both the Harkey Declaration and the Nora  
4 Declaration expressed dissatisfaction with attorney Riggi and indicated that his services to the  
5 Debtor had been terminated. As of the hearing, however, attorney Riggi remained counsel of  
6 record as no substitution of attorneys had been approved, and attorney Riggi had not received  
7 permission from the court to withdraw.<sup>10</sup> Although the response to the RAS Motion filed by  
8 attorney Riggi had suggested that a stipulation for relief from stay could be reached, apparently  
9 the Debtor's co-trustees disagreed<sup>11</sup> and desire to submit a substantive opposition to the RAS  
10 Motion.<sup>12</sup>

### 11 DISCUSSION

12 Relief from the automatic stay may be granted for "cause," including a lack of adequate  
13 protection. 11 U.S.C. § 362(d)(1). Relief from stay as to property also may be granted if the  
14 debtor lacks equity in the subject property and the property is not necessary to an effective  
15 reorganization. 11 U.S.C. § 362(d)(2). On a motion for relief from stay, the moving party has

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17 from the foreclosure and sale by mortgage servicers alleged to have occurred without lawful  
18 authority" as well as Harkey's causes of action "arising from breach of contract or professional  
19 malpractice alleged to have occurred." The other exhibits attached to the Nora Declaration  
20 include copies of documents filed in bankruptcy court proceedings in Nevada and Washington,  
21 as well as civil proceedings in federal and state courts in Washington.

22 <sup>10</sup> As a non-individual, Debtor cannot represent itself and must be represented by legal  
23 counsel. See C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697-698 (9th Cir.1987).

24 <sup>11</sup> The Debtor is now a Chapter 11 debtor in possession. As such, it has a fiduciary  
25 obligation to its creditors rather than the trustor or beneficiaries of the trust. See Woodson v.  
26 Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 614 (9th Cir. 1988) ("[Debtor's] failure  
27 to notice his creditors of the \$1 million in a timely fashion is troubling because [Debtor] is not an  
28 ordinary litigant. As debtor in possession he is the trustee of his own estate and therefore **stands  
in a fiduciary relationship to his creditors.**") (emphasis added). That fiduciary responsibility  
also rests with bankruptcy counsel for the debtor in possession. See Everett v. Perez (In re  
Perez), 30 F.3d 1209, 1219 (9th Cir. 1994).

<sup>12</sup> Attorney Pressel appeared solely to support a request for time to file an opposition, but  
not to act as bankruptcy counsel to do so. In other words, the Debtor wanted time to find new  
bankruptcy counsel and for such counsel to prepare an opposition.

1 the burden of proof with respect to the debtor's equity in an subject property, see 11 U.S.C. §  
2 362(g)(1), while the responding party has the burden of proof on all other issues. 11 U.S.C. §  
3 362(g)(2). The moving party is not required to establish the validity of its underlying claim, but  
4 need only establish a colorable basis to pursue its claims. See In re Edwards, 454 B.R. 100, 105  
5 (B.A.P. 9th Cir. 2011).

6 In its RAS Motion, BSI seeks relief from the automatic stay with respect to the Thunder  
7 Road Property. BSI asserts that it has a deed of trust against the Thunder Road Property  
8 securing a loan to William Kalson, Jr. and Susan Kalson ("Kalsons"), and that title to the subject  
9 property is vested in the Kalsons rather than the Debtor. See RAS Motion at ¶ 5. BSI also  
10 asserts that the Kalsons owed \$337,207.99 as of May 9, 2017. Id. at ¶ 7. The nature of the relief  
11 that BSI seeks, however, is uncertain due to the language appearing in the prayer of the RAS  
12 Motion and the language appearing in the Clymer Declaration.

13 The prayer of the RAS Motion is straightforward as it requests "an Order granting  
14 relief...permitting this Movant to move ahead with foreclosure proceedings under Movant's  
15 Trust Deed and to sell the subject Property under the terms of said Trust Deed, including  
16 necessary action to obtain possession of the Property." See RAS Motion at 6:4-8.<sup>13</sup> By contrast,  
17 the Clymer Declaration represents that BSI "is requesting an Order stating the Property is not an  
18 asset of Debtor's estate, and thus the automatic stay is terminated." Clymer Declaration at 3:17-  
19 18. At the hearing, counsel for BSI withdrew any request for a determination that the Thunder  
20 Road Property is not an asset of the Debtor's estate, but requested a termination of the automatic  
21 stay so that BSI can seek to foreclose in the event the Kalsons default on thier loan payments.

22 The opposition filed on the Debtor's behalf suggests that relief from stay might be  
23 appropriate as long as its equitable claims are preserved, as illustrated by the Washington Quiet  
24 Title Action. See Opposition at 1:28 to 2:25. The two declarations filed by Harkey and Nora  
25 are, inter alia, critical of the services provided by attorney Riggi and request additional time to  
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27 <sup>13</sup> BSI asserts, and its counsel confirmed at the hearing, that foreclosure proceedings have  
28 not been initiated. See RAS Motion at 3:22-26. In fact, counsel represented that any arrearages  
on the loan secured by the Thunder Road Property have been cured.

1 find new counsel to respond to the RAS Motion.

2 The court having considered the record, along with the arguments and representations of  
3 counsel, concludes that even the limited relief from stay ultimately requested by BSI at the  
4 hearing is unnecessary at this time.

5 The record before the court sufficiently establishes that BSI is a lender under an  
6 obligation secured by a deed of trust recorded against the Thunder Road Property. The apparent  
7 borrowers under that obligation, William Kalson, Jr. and Susan Kalson, are not in bankruptcy,  
8 nor are they protected by the automatic stay arising in the Debtor's instant Chapter 11  
9 proceeding. In this instance, BSI asserts a secured interest only in the Thunder Road Property,  
10 which has been the subject of multiple bankruptcy filings affecting the property made by the  
11 Debtor or Harkey. The first two bankruptcy filings consisted of separate Chapter 13 cases  
12 commenced by Harkey in the Washington Bankruptcy Court.

13 The first Chapter 13 proceeding was filed by Harkey in pro se on October 17, 2008,  
14 denominated Case No. 08-16934. The Chapter 13 petition listed Harkey's street address as the  
15 Thunder Road Property. (Washington 1 ECF No. 1). No schedules of assets or liabilities were  
16 filed. On November 24, 2008, the Chapter 13 was dismissed and on December 4, 2008, the case  
17 was closed.<sup>14</sup>

18 The record also reflects that Harkey filed a second Chapter 13 proceeding on January 12,  
19 2009, denominated Case No. 09-10180-TTG.<sup>15</sup> The Chapter 13 petition listed Harkey's street  
20 address as the Thunder Road Property. (Washington 2 ECF No. 1). The Chapter 13 debtor's  
21 real property Schedule "A" also listed Harkey's residence as the Thunder Road Property.  
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25 <sup>14</sup> The automatic stay under Section 362(a) that arose when Harkey filed his first Chapter  
26 13 petition on October 17, 2008, terminated for all purposes when the case was closed on  
December 4, 2008 under Section 362(c)(2)(A).

27 <sup>15</sup> Because Harkey had a prior Chapter 13 dismissed within one year of filing another  
28 Chapter 13 petition, the automatic stay in the second Chapter 13 proceeding expired after 30  
days pursuant to Section 362(c)(3)(A).

1 (Washington 2 ECF No. 14)<sup>16</sup>

2 On January 3, 2009, an order was entered denying confirmation of a proposed Chapter 13  
3 plan and dismissing Harkey's second Chapter 13 case. (Washington 2 ECF No. 53). On April  
4 22, 2009, the Chapter 13 case was closed. The third bankruptcy filing affecting the Thunder  
5 Road Property occurred more than six years later.

6 On October 16, 2015, Harkey commenced Adversary Proceeding No. 15-01355-MLB,  
7 styled as Michael Harkey v. Northwest Trustee Services, MERS, U.S. Bank, N.A., and others  
8 ("Washington 2 Adversary"). That adversary proceeding apparently was commenced in  
9 connection with Harkey's second Chapter 13 case even though it had been dismissed in 2009.  
10 The adversary complaint alleged that the Washington Bankruptcy Court had ancillary  
11 jurisdiction under "11 U.S.C. § 1334(b)" (sic)<sup>17</sup> to award Harkey sanctions and damages under a  
12 variety of vague legal theories. (Washington 2 Adversary ECF No. 1).<sup>18</sup>

13 On November 17, 2015, defendant US Bank, NA, filed a motion to dismiss the adversary  
14 complaint accompanied by the Declaration of Kennar M. Goodman.<sup>19</sup> (Washington 2 Adversary  
15 ECF Nos. 7 and 8).

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17 <sup>16</sup> Harkey's real property Schedule "A" listed the Thunder Road Property, as well as three  
18 of the four Southern Nevada properties that are listed in the instant Debtor's bankruptcy  
19 schedules.

20 <sup>17</sup> Presumably, Harkey was referring to 28 U.S.C. 1334(b) that has been considered in  
21 connection with the assertion of "ancillary" or "supplemental" jurisdiction over matters related  
22 to a bankruptcy case. See generally Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 869 (9th  
23 Cir. 2005).

24 <sup>18</sup> The complaint commencing the Washington 2 Adversary was not a bankruptcy petition  
25 under Sections 301, 302 or 303 that triggers the automatic stay under Section 362, nor does the  
26 adversary proceeding docket reflect that the Washington Bankruptcy Court issued any form of  
27 injunctive relief preventing any activities by creditors against Harkey or the Thunder Road  
28 Property.

26 <sup>19</sup> Attached to that declaration are copies of a variety of documents filed in various courts,  
27 including an Unpublished Opinion dated July 27, 2015, by Division One of the Washington  
28 Court of Appeals, in Harkey v. US Bank, N.A., Case Nos. 71634-4-1 and 71635-2-1. That state  
court decision appears to reflect the unsuccessful appeal by Harkey of a quiet title judgment  
regarding a 2008 nonjudicial foreclosure of the Thunder Road Property.

1 On December 1, 2015, Harkey filed an amended adversary complaint. (Washington 2  
2 Adversary ECF No. 15).

3 On December 4, 2015, US Bank filed a reply in support of its dismissal motion.  
4 (Washington 2 Adversary ECF No. 18).

5 On December 10, 2015, an order was entered dismissing the complaint and amended  
6 complaint for lack of subject matter jurisdiction, without prejudice to a further amended  
7 complaint sufficiently alleging subject matter jurisdiction. (Washington 2 Adversary ECF No.  
8 26).

9 On January 19, 2016, Harkey filed a declaration requesting an extension of time to file a  
10 second amended complaint alleging subject matter jurisdiction. (Washington 2 Adversary ECF  
11 No. 39).

12 On January 22, 2016, the Washington Bankruptcy Court entered an order dismissing the  
13 adversary complaint with prejudice as to US Bank, NA. (Washington 2 Adversary ECF No. 44).

14 On May 2, 2016, an order was entered dismissing the remaining claims in the adversary  
15 proceeding for lack of prosecution and closing the case. (Washington 2 Adversary ECF No. 54).

16 On June 2, 2016, the adversary proceeding was closed.

17 On November 23, 2016, Harkey filed a motion to reopen the adversary proceeding and to  
18 vacate the orders that dismissed the adversary proceeding with prejudice. (Washington 2  
19 Adversary ECF No. 63). Even though Harkey had voluntarily commenced the adversary  
20 proceeding, he argued that because the claims had been dismissed for lack of subject matter  
21 jurisdiction, the dismissals should have been without prejudice. On January 11, 2017, the  
22 Washington Bankruptcy Court heard Harkey's motion and took the matter under submission.

23 The fourth bankruptcy filing affecting the Thunder Road Property occurred on March 9,  
24 2017, when the Debtor commenced the instant Chapter 11 proceeding in Minnesota. As  
25 previously noted, Harkey formed the Debtor on April 27, 2016, and transferred the Thunder  
26 Road Property and other real estate interests into the trust. See discussion at note 9, supra. At  
27 least three of the other four real estate interests also were held by Harkey during his second  
28 Chapter 13 proceeding, see note 16, supra, before those interests were transferred to the Debtor.



1 On this record, it therefore appears that at least four bankruptcy filings affecting the  
2 Thunder Road Property have occurred, and that several parcels of real property, including the  
3 Thunder Road Property, have been transferred by Harkey to the Debtor. It also appears that the  
4 Debtor or Harkey have litigated the issue of title to the Thunder Road Property in both state  
5 court and federal court without success, and apparently intend to pursue appeals of the adverse  
6 results.

7 Examination of the SOFA and Schedules filed by the Debtor raise a variety of concerns.  
8 According to Item 1 of the SOFA, the Debtor's fiscal year began on May 2, 2016, which was  
9 shortly after the Debtor was formed. See note 9, supra. As of the date the Debtor filed its  
10 Chapter 11 petition, Item 1 of the SOFA also attests that the Debtor had received no gross  
11 revenues, and Items 2, 3 and 4 indicate that it has received some nature of capital contributions  
12 for litigation expenses. Debtor also has filed Chapter 11 operating reports for the months of  
13 March, April and May, 2017. (ECF Nos. 33, 48, 64). Those operating reports attest that the  
14 Debtor received no gross revenues during any of those months and that it has received capital  
15 contributions on a cash basis sufficient to pay quarterly Chapter 11 fees to the United States  
16 Trustee. Those reports also disclose that the Debtor pays no employees, pays no secured  
17 creditors, pays no taxes, and pays no insurance.

18 According to its creditor Schedules D, the Debtor has five secured creditors with claims  
19 totaling approximately \$5,500,000, the latest of which was incurred on September 7, 2007. The  
20 trust agreement submitted by the Debtor, however, establishes that the Debtor never existed  
21 when those purported claims were incurred. According to its creditor Schedule E/F, the Debtor  
22 also has as nine nonpriority unsecured creditors with claims in an unknown amount, all of which  
23 claims were incurred on March 3, 2017. All of the unsecured claims are specified as having the  
24 same basis as the creditor identified in Item 3.1, i.e., MERSCORP Holidngs, Inc.<sup>20</sup> All of the  
25 purported unsecured claims appear to arise in connection with the foreclosures of the real  
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27 <sup>20</sup> Item 4 if Schedule E/F requires the Debtor to provide an alphabetical listing of others  
28 who must be notified about the unsecured claims. Debtor provided such a list in its Exhibit 4  
attached to Schedule E/F.

1 property underlying the five secured claims. Inasmuch as the Debtor never existed at the time  
2 the underlying real property was encumbered, it is not readily apparent how the foreclosures  
3 would have given rise to claims against the Debtor. Under these circumstances, it does not  
4 appear that the Debtor has any creditors at all.

5       According to Item 56 of property Schedule A/B, the total value of the Debtor's interests  
6 in real property is \$3,525,000. According to Item 64 of Schedule A/B, the Debtor also has  
7 "other intangibles, or intellectual property" having an estimated market value of \$7,500,000.  
8 According to Item 78 of Schedule A/B, the Debtor also has other assets, including causes of  
9 action against third parties, other claims, and equitable interests in real property, having an  
10 estimated value of plus or minus \$10,000,000. Item 92 of Schedule A/B attests that the total  
11 value of the Debtor's assets are plus or minus \$21,027,600. If this value is remotely accurate,  
12 the Debtor may be solvent as the value of its alleged assets is many times greater than its alleged  
13 liabilities. Additionally, in spite of including the words "Operating Trust" in the Debtor's name,  
14 it does not appear to have any operations at all according to its own monthly reports. The Debtor  
15 never generated any gross revenues before bankruptcy and it has not generated any gross  
16 revenues after bankruptcy. Instead, the Debtor appears to be an artificial entity created to hold  
17 purported assets previously owned by Harkey, most of which are lawsuits or threatened lawsuits  
18 against entities or individuals who have had some financial interaction with Harkey. According  
19 to the Debtor, the purpose of its Chapter 11 filing on March 9, 2017, was to "protect Trust's  
20 interest in litigation asset for recovery of real estate and damages resulting from fraud and  
21 racketeering." See Monthly Operating Report For Period Ending March 31, 2017, Form 2-G  
22 Narrative. (ECF No. 33).

23       Debtor apparently maintains that it has an equitable interest in the Thunder Road  
24 Property that would be property of its bankruptcy estate. See 11 U.S.C. § 541(a)(1). As  
25 previously discussed, see note 8, supra, the Debtor values that interest at \$1.5 million. If the  
26 interest exists at all, enforcement of BSI's lien against the Thunder Road Property would be  
27 barred by the automatic stay. See 11 U.S.C. § 362(a)(4).

28       In this instance, BSI seeks relief from stay for cause under Section 362(d)(1), as well as

1 for lack of equity and necessity for reorganization under Section 362(d)(2).<sup>21</sup> As previously  
 2 mentioned at 6, supra, the Kalsons apparently are not in bankruptcy and there is no automatic  
 3 stay preventing foreclosure on the Thunder Road Property in the event they default on their  
 4 obligation to BSI. When the RAS Motion was filed on July 14, 2017, BSI alleged that the  
 5 Kalsons were in default and that BSI had elected to initiate foreclosure proceedings. See RAS  
 6 Motion at ¶¶ 9 and 10. At the hearing on the RAS Motion, however, counsel for BSI advised the  
 7 court that as of August 15, 2017, the Kalsons were no longer in default. Presumably, BSI no  
 8 longer has any basis, much less an imminent reason, to pursue foreclosure under its deed of trust.

9 As to the Debtor, the evidentiary record does not support relief under Section 362(d)(1)  
 10 nor under Section 362(d)(2). BSI asserts that the fair market value of the Thunder Road  
 11 Property is approximately \$303,773.00 based on a county tax assessors report attached as  
 12 Exhibit D to the RAS Motion, see RAS Motion at ¶ 12, as well as “the Debtor’s Schedules A &  
 13 D.” RAS Motion at ¶ 17.<sup>22</sup> Nora attests that the Debtor values its interest in the Thunder Road  
 14 Property at \$1.5 million. See note 8, supra.<sup>23</sup> Neither party has offered a third-party appraisal to  
 15 establish the fair market value of the property. If the Debtor is correct, the bankruptcy estate  
 16 would have an “equity cushion” in the Thunder Road Property sufficient to constitute adequate  
 17 protection of BSI’s interest. See In re Mellor, 734 F.2d 1396, 1400-01 (9th Cir. 1984).  
 18 Likewise, there is no evidence of a diminution in the value of the Thunder Road Property after  
 19 the commencement of the Chapter 11 proceeding otherwise establishing that adequate protection

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21 <sup>21</sup> While the record reflects that there have been multiple bankruptcy filings affecting the  
 22 Thunder Road Property, BSI presumably has not sought in rem relief under Section 362(d)(4)  
 23 because it is not a creditor. Instead, it is a party in interest generally under Section 362(d) that  
 24 may seek relief from stay under Sections 362(d)(1 and 2). Compare Ellis v. Yu (In re Ellis), 523  
 B.R. 673, 678-80 (B.A.P. 9th Cir. 2014) (conflicting claims to ownership of real property does  
 not entitle movant to in rem relief).

25 <sup>22</sup> Nothing in those Schedules, however, support the \$303,773 figure. Instead, Debtor’s  
 26 creditor Schedule D asserts that the Thunder Road Property has a value of \$1,500,000.

27 <sup>23</sup> Although the Debtor’s ownership of any interest in the Thunder Road Property is  
 28 disputed, it is well established that an owner of property has capacity to testify as to its value.  
See generally Hon. B. Russell, 2 BANKRUPTCY EVIDENCE MANUAL, § 701:2 (West 2016-2017  
 Ed.). The weight, if any, to be given such testimony, however, lies with the finder of fact. Id.

1 payments should be required under Section 362(d)(1). See First Federal Bank of California v.  
2 Weinstein (In re Weinstein), 227 B.R. 284, 296-97 (B.A.P. 9th Cir. 1998). Moreover, if the  
3 Debtor's asserted value is correct, the bankruptcy estate arguably has equity in the Thunder Road  
4 Property and the burden never shifts to the Debtor under Section 362(d)(2)(B) to provide  
5 evidence that it can propose a plan of reorganization that has "a reasonable possibility of being  
6 confirmed within a reasonable time." See United Savings Association of Texas v. Timbers of  
7 Inwood Forest Associates, Ltd., 484 U.S. 365, 375-76, 108 S.Ct. 626, 632-33 (1988).

8 On the present record, these factual issues as to the value of the Thunder Road Property  
9 and the alleged value of the Debtor's purported interest cannot be resolved in favor of BSI nor  
10 the Debtor. More important, there is no need to address these issues at this time as BSI does not  
11 seek to foreclose on the Thunder Road Property, the Kalsons apparently do not seek to  
12 hypothecate or sell the Thunder Road Property,<sup>24</sup> and the Debtor has not taken any steps during  
13 this Chapter 11 proceeding that impacts the Thunder Road Property.

14 For the reasons discussed, the court will deny the RAS Motion without prejudice. In  
15 light of the court's concerns regarding the multiple bankruptcy filings, the property transfers, the  
16 doubtful existence of any creditors of the Debtor, and the absence of operations, the court will  
17 direct the UST to review whether the appointment of an examiner or a Chapter 11 trustee, as  
18 well as conversion to Chapter 7 or dismissal of the case, is appropriate.<sup>25</sup>

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21 <sup>24</sup> In the event the Debtor follows through with its apparent intention to commence  
22 litigation against the Kalsons in the State of Washington to quiet title to the Thunder Road  
23 Property, the court likely would grant relief from stay to BSI as necessary to intervene or  
otherwise appear in the litigation.

24 <sup>25</sup> When the UST objected to the employment of Nora as Chapter 11 counsel, it expressed  
25 its own concerns as follows: "The proposed representation also has a potential conflict based on  
26 Ms. Nora's involvement in the creation and funding of the Trust. The Trust is less than a year  
27 old. It is unclear why the Trust was established or what it is intended to accomplish. For the  
28 schedules, it appears its assets consist of mostly title insurance litigation claims.... The Trust's  
need for bankruptcy protection after less than a year of the Trust's existence may raise issues  
surrounding the adequacy of its management and funding. Attorney Nora's prior work in  
establishing the Trust would be implicated in such issues. That potential conflict also is  
disqualifying." UST Employment Objection at ¶ 15.

1           **IT IS THEREFORE ORDERED** that the Motion for Relief from Automatic Stay,  
2 Docket No. 85, be, and the same hereby is, **DENIED WITHOUT PREJUDICE**.

3           **IT IS FURTHER ORDERED** that a status hearing will be held on October 18, 2017, at  
4 9:30, at which a representative of the Office of the United States Trustee is required to attend.  
5 No later than October 11, 2017, the Office of the United States Trustee must file a statement  
6 addressing whether grounds exist to appoint an examiner or trustee in this Chapter 11  
7 proceeding, or to convert or dismiss the case.

8

9 Copies sent to all parties via CM/ECF ELECTRONIC FILING

10 Copies sent via BNC to:

11 KENNETH EDSTROM  
12 Sapientia Law Group  
12 120 South 6th Street, Suite 100  
13 Minneapolis, MN 55402

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