SO ORDERED.
SIGNED this 19th day of May, 2019

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ALBERT OKOREEH BAAH

Debtor

Case No. 3:19-bk-31391-SHB
Chapter 13

MEMORANDUM AND ORDER

On May 16, 2019, the Court held an evidentiary hearing on Debtor's Motion to Impose the Automatic Stay Pursuant to 11 U.S.C. § 362(c)(4)(B) as to Knoxville Teachers Federal Credit Union ("Motion") filed on May 3, 2019 [Doc. 11]. Debtor asks the Court to impose the automatic stay of § 362(a) to prevent a foreclosure sale scheduled by Knoxville Teachers Federal Credit Union (the "Credit Union") for May 20, 2019.[1] The Motion was opposed by the Credit

[1] Debtor and his counsel explained at the May 16 hearing that Debtor opposes foreclosure only on his residence. If the Court grants Debtor's Motion, he hopes to reach an agreement with the Credit Union for the modification of the stay to allow the Credit Union to foreclose on vacant property adjacent to his residence, with the Credit Union selling the property to a buyer with whom Debtor had a pre-existing sales contract from his most recent bankruptcy case. Debtor believes that the foreclosure sale to the ready buyer would terminate the judgment liens of several creditors and make Debtor's proposed plan feasible at a monthly payment of $5,000.00.

Union, which filed an objection [Doc. 14] and participated in the hearing, requesting entry of an order pursuant to § 362(c)(4)(A)(ii) to confirm that no stay is in effect.

Because this is Debtor's third Chapter 13 bankruptcy case filed within the past year,[2] the automatic stay did not go into effect upon filing of the petition, *see* 11 U.S.C. § 362(c)(4); thus, the issue before the Court is whether Debtor has rebutted by clear and convincing evidence the statutory presumption that this case was "filed not in good faith" under § 362(c)(4)(D). The record before the Court consists of three exhibits, including Debtor's most recent bank statements, together with the testimony of Bill Bourne and Debtor. The Court also takes judicial notice of Debtor's schedules and statements filed in this case and in the prior two cases. *See* Fed. R. Evid. 201 (made applicable by Fed. R. Bankr. P. 9017); *see also Sherman v. Rose (In re Sherman)*, 18 F. App'x 718, 721 (10th Cir. 2001) (noting that "a bankruptcy court may take judicial notice of schedules to the bankruptcy petition filed by the debtor" and that it "may even take notice of schedules, averments and statements filed in prior bankruptcy cases"); *In re Wark*, 542 B.R. 522, 565 n.146 (Bankr. D. Kan. 2015).

Section 362(c)(4) states, in material part:

> [I]f a . . . case is filed by . . . a debtor who is an individual under this title, and if 2 or more . . . cases of the debtor were pending within the previous year but were dismissed, . . . the stay under subsection (a) shall not go into effect upon the filing of the later case; and
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> . . . .
>
> (B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and

[2] Case number 3:18-bk-30345-SHB was filed February 9, 2018, and dismissed post-confirmation October 5, 2018, on the Chapter 13 Trustee's certification of plan arrearages. [*See In re Baah*, No. 3:18-bk-30345, ECF Nos. 82, 83.] Case number 3:18-bk-33862-SHB was filed December 24, 2018, and dismissed pre-confirmation on March 18, 2019, on the Trustee's certification that Debtor did not make a plan payment as required by the Court on the record at a status hearing on the Trustee's objection to confirmation based on feasibility. [*See In re Baah*, No. 3:18-bk-33862, ECF Nos. 75, 79.]

> 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; [and]
>
> . . . .
>
> (D) for the purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) –
>
> (i) as to all creditors if –
>
> (I) 2 or more previous cases . . . were pending within the 1-year period;
>
> (II) a previous case . . . was dismissed within the time period stated in this paragraph after the debtor . . . 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 . . . or any reason to conclude that the later case will not be concluded . . . with a confirmed plan that will be fully performed[.]

11 U.S.C. § 362(c)(4).

As support for the Motion, Debtor, who buys, repairs, and sells cars, introduced into evidence a handwritten list of his 2019 sales, together with copies of five checks payable to him for salvage purchases by Whitehead Auto Sales LLC in the aggregate amount of $28,400.00 [Ex. 1] and copies of bank statements dated March and April 2019 for a savings account with First Tennessee Bank, as well as a printout of the transactions occurring between the April statement and May 14, 2019 [Ex. 2]. The savings account, which Debtor stated is an "old" account, was not disclosed in his statements and schedules filed on May 2, 2019 [Doc. 1] or in either of the prior two cases. After the May 16 hearing, Debtor amended Schedule A/B and Schedule I on May 17 to add the savings account and to change the value of his real property as well as to include information about business expenses to reflect a $200.00 increase in his net income. As a result, Debtor now claims net monthly income of $6,960.00. [Doc. 25.] Debtor's Schedule J

[Doc. 1 at pp. 43-44] reflects personal expenses totaling $1,963.00, leaving $4,997.00 in net disposable income based on the post-hearing amended Schedule I. Thus, Debtor's proposed plan payment of $5,000.00 is facially infeasible, even based on Debtor's amended Schedule I.

Debtor's counsel confirmed that a minimum plan payment of $5,000.00 would be required even if the Court imposes the automatic stay and Debtor reaches an agreement with the Credit Union. [*See supra* note 1.] Setting aside the facial inability of Debtor to make the proposed plan payment (because his filings now reflect that he is only $3.00 per month short), the Court finds that the evidence at the May 16 hearing, especially Exhibits 1 and 2, does not support the amended Schedule I that reflects net business income of $5,510.00. Nor did Debtor testify concerning the amount of his girlfriend's contribution to his income or her source of income.

Simply, the Court finds that Debtor's post-hearing submission of Amended Schedule I does not meet the clear and convincing burden of § 362(c)(4). Indeed, the bank statements submitted at the May 16 hearing contradict Debtor's Business Income and Expenses [Doc. 25 at p. 12] submitted after the hearing. Notwithstanding that Debtor has made deposits into the First Tennessee account totaling $29,250.88 since January 31, 2019, there have also been withdrawals (including bank fees) totaling $26,122.99, which Debtor testified went toward the purchase of additional cars. Specifically, the March 31, 2019 statement, which started with a balance of $0.00 on January 31, reflects deposits of $7,050.00 and withdrawals of $6,393.99 between January 31 and March 28, leaving an ending balance of $656.01. [Ex. 2.] The April 30, 2019 statement reflects deposits of $1,734.66 and withdrawals of $2,275.00 between April 4 and April 10, leaving an ending balance of $115.67. [*Id.*] Finally, the printout for transactions occurring between May 2 and May 14 reflects deposits of $20,466.22 and withdrawals of $17,454.00,

leaving a balance on May 14 of $3,127.89. [*Id.*] Debtor testified that as of the hearing, the account balance was only approximately $100.00 because he had withdrawn cash to purchase a vehicle. When questioned about how he planned to make his first plan payment of $5,000.00 before the thirty-day deadline imposed by 11 U.S.C. § 1326(a), Debtor testified that he could sell vehicles that he currently owns for salvage to secure sufficient funds for the payment. Such salvage sales, however, would serve only to keep Debtor's case from being dismissed under § 1307(c) for failure to timely make the first plan payment and would significantly reduce Debtor's net business income going forward, which already is facially insufficient to support the proposed plan payment.

Debtor also testified that he relies on income from his girlfriend, which is reflected on his original and amended Schedule I. Debtor, however, provided no evidentiary proof concerning his girlfriend's income or to support the claim that she does – or can – contribute the amount shown in his Schedule I. Debtor also failed to meet the clear and convincing burden under § 364(c)(4) concerning his girlfriend's monthly contribution to his budget.

For these reasons, the Court finds that Debtor has not overcome the statutory presumption that this case (being his third since February 9, 2018) was not filed in good faith. Because he has not overcome the statutory presumption by clear and convincing evidence as required by 11 U.S.C. § 362(c)(4)(D), the Motion must be denied, especially in light of the Credit Union's objection. Accordingly, the Court directs the following:

1. The Motion to Impose the Automatic Stay Pursuant to 11 U.S.C. § 362(c)(4)(B) as to Knoxville Teachers Federal Credit Union filed by Debtor on May 3, 2019 [Doc. 11], is DENIED.

2. Pursuant to 11 U.S.C. § 362(c)(4)(A)(ii), the Court confirms that no stay is in effect in this case.

3. This Memorandum and Order constitutes the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure, applicable to contested matters by virtue of Rule 9014 of the Federal Rules of Bankruptcy Procedure.

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