

Dated: December 6, 2016



*Scott H. Gan*

Scott H. Gan, Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

In re:

DIANA R. SHAFFER,

Debtor.

Chapter 13

Case No. 2:16-bk-10935-SHG

**MEMORANDA DECISION RE:  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY UNDER §362(a)**

On September 22, 2016, Diana R. Shaffer (the “Debtor”) filed a petition pursuant to chapter 13 of the Bankruptcy Code<sup>1</sup>. On October 7, 2016, a creditor in the case, Procaccianti AZ II LP (“Procaccianti”) filed a *Motion to Confirm the Inapplicability of Automatic Stay or in the Alternative to Lift the Automatic Stay* (the “Motion”)<sup>2</sup>. On October 21, 2016 Debtor filed a Response to the Motion<sup>3</sup>. On November 8, 2016 Procaccianti filed a Reply in support of the Motion<sup>4</sup>. On November 15, 2016 a hearing was held and arguments were presented by both parties with respect the Motion. The Court took the matter under submission and now rules in

<sup>1</sup> On October 7, 2016, Procaccianti filed a motion to dismiss the Debtor’s bankruptcy case because the Debtor’s liquidated, non-contingent, unsecured debts exceeded the debt limit set forth in 11 U.S.C. §109(e) and the bankruptcy case was not filed in good faith (DE 16). The Debtor immediately moved to convert to chapter 11 (DE 24). Procaccianti opposes Debtor’s conversion to chapter 11 (DE 28). An evidentiary hearing on these motions is set for December 8, 2016 (DE 41).

<sup>2</sup> DE 15

<sup>3</sup> DE 26

<sup>4</sup> DE 33

1 favor of Procaccianti granting relief from the automatic stay for the reasons discussed below.

2 During the oral argument on November 15, 2016, counsel for the Debtor and  
3 Procaccianti were asked whether the facts relevant to the determination of the Motion were  
4 disputed. Each responded that the historical facts and procedural history were not disputed. The  
5 facts and history set out below were taken from the exhibits attached to the parties' pleadings.

## 6 **HISTORICAL BACKGROUND AND DEBTOR'S PURCHASE OF UNIT NO. 17**

7 In April 1970, W.J. Small and Hazel M. Small leased 20 acres of land situated in  
8 Maricopa County to Linscott Hotel Corporation ("Linscott") for a period of 99 years ("Ground  
9 Lease")<sup>5</sup>. Linscott subjected and submitted 8 of the 20 acres to a condominium arrangement by  
10 recording a Declaration of Horizontal Property ("Declaration"), and the condominium  
11 arrangement is sometimes referred to as "Hilton Casitas"<sup>6</sup>. Linscott constructed, sold and  
12 conveyed dwelling units ("Units") in the 29 tracts to individual buyers.

13 Dawn Borger ("Borger") purchased one of the Units from Linscott on or about  
14 September 1973 and obtained a deed for the same<sup>7</sup>. In a separate transaction from the sale and  
15 purchase of the Unit, in September 1973, Linscott subleased to Borger the tract of underlying  
16 land referred to as "Casita No. 17"<sup>8</sup>. In September 1999, Scottsdale Resort & Spa Limited  
17 Partnership, as successor in interest to Linscott, and Borger amended the sublease in regards to  
18 rental terms<sup>9</sup>. In March 2005, Debtor purchased from Borger Unit 17 pursuant to a Purchase  
19 Agreement and obtained a Deed for same<sup>10</sup>. At the same time, Borger also assigned her sublease  
20 to the Debtor ("Ground Sublease").

21 Evidently, at a meeting held on January 12, 2006, the Hilton Casitas Council of Co-  
22 Owners (currently called the Scottsdale Hilton Casitas Homeowners Association) allegedly  
23 approved, in accordance with its by-laws, the terms of the negotiated rent allocation that, among  
24 other things, provides that the net annual rental payable by Sublessor (in its capacity as Lessee

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25 <sup>5</sup> DE 26, Ex 3

26 <sup>6</sup> Id., Ex 4

27 <sup>7</sup> Id., Ex 5

28 <sup>8</sup> Id., Ex 6

<sup>9</sup> DE 15, Ex A, p. 38-44

<sup>10</sup> DE 26, Ex 1 and 2

1 under the (Ground Lease) shall, for the period October 1, 2003 through September 30,2036,  
2 when the rental shall again be adjusted in connection with the redetermination of rental due from  
3 Sublessor under the Ground Lease<sup>11</sup>. The terms of the Association’s agreement was  
4 memorialized in the Second Amendment of Sublease Casita No. 17, dated January 13, 2006 by  
5 and between Scottsdale Resort & Spa Partners Limited Partnership (“Sublessor”)(Procaccianti’s  
6 predecessor-in-interest) and Debtor (“Sublessee”)<sup>12</sup>. The Second Amendment of Sublease  
7 provided, *inter alia*, various methods for Debtor’s payment of: (1) increased monthly rent of  
8 \$708.50 from February 1, 2006 through September 1, 2036; (2) Sublessee’s “Aggregate Rental  
9 Shortfall Amount” of \$10,685.36 for the period from October 1, 2003 through January 31, 2006;  
10 and (3) Sublessee’s share of Expert Fees of \$4055.60

### 11 **LITIGATION OVER THE SECOND AMNEDED SUBLEASE**

12 Apparently the Debtor refused to sign the Second Amended Sublease (Id.). Instead, in  
13 2006, she and three other unit owners, filed an action in Maricopa County Superior Court in  
14 CV2006-002866 seeking a determination that the then existing Homeowners Association  
15 (“HOA”) did not have the appropriate votes to authorize negotiating the future lease obligation  
16 for the respective unit owners. The 2006 action ultimately resulted in a ruling and judgment  
17 dated August 19, 2011, in favor of the Debtor and the other unit owners that the HOA did not  
18 have authority to negotiate the Second Amended Subleases, specifically the increased rental  
19 payments<sup>13</sup>.

20 Procaccianti evidently continued to demand the Debtor pay the past due and increased  
21 rent the other 25 Unit owners were paying under the terms of their Second Amended Subleases  
22 signed in 2006. So, in 2012, the Debtor and three other Unit owners brought an action against  
23 Procaccianti among others in Maricopa County Superior Court, No. CV2012-051066, to resolve  
24 the dispute over the rent required to be paid for the Ground Sublease.

25 Procaccianti filed counterclaims in that action asserting claims for breach of contract,  
26 unjust enrichment, breach of covenant of good faith and fair dealing and seeking a judicial

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27 <sup>11</sup> DE 15, Ex A, p. 45-53

28 <sup>12</sup> Id.

<sup>13</sup> DE 26, Ex 7

1 declaration whether it could enforce the increased rent set forth in the Second Amended  
2 Subleases and to establish the amounts owed by each of the “objecting” Unit owners<sup>14</sup>. On June  
3 9, 2016, the State Court entered a money judgment against the Debtor in favor of Procaccianti  
4 in the amount of \$114,589.70 for sums owed under the Ground Sublease and \$459,000 in  
5 attorney’s fees and \$5,108.56 in costs (“2016 Judgment”)<sup>15</sup>.

### 6 **EVICTON AND BANKRUPTCY**

7 On June 30, 2016 Procaccianti sent a letter notifying the Debtor that she was in default  
8 under the terms of the Ground Sublease by failing to pay monthly rent “on multiple and  
9 continuing occasions” and demanding the Debtor pay the amount of \$118,132.20 within 30 days  
10 or face termination of the sublease lease and subsequent eviction<sup>16</sup>.

11 On August 16, 2016 Procaccianti filed a forcible entry and detainer action against  
12 Debtor in the Maricopa County Superior Court, CV2016-012290 seeking to evict the Debtor<sup>17</sup>.  
13 An evidentiary hearing in the forcible entry and detainer action was set to commence in the  
14 superior court at 9:00 a.m. on September 23, 2016<sup>18</sup>. On September 22, 2016 at about 4:00 p.m.,  
15 the afternoon before the eviction trial was scheduled to commence, the Debtor filed the instant  
16 bankruptcy proceeding under chapter 13 of the Bankruptcy Code.

### 17 **PROCACCIANTI SEEKS RELIEF FROM THE STAY**

18 On October 7, 2016, Procaccianti filed the Motion seeking a determination that the  
19 automatic stay is inapplicable based on the alleged prepetition termination of the lease, or  
20 alternatively seeking “lift” of the automatic stay to permit completion of the eviction action still  
21 pending in the Maricopa County Superior Court. Procaccianti asserts: (1) the Debtor’s rights  
22 under the Ground Lease and in Unit 17 terminated prepetition; it is not property of the estate;  
23 and therefore, the stay is inapplicable to those interests; (2) “cause” for relief from the stay  
24 under §362(d)(1) has been established because the Debtor has no rights in the Ground Lease;

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<sup>14</sup> DE 26, Ex 9

27 <sup>15</sup> Id., Ex 10

28 <sup>16</sup> DE 26, Ex 11, p. 214-215

<sup>17</sup> DE 26, p. 5, l. 17-18

<sup>18</sup> Id., Ex 12

1 she cannot assume the Ground Lease because it terminated according to its terms prepetition;  
2 and the Debtor has no legal basis to remain in the property; (3) the Debtor admittedly has no  
3 equity in Unit 17 and it is not necessary for an effective reorganization since she did not own it  
4 on the filing date; and (4) stay relief may be granted if any of the standards for relief under  
5 §362(d) have been satisfied.

6 Debtor opposes the Motion and asserts: (1) she cannot be legally evicted her from the  
7 real property improvements on leased land based on the prior state court judgment in favor of  
8 Procaccianti, even if the lease was properly terminated prepetition; (2) the Debtor has repeatedly  
9 tendered monthly rent payments “outside of the scope of the 2016 Judgment”, but these  
10 payments have been improperly rejected by Procaccianti; (3) cause does not exist to lift the stay;  
11 and (4) the ground lease was not properly terminated by Procaccianti prepetition.

12 This Court need not resolve the Debtor’s claims regarding her rights in the Ground  
13 Lease, the improvements to Unit 17 or over the land, as well as her claims that Procaccianti is  
14 legally precluded from foreclosing on them under state law. It is not necessary to determine here  
15 whether the lease was properly terminated by Procaccianti prepetition. Cause for relief from the  
16 stay has been established.

## 17 THE LAW

18 11 U.S.C.A. § 362 provides in pertinent part:

19 d) On request of a party in interest and after notice and a hearing, the court shall grant relief  
20 from the stay provided under subsection (a) of this section, such as by terminating, annulling,  
21 modifying, or conditioning such stay--

22 (1) for cause, including the lack of adequate protection of an interest in property of  
23 such party in interest;

24 (2) with respect to a stay of an act against property under subsection (a) of this section,  
25 if--

26 (A) the debtor does not have an equity in such property; and

27 (B) such property is not necessary to an effective reorganization;

28 A bankruptcy filing imposes an automatic stay of all litigation against the debtor. 11

1 U.S.C. § 362(a). A bankruptcy court, however, “shall” lift the automatic stay “for cause.” §  
2 362(d)(1). “Cause” has no clear definition and is determined on a case-by-case basis, *In re*  
3 *MacDonald*, 755 F.2d 715, 717 (9th Cir.1985). But, where a bankruptcy court may abstain from  
4 deciding issues in favor of an imminent state court trial involving the same issues, cause may  
5 exist for lifting the stay as to the state court trial. *See In re Castlerock Properties*, 781 F.2d 159,  
6 163 (9th Cir.1986). *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1166 (9th Cir. 1990).

7 A creditor seeking to proceed post-petition with litigation against the debtor typically  
8 must request and obtain relief from the automatic stay. *Id.* Such relief is granted only upon a  
9 showing of cause. § 362(d)(1); *In re Conejo Enterprises, Inc.*, 96 F.3d at 351. However, because  
10 the Bankruptcy Code does not specify what constitutes cause in this context, bankruptcy courts  
11 must determine whether cause exists on a case-by-case basis. *Id.*; *Kronemyer v. Am. Contractors*  
12 *Indemn. Co. (In re Kronemyer)*, 405 B.R. 915, 921 (9th Cir. BAP 2009).

13 In *In re Kronemyer*, the bankruptcy court considered the factors articulated in *In re*  
14 *Curtis*, 40 B.R. 795, 799–800 (Bankr. D. Utah 1984), for the purpose of determining whether  
15 cause existed to lift the stay to permit the creditor to proceed with prepetition litigation against  
16 the debtor. *In re Kronemyer*, 405 B.R. at 921. As the *Kronemyer* court stated, “We agree that the  
17 *Curtis* factors are appropriate, nonexclusive, factors to consider in deciding whether to grant  
18 relief from the automatic stay to allow pending litigation to continue in another forum.” *Id.*

19 The *Curtis* factors consist of the following twelve nonexclusive factors:

- 20 1. Whether the relief will result in a partial or complete resolution of the issues;
- 21 2. The lack of any connection with or interference with the bankruptcy case;
- 22 3. Whether the foreign proceeding involves the debtor as a fiduciary;
- 23 4. Whether a specialized tribunal has been established to hear the particular cause of action  
24 and whether that tribunal has the expertise to hear such cases;
- 25 5. Whether the debtor's insurance carrier has assumed full financial responsibility for  
26 defending the litigation;
- 27 6. Whether the action essentially involves third parties, and the debtor functions only as a  
28 bailee or conduit for the goods or proceeds in question;

- 1 7. Whether the litigation in another forum would prejudice the interests of other creditors, the
- 2 creditors' committee and other interested parties;
- 3 8. Whether the judgment claim arising from the foreign action is subject to equitable
- 4 subordination under Section 510(c);
- 5 9. Whether movant's success in the foreign proceeding would result in a judicial lien
- 6 avoidable by the debtor under Section 522(f);
- 7 10. The interests of judicial economy and the expeditious and economical determination of
- 8 litigation for the parties;
- 9 11. Whether the foreign proceedings have progressed to the point where the parties are
- 10 prepared for trial, and
- 11 12. The impact of the stay on the parties and the "balance of hurt,"

## 12 ANALYSIS

13 In weighing the relevant factors whether to grant relief from the stay to permit pending  
14 state court litigation to proceed, the bankruptcy court is not required to give equal weight to all  
15 factors. The balancing of potential harm to the creditor on the one hand and to the debtor and the  
16 bankruptcy estate on the other hand frequently is dispositive. *Green v. Brotman Med. Ctr., Inc.*  
17 (*In re Brotman Med. Ctr., Inc.*), 2008 WL 8444797, at \*6 (Mem. Dec.) (9th Cir. BAP Aug. 15,  
18 2008) ("the bankruptcy court must balance the potential hardship that will be incurred by the  
19 party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the  
20 bankruptcy estate")

21 In essence Procaccianti is relief from the stay to resolve whether the Ground Lease was  
22 terminated prepetition and whether Debtor's defenses to termination or eviction should prevail  
23 in the state court. These parties have been in litigation over the enforcement of the Second  
24 Amended Sublease since at least 2012. On October 3, 2016, after the petition was filed, the  
25 Debtor filed a notice of appeal from the 2016 Judgment entered against her and in favor of  
26 Procaccianti<sup>19</sup>. So, the litigation between these parties in the Arizona state courts continues,

27 <sup>19</sup> DE 26, Ex 15. To the extent that §362 stays an appeal by a debtor when the action or  
28 proceeding below was against the debtor, relief from the stay to permit the debtor to  
pursue her appeal is granted by this order. *Parker v. Bain*, 68 F.3d 1131, 1136 (9th Cir.  
1995) ("[S]ection 362 should be read to stay all appeals in proceedings that were  
*originally brought* against the debtor, regardless of whether the debtor is the appellant

1 despite the filing of the Debtor’s bankruptcy case.

2           There are no disputed facts that required an evidentiary hearing prior to determination  
3 of the Motion. Despite the Debtor’s arguments to the contrary, there is no reason for this Court  
4 to insert itself in the Ground Lease litigation at this late stage of those proceedings. Particularly,  
5 in light of the fact there is a pending state court proceeding that will provide a competent forum  
6 for resolution of these questions of state law.

7           Applying the *Curtis* factors in this case leads to the conclusion that relief from the stay  
8 should be granted. The state court will permit Procaccianti and the Debtor to obtain a complete  
9 determination of whether the lease was properly terminated and the Debtor’s defenses to the  
10 lease termination and eviction in the same state court proceeding. The resolution of the eviction  
11 action will have not interfere with the bankruptcy case. In fact resolution of the lease  
12 termination issues will assist the bankruptcy court in subsequently resolving the Debtor’s  
13 motion to assume the Ground Lease which was recently filed.

14           The Maricopa County Superior Court is a specialized tribunal established to hear these  
15 kinds of real property disputes. See, *Matter of Williams*, 144 F.3d 544, 550 (7th Cir. 1998)  
16 (finding the bankruptcy court did not abuse its discretion in granting relief from the automatic  
17 stay to permit completion of an eviction action, in part, because it had no particular expertise  
18 under this narrow area of state law and this would not be a particularly efficient use of judicial  
19 resources); *In re Blair*, 534 B.R. 787, 792–93 (Bankr. D.N.M. 2015) (citing the *Curtis* factors  
20 and concluding the stay should be modified to permit an eviction action to continue, in part,  
21 because the state courts are well-versed in this area of law and traditionally exercise jurisdiction  
22 over such disputes.)

23           There is no creditors committee in this case. The case has not yet been converted to  
24 chapter 11. The secured creditor holding a first priority lien on the improvements and the  
25 Debtor’s husband’s business that has a second lien on the same property will not be prejudiced  
26 by continuing the eviction litigation in the state court. Both should be fully capable of  
27 representing their interests in that litigation, if necessary. The interests of judicial economy and  
28 the expeditious and economical determination of the pending litigation between the parties

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or the appellee....”)



1 clearly favors granting relief from the stay.

2 Finally, the balance of the hurt, the impact of the stay favors granting relief from the  
3 stay. The Debtor has not demonstrated why continuing the stay will do anything more than  
4 prevent her eviction from Unit 17. The value of the property according to the Debtor's schedules  
5 is approximately \$320,000. The property is encumbered by a first lien owed approximately  
6 \$145,000 and a second lien in favor of an entity owned by the Debtor's husband owed  
7 approximately \$644,000. As a result, the property is over encumbered and there is no equity for  
8 the bankruptcy estate. The only reason to litigate the lease termination/eviction matter in the  
9 bankruptcy court is to permit the Debtor to continue to reside in the property. There does not  
10 appear to be any economic benefit to the estate's creditors even if the Debtor is successful in  
11 proving the lease was not properly terminated.

12 **CONCLUSION**

13 Procaccianti has established cause under §362(d)(1) for relief from the stay to permit  
14 completion of the eviction action pending in state court. Whether the lease was properly  
15 terminated as well as Debtor's other defenses to eviction can be litigated in that pending state  
16 court proceeding. This grant of stay relief includes the determination by the state court whether  
17 Procaccianti may foreclose under state law on the Debtor's asserted interest in the land and  
18 improvements comprising Unit 17 as a consequence of the claimed termination of the Ground  
19 Lease. Procaccianti is not authorized to take any collection action with respect to the judgment  
20 against the Debtor personally without further order of the Court. For the reasons set forth above,  
21 Procaccianti's Motion for Relief from the automatic stay is granted. Counsel for Procaccianti is  
22 directed to prepare a form of order.

23 Dated and signed above.

1 Notice to be sent through the  
2 Bankruptcy Noticing Center "BNC"  
3 to the following:

4 Diana Shaffer  
5 6333 North Scottsdale Road #17  
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