THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: April 3, 2014

G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In the matter:

Mitchell and Connie L. Choy,	Case No. 14-21411-GMH
Debtors.	Chapter 13

ORDER DENYING DEBTORS' MOTION TO IMPOSE THE AUTOMATIC STAY

The Choys filed this chapter 13 case, their second, on February 14, 2014. Because they had a prior case dismissed within the last year, the automatic stay in this case only remains in place for 30 days unless the court makes a finding before the stay expires that they filed this case in good faith. See 11 U.S.C. §362(c)(3). On March 6, only 10 days before the stay was set to expire, the debtors filed a motion to continue the automatic stay and moved to shorten the 14-day notice period. I issued an order setting both matters for hearing on March 13, 2014 and directing the debtors to serve notice of both motions and my order no later than March 10.

The debtors failed to serve the motions by March 10 and so withdrew their motions. Once the debtors withdrew the motions, I canceled the March 13 hearing.

On March 13, the debtors filed and served a new motion on 14-day negative

notice. Their new motion requests that I impose the automatic stay under 11 U.S.C. §362(c)(4).

Meanwhile, the automatic stay expired on March 16, and on March 19, the chapter 13 trustee objected to the debtors' motion on the basis that §362(c)(4) does not apply in this case because the debtors had only one pending case within the last year. The trustee's objection correctly reads the Code, and I deny the motion.

Section 362(c)(4) provides that the automatic stay will not go into effect upon the filing of a case if a debtor had "*2 or more* single or joint cases [] pending within the previous year [that] were dismissed". 11 U.S.C. §362(c)(4)(A)(i) (emphasis added). That subsection further provides, "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 all creditors". 11 U.S.C. §362(c)(4)(B).

"[T]he later case" to which subsection (c)(4)(B) refers, is the later of a debtor's "2 or more . . . cases [that] were pending within the previous year but were dismissed", referred to by subsection (c)(4)(A)(i). As the trustee points out in his objection, the Choys did not have 2 or more cases pending within the last year that were dismissed. Accordingly, I issued an order requiring the debtors to file a memorandum in support of their motion explaining why they have standing to invoke §362(c)(4). The debtors did so, citing *In re Gray*, Case. No. 05-45793 (Bankr. E.D. Wis. Jan. 30, 2006), and *In re Toro-Arcila*, 334 B.R. 224 (S.D. Tex. 2005).

Gray was filed only one month after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which added the stay-limiting provisions of §362(c)(3) and (4), took effect. The debtors in that case, who had only one earlier dismissal, filed a motion to reinstate the stay on the 30th day after filing their petition, which made it impossible for the bankruptcy court to decide the motion within that period, as required by §362(c)(3). The bankruptcy judge imposed the stay under §362(c)(4) relying solely on *In re Toro-Arcila*, the only published decision on the issue then available, even while

recognizing that the debtors did not appear to fall within the subset of debtors entitled to request relief under (c)(4).

Times have changed since *Gray* was decided. Since then, courts have rejected *In re Toro-Arcila* and limited the application of (c)(4) to debtors with two or more prior dismissals. See, e.g., *In re Thornton*, 2007 WL 7140155 (Bankr. N.D. Ga. Aug. 30, 2007) (concluding that *Toro-Arcila* is "unpersuasive"); *In re Ajaka*, 370 B.R. 426, 428 (Bankr. N.D. Ga. 2007) ("Section 362(c)(4) is not available to a debtor who fails to comply with the procedural requirements of §362(c)(3)."); *In re Norman*, 346 B.R. 181, 184 (Bankr. N.D.W. Va. 2006) ("Congress specifically chose to treat debtors with one prior case dismissal in the preceding one-year period differently than debtors that had two prior case dismissals in the same period."); *In re Whitaker*, 341 B.R. 336, 344 (Bankr. S.D. Ga. 2006) (holding that *Toro-Arcila*'s application of §362(c)(4) to a debtor with a single prior dismissal was "unpersuasive"); see also 1 ROBERT E. GINSBERG & ROBERT D. MARTIN, GINSBERG & MARTIN ON BANKRUPTCY §3.01[G], at 3-52 & n.197 (Susan V. Kelley, ed., 5th ed. 2012) (explaining that "most bankruptcy courts disagree" with *Toro-Arcila*'s application of §362(c)(4) to one-prior-dismissal debtors and collecting cases). A leading treatise states the law unequivocally: "For [§362(c)(4)] to apply, at least two prior cases filed under any chapter must have been pending and subsequently dismissed during the one-year period." 3 COLLIER ON BANKRUPTCY ¶362.06[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

Section (c)(4) applies to debtors that have had two or more cases pending within the last year that were dismissed. The Choys are not such debtors.

Accordingly,

IT IS ORDERED that the debtors' motion to impose the automatic stay pursuant to 11 U.S.C. §362(c)(4) is denied for lack of standing.

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