UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **SHAWN EVAN KIEFER**, Debtor.	Case No. **05-65442-13**

MEMORANDUM OF DECISION

At Butte in said District this 15th day of May, 2006.

In this Chapter 13 case secured creditor Washington Mutual Bank ("Washington Mutual") filed on March 24, 2006, a "Motion for Order Regarding Termination of Automatic Stay". Debtor filed an objection on March 27, 2006, setting the matter for hearing which was held at Billings on April 17, 2006. Washington Mutual was represented at the hearing by attorney Matthew J. Kolling ("Kolling"). Debtor was represented by attorney Joanne M. Briese ("Briese"). No testimony or exhibits were admitted. Counsel for the parties clarified that Washington Mutual's Motion is based solely on the timelines set forth under 11 U.S.C. § 362(c)(3)(A), and does not involve the good faith provisions of subsections § 362(c)(3)(B) and (3)(C)[1]. The Court granted the parties time to file simultaneous briefs, which have been filed and reviewed by the Court. This matter is ready for decision.

At issue is whether under § 362(c)(3)(A) the stay is terminated with respect to property of the estate. This Court holds that the stay is not terminated with respect to property of the estate

[1]Kolling stated at the hearing that the bad faith presumption of § 363(c)(3)(C) did not arise and is not at issue in this case.

based upon the plain language of § 363(c)(3)(A), in accordance with prevailing authority.

This Court has jurisdiction of this Chapter 13 case under 28 U.S.C. § 1334(a). Washington Mutual's Motion is a core proceeding to terminate the automatic stay under 28 U.S.C. § 157(b)(2)(G). This Memorandum of Decision includes the Court's findings of fact and conclusions of law for this contested matter.

FACTS

Debtor Shawn Evan Kiefer filed a Chapter 13 petition in Case No. 04-60325-13 on February 16, 2004. A Chapter 13 Plan was confirmed on June 10, 2004, and modified on August 23, 2004, but Kiefer filed a motion to dismiss on March 21, 2005, the day before a hearing was scheduled to be held on Washington Mutual's motion to modify stay. The Court granted Debtor's motion and dismissed Case No. 04-60325-13 on March 22, 2005. A final decree was entered and Case No. 04-60325-13 was closed on April 11, 2005.

Debtor filed his petition in the instant Chapter 13 case on December 22, 2005. Notice went out to the creditors on December 25, 2005, including to Washington Mutual at 11200 West Parkland Ave., Milwaukee, WI 53224-3127. Debtor filed his Chapter 13 Plan on December 28, 2005, which treats Washington Mutual as a creditor holding an unimpaired claim secured by a mortgage on Debtor's homestead, and curing a $9,000.00 arrearage owed to Washington Mutual.. Objections to confirmation were filed by Washington Mutual based upon the prepetition arrearage stated on its Proof of Claim, and by the Chapter 13 Trustee. A hearing on confirmation was set for February 21, 2006.

Debtor filed an objection to Washington Mutual's claim seeking to disallow certain arrearages and escrow charges. The Court sustained Debtor's objection on February 8, 2006,

after Washington Mutual failed to respond to Debtor's objection within the time allowed. The Court allowed Washington Mutual a total secured claim in the sum of $112,664.97 with an arrearage in the sum of $26,773.86 (Docket No. 15). Debtor filed amended Plans on February 9, 2006, which paid Washington Mutual's arrearage in the amount allowed by the Court. The Trustee filed a consent to confirmation, and no other creditor or interested party filed an objection to confirmation. The Court confirmed Debtor's amended Plan by Order entered on February 10, 2006. The confirmed Plan provides at paragraph 6.a:

> All property, including Debtor's homestead property, shall remain property of the estate and shall vest in the Debtor only upon dismissal, discharge or conversion. Debtor shall be responsible for the preservation and protection of all property of the estate at all times, including the period of time between confirmation of Debtor's plan and the dismissal, discharge or conversion of the case.

Washington Mutual did not file an objection to confirmation of Debtor's amended Plan[2]. On February 28, 2006, Washington Mutual filed a motion for relief from the Court's Order sustaining Debtor's objection to its Proof of Claim, claiming excusable neglect because of a calendaring error. Debtor filed an objection, and Washington Mutual's attorney withdrew its motion for relief at hearing on March 21, 2006.

On March 24, 2006, Washington Mutual filed its instant motion based on § 363(c)(3)(A) for termination of the stay because of the dismissal of Debtor's prior Chapter 13 case, and alleged that Debtor's case is presumptively not filed in good faith[3]. The Chapter 13 Trustee filed

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[2]Washington Mutual's original objection to confirmation (Docket No. 11) was based upon its claimed arrearage, which was fixed by Order (Docket No. 15), which thereby rendered its objection moot.

[3]Kolling withdrew the presumptive lack of good faith at the hearing held on April 17, 2006.

a consent on March 31, 2006. Debtor filed a response on March 27, 2006, to Washington Mutual's motion and requested a hearing contending that Washington Mutual waived § 363(c)(3)(A) by not objecting to Debtor's amended Plan and is bound by confirmation, that Washington Mutual's arrearage is cured by the confirmed Plan and Debtor may request an extension of the stay through the term of the Plan, and that Debtor has demonstrated good faith. Washington Mutual filed a reply contending that the termination of the stay under § 362(c)(3)(A) is mandatory, and Debtor has not met the detailed procedure under § 363(c)(3)(B) for continuation of the stay. Debtor supplemented his objection on April 12, 2006, citing case law that the stay does not terminate under § 362(c)(3)(A) with respect to property of the estate, or with respect to actions against codebtors which are stayed under 11 U.S.C. § 1301.

DISCUSSION

I. Contentions of the Parties.

Washington Mutual admits that case law interprets § 362(c)(3)(A) to maintain the stay against property of the estate, but argues "the better reading of the statute, consistent with the language of the statute, the legislative history and the intent of Congress, is that when the conditions of § 362(c)(3)(A) are met, the automatic stay terminates in its entirety, including against property of the estate ...." Washington Mutual cites cases describing the statute as "virtually incoherent" and "far from being ambiguous", and thus refers to legislative history which it argues is "clear that Congress intended the statute to terminate all protections of the automatic stay ...." Washington Mutual contends that the phrase "with respect to the debtor" does not alter the clear intent of Congress, and that the phrase applies only for the purpose of identifying the parties against whom the stay is terminated. Washington Mutual argues that cases

to the contrary are from outside this district, misconstrue § 362(c)(3)(A), and are contrary to the standard rules of statutory construction which prohibit causing critical words of a statute to be rendered meaningless. With respect to the codebtor stay Washington Mutual contends that § 1301 has no effect on its Motion because § 362(c)(3)(A) refers specifically to the stay under § 362(a). With respect to confirmation, Washington Mutual does not contest that its collateral is property of the estate, but argues that § 362(c)(3)(A) is effective against property of the estate and nothing in the confirmed Plan precludes termination of the stay.

Debtor contends that the plain language of § 362(c)(3)(A) terminates the stay with respect to the debtor but not with respect to property of the estate, and that his confirmed Plan binds Washington Mutual and provides that the homestead remains property of the estate until dismissal, discharge or conversion. With respect to codebtors the Debtor argues that the codebtor stay under § 1301(a) remains in effect and is not terminated by § 362(c)(3)(A).

II. 11 U.S.C. § 363(c)(3)(A) – "shall terminate with respect to the debtor".

The filing of a Chapter 13 petition operates as a stay.

> Under 11 U.S.C. § 362(a), "[a] bankruptcy filing imposes an automatic stay of all litigation against the debtor." *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir. 1990) (citing 11 U.S.C. § 362(a)), except in those cases specifically enumerated in § 362(b). The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives debtors a breathing spell from creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits debtors to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove them into bankruptcy. S.Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 5840-41.

In re Mittlestadt, 20 Mont. B.R. 46, 51-52 (Bankr. D. Mont. 2002), quoting *In re Westco Energy, Inc.*, 18 Mont. B.R. 199, 211-12 (Bankr. D. Mont. 2000). The subsections of § 362(a)

specifically stay actions against the debtor, against property of the debtor, and against property of the estate. § 362(a)(1)-(6); *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D. N.C. 2006). Generally the stay under § 362(a) continues to stay "an act against property of the estate" until such property is no longer property of the estate. 11 U.S.C. § 362(c)(1); *In re Parker,* 226 B.R. 678, 680 (Bankr. S.D. N.Y 2006).

Section 362(c)(3) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. No. 109-8, § 302, and provides in pertinent part:

> (3) [I]f a single or joint case is filed by or against 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) –
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> > (A) the stay under subsection (a) with respect to any action taken with respect to a debtor or property security 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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> > (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period 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 ....

The parties stipulated at the hearing that issues of good faith under § 363(c)(3)(B) and thereafter do not apply to Washington Mutual's instant Motion.

Most cases construing the new statute conclude that the words "with respect to the debtor" in § 362(c)(3)(A) encompass "actions taken" against the debtor and against property of the debtor, but do not include "actions taken" against property of the estate. *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D. N.C. 2006); *In re Moon*, 339 B.R. 668, 673 (Bankr. N.D. Ohio

2006); *In re Johnson*, 335 B.R. 805, 806 (Bankr. W.D. Tenn. 2006)[4]. In *Jones*, Hon. A. Thomas Small, bankruptcy judge, construed § 362(c)(3)(A) in conjunction with § 362(a) in differentiating between acts against the debtor versus acts against property of the estate, and also the distinction between property of the estate and property of debtor found at 11 U.S.C. § 521, and Judge Small concluded that if Congress had intended that the automatic stay would terminate under § 362(c)(3)(A) as to property of the estate, "it would have specifically said so, as it did in § 521(a)(6)". *Jones,* 339 B.R. at 363-64. *Jones* concluded by holding "that § 362(c)(3)(A) terminates the say with respect to actions taken against the debtor and against property of the debtor, but does not terminate the stay with respect to property of the estate. *See In re Johnson*, 335 B.R. 805-806 (Bankr. W.D. Tenn 2006)". *Jones*, 339 B.R. at 365.

Washington Mutual cites cases which found the language of § 362(c)(3) difficult to parse and even incoherent, which it argues thereby requires reference to legislative history to determine Congress' clear intent that the stay is terminated with respect to property of the estate. *In re Charles*, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005), cited by Washington Mutual, does describe the relevant provisions as difficult to parse and incoherent. However, *Charles* and *In re Paschal*, 337 B.R. 274, 280-281 (Bankr. E.D. N.C. 2006), also cited by Washington Mutual, did not decide whether § 362(c)(3)(A) terminates the stay as to action taken with respect to property of the estate. *Charles* dealt with the good faith provisions of § 362(c)(3)(B) and (C), which Washington Mutual's attorney admitted at hearing are not at issue in its instant Motion. *Paschal* identified the question as follows, but did not decide it:

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[4]Briese cited Hon. Karen Overstreet's opinion in *In re Womack,* No. 05-30565 (W.D. Wash. 2006) in Debtor's supplemental response. As that decision is not reported, the Court declines to included it in citations to authority.

"If the stay is lifted as to an 'action taken,' does the stay terminate with respect to property of the estate, or only with respect to the debtor? That is an interesting question that need not be decided in this case." 337 B.R. at 280-81; *see also Jones*, 339 B.R. at 363, citing *Paschal*.

Judge Small authored both *Paschal* and *Jones*, and he states in *Jones*:

> Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words, "with respect to the debtor" in that section are entirely plain; a plain reading of those words makes sense and is entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code. Section 362(c)(2)(A) provides that the stay terminates "with respect to the debtor." How could that be any clearer?
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> It is abundantly clear from the plain language of § 362(c)(3)(A) that the stay that terminates under that section is not the stay that protects property of the estate.

Jones, 339 B.R. at 363, 365.

The Court agrees with *Jones* and *Moon* that the phrase "shall terminate with respect to the debtor" in § 362(c)(3)(A) is plain. "It is well established that 'when the statute's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms.' *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)))." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004). Since the phrase "with respect to the debtor" in § 362(c)(3)(A) is plain and the disposition required by the text is not shown to be absurd, this Court's sole function is to enforce it according to its terms. *Id.* ; *but see, In re Baldassaro*, 338 B.R. 178, 183-184 (Bankr. D. N.H. 2006) ("statutory

language of § 362(c)(3) is not consistent and coherent, and a strict reading of the plain language would lead to an absurd result", requiring reference to legislative history).

Kolling argued at hearing that Briese left out *Baldassaro* in her response. However, like *Parker* and *Paschal, Baldassaro* did not decide the issue of whether § 362(c)(3)(A) applied to the stay of action against property of the estate. 338 B.R. at 185. While describing the question "interesting", that court instead discussed and decided that the debtor rebutted the presumption that the case was filed not in good faith under § 362(c)(3)(C)(ii), and granted the debtor's motion to extend the automatic stay as to all creditors. *Baldassaro*, 338 B.R. at 186, 191-92.

The plain language of § 362(c)(3)(A) terminates the stay with respect to the debtor on the 30th day after the filing of the later case. The statute does not, by its plain language, terminate the stay with respect to property of the estate. When Congress sought to terminate the stay with respect to property of the estate in BAPCPA, it did so explicitly in § 521(a)(6):

> If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal *property of the estate or of the debtor* which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law ....

(Emphasis added). "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 2040, 124 L.Ed.2d 118 (1993) (internal quotation marks and alterations omitted); *Jones*, 339 B.R. at 364.

"Property of the estate" is a term of art in the Bankruptcy Code, defined specifically and at length in its own section, 11 U.S.C. § 541, rather than in the catch-all "Definitions" statute, 11

U.S.C. § 101. This Court deems it unlikely that Congress inadvertently left out the term of art "property of the estate" from § 362(c)(3)(A) when at the same time in another section addressing automatic termination of the stay, § 521(a)(6), it specifically included "property of the estate" in the termination clause. This Court agrees that Congress' use of a particular phrase in one statute, but not in another, "highlights the fact that Congress knew how to include such a limitation when it wanted to." *Jones*, 339 B.R. at 364; *Paschal*, 337 B.R. at 279, quoting *In re Coleman*, 426 F.3d 719, 725 (4th Cir. 2005).

Even *Baldassaro*, cited by Washington Mutual as support for its position that § 363(c)(3)(A) terminates the stay with respect to property of the estate, discourages the interpretation advanced by Washington Mutual:

> The language of § 362(c)(3)(A) expressly provides that if the subsection applies in a particular case, the stay "shall terminate with respect to the debtor." If the stay terminates with respect to the debtor, does it also terminate the stay with respect to any property that is property of the estate? Interpreting the words "shall terminate with respect to the debtor" to mean terminating the stay as to both the debtor and property of the estate could render the distinction in other subsections of § 362 superfluous. Such in interpretation would not be favored. *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998).

Baldassaro, 338 B.R. at 185.

The plain language of § 362(c)(3)(A) does not apply to property of the estate, and since even the court in *Baldassaro* agrees that such an interpretation would not be favored, legislative history suggesting such an interpretation is not a factor in the Court's analysis. *Jones,* 339 B.R. at 364; *Paschal*, 337 B.R. at 278. Moreover, even if the Court were to find the phrase "terminate with respect to property of the debtor" in § 362(c)(3)(A) incoherent and ambiguous rather than plain, resort to legislative history would provide little guidance. The court in *Moon* stated flatly: "Even

if the Court were to look beyond the plain language of the statute, however, Congress did not give the Court the benefit of any legislative history clarifying its intent on this point." 339 B.R. at 672. Judge Small wrote in *Jones* that the legislative history "suggests" that § 363(c)(3)(A) terminates all the protections of the stay under § 362(a), but he described it as unconvincing and not a factor because "the language here is clear". 339 B.R. at 364. This Court agrees that the language "terminate with respect to the debtor" in § 362(c)(3)(A) is clear, and further agrees that the legislative history is thus not a factor to be considered.[5] The Court concludes that the plain language "terminate with respect to the debtor" in § 362(c)(3)(A) terminates the stay only with respect to "actions taken" against the debtor and against property of the debtor, but does not terminate the stay with respect to "actions taken" against property of the estate. *See Jones*, 339 B.R. at 363, 365; *Moon*, 339 B.R. at 673; *Johnson*, 335 B.R. at 806.

The Court further notes and agrees that it is important to protect property of the estate from automatic termination under § 362(c)(3)(A) in chapter 13 cases because estate property may be needed to consummate a debtor's chapter 13 Plan. *Jones*, 339 B.R. at 365. In the instant Chapter 13 case Debtor needs the property of the estate to consummate his Plan, and toward that end his confirmed Plan provides that his homestead remains property of the estate until the plan is completed. *Id.* at 365 n.1; *see also Johnson*, 335 B.R. at 807.

Finally, the Court observes that § 362(c)(3)(A) is silent on the codebtor stay of § 1301. A

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[5]The legislative history cited in *Baldassaro*, 338 B.R. at 183-84, describes Congress' intent in § 362(c)(3)(A) "to terminate the automatic stay", but the history does not address the specific question before the Court, i.e., whether the stay is terminated with respect to the debtor *and* with respect to property of the estate, or only "with respect to the debtor" as plainly stated in § 362(c)(3)(A). Congress' intent on this specific question is not at all clear from the sparse legislative history.

leading commentator notes, "as a result of the absence in the 2005 amendments of any express or implied limitation on section 1301, subsection [362(c)(3)] does not prevent the application of the stay provided under section 1301 as to any consumer debt of the debtor with respect to actions taken against a codebtor on the debt." 3 COLLIER ON BANKRUPTCY, ¶ 362.06[3] (15th ed. 2005). Washington Mutual's Motion based on § 362(c)(3)(A) has no effect on the codebtor stay.

IT IS ORDERED a separate Order shall be entered in conformity with the above, sustaining the Debtor's objection filed March 27, 2006, and denying Washington Mutual Bank's Motion for Order Regarding Termination of Automatic Stay filed on March 24, 2006.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana