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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BMO HARRIS BANK N.A., a national banking association,  
  
Plaintiff,  
  
v.  
  
MARKEN ENTERPRISE, LLC, an Arizona limited liability company, AND GARY MARKEN, an individual,  
  
Defendants.

Case No.: 3:17-cv-00091-GPC-NLS  
  
**ORDER**  
  
**(1) STAYING CASE PENDING RESOLUTION OF AUTOMATIC STAY RE: GARY MARKEN**  
  
**(2) DENYING MOTION FOR DEFAULT JUDGMENT WITHOUT PREJUDICE**  
  
**[ECF No. 7.]**

On July 31, 2017, Plaintiff BMO Harris Bank N.A. filed a motion for default judgment against Defendants Marken Enterprise, LLC and Gary Marken. (Dkt. No. 7.) A hearing has been scheduled for October 6, 2017 at 1:30 p.m. On August 21, 2017, Plaintiff filed a Notice of Automatic Stay Pursuant to 11 U.S.C. § 362 to inform the court that Gary Marken (“Debtor”) had filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code (“Petition”). (Dkt. No. 8.) This Petition is currently pending in the United States Bankruptcy Court for the District of Arizona in Case Number 2:17-bk-08563-MCW.

1 Pursuant to 11 U.S.C. § 362(a), an automatic stay is applicable to actions and legal  
2 proceedings against the Debtor, including in this instant case, until further order from the  
3 Bankruptcy Court. An automatic stay precludes the “commencement or continuation,  
4 including the issuance or employment of process, of a judicial, administrative, or other  
5 action or proceeding against the debtor that was or could have been commenced before  
6 the commence of the case under [the Bankruptcy title], or to recover a claim against the  
7 debtor that arose before the commencement of the case under this title.” Once a  
8 discharge is granted in a Chapter 7 bankruptcy, a stay issued pursuant to § 362(a) is  
9 lifted. 11 U.S.C. § 362(c)(2)(C).

10 Pursuant to 11 U.S.C. § 362, the filing of the bankruptcy petition operates as an  
11 automatic stay only as to Defendant Gary Marken. *See* 11 U.S.C. § 901(a). Section 362  
12 does not stay this action as to the non-bankrupt defendant, Marken Enterprise, LLC. *See*  
13 *Ingersoll-Rand Financial Corp. v. Miller Mining Co. Inc.*, 817 F.2d 1424, 1427 (9th Cir.  
14 1987) (“In the absence of special circumstances, stays pursuant to section 362(a) are  
15 limited to debtors and do not include non-bankrupt co-defendants.”) Plaintiff has not  
16 expressed a view as to whether the stay should apply to Marken Enterprise, LLC. *See*  
17 (Dkt. No. 8.)

18 Courts have found that the automatic stay may apply to non-debtor entities under  
19 the “unusual circumstances” exception. *See Zurich Amer. Ins. Co. v. Trans Cal*  
20 *Associates*, 2011 WL 6329959, at \*2–3 (E.D.Cal. Dec.16, 2011) (explaining the “unusual  
21 circumstances” exception and ultimately staying the action as to non-bankrupt co-  
22 defendants pursuant to the court's inherent authority). “The courts have carved out  
23 limited exceptions [to the general rule that stays pursuant to § 362(a) are limited to  
24 debtors and do not include non-bankrupt co-defendants] where: (1) ‘there is such identity  
25 between the debtor and the third-party defendant that the debtor may be said to be the real  
26 party defendant and that a judgment against the third-party defendant will in effect be a  
27 judgment or finding against the debtor,’ or (2) extending the stay against codefendants  
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1 ‘contributes to the debtor's efforts of rehabilitation.’” *United States v. Dos Cabezas*  
2 *Corp.*, 995 F.2d 1486, 1491 n. 3 (9th Cir.1993). *See also Queenie, Ltd. V. Nygard Int’l*,  
3 321 F.3d 282, 287 (2d Cir.2003) (staying the proceedings as to non-debtor corporation  
4 co-defendant that was wholly owned by debtor because the “claim against the non-debtor  
5 will have an immediate adverse economic consequence for the debtor's estate”). The  
6 Court observes that the instant case is a prime candidate for the “unusual circumstances”  
7 exception because (1) there is significant identity between the Debtor and co-defendant  
8 and because (2) Debtor serves as a guarantor for the loan undertaken by Marken  
9 Enterprise LLC that is the subject of this instant action and the claim against the LLC will  
10 have an “adverse economic consequence” for his estate. *See* Compl. ¶ 2-3 (stating that  
11 Marken Enterprise LLC’s sole and Managing Member is Gary Marken and that Marken  
12 is the guarantor of the obligations owed by Marken Enterprise LLC in this lawsuit);  
13 *Queenie, Ltd. v. Nygard Int’l*, 321 F.3d 282, 287 (2d Cir. 2003) (finding that claims that  
14 “establish an obligation of which the debtor is a guarantor” constitute unusual  
15 circumstances to warrant an extension of automatic stay to a non-debtor).

16       However, even if such an exception applied, the weight of authority holds that the  
17 bankruptcy court must extend the automatic stay, not the district court. *See Zurich*, 2011  
18 WL 6329959, at \*2 (citing *Placido v. Prudential Ins. Co. of Am.*, No. c09-00668-WHA,  
19 2010 WL 334744, at \*1 (N.D. Cal. Jan. 22, 2010). *See also Boucher v. Shaw*, 572 F.3d  
20 1087, 1093 n.3 (9th Cir. 2009). Consequently, the Court will not and cannot stay the  
21 instant action as to Marken Enterprise LLC pursuant to the automatic stay provisions of  
22 Section 362.

23       However, the court will stay the action against Marken Enterprise LLC under its  
24 inherent authority since doing so would be judicially efficient and the fairest course for  
25 the parties. District courts faced with similar situations have pursued a similar course and  
26 exercised their inherent authority to stay matters as to a non-debtor party. *See J&J Sports*  
27 *Products Inc. v. Brar*, No. 2:09-cv-3394-GEB-EFB, 2012 WL 4755037, at \*2 (E.D. Cal.  
28 Oct. 3, 2012) (ordering a stay as to claims against the debtor’s LLC pursuant to inherent

1 authority pending resolution of the debtor’s bankruptcy petition); *Zurich*, 2011 WL  
2 6329959, at \*2-3 (staying case against non-bankrupt co-defendants pursuant to inherent  
3 authority). In *J&J Sports*, Judge Brennan explained that default judgment should not be  
4 entered until the case is finally adjudicated as to all claims and all parties. *J&J*, 2012 WL  
5 4755037, at \*2. By permitting plaintiff to proceed against only the LLC, a “later trial of  
6 the claims against the individual defendant could involve the relitigation of most if not all  
7 of the issues litigated in the first proceeding against [the] LLC.” *Id.* These same  
8 concerns of judicial economy and fairness to the parties are present in this instant case.

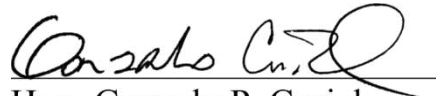
9       The Court concludes that a stay of Plaintiff’s claims are appropriate, in the interest  
10 of judicial economy, and is permissible under the Court’s inherent authority to manage its  
11 cases. *See SCI Northbay Commerce Fund 4, LLC v. SCI Real Estate Invs., LLC*, 2011  
12 WL 1133898, at \*1 (M.D. Fla. Mar.28, 2011). The court will therefore deny plaintiff’s  
13 motion for default judgment without prejudice.

14 Accordingly it is **HEREBY ORDERED** that:

- 15       1. Plaintiff’s Motion for Default Judgment is **DENIED** without prejudice as to its  
16       reassertion upon termination of the bankruptcy proceeding or an order granting  
17       relief from the automatic stay. The Court vacates the hearing set for October 6,  
18       2017 at 1:30 p.m.
- 19       2. This action is stayed pending resolution of Defendant Gary Marken’s bankruptcy  
20       petition, case number 2:17-bk-08563-MCW, filed July 25, 2017
- 21       3. The parties shall notify the court within fourteen days of the resolution of the  
22       bankruptcy proceeding
- 23       4. The Clerk of Court is instructed to administratively close this case, to be reopened  
24       after the conclusion of the bankruptcy proceedings upon written request and  
25       application of the parties and order of this court.

**IT IS SO ORDERED.**

Dated: September 14, 2017

  
Hon. Gonzalo P. Curiel  
United States District Judge

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