

RELIEF FROM STAY SUMMARY SHEET

* * * INSTRUCTIONS ON FORM EDC 3-468-INST * * *

*COMPLETE ALL PORTIONS APPLICABLE TO THE RELIEF FROM STAY MOTION.
 THIS IS IN THE NATURE OF A PRETRIAL STATEMENT AND IS NOT EVIDENCE.*

DEBTOR: Counsel for Refractive Surgery Quality Assurance d/b/a USAEyes.org **CASE NO.** 10-39240

MOVANT: Lauranell Burch **DC NO.** DF-1

HEARING DATE/TIME: _____

RELIEF IS SOUGHT AS TO:

- () REAL PROPERTY Assessor Parcel Number (APN): _____
- () PERSONAL PROPERTY If applicable, Vehicle Identification Number (VIN): _____
- () STATE COURT LITIGATION

1. Address OR description of property or state court action: General Court of Justice, Superior Court Division, Wake County, NC
Hagele v. Burch v. Counsel for Refractive Surgery Quality Assurance, 07 CVS 19854

2. Movant's trust deed is a () 1st () 2nd () 3rd () Other: _____
 OR
 Leased property is () Residential () Non-residential Term: () Month-to-Month () Other

3. Verified appraisal filed? _____ Movant's valuation of property: \$ _____

4. The following amounts are presently owing to movant for:

PRINCIPAL	INTEREST	COSTS	TOTAL
\$ _____	\$ _____	\$ _____	\$ _____

5. State identity, rank, and balance owing to other known lien holders. Use additional page(s) if necessary.

	\$ _____
	\$ _____
	\$ _____
TOTAL ALL LIENS	\$ _____
DEBTOR'S EQUITY	\$ _____

6. Monthly payment is \$ _____, of which \$ _____ is for impound account. Monthly late charge is \$ _____.

7. The last payment by debtor was received on _____ and was applied to the payment due _____.

8. Number of payments past due and amount: (a) Pre-petition _____ \$ _____ (b) Post-petition _____ \$ _____.

9. Notice of Default was recorded on _____. Notice of sale was published on _____.

10. If a chapter 13 case, in what class is this claim? _____

11. Grounds for seeking relief (check as applicable):

- () § 362(d)(1) () § 362(d)(2) () § 362(d)(3) () § 362(d)(4)
- () Cause () Inadequate protection () Lack of equity () Lack of insurance () Bad faith
- () Surrendered pursuant to Statement of Intention. () Report of No Distribution has been filed.
- () Other _____.

12. For each ground checked in item 11, furnish a brief supporting statement below. Use additional page(s) if necessary.

State Court litigation has been pending for three years. The Debtor filed the petition solely to delay the litigation and the ultimate discovery of the Debtor's criminal schemes directed toward Movant and her family.

1 **10**

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11 **UNITED STATES BANKRUPTCY COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**
13

14 **In Re:**

15 COUNCIL FOR REFRACTIVE
16 SURGERY QUALITY ASSURANCE
17 D/B/A USAEYES.ORG

18 **Debtor and Debtor in Possession**

19 **Case No. 10-39240**

20 **DC No. DF - 1**

21 **MOTION FOR RELIEF FROM**
22 **AUTOMATIC STAY**

23 Date: January 18, 2011

24 Time: 9:31 a.m.

25 Courtroom: 32 Sacramento Division

26 Judge: Thomas C. Holman
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1 **INTRODUCTION**

2 The Council for Refractive Surgery Quality Assurance (“Debtor”) is an organization whose
3 only current purpose is apparently to make tax-free payments for the benefit of its lone “volunteer,”
4 Glenn Hagele (“Hagele”). With nearly no assets, no employees, no legitimate business purpose,
5 and very few unsecured creditors, there is simply nothing about the Debtor worth protecting or
6 reorganizing. In short, this Case is a sham. Unsecured creditor Lauranell Burch (“Movant”)
7 therefore requests relief from the automatic stay as a remedy for the Debtor’s bad faith filing.

8 Judicial economy also weighs in favor of Movant’s request. As part of a long campaign of
9 harassment, Hagele and the Debtor sued Movant in North Carolina state court three years ago. The
10 Debtor’s and Hagele’s claims had no basis and were dismissed, either by the state court or by
11 Hagele himself voluntarily. What remain are meritorious counterclaims that Movant has asserted
12 against Hagele and the Debtor.

13 Movant moved forward with her counterclaims in North Carolina despite Hagele’s and the
14 Debtor’s delaying tactics. The North Carolina state court sanctioned the Debtor for its dilatory
15 conduct in discovery and compelled Hagele and the Debtor to disclose documents that had been
16 improperly withheld. When some of the requested documents were disclosed, they revealed
17 communications between Hagele and a person with a criminal record who Hagele apparently had
18 hired to engage in a range of unlawful activity directed toward Movant and others. Such unlawful
19 acts included the authorized interception of electronic communications sent and received by
20 Movant.

21 It has now been three years since Hagele originally sued Movant in North Carolina. Hagele
22 and the Debtor should not be permitted to delay justice further. Even if the Bankruptcy Petition had
23 not been filed in bad faith (it was), Movant still would be entitled to relief from stay to bring the
24 lawsuit in North Carolina to its inevitable conclusion—a judgment in Movant’s favor against
25 Hagele and the Debtor.

1 **FACTS**

2 **A. The Debtor Brought This Case In Bad Faith**

3 1. The Debtor listed assets totaling \$1,220.00. According to its schedules, its non-
4 contingent liabilities total only \$5,716.71.

5 2. Furthermore, the Monthly Operating Reports submitted by the Debtor suggest
6 Hagele is using Debtor as a means to shield income from income taxes. For example, the Debtor's
7 October 2010 status report, submitted by Debtor on December 5, 2010, indicates that Debtor's three
8 largest expenses are for payment of utilities bills for Hagele's personal residence (totaling
9 \$2,530.54, including Internet, telephone, and other utilities), for payment of Hagele's health and
10 "other" insurance (totaling \$1,705.96), and for payment of "rent" to Hagele (totaling \$855). There is
11 also a charge on the Debtor's US Bank account to Guitar Center. Other submissions confirm there
12 have been multiple transfers to and from Hagele's personal checking account and the Debtor's
13 account with US Bank. *See, e.g.*, Small Business Monthly Operating Report, Doc. No. 44.

14 3. Debtor could easily satisfy the liquidated claims of the IRS, totaling \$12,304.02, if it
15 refrained from paying Hagele's personal expenses for three months.

16 4. This Case was not filed to reorganize a business. As the above figures confirm, to the
17 extent Debtor has any legitimate business at all, it is insubstantial.

18 5. The Debtor's two other scheduled creditors are Movant and Brent Hanson. Movant
19 has asserted claims in North Carolina against Hagele and the Debtor arising out of Hagele's
20 campaign of harassment and intimidation against her for the views she has expressed about the
21 safety of the LASIK procedure on the Internet. Upon information and belief, Mr. Hanson's claims
22 arise out of Hagele's unlawful activity in hiring a person to trespass in Mr. Hanson's residence,
23 illegally access Mr. Hanson's personal employment and financial information, and illegally
24 intercept communications between Mr. Hanson and various persons, including Movant.

25 6. Given the unlawful activity Hagele has conducted through the Debtor, the Debtor's
26 business is not a business worth saving. In short, because continuing with this Bankruptcy Case
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1 would serve no legitimate purpose, Movant respectfully requests that this Motion for Relief from
2 Stay be granted.

3 **B. The North Carolina Litigation**

4 7. Hagele and the Debtor are engaged in the business of promoting the LASIK industry
5 by, among other things, criticizing, harassing, and intimidating those who wish to speak publicly
6 about the risks of the LASIK procedure and about negative outcomes experienced by some LASIK
7 patients. Mr. Hagele is not a doctor. Upon information and belief, he has not graduated from
8 college, and he possesses no scientific or medical experience that would qualify him to certify
9 LASIK surgeons, which he purports to do for and on behalf of the Debtor.

10 8. Movant is a medical research scientist whose vision was seriously damaged by
11 LASIK eye surgery in 2004. Unfortunately for Movant, she became one of Hagele and the Debtor's
12 targets after she published a review of the scientific literature critical of the LASIK industry.
13 Hagele, acting for and on behalf of the Debtor, began by insulting and attacking Movant in Internet
14 postings, and he eventually created a website largely devoted to disparaging Movant, Mr. Hanson,
15 and other injured LASIK patients who spoke out publicly with safety concerns regarding LASIK
16 eye surgery. His conduct against Movant escalated to making repeated telephone calls and sending
17 numerous email messages to her employer. During the course of these communications, Hagele
18 made false and disparaging statements to Movant's employer about her, which Movant believes he
19 did in an effort to have her fired. Hagele previously threatened litigation against the employer of
20 another LASIK critic, and she was fired. In addition to his Internet activity and communications
21 with Movant's employer, Hagele hired a private investigator to monitor Movant and, upon
22 information and belief, her elderly mother, and, as noted above, hired a person to intercept
23 electronic communications unlawfully.

24 9. On or about December 10, 2007, Hagele sued Movant in the Wake County General
25 Court of Justice, Superior Court Division, in a case captioned *Hagele v. Burch*, 07 CVS 19854 (the
26 North Carolina Action). Consistent with conduct described above, Hagele's conduct in that
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1 litigation indicates he instituted the lawsuit solely to harass and intimidate Movant and to chill the
2 exercise of her free speech rights.

3 10. In particular, Hagele initiated the North Carolina Action with a flurry of activity,
4 obtaining an *ex parte* temporary restraining order and an order for expedited discovery based on
5 incorrect information about Movant's involvement with certain websites—all before Movant was
6 served with process. Hagele then used the *ex parte* order, which was limited in scope to information
7 regarding his personal bankruptcy, to shut down entirely certain websites devoted to discussion of
8 the LASIK procedure and its attendant risks.

9 11. After Movant retained counsel, the Court conducted a hearing on Hagele's motion
10 for preliminary injunction, which it denied on December 12, 2007. On February 11, 2008, Movant
11 filed and then later amended counterclaims against Hagele and the Debtor, asserting causes of
12 action for defamation and unfair and deceptive trade practices.

13 12. Once Hagele's request for preliminary injunctive relief was denied, Hagele and the
14 Debtor spent the next two and a half years engaged in delaying tactics designed to impair Movant's
15 inquiry into Hagele and the Debtor's wrongful conduct.

16 13. As of July 2008, three and a half months after Movant had served her first set of
17 discovery requests on Hagele, Hagele had provided only limited responses primarily consisting of
18 generic objections and had produced no documents at all. Movant moved to compel responses. *See*
19 Exhibit 1 (exhibits to the motion to compel have been omitted). As of October 2008, the Debtor had
20 failed to provide any response whatsoever to Movant's discovery requests. *See* Exhibit 2 (exhibits
21 omitted). Movant's motions to compel were granted on October 13, 2008. *See* Exhibit 3. The
22 Debtor also sought to dismiss Movant's claims against it for lack of personal jurisdiction, a motion
23 the Court denied. *See* Exhibit 4.

24 14. Hagele and the Debtor's pattern of delay and vexatious litigation continued. The
25 Debtor later lodged counterclaims against Movant in a document containing some 166 pages of
26 vague, unsupportable, and false allegations. After Movant incurred significant expense and had
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1 briefed a multitude of issues, the Counterclaims were dismissed by the Court with prejudice for
2 failure to state a claim. *See* Exhibit 5.

3 15. Hagele and the Debtor persisted in their failure to comply with Movant's discovery
4 requests, even after they had been ordered to do so. Movant eventually moved for sanctions against
5 Hagele and the Debtor for their lack of cooperation in the discovery process in October 2009. *See*
6 Exhibit 6. In December of 2009, this motion was granted as against Hagele and the Debtor, and
7 Movant was awarded her attorneys' fees as against the Debtor. *See* Exhibit 7.

8 16. Thereafter, Hagele and the Debtor produced approximately 1,700 pages of
9 documents. These documents include email communications with a person in the State of
10 Washington showing that Hagele retained him to engage in multiple acts of computer theft and
11 computer fraud against Mr. Hanson. *See* Exhibit 8. These documents also show that Hagele retained
12 the person to conduct surveillance against Movant, and they confirm that messages Movant sent and
13 received were unlawfully intercepted and provided to Hagele as well.

14 17. After these documents were produced to Movant's counsel, Hagele's counsel in the
15 North Carolina Action moved to withdraw, a motion the Court granted. Hagele's counsel wrote to
16 the judge who had presided over motion for sanctions to apologize for contesting the motion on a
17 factual premise which was incorrect.

18 18. In a final effort to frustrate Movant's ability to understand and use the documents
19 Hagele and the Debtor had produced, Hagele improperly designated all such documents as "highly
20 confidential" pursuant to the protective order between the parties. Movant subsequently moved to
21 have the designations removed. *See* Exhibit 9. The motion was granted. *See* Exhibit 10. To prevent
22 future recurrence of improper designations, the Court ordered Hagele to submit any additional
23 documents produced in discovery to the Court for *in camera* review before making further
24 confidentiality designations. *Id.*

25 19. Notwithstanding these victories in discovery, Movant was forced, yet again, to move
26 for sanctions when a review of the documents, as damaging as they were, still revealed gaps, and
27 other documents which still had not been produced. *See* Exhibit 11. Movant also moved to amend
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1 her counterclaims against Hagele and the Debtor to add claims arising out of the unlawful computer
2 theft revealed in the documents produced during discovery. While these motions were pending, and
3 shortly before the scheduling hearing on them, Hagele voluntarily dismissed his claims against
4 Movant and caused the Debtor to institute this Bankruptcy Case.¹

5 20. Based on Hagele and the Debtor's conduct in the North Carolina Action, it is clear
6 that a primary, if not the sole, purpose of this Bankruptcy Case was to impair Movant's efforts to
7 discover the full extent of Hagele and the Debtor misconduct and to interfere with Movant's efforts
8 to reduce her claims against Hagele and the Debtor to judgment in North Carolina. This alone
9 shows bad faith and constitutes cause to grant Movant's request for relief from stay. Furthermore,
10 Movant should not be required to re-litigate these issues before this Court. It will be more efficient
11 to allow Movant to liquidate her claims through the North Carolina Action rather than burdening the
12 parties and this Court with renewed litigation.

13 ARGUMENT

14 21. On request of an interested party, the Court shall modify or terminate the automatic
15 bankruptcy stay of Section 362(a) of the Bankruptcy Code for cause shown. *See* 11 U.S.C.
16 § 362(d)(1). It has long been held that the existence of "bad faith in commencing a bankruptcy case
17 constitutes cause for granting relief from the stay pursuant to [Section] 362(d)." *In re Duvar Apt.,*
18 *Inc.*, 205 B.R. 196, 200 (9th Cir.1996).

19 22. Furthermore, the automatic stay may also be lifted and "a bankruptcy court may
20 abstain from deciding issues in favor of an imminent state court trial involving the same issues."
21 *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1166 (9th Cir.1990).
22 "[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when
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24 ¹ On the same day that Hagele dismissed his claims against Movant, he attempted to add
25 Movant to a pending litigation in California against Mr. Hanson. *See Glenn Hagele v. Brent*
26 *Hanson, et. al*, Superior Court of the State of California, County of Sacramento, Case No.
27 06AS00839. Considering that Movant was willing to restart the litigation in California against
28 Movant, it appears that costs were not the sole factor, or even a considerable factor, in Hagele's
decision to dismiss his claims in the North Carolina. After Movant filed a special motion to strike
Hagele's claims under California's anti-SLAPP statute, Hagele again voluntarily dismissed his
claims against her. Movant's request for an award of attorneys' fees against Hagele was pending as
of the date of this Motion.

1 no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen
2 forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.”
3 H.R.Rep. No. 95-595, at 341 (1977); S.Rep. No. 95-989, at 50 (1978), *reprinted in* 1978
4 U.S.C.C.A.N. 5787, 5836.

5 23. In this Bankruptcy Case, cause exists for lifting the automatic stay on both of the
6 above described grounds: (1) the Debtor filed the Petition in bad faith, and (2) the Debtor will not
7 be prejudiced and judicial efficiency will be promoted if the North Carolina Action is allowed to
8 proceed to completion.

9 **A. The Debtor Filed The Petition In Bad Faith**

10 24. Bad faith exists when the debtor files a Chapter 11 petition for “tactical reasons
11 unrelated to reorganization.” *In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994). Such is the case when
12 the debtor files the petition as a “litigating tactic” to avoid state court orders and laws of procedure.
13 *See id.* Stated in other terms, the Bankruptcy Code was not enacted as a litigation option to stall a
14 two party dispute. *See In re Meshkatai*, 2008 WL 1329225 at *3 (Bank. D. Ariz. 2008). “These
15 types of cases are generally subject to dismissal as bad-faith filings . . . or to grant [relief from] stay
16 for ‘cause’ under § 362(d).” *Id.* at *2. The record here amply supports the conclusion that the
17 Debtor filed the Petition in bad faith.

18 25. “Findings of lack of good faith in proceedings based on § 362(d) . . . have been
19 predicated on certain recurring but non-exclusive patterns.” *Matter of Little Creek Development*
20 *Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) (cited with approval, *Marsh*, 36 F.2d at 828). The indicia
21 of bad faith include: (1) the debtor has few, if any, assets; (2) the prepetition conduct of the debtor
22 has been improper; (3) there are only a few unsecured creditors; (4) the debtor and one, or a few,
23 creditor(s) have been involved in extensive state court litigation, where the debtor has been
24 unsuccessful; (5) the filing of the petition effectively allows the debtor to evade state court orders;
25 (6) the debtor has no ongoing business or employees; and (7) the lack of possibility of a
26 reorganization. *See id.* “Resort to the protection of the bankruptcy laws is not proper under these
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1 circumstances because there is no going concern to preserve, there are no employees to protect, and
2 there is no hope of rehabilitation.” *Id.* at 1073.

3 26. All these factors are evident with respect to the Debtor’s Petition.

4 27. As of the date of the Petition, the Debtor scheduled assets totaling \$1,220.00. The
5 Debtor’s non-contingent liabilities totaled just over \$5,700.00. Furthermore, over 75% of the
6 Debtor’s expenses as of November 2010 were for the payment of Hagele’s personal expenditures
7 (the utility payments at his house and his personal insurance). The Debtor has few assets or
8 liabilities, because the Debtor is not engaged in any bona fide business. This, therefore, was not a
9 proper Chapter 11 filing, and cause exists to grant Movant’s request for relief from stay.

10 28. The only conceivable reason for Hagele—upon information and belief, the Debtor’s
11 only volunteer—to have caused the Debtor to institute this Bankruptcy Case was to stall its state
12 court litigation with Movant. This is merely a litigation tactic. Moreover, the Debtor’s “dilatory
13 conduct” in the North Carolina Action is another proper consideration in the bad faith analysis. *See*
14 *In re Kemble*, 776 F.2d 802, 807 (9th Cir. 1985).

15 29. In short, the Debtor did not file its Petition “to effect a speedy, efficient
16 reorganization on a feasible basis.” *Marsch*, 36 F.3d at 828. The Debtor’s purpose appears to have
17 been to stall state-court litigation in which the Debtor and Hagele had experienced unfavorable
18 results. This is a transparent abuse of the bankruptcy process. Cause therefore exists to lift the stay
19 to allow Movant to continue to litigate the North Carolina Action.

20 **B. Judicial Efficiency Will Be Enhanced If The North Carolina Action Is Allowed**
21 **To Proceed**

22 30. “Many cases have held that a district court may properly consider the factor of
23 judicial economy in deciding whether to lift an automatic stay.” *Kemble*, 776 F.2d at 807. “A clear
24 congressional policy exists to give state law claimants a right to have claims heard in state court.” *In*
25 *re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986). Thus, “the stay may be lifted when
26 there is an administrative need in the bankruptcy case to fix the amount of the claim and the claim
27 dispute has been pending for considerable time in a non-bankruptcy forum. Issues of comity and
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1 economy may dictate that the non-bankruptcy forum conclude the resolution of that dispute.” *In re*
2 *Quad Systems Corp.*, 2001 WL 1843379 at *7 (E.D.Pa. 2001) (citing *Matter of Holtkamp*, 669 F.2d
3 505 (7th Cir.1982); *In re Castlerock Properties*, 781 F.2d; *In re Olmstead*, 608 F.2d 1365 (10th
4 Cir.1979); *In re Marvin Johnson’s Auto Service, Inc.*, 192 B.R. 1008 (Bankr.N.D.Ala.1996); *In re*
5 *Hoffman*, 33 B.R. 937 (Bankr.W.D.Ok.1983); *In re Philadelphia Athletic Club*, 9 B.R. 280
6 (Bankr.E.D.Pa.1981)).

7 31. Hagele instituted the North Carolina Action in December 2007. It was only after
8 Movant had made substantial progress in forcing Hagele and the Debtor to produce damaging
9 evidence in discovery that Hagele caused the Debtor to file this Bankruptcy Case. There is no
10 reason to re-litigate discovery disputes and other issues of North Carolina law before this Court. It
11 will be much more efficient and would conserve judicial resources to allow Movant to conclude the
12 litigation and liquidate her claims in the North Carolina Action. Cause, therefore, exists to grant the
13 instant Motion and to lift the automatic stay under Section 362(d)(1) of the Bankruptcy Code.

14 32. If necessary, Movant will agree to only use the North Carolina Action to liquidate
15 her claim, and will return to this Bankruptcy Case for satisfaction of the judgment.

16 **CONCLUSION**

17 The Debtor has no legitimate basis for being in bankruptcy. Hagele caused the Debtor to file
18 this Case to impede Movant’s discovery into the Debtor’s and his own unlawful conduct in the
19 North Carolina Action. Pursuant to Section 362(d)(1) of the Bankruptcy Code, therefore, cause
20 exists to lift the automatic stay, and Movant’s Motion for Relief From Stay should be granted.

21 DATED: December 17, 2010

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.

22
23 By: /s/ Darrell A. Fruth
24 Darrell A. Fruth
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