

Overview: Continuation of the Stay, 11 U.S.C. § 362(c)(3) and D. Kan. LBR 4001(a).3 [S.O. 14-5, effective December 1, 2014]

The Court continues to receive motions brought under § 362(c)(3)(B) that do not comply with our local Rule 4001(a).3. Motions to extend the automatic stay are noticed and handled slightly different from other motions on our regular monthly motions docket. Timing is of the essence when bringing these motions and the Court and our local rule allow for flexibility in scheduling hearings on these motions to comply with the time requirements. Please review D. Kan. L.B.R. Rule 4001(a).3 carefully when preparing a motion to continue or extend the temporary 30-day stay under § 362(c)(3)(A). The numbered questions below address the more frequent questions and deficiencies we see in these motions.

1. Where Do I Find the Current Local Rule 4001(a).3 and SO 14-5?

Standing Order 14-5, dated December 9, 2014, adopted former revised Interim D. Kan. LBR 4001(a).3 as modified by our bankruptcy judges. The current version of Rule 4001(a).3 (effective 12/1/14) can be found on the Court's website: www.ksb.uscourts.gov and clicking on the "Local Rules" link. There, select the option (2) link containing the pocket part update to the local rules, covering local rules amended between March 17, 2014 and March 17, 2015. Rule 4001(a).3 can be found beginning on page 13 of the electronic pocket part. Also, if you receive the Rules of Practice and Procedure for District and Bankruptcy Court (Local Rules) issued by the United States District Court for the District of Kansas, Rule 4001(a).3 is included in the 2015 Supplement issued March 17, 2015 to the March 2014 edition of the Local Rules.

SO 14-5 has been filed in the CM/ECF system as a "Miscellaneous Proceeding." By accessing the Docket Report/Sheet for **Case No. 14-00001**, all of the Standing Orders and General Orders adopted by the Bankruptcy Court and currently in effect are filed in this Miscellaneous Proceeding. SO 14-5 can be accessed at Dkt. 14 in Case No. 14-00001.

2. When Must a Motion to Continue the Stay Be Filed?

The Motion *shall* be filed **within 7 days** of the date of the petition. For good cause, *shown in the motion*, the Court *may* consider a motion to continue the stay that is filed beyond the 7 days specified. *See* D. Kan. L.B.R. Rule 4001(a).3(b).

Practice Pointer: Prepare the Motion when you are preparing the bankruptcy petition and schedules and file the Motion when you file the bankruptcy petition.

3. What Must my Motion to Continue the Stay Contain?

Section 362(c)(3)(A) provides that the stay terminates 30 days after filing of a case if a prior case was pending in the preceding 1-year period and was dismissed (except a dismissal under 707(b) and refiling the case in a chapter other than chapter 7). The termination of the stay is self-executing – that is, upon expiration of 30 days, the stay terminates by operation of law absent action to extend the stay. Section 362(c)(3)(B) authorizes a motion to continue the stay upon a showing that the current case is filed in good faith and empowers the Court to extend the stay. Section 362(c)(3)(C) describes the circumstances under which the current case is “presumptively filed not in good faith.”

A Motion to continue the stay as authorized by § 362(c)(3)(B) must include the following information: (1) the number of cases pending within the 1-year period preceding the filing of the current case (including the case number and jurisdiction where the case was pending); (2) the date and reason for dismissal of the previous cases; (3) a statement whether the presumption arises under § 362(c)(3)(C); and (4) the facts upon which the movant relies to rebut the presumption and demonstrate that the current case is filed in good faith. *See* D. Kan. L.B.R. 4001(a).3(c)(1).

If a presumption arises that the current case is not filed in good faith, the movant must attach to the Motion an **Affidavit or Unsworn Declaration signed under penalty of perjury** that contains the facts upon which the movant relies to rebut the presumption. *See* D. Kan. L.B.R. 4001(a).3(c)(2). Clear and convincing evidence is required to overcome the presumption. *See* § 362(c)(3)(C).

Practice Pointer: The Court encourages counsel to submit with the Motion an affidavit or declaration demonstrating good faith in every instance. It is also recommended that the movant specify in the motion whether continuation of the stay is sought “as to all creditors” under § 362(c)(3)(C)(i), or as to a particular creditor under § 362(c)(3)(C)(ii).

4. When are Objections to my Motion Due?

Generally, objections are due **14 days** after service of the Motion. The Court in its discretion may shorten the objection deadline for good cause, with or without a motion or notice. *See* D. Kan. L.B.R. Rule 4001(a).3(g) and Fed. R. Bankr. P. 9006(c)(1) (reducing time).

Practice Pointer: If you need the objection deadline shortened, file a motion to reduce the objection deadline with your Motion, but do not wait for an order on your motion for reduction before serving your Motion. *See* D. Kan. L.B.R. Rule 4001(a).3(f)(1).

5. When Must my Motion to Continue the Stay be Heard?

A Motion under § 362(c)(3)(B) must be scheduled to be heard within **30 days of the date of the petition**. *See* D. Kan. L.B.R. 4001(a).3(d)(3). The local rule contains accommodations in scheduling the hearing to one of the Court’s regular dockets or an expedited hearing and special setting in order to be heard within 30 days. *See* D. Kan. L.B.R. 4001(a).3(d) and (e). **It is counsel’s responsibility to schedule and obtain a hearing within the 30-day period.**

Under § 362(c)(3)(B) the “hearing” on the Motion **must be completed before the expiration of the 30-day period**.¹ On the 30th day, the temporary stay expires; after that, there is no stay to extend.² The question thus becomes whether the ruling or order must also be made and entered upon the completion of the hearing and before the 30-day period expires. Arguably, if the Motion is granted at the hearing, the Order extending the stay should also be entered within the 30-day period to ensure the seamless, uninterrupted operation of the stay.³ Fed. R. Bankr. P. 9021 provides that judgments or orders

¹ *See In re Norman*, 346 B.R. 181 (Bankr. N.D. W.Va. 2006) (motion to extend 30-day stay was denied as untimely where filed on the 28th day after the date of petition and didn’t allow adequate notice or time to complete hearing prior to expiration of 30-day deadline); *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006) (motion to extend stay under § 362(c)(3)(B) denied where hearing date was not within 30-day period).

² *See In re Whitaker*, 341 B.R. 336 (Bankr. S.D. Ga. 2006) (bankruptcy court could not extend temporary 30-day stay under § 362(c)(3)(B) after stay had already expired); *In re Tubman*, 364 B.R. 574 (Bankr. D. Md. 2007) (motion to extend stay filed after the 30-day window could not be considered by the court).

³ At least in dicta, some courts have so stated. *See In re Hale*, 535 B.R. 520, 522 (Bankr. E.D.N.Y. 2015) (stating that unless a motion is made to extend the stay and “such motion is heard *and granted before the expiration of the 30-day period*,” the automatic stay terminates on the 30th day.); *In re Tubman*, 364 B.R. 574, 580 (also stating that the motion “must both be filed and granted” after notice and hearing completed before the expiration of the 30-day period). *See also In re Williams*, 410 B.R. 491 (Bankr. S.D. Tex. 2009) (Court could not grant relief on a timely motion for reconsideration of order denying motion to extend stay after expiration of the 30-day stay).

are not effective *until entered on the docket* under Rule 5003. Creditors do not have notice of the extension of the stay granted in open court until the order is docketed in the case. Unlike other motions ruled upon in open court, counsel should not rely on the 14-day rule to submit the Order under D. Kan. L.B.R. 9074.1.

Practice Pointer: If a hearing is held on the Motion, the clerk will enter a text order on the docket at the conclusion of the hearing indicating whether the Motion is granted or denied. If no hearing is held on the Motion, counsel will be responsible for submitting an order on the Motion within the 30-day period for the Court's approval and signature.

6. Will a Hearing be Held if there are no Objections to the Motion?

Unless an order on the Motion is **entered prior** to the scheduled hearing date, the parties should assume **the hearing will be held**. The Motion will be denied if the movant fails to appear. An objection will be deemed withdrawn if the objector fails to appear. *See* D. Kan. L.B.R. Rule 4001(a).3(j).

Rule 4001(a).3(h) sets forth the conditions under which the Court may grant the Motion without a hearing. The Court will review the Motion papers when a proposed order is submitted on a Motion to which no objection was made.

Practice Pointer: This procedure differs from the ordinary motion practice in bankruptcy court. Upon expiration of the objection deadline without an objection being filed or the parties' resolution of the Motion, counsel for debtor should act promptly to draw up the order and submit to the Court for signature and entry before the hearing date to save everyone a trip to the Courthouse and to have the Order on file prior to expiration of the 30-day period. Unless the Court directs otherwise, the hearing will not be canceled or taken off docket call until an order is *entered*. **NOTE:** Unless the chapter 13 trustee objects to the Motion, you do not have to obtain the signature of the chapter 13 trustee on such orders. *See* D. Kan. L.B.R. Rule 4001(a).3(i).