

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman  
Bankruptcy Judge  
Sacramento, California

September 16, 2008 at 9:30 A.M.

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1. [08-28216](#)-B-7 ZENAIDA MEDINA HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-13-08 [[28](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor filed the missing documents on August 25, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

2. [08-30919](#)-B-7 NADINE TURNER HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-13-08 [[7](#)]

**Tentative Ruling:** None.

3. [08-31020](#)-B-7 WILMA PELOZA HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-18-08 [[7](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor filed the missing document on August 19, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

4. [08-29453](#)-B-7 CONCHIA CASTRODES HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-18-08 [[15](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot. By order signed September 15, 2008, the automatic dismissal of this case was confirmed as of 12:01 a.m. on August 29, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

5. [08-29453](#)-B-7 CONCHITA CASTRODES HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-19-08 [[16](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot. By order signed September 15, 2008, the automatic dismissal of this case was confirmed as of 12:01 a.m. on August 29, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

6. [08-29454](#)-B-13J JOSE/JIAMELA SUNGA HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-19-08 [[18](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot. This case was automatically dismissed at 12:01 am on August 29, 2008 pursuant to 11 U.S.C. § 521(i).

The court will issue a minute order.

7. [08-29955](#)-B-7 KAO SAECHAO AND  
MELISSA LEPAGE HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-20-08 [[11](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtors paid the delinquent filing fee installment on August 29, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

8. [08-29856](#)-B-7 EDWIN MALO AND HEARING - ORDER  
LADIZ MORALES TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-22-08 [[25](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot because the bankruptcy case was dismissed by order entered August 22, 2008.

The court will issue a minute order.

9. [08-29856](#)-B-7 EDWIN MALO AND HEARING - MOTION FOR  
PD #1 LADIZ MORALES RELIEF FROM AUTOMATIC STAY  
WASHINGTON MUTUAL BANK, VS. 8-15-08 [[18](#)]

**Tentative Ruling:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). However, because the debtors are pro se, the court will issue a tentative ruling.

The motion is denied in part and granted in part. The movant's request for relief from the automatic stay is denied as moot. This case was dismissed by order entered August 28, 2008. The movant already has the relief that it seeks by this motion.

Because the value of the collateral exceeds movant's claim, movant is awarded attorneys fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150. These fees and costs may be enforced only against the movant's collateral.

The court will issue a minute order.

10. [08-31476](#)-B-7 SARAH CERING HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
AND/OR IMPOSITION OF SANCTIONS  
FOR FAILURE TO TENDER FEES OR  
AN APPLICATION TO PAY FEES IN  
INSTALLMENTS WITH BANKRUPTCY  
PETITION  
8-20-08 [[8](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor paid the filing fee in the amount of \$299.00 on August 20, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

11. [08-30283](#)-B-7 LYDIA GONZALEZ HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-15-08 [[9](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot. This case was automatically dismissed at 12:01 am on September 12, 2008 pursuant to 11 U.S.C. § 521(i).

The court will issue a minute order.

12. [08-29090](#)-B-7 MARIEO DAVIS HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-13-08 [[16](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged as moot because the bankruptcy case was dismissed by order entered August 22, 2008.

The court will issue a minute order.

13. [08-30692](#)-B-7 SHARON TUCKER HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-21-08 [[12](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor filed the statistical summary on August 27, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

14. [08-24393](#)-B-7 THELMA GONZALEZ HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-19-08 [[29](#)]

**Tentative Ruling:** None.

15. [08-28802](#)-B-7 CLOVIS/JEANNITE BAPTISTE HEARING - MOTION FOR  
PD #1 RELIEF FROM AUTOMATIC STAY  
CHASE HOME FINANCE, LLC, VS. 8-7-08 [[11](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 2237 Chamberlain Street, Stockton, CA 95212 (APN 12811003) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$234,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$360,147.91. Even without considering the junior lien of \$84,426.78, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make seven (7) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

16. [08-28802](#)-B-7 CLOVIS/JEANNITE BAPTISTE HEARING - MOTION FOR  
KAT #1 RELIEF FROM AUTOMATIC STAY  
DEUTSCHE BANK NATIONAL TRUST CO., VS. 8-13-08 [[20](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1308 Pacific Avenue, Petaluma, CA 94954 (APN 005-074-010) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$369,500.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$119,393.58. Even without considering the senior lien of \$459,200.00 there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make five (5) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

17. [08-27205](#)-B-7 KEVIN/ROTHYNEE UNG HEARING - MOTION FOR  
JDL #1 RELIEF FROM AUTOMATIC STAY  
DOWNEY SAVINGS AND LOAN 8-18-08 [[14](#)]  
ASSOCIATION, F.A., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 8802 Terracorvo Circle, Stockton, CA 95212 (APN 126-260-08) (the "Property"), and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtors received their discharge on September 10, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$199,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$414,250.78. Without considering the junior lien of \$55,000.00 and the senior tax lien of \$5474.80, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this

chapter 7 case. Movant also alleges without dispute that the debtors have failed to make ten (10) mortgage payments. The lack of opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

18. [06-24907](#)-B-7 SEAN MCDERMOTT HEARING - MOTION FOR  
MDE #1 RELIEF FROM AUTOMATIC STAY  
LITTON LOAN SERVICING, LP, VS. 8-20-08 [[68](#)]

**Tentative Ruling:** This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

19. [08-25907](#)-B-7 SCOTT/LISA BLAKE HEARING - MOTION FOR  
ND #1 RELIEF FROM AUTOMATIC STAY  
BANK OF AMERICA, N.A., VS. ON REAL PROPERTY  
8-19-08 [[14](#)]

**Tentative Ruling:** This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part and denied in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1328 Freswick Drive, Folsom, CA 95630 (APN 071-1520-070), (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtors received their discharge and were discharged from all dischargeable debts on August 26, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$435,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$521,631.67. Even without considering the junior lien of \$74,510.00 there is no equity in the Property, and the Property is not necessary to an effective

reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eleven (11) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition and report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

20. [08-22310](#)-B-7 MARIO/ANNA DERENZI HEARING - MOTION FOR  
RDW #1 RELIEF FROM AUTOMATIC STAY  
FIRESIDE BANK, VS. 8-19-08 [[38](#)]

**Tentative Ruling:** The motion is denied as moot. Considering the automatic extension provided in Bankruptcy Rule 9006(a), the automatic stay terminated with respect to the collateral, a 2006 Honda Civic (VIN JHMF16886S012015) (the "Collateral"), at 12:01 a.m. on August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtors did not file a statement of intention with respect to the Collateral within the time allowed by law. The debtors had until August 25, 2008, 30 days after entry of the order converting this case to one under chapter 7 plus the automatic extension provided by Bankruptcy Rule 9006(a), to file a statement of intention that addressed the Collateral. Because they did not timely file such a statement of intention, and because the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

21. [08-29017](#)-B-7 RICAHRD/DEBORAH LANGLOIS HEARING - MOTION FOR  
MBB #1 RELIEF FROM AUTOMATIC STAY  
MORTGAGE ELECTRONIC REGISTRATION 8-14-08 [[14](#)]  
SYSTEMS, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 236 Dunsmuir Drive, Lodi, CA 95240 (APN 062-460-20) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$289,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$422,063.28. There is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make thirteen (13) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

22. [08-28409](#)-B-7 ANTHONY/ANDREA NICOLI HEARING - MOTION FOR  
KAT #1 RELIEF FROM AUTOMATIC STAY  
WELLS FARGO BANK 8-26-08 [[15](#)]  
NATIONAL ASSOC., ET AL., VS.

**Tentative Ruling:** This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 2860 Marigold Drive, Fairfield, CA 94533 (APN 0162-052-380) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$250,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$341,565.26. Even without considering the senior tax lien of \$2,950.00 or the junior lien of \$79,358.42, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make nine (9) mortgage payments. The lack of opposition by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

23. [08-27113](#)-B-7 DENNIS BARCUS  
DGN #1  
FORD MOTOR CREDIT CO., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
9-2-08 [[20](#)]

**Tentative Ruling:** The motion is denied as moot. The automatic stay terminated as to the collateral, a 2005 Mazda RX8 (VIN JM1FE173150150501) (the "Collateral"), at 12:01 a.m. on July 1, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtor filed a statement of intention with respect to this item of personal property within the deadline established by 11 U.S.C. § 521(a)(2) and [Interim 2006] Federal Rule of Bankruptcy Procedure 1007(b)(2). The debtor stated that he would retain the collateral and pay pursuant to the original contract. However, Section 362(h)(1)(A) requires something more. In order for the automatic stay to remain in effect with respect to personal property that the debtor is retaining, the debtor must either redeem the personal property or enter into a reaffirmation agreement with the creditor. See Dumont v. Ford Motor Credit Co. (In re Dumont), 383 B.R. 481 (B.A.P. 9<sup>th</sup> Cir. 2008). The docket indicates that neither of these requirements has been satisfied.

Pursuant to 11 U.S.C. § 521(a)(2), the debtor had until June 30, 2008 to file a statement of intention that properly addressed the Collateral. Because he did not file a compliant statement of intention timely and because the Collateral is personal property, the automatic stay terminated as to the Collateral at 12:01 a.m. on July 1, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

24. [08-28118](#)-B-7 SETH BOUSQUET  
MBB #1  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-5-08 [[41](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted to the extent set forth herein. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. §

362 (d) (1) and (d) (2) in order to permit the movant to foreclose on the real property located at 1716 East Dorothea Avenue, Visalia, CA 93292 (APN 126-510-069) and to obtain possession of the subject real property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day stay of Fed.R.Bankr.P. 4001(a) (3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the subject real property has a value of \$196,000 and is encumbered by a perfected deed of trust or mortgage in favor of the movant. That security interest secures a claim of \$283,757.71. Considering these figures, there is no equity in the subject property, and it is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. The lack of written opposition and report of no distribution by the trustee shows that the trustee cannot administer the subject property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

25. [08-29723](#)-B-7 MELANIE/KEVIN MILLER HEARING - MOTION FOR  
PD #1 RELIEF FROM AUTOMATIC STAY  
GMAC MORTGAGE, LLC, VS. 8-13-08 [[13](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f) (1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d) (1) and (d) (2) in order to permit movant to foreclose on the real property located at 809 Cookson Street, Vacaville, CA 95687 (APN 0136-334-190) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a) (3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$289,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$422,063.28. There is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make seven (7) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11

U.S.C. § 506(b).

The court will issue a minute order.

26. 08-22725-B-11 BAYER PROTECTIVE SERVICES, CONT. HEARING - MOTION FOR  
DGN #1 INC. RELIEF FROM AUTOMATIC STAY  
FORD MOTOR CREDIT CO., VS. 7-31-08 [55]

CONT. FROM 8-19-08

**Tentative Ruling:** This matter continued from July 19, 2008 with a briefing schedule. Opposition was due by September 2, 2008. Replies, if any, were due by September 9, 2008. Both the debtor and the movant filed timely written responses. No further briefs have been filed in this matter since the previous hearing date. In this instance, the court issues the following tentative ruling.

The motion is granted in part. Termination of the automatic stay is conditionally denied. Adequate protection is ordered as follows: (1) Commencing September 25, 2008, and continuing on or before the 25<sup>th</sup> day of each month thereafter until the earlier of a further order of the court or confirmation of a plan of reorganization, the debtor shall tender to movant the regular monthly payment (without late charge or penalty) for this vehicle, a 2008 Ford Escape (VIN 1FMCU94HT8KC98916) (the "Vehicle"), and (2) the debtor shall keep the Vehicle continuously insured as required by the contract between the parties. In the event debtor fails to do either or both of those things, the movant may submit a declaration and order granting relief from the automatic stay. Any such declaration and proposed order must be served on the debtor's counsel by facsimile three business days prior to submitting the documents to the court, and the movant's transmittal to the court shall represent that such service was made. The only relevant response by debtor will be that there was no default. If the debtor makes that contention, it should be supported by documentary proof, such as a receipt for certified mail, that the disputed payments were transmitted on an identifiable date to the movant at an identifiable address and were received by the movant on an identifiable date. Attorneys fees and costs are denied. Except as so ordered, the motion is denied.

The motion does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(1). The movant alleges that the debtor is four (4) months in post-petition arrears, but a failure to make monthly payments is not cause for relief in a chapter 11 case. In re Air Beds, Inc., 92 B.R. 419, 422 (9<sup>th</sup> Cir. BAP 1988) ("The general rule is that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances."). The movant does have a right to protection from depreciation in the value of its collateral that would impair its secured claim. In re Mellor, 734 F.2d 1396, 1400 n.2 (9<sup>th</sup> Cir. 1984) ("Equity cushion" has been defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect." [emphasis added]). See, also, United Savings Association of Texas v. Timbers of

Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L.Ed.2d 740, 108 S.Ct. 626, 629-630 (1988) ("It is common ground that the 'interest in property' referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay." [emphasis added]). Here, there is no specific evidence that the Vehicle is depreciating in value. However, the court takes judicial notice under Federal Rule of Evidence 201 that, except for certain classic or vintage vehicles, motor vehicles are personal property that depreciate in value with the passage of time and with use. The Vehicle is not a classic or vintage vehicle; it is depreciating in value. The evidence before the court does not show that the Vehicle is worth more than the debt owed to the movant. The NADA evidence submitted by debtor indicates a retail value, which is not an appropriate value for determining adequate protection. The contention that the Vehicle is worth \$800 more than the debt it secures is also inconsistent with the debtor's own schedules, which show the contrary. (Dkt. 15 at 7). Because the Vehicle is depreciating, and because there is no equity in the Vehicle to protect the movant from the effect of that depreciation, the adequate protection payments set forth above are required.

The motion likewise does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(2). Even though the Vehicle has no equity, the debtor has shown that the Vehicle is necessary to an effective reorganization that is in prospect.

Because the movant has not established that the value of the Vehicle exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

27. [08-22725](#)-B-11 BAYER PROTECTIVE SERVICES, CONT. HEARING - MOTION FOR  
DGN #2 INC. RELIEF FROM AUTOMATIC STAY  
FORD MOTOR CREDIT CO., VS. 7-31-08 [[61](#)]

CONT. FROM 8-19-08

**Tentative Ruling:** This matter continued from July 19, 2008 with a briefing schedule. Opposition was due by September 2, 2008. Replies, if any, were due by September 9, 2008. Both the debtor and the movant filed timely written responses. No further briefs have been filed in this matter since the previous hearing date. In this instance, the court issues the following tentative ruling.

The motion is granted in part. Termination of the automatic stay is conditionally denied. Adequate protection is ordered as follows: (1) Commencing September 25, 2008, and continuing on or before the 25<sup>th</sup> day of each month thereafter until the earlier of a further order of the court or confirmation of a plan of reorganization, the debtor shall tender to movant the regular monthly payment (without late charge or penalty) for this vehicle, a 2007 Ford Mustang (VIN 1ZVHT89S575317568) (the "Vehicle"), and (2) the debtor shall keep the Vehicle continuously

insured as required by the contract between the parties. In the event debtor fails to do either or both of those things, the movant may submit a declaration and order granting relief from the automatic stay. Any such declaration and proposed order must be served on the debtor's counsel by facsimile three business days prior to submitting the documents to the court, and the movant's transmittal to the court shall represent that such service was made. The only relevant response by debtor will be that there was no default. If the debtor makes that contention, it should be supported by documentary proof, such as a receipt for certified mail, that the disputed payments were transmitted on an identifiable date to the movant at an identifiable address and were received by the movant on an identifiable date. The court awards attorney's fees equal to the lesser of \$675 or the amount actually billed for this motion, plus costs of \$150. Except as so ordered, the motion is denied.

The motion does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(1). The movant alleges that the debtor is four (4) months in post-petition arrears, but a failure to make monthly payments is not cause for relief in a chapter 11 case. In re Air Beds, Inc., 92 B.R. 419, 422 (9<sup>th</sup> Cir. BAP 1988) ("The general rule is that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances."). The movant does have a right to protection from depreciation in the value of its collateral that would impair its secured claim. In re Mellor, 734 F.2d 1396, 1400 n.2 (9<sup>th</sup> Cir. 1984) ("Equity cushion" has been defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect." [emphasis added]). See, also, United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L.Ed.2d 740, 108 S.Ct. 626, 629-630 (1988) ("It is common ground that the 'interest in property' referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay." [emphasis added]). Here, there is no specific evidence that the Vehicle is depreciating in value. However, the court takes judicial notice under Federal Rule of Evidence 201 that, except for certain classic or vintage vehicles, motor vehicles are personal property that depreciate in value with the passage of time and with use. The Vehicle is not a classic or vintage vehicle; it is depreciating in value. The evidence before the court shows that the Vehicle is worth more than the debt owed to the movant. However, the evidence also shows that the Vehicle is "surplus" and is not necessary to an effective reorganization. The debtor does not object to relief from the automatic as to the Vehicle so long as the movant waives any deficiency claim after its disposition. In essence, the debtor wants to hold the Vehicle hostage to extort a concession from the movant. While equity alone may constitute adequate protection, it does not always do so. A debtor do not have an unlimited right to keep property without making payments until all of its equity is consumed. On the facts to this case, the adequate protection payments set forth above are required.

The motion likewise does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(2). The movant has not carried its burden of showing that the Vehicle has no equity.

Because the value of the Vehicle exceeds movant's claim, the movant is awarded attorneys fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150.

The court will issue a minute order.

28. [08-22725](#)-B-11 BAYER PROTECTIVE SERVICES, CONT. HEARING - MOTION FOR  
DGN #3 INC. RELIEF FROM AUTOMATIC STAY  
FORD MOTOR CREDIT CO., VS. 7-31-08 [[67](#)]

CONT. FROM 8-19-08

**Tentative Ruling:** This matter continued from July 19, 2008 with a briefing schedule. Opposition was due by September 2, 2008. Replies, if any, were due by September 9, 2008. Both the debtor and the movant filed timely written responses. No further briefs have been filed in this matter since the previous hearing date. In this instance, the court issues the following tentative ruling.

The motion is granted in part. Termination of the automatic stay is conditionally denied. Adequate protection is ordered as follows: (1) Commencing September 25, 2008, and continuing on or before the 25<sup>th</sup> day of each month thereafter until the earlier of a further order of the court or confirmation of a plan of reorganization, the debtor shall tender to movant the regular monthly payment (without late charge or penalty) for this vehicle, a 2007 Ford Focus (VIN 1FAFP34N37W166264) (the "Vehicle"), and (2) the debtor shall keep the Vehicle continuously insured as required by the contract between the parties. In the event debtor fails to do either or both of those things, the movant may submit a declaration and order granting relief from the automatic stay. Any such declaration and proposed order must be served on the debtor's counsel by facsimile three business days prior to submitting the documents to the court, and the movant's transmittal to the court shall represent that such service was made. The only relevant response by debtor will be that there was no default. If the debtor makes that contention, it should be supported by documentary proof, such as a receipt for certified mail, that the disputed payments were transmitted on an identifiable date to the movant at an identifiable address and were received by the movant on an identifiable date. Attorneys fees and costs are denied. Except as so ordered, the motion is denied.

The motion does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(1). The movant alleges that the debtor is four (4) months in post-petition arrears, but a failure to make monthly payments is not cause for relief in a chapter 11 case. In re Air Beds, Inc., 92 B.R. 419, 422 (9<sup>th</sup> Cir. BAP 1988) ("The general rule is that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances."). The movant does have a right to protection from depreciation in the value of its collateral that would impair its secured claim. In re Mellor, 734 F.2d 1396, 1400 n.2 (9<sup>th</sup> Cir. 1984) ("Equity cushion" has been defined as the value in the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect." [emphasis

added]). See, also, United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L.Ed.2d 740, 108 S.Ct. 626, 629-630 (1988) ("It is common ground that the 'interest in property' referred to by § 362(d)(1) includes the right of a secured creditor to have the security applied in payment of the debt upon completion of the reorganization; and that that interest is not adequately protected if the security is depreciating during the term of the stay." [emphasis added]). Here, there is no specific evidence that the Vehicle is depreciating in value. However, the court takes judicial notice under Federal Rule of Evidence 201 that, except for certain classic or vintage vehicles, motor vehicles are personal property that depreciate in value with the passage of time and with use. The Vehicle is not a classic or vintage vehicle; it is depreciating in value. The debtor admits that there is no equity in the Vehicle. (Dkt. 15 at 7). Because the Vehicle is depreciating, and because there is no equity in the Vehicle to protect the movant from the effect of that depreciation, the adequate protection payments set forth above are required.

The motion likewise does not show cause for termination of the automatic stay under 11 U.S.C. § 362(d)(2). Even though the Vehicle has no equity, the debtor has shown that the Vehicle is necessary to an effective reorganization that is in prospect.

Because the movant has not established that the value of the Vehicle exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

29. [08-29325](#)-B-7 DAVID/SHANNON DURVAL HEARING - MOTION FOR  
PPR #1 RELIEF FROM AUTOMATIC STAY  
GREENPOINT MORTGAGE 8-15-08 [[17](#)]  
FUNDING, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 2253 Holtspur Court, Tracy, CA 95376 (APN 232-370-05) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$313,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$351,541.82. Without considering the junior lien of \$83,000, there is no equity in the

Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make nine (9) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

30. [08-25927](#)-B-7 MA MIRANDA  
JDL #1  
DOWNEY SAVINGS AND LOANS  
ASSOCIATION, F.A., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-18-087 [[13](#)]

DISCHARGED 8-19-08

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1651 Dewey Street, Vallejo, CA 94590 (APN 0051-344-250), (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

The debtors received their discharge on August 29, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$443,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$489,895.00. Without considering the senior tax lien of \$4,835.84, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make six (6) mortgage payments. The lack of opposition and report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

31. [08-29430](#)-B-7 CYNTHIA GAUTHIER HEARING - MOTION FOR  
JAY #1 RELIEF FROM STAY OR IN THE  
USAA FEDERAL SAVINGS BANK, VS. ALTERNATIVE, FOR ADEQUATE  
PROTECTION  
8-5-08 [8]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied as moot. The court awards no fees and costs.

The motion is moot because the debtor's statement of intention provides that they will surrender the movant's collateral, a 2007 Toyota Prius (VIN JTDKB20U277619914) (the "Collateral"), to the movant. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtor had until Thursday, September 11, 2008 to perform their stated intention. There is no evidence that they did so. Thus, as the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on September 12, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

32. [08-29231](#)-B-7 DAVID/SUZANNA FULLER HEARING - MOTION FOR  
MBB #1 RELIEF FROM AUTOMATIC STAY  
MORTGAGE ELECTRONIC REGISTRATION 8-15-08 [18]  
SYSTEMS, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 9030 Weeping Fig Way, Elk Grove, CA 95758 (APN 1190750038) (the "Property") and to obtain possession of the Property following the sale,

all in accordance with applicable non-bankruptcy law. The court awards attorney's fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150. These fees and costs may be enforced only against the Property. The 10-day period specified in Fed.R.Bankr.P. 4001(a) (3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$320,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$297,061.98. Considering the junior lien of \$137,000, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make (12) twelve mortgage payments. The lack of written opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the value of the Property exceeds movant's claim, movant is awarded attorneys fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150. These fees and costs may be enforced only against the Property.

The court will issue a minute order.

33. [08-27238](#)-B-7 JOSE/ESMERALDA BARRAGAN HEARING - MOTION FOR  
DGN #1 RELIEF FROM AUTOMATIC STAY  
FORD MOTOR CREDIT CO., VS. 8-21-08 [[14](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f) (2). Opposition may be presented at the hearing. However, in this instance, the court issues the following tentative ruling.

The motion is denied as moot.

Through the motion, movant seeks relief from the automatic stay in connection with a 2006 Volvo XC90 (VIN YV4CY592361254891) (the "Vehicle"). The motion is denied as moot because the debtors' statement of intention provides that they will surrender the Vehicle to the movant. Pursuant to 11 U.S.C. § 521(a) (2) (B), debtor had until Monday, August 11, 2008 to perform her stated intention. There is no evidence that she did so. Thus, as the collateral is personal property, the automatic stay terminated at 12:01 a.m. on August 12, 2008 by operation of 11 U.S.C. § 362(h) (1), and the collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because this motion became moot approximately (9) nine days before it was filed, the court awards no attorney's fees and costs.

The court will issue a minute order.

34. [08-29738](#)-B-7 NAZIH MAROUCHE  
JMS #1  
CHASE HOME FINANCE, LLC, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-8-08 [[11](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 502 Baylor Court, Benicia, CA 94510 (APN 0086-301-040) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$409,500.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$515,518.70. Without considering the junior lien of \$118,706.17, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make twenty-two (22) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

35. [08-28054](#)-B-7 STEVEN/CAROL GRAVATT  
KAT #2  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-12-08 [[22](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2)

in order to permit movant to foreclose on the real property located at 706 Clifton Way, Vacaville, CA 95688 (APN 0133-396-020) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$350,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$397,923.14. Without considering the junior lien of \$43,791 and the senior tax lien of \$5420.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. The debtors have filed a statement of intent to surrender the Property. Movant also alleges without dispute that the debtors have failed to make six (6) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

36. [08-26456](#)-B-7 CLINT ACHESON HEARING - MOTION FOR  
WGM #1 RELIEF FROM AUTOMATIC STAY  
CENTRAL MORTGAGE CO., VS. ON REAL PROPERTY  
8-21-08 [[16](#)]

**Tentative Ruling:** This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

37. [08-24557](#)-B-7 PETE/MARBE AGMATA CONT. HEARING - MOTION FOR  
MSS #1 RELIEF FROM AUTOMATIC STAY  
MONTEREY COUNTY BANK, VS. 5-19-08 [[20](#)]

CONT. FROM 6-24-08

**Tentative Ruling:** This motion for relief from automatic stay was filed on May 19, 2008. Debtors filed a timely opposition on June 10, 2008. The case was converted from a Chapter 13 by order entered on June 9, 2008. The newly appointed Chapter 7 trustee John W. Reger ("Trustee") and movant stipulated to continue the matter to this calendar. Trustee filed a supplemental declaration in opposition to the motion on September 12, 2008. The court issues the following tentative ruling.

Neither the respondents within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondents have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied without prejudice or further continued with movant's consent to November 18, 2008 at 9:30 a.m. Movant's consent to a continuance will constitute a waiver of the time limits of 11 U.S.C. § 362(e).

Trustee's supplemental declaration states that he has entered into an agreement to sell the subject properties, real properties located at 8585 Skyway, Paradise, California and 5446 Black Olive Drive, Paradise, California (collectively the "Properties") for an amount more than sufficient to pay all liens, including movant's, and that he intends to file a motion to sell the Properties in the near future.

The court will issue a minute order.

38. [08-28658](#)-B-7 RONALD RYDER HEARING - MOTION FOR  
JDL #1 RELIEF FROM AUTOMATIC STAY  
DOWNEY SAVINGS AND 8-18-08 [[15](#)]  
LOAN ASSOC., ET AL., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 2847 Carissa Way, Sacramento, CA 95824 (269-0111-005-0000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$256,509.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$318,346.20. Without considering the junior lien of \$31,798.00 and the senior tax lien of \$1,947.78, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make eleven (11) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

39. [07-23562](#)-B-7 PAUL/TERRY PENQUITE  
APN #1  
WELLS FARGO AUTO  
FINANCE, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-15-08 [[84](#)]

**Tentative Ruling:** The motion is denied as moot. Considering the automatic extension provided by Bankruptcy Rule 9006(a), the automatic stay terminated with respect to the collateral, a 2006 Ford Escape (VIN 1FMYU02ZX6KC05630) (the "Vehicle"), at 12:01 a.m. on August 11, 2008, by operation of 11 U.S.C. § 362(h), and the Vehicle has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Vehicle. The debtor did not file a statement of intention with respect to the Collateral within the time allowed by law. The debtor had until August 10, 2008, 30 days after the filing of the petition commencing the case, to file a statement of intention that addressed the Collateral. Because he did not timely file such a statement of intention, and because the Vehicle is personal property, the automatic stay terminated at 12:01 a.m. on August 11, 2008, by operation of 11 U.S.C. § 362(h), and the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

40. [08-22270](#)-B-7 JOSEPH SIAU AND  
ASW #1 QIAN WANG  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-19-08 [[124](#)]

DISCHARGED 6-17-08

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 807 Mckinley Avenue, Lehigh Acres, Florida 33936 (the "Property"), and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtors received their discharge on August 17, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$180,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$235,253.24. Without considering the junior lien of \$42,750.00 there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make twelve (12) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

Counsel for the movant shall submit an order consistent with the foregoing ruling.

41. [08-28672](#)-B-7 RICHARD SALAZAR, SR. HEARING - MOTION FOR  
KAT #1 RELIEF FROM AUTOMATIC STAY  
MORTGAGE ELECTRONIC REGISTRATION 8-11-08 [[18](#)]  
SYSTEMS, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 8733 Spring House Way, Elk Grove, CA 95624 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$236,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$352,971.49. Without considering the junior lien of \$41,271.00 there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make ten (10) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Counsel for the movant shall submit an order consistent with the foregoing ruling.

42. [08-26376](#)-B-7 BETH DICKINSON HEARING - MOTION FOR  
MBB #1 RELIEF FROM AUTOMATIC STAY  
MORTGAGE ELECTRONIC REGISTRATION 8-8-08 [[17](#)]  
SYSTEMS, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtor, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1657 Calabria Way, Roseville, CA 95747 (APN 484-070-003), (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

The debtor received her discharge on September 4, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$650,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$734,240.17. Without considering the junior lien of \$82,400.00 there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make four (4) mortgage payments. The debtor has filed a statement of intent to surrender the Property. The lack of opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

The court will issue a minute order.

43. [08-26376](#)-B-7 BETH DICKINSON HEARING - MOTION FOR  
JDL #1 RELIEF FROM AUTOMATIC STAY  
DOWNEY SAVINGS AND LOAN 8-18-08 [[24](#)]  
ASSOCIATION, F.A., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v.

Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtor, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d) (1) and (d) (2) in order to permit movant to foreclose on the real property located at 1756 Tuscan Grove Circle, Roseville, CA 95747, (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees or costs. The 10-day stay of Fed.R.Bankr.P. 4001(a) (3) is not waived. Except as so ordered, the motion is denied.

The debtor received her discharge on September 4, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c) (2) (C).

Movant alleges without dispute that the Property has a value of \$450,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$598,002.85. Without considering the senior tax lien of \$7,432.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make four (4) mortgage payments. The debtor has filed a statement of intent to surrender the Property. The lack of opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

44. 08-27576-B-7 THOMAS/KIMBERLY MULROONEY HEARING - MOTION FOR  
KAT #1 RELIEF FROM AUTOMATIC STAY  
MORTGAGE ELECTRONIC REGISTRATION 8-18-08 [14]  
SYSTEMS, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f) (1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d) (1) and (d) (2) in order to permit movant to foreclose on the real property located at 2820 Ashland Drive, Roseville, CA 95661 (APN 468-290-007) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a) (3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$450,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$408,875.61. Considering the junior lien of \$65,900.34, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make seven (7) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

45. 08-30282-B-7 JORGE PLASCENCIA HEARING - MOTION FOR  
PD #1 RELIEF FROM AUTOMATIC STAY  
WELLS FARGO HOME 8-15-08 [[11](#)]  
MORTGAGE, INC., VS.

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). Because the debtor is in pro se, the court issues the following tentative ruling.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 4250 Anatolia Drive, Rancho Cordova, CA 95742 (APN 067-0600-083) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$190,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$388,195.68. Without considering the junior lien of \$94,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make two (2) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

46. [07-29384](#)-B-7 JOSEPH MCCALPIN  
DGN #1  
FORD MOTOR CREDIT CO., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-21-08 [[60](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, in this instance, the court issues the following tentative ruling.

The motion is denied as moot. The automatic stay terminated with respect to the collateral, a 2000 Ford Winstar (VIN 2FMZA524XYBB24994) (the "Collateral"), at 12:01 a.m. on August 23, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The court awards attorney's fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150. These fees and costs may be enforced only against the Collateral.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtor did not file a statement of intention with respect to the Collateral within the time allowed by law. The debtor had until Friday, August 22, 2008, 30 days after entry of the order converting this case to one under chapter 7, to file a statement of intention that addressed the Collateral. Because he did not timely file such a statement of intention, and because the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on August 23, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court awards attorney's fees and costs, as this motion became moot only after it was filed and because the value of the Collateral exceeds movant's claim. Movant is awarded attorneys fees equal to the lesser of \$675 or the amount actually billed plus costs of \$150. These fees and costs may be enforced only against the Collateral.

The court will issue a minute order.

47. [08-25485](#)-B-7 DOTTY/JOSEPH SPELL  
JHW #1  
DAIMLERCHRYSLER FINANCIAL  
SERVICES AMERICAS LLC, VS.

HEARING - MOTION  
CONFIRMING TERMINATION OF  
THE AUTOMATIC STAY  
8-6-08 [[29](#)]

DISCHARGED 8-12-08

**Tentative Ruling:** The motion is denied as moot. The automatic stay terminated with respect to the collateral, a 2008 Dodge Ram 3500 (VIN 3D7MX38A38G176968) (the "Collateral") at 12:01 a.m. on July 3, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate.

The motion is moot because the debtors' statement of intention states that that they will reaffirm their obligation to movant regarding the Collateral. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtors had until

Wednesday, July 2, 2008 to perform their stated intention. There is no evidence that they did so. Thus, as the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on July 3, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the automatic stay terminated with respect to the Collateral on July 3, 2008 under 11 U.S.C. § 362(h)(1), the court does not reach the movant's argument regarding automatic termination of the automatic stay on July 17, 2008 under 11 U.S.C. § 521(a)(6).

The court will issue a minute order.

48. [08-24088](#)-B-7 CATHY FRIEDMAN HEARING - MOTION FOR  
PD #1 RELIEF FROM AUTOMATIC STAY  
AMERICA'S SERVICING CO., VS. 8-7-08 [[42](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 3513 Ridge Rim Court, Antelope, CA 95843 (APN 203-1410-018-0000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$320,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$381,550.05. Without considering the senior lien of \$4,200.00 and the junior lien of \$80,895.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make twenty (20) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

49. [08-26388](#)-B-11 JOHN O'SULLIVAN  
PSK #1  
OXFORD MORTGAGE FUNDS, L.P., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-14-08 [[39](#)]

**Disposition Without Oral Argument:** Oral argument will not aid the court in rendering a decision on this matter.

This matter is continued to September 30, 2008 at 9:30 a.m. to allow movant to timely serve the creditors included on the list filed pursuant to Bankruptcy Rule 1007(d). The proof of service on this motion indicates that the debtor, debtor's counsel, and the United States Trustee were served with this motion on August 14, 2008 (Dkt. 46). Pursuant to the applicable provisions of Bankruptcy Rule 4001(a)(1), in a chapter 11 case, a motion for relief from the automatic stay must be served on the creditors committee, or if none is appointed, the creditors included on the list filed pursuant to Rule 1007(d). The proof of service does not indicate that the 20 largest unsecured creditors have been served with the instant motion. The court notes that debtor filed a list of the 20 largest unsecured creditors on June 17, 2008. (Dkt 19). Based on the foregoing, there is no presumption of service on the 20 largest unsecured creditors, as required.

On or before September 16, 2008, the date of this hearing, movant shall serve the 20 largest unsecured creditors with the motion, its supporting documentation, and the notice of continued hearing. Movant shall also serve debtor with notice of the continued hearing and file notice of the continued hearing with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the movant fails to do any of the foregoing, the motion will be denied without prejudice for improper service.

The court will issue a minute order.

50. [08-26788](#)-B-7 HOUA/MARIGOLD YANG  
EAT #1  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-15-08 [[20](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 7730 Rock Creek Way, Sacramento, CA 95824 (APN 038-0225-002-0000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtors received their discharge on September 3, 2008. The automatic stay as to the debtors ended on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$190,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$227,175.57. Without considering the senior lien of \$3,000.00 and the junior lien of \$24,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make four (4) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

51. [08-27292](#)-B-7 JOSEPH MARTEL HEARING - MOTION FOR  
APN #1 RELIEF FROM AUTOMATIC STAY  
WELLS FARGO AUTO 8-18-08 [[26](#)]  
FINANCE, VS.

**Tentative Ruling:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied as moot. The automatic stay terminated as to the subject vehicle, a leased 2004 Ford F150 (VIN 1FTPW14594KD69944) (the "Vehicle") at 12:01 a.m. on August 23, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtor's possessory interest in the Vehicle has from that date no longer been property of the estate. The court awards no fees and costs.

Debtor's petition was filed under chapter 13 on June 2, 2008. By order entered on June 23, 2008 (Dkt. 12), this case was converted under 11 U.S.C. § 1307(a) from chapter 13 to chapter 7. Pursuant to the applicable terms of 11 U.S.C. §§ 348(c) and 365(d)(1), the chapter 7 trustee may assume or reject an unexpired lease of personal property of the debtor within 60 days after the entry of the conversion order. In this case, as of August 22, 2008, sixty days after entry of the order converting this case, the chapter 7 trustee had not assumed or rejected the lease of the Vehicle. Pursuant to 11 U.S.C. § 365(p)(1), where a lease of personal property is rejected or not timely assumed by the trustee under section 362(d), the debtor's interest in the leased property is no longer property of the estate and the automatic stay under section 362(a) is automatically terminated. Thus, the automatic stay terminated with respect to the Vehicle at 12:01 a.m. on August 23, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtor's possessory interest in the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that it is the holder of a secured claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

52. [08-27992](#)-B-7 JAMES/DONNA MOULTRIE  
KAT #1  
INDYMAC FEDERAL BANK FSB, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-11-08 [[15](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 11560 Bedrock Drive, Nevada City, CA 95959 (APN 37-030-21) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$499,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$502,333.74. Considering these figures, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

53. [08-30292](#)-B-7 MEGAN BROWN  
PD #1  
WELLS FARGO HOME  
MORTGAGE, INC., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-15-08 [[9](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 3597 Galena Drive, # 2, Auburn, CA 95602 (APN 051-270-009) (the "Property") and to obtain possession of the Property following the sale, all in

accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$110,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$112,692.12. Without considering the junior lien of \$50,474.84, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make eight (8) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

54. 08-30096-B-7      GEORGE/CARMELITA ENCINAS      HEARING - MOTION FOR  
PPR #1      RELIEF FROM AUTOMATIC STAY  
GREENPOINT MORTGAGE      8-15-08      [8]  
FUNDING, INC., VS.

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 624 Emerald Hills Circle, Fairfield, CA 94533 (APN 0167-435-040) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$400,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$590,291.12. Without considering the senior lien of \$3,235.00 and the junior lien of \$113,300.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

55. [08-21307](#)-B-7 DANIEL GANAS HEARING - MOTION  
[08-2211](#) JH #2 FOR ENTRY OF DEFAULT JUDGMENT  
JANICE HARVILL, VS. 8-11-08 [[19](#)]

DANIEL GANAS

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance the court issues the following tentative ruling.

The motion is granted in part and denied in part. Default judgment will be rendered against debtor Daniel Ganas in the amount of \$50,400.00, which judgment will be nondischargeable under 11 U.S.C. § 523(a)(2)(A). Except to that extent, the motion is denied.

Plaintiff Janice Harvill ("Plaintiff") seeks entry of a default judgment against debtor Daniel Ganas ("Defendant"). Plaintiff commenced the adversary proceeding by filing a complaint against Defendant on April 21, 2008. Defendant did not answer the complaint, and on June 23, 2008 his default was entered. Plaintiff now seeks entry of default judgment against Defendant in the amount of \$50,400.00, and requests that the judgment be declared nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), and (a)(6).

The facts alleged without dispute in the complaint (Dkt. 1) include the following. In early May 2007, Plaintiff made a business loan in the amount of \$45,000.00 pursuant to a promissory note (the "Note"), which was subsequently collateralized with rental property owned by Defendant, commonly known as 4120 Monte Verde Way, Lincoln, CA (the "Property"). The Note was intended to fund Defendant's start-up business (the "Business"), and \$5,000.00 of the loan was to be used to evict a tenant who was not paying rent on a residential rental property that Defendant owned. The subject loan was to be re-paid in the amount of \$50,400.00 with interest at the end of six (6) months. At the time Plaintiff made the loan to Defendant, Defendant represented to Plaintiff that Defendant was current on the Property's senior mortgage.

Notwithstanding the foregoing, Plaintiff later learned that Defendant never obtained a business license for the Business, that Defendant never started the Business, that Defendant instead used the subject funds to pay personal bills including a personal auto lease payment, and that foreclosure proceedings were commenced against the Property as of May 2007. In addition, Defendant never used \$5,000.00 of the loan proceeds to evict the tenant from his rental property but instead used the money to pay mortgage payments on a different rental property he owned in Roseville, California. As of April 9, 2008, nearly a year after the transaction was executed, Defendant had made only one (1) interest

payment of \$900.00 to Plaintiff in connection with the Note.

Based on the facts alleged in the complaint, a judgment of nondischargeability under 11 U.S.C. § 523(a)(2)(A) is appropriate in this case. Under § 523(a)(2)(A), any debt "for money, property, services, or an extension, renewal, or refinancing of credit, the extent obtained by-- []false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's an or an insider's financial condition," is excepted from discharge. Here, Plaintiff alleges that she loaned \$45,000.00 to Defendant in or about May 2007. As part of the basis for the loan, Defendant represented to Plaintiff that he would use the loan proceeds as venture capital on the Business and would allocate \$5,000.00 of the proceeds to evict a non-paying tenant. Additionally, Defendant represented to Plaintiff that the senior mortgage on the Property was in good standing. Defendant's representations were false. Defendant did not use the loan proceeds to fund the Business but instead used the money to pay his own personal debts, including the mortgage on his residence and his personal auto lease payment. Additionally, Defendant never formed the Business, never obtained a business license for the Business, and used the \$5,000.00 to make a mortgage payment on rental property rather than using the money to evict a tenant. Furthermore, contrary to Defendant's representation to Plaintiff that the senior mortgage on the Property was in good standing, Defendant had used the Property as collateral for another loan which was already in default at that time. Finally, Plaintiff alleges that she justifiably relied on Defendant's representation and has been damaged in the total amount of \$50,400.00 as a result.

A judgment of nondischargeability under § 523(a)(2)(B) is inappropriate in this case. In relevant part, section 523(a)(2)(B) requires the use of a statement in writing that is materially false respecting the debtor's financial condition on which the creditor to whom the debtor is liable for money, property, services, or credit reasonably relied and that the debtor caused to be made or published with the intent to deceive. Here, Defendant signed the Note for a total of \$45,000.00, payable to Plaintiff with interest in the amount of \$50,400.00 within six months. Plaintiff also states that Defendant knowingly and intentionally concealed from Plaintiff his true intention as to the specific expenses he intended to pay with the subject loan proceeds. However, assuming that the Note would satisfy the writing requirement of § 523(a)(2)(B), no copy of the Note is attached to the complaint, and Plaintiff has not shown that the Note itself is a materially false statement in writing rather than simply the result of false oral representations regarding Defendant's intentions and financial condition.

A judgment of nondischargeability under § 523(a)(6) is also inappropriate in this case. Plaintiff alleges that Defendant intentionally, wilfully, and maliciously harmed Plaintiff's property interests by inducing Plaintiff to part with \$45,000.00 which she otherwise would not have done had she known Defendant's true intentions.

The "willful and malicious" standard for the purposes of § 523(a)(6) is a two-pronged test. Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 831 (9<sup>th</sup> Cir. BAP 2006). Under the first prong, a court must determine whether there was a "willful" injury. "[T]he standard for meeting the willful prong of the two-part test under § 523(a)(6) is high. That is, the creditor must prove that the debtor had the subjective intent to cause harm or the subjective knowledge that harm was substantially

certain to occur." Luc v. Chien (In re Chien), No. NC-07-1268-JuMkK at \*11 (9<sup>th</sup> Cir. Bap, February 7, 2008) (citing Kawaauhau v. Geiger, 523 U.S. 57 (1998) and Carillo v. Su (In re Su), 290 F.3d 1140 (9<sup>th</sup> Cir. 2002)). As an illustration of how high the standard for willfulness has been set, in Su a state court jury had found by clear and convincing evidence that a chapter 7 debtor was guilty of malice in deliberately running a red light and striking a judgment creditor. "Malice" under California state law is defined as either conduct intended to cause injury to plaintiff or despicable conduct carried on with a willful and conscious disregard for the safety and rights of others. Su, 290 F.3d at 1141. The Su court held that where the bankruptcy court had focused exclusively on the objective substantial certainty of harm stemming from the debtor's driving, but did not consider the debtor's subjective intent to cause harm or knowledge that harm was substantially certain, the bankruptcy court had applied the wrong legal standard in deciding that the debt was nondischargeable under § 523(a)(6). Id. at 1145. The Su court stated its belief that a failure to inquire into the debtor's subjective intent in determining willfulness prong would expand the scope of nondischargeable debt under § 523(a)(6) far beyond what Congress intended by reducing the willfulness standard to something akin to the "reckless disregard" standard used in negligence. The Su court pointed out that the Bankruptcy Code's legislative history "makes it clear that Congress did not intend § 523(a)(6)'s willful injury requirement to be applied so as to render nondischargeable any debt incurred by reckless behavior." Id. at 1145-46.

Here, Plaintiff has not satisfied the willfulness prong. The facts as set forth by Plaintiff do not support the existence of subjective intent by Defendant to cause harm to Plaintiff, or subjective knowledge that harm was substantially certain to occur, as opposed to merely a reckless disregard that harm would come to Plaintiff. Under the facts alleged in the complaint, it is equally possible that Defendant's misrepresentation was intended only for the purpose of acquiring sufficient funds for the start-up of the Business and/or for payment of personal expenses, and was made only with an awareness - not necessarily a subjective intent - that his failure to repay the loan would cause harm to Plaintiff. Because Plaintiff has failed to satisfy the willfulness element of the standard, the court need not address the maliciousness element of the standard.

The court will issue a minute order granting the motion in part. The court will issue a separate order to show cause why the 11 U.S.C. § 523(a)(2)(B) and (a)(6) claims for relief set forth in the complaint should not be dismissed. An appropriate judgment will be entered when all claims in the adversary proceeding have been resolved.

56. 07-20823-B-7 MARK/LALAINA BUSBY  
MAR #2

HEARING - FIRST  
AND FINAL APPLICATION FOR  
COMPENSATION BY COUNSEL FOR  
TRUSTEE (\$7,000.00 FEES;  
\$361.57 EXPENSES)  
8-18-08 [50]

DISCHARGED 5-11-07

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran,

46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted to the extent set forth herein. The application is approved for a total of \$7,000.00 in fees and costs of \$361.57. Of that amount, \$7,361.57 shall be paid in funds as an administrative expense by the chapter 7 trustee. Except as so ordered, the motion is denied.

On February 7, 2007, the debtors filed a chapter 7 petition. On February 8, 2007, Prem N. Dhawan was appointed as the chapter 7 trustee of the instant case. By order entered on March 16, 2007 (Dkt. 15), the court approved employment of Marshall & Ramos, LLP as counsel for the chapter 7 trustee. Marshall & Ramos, LLP now seek compensation for services for the period of December 10, 2007 through July 22, 2008, equaling \$7,000.00 in attorney's fees. As set forth in the attorneys' application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

57. [08-28327](#)-B-7 JEANNIE TAYLOR HEARING - MOTION TO  
MAS #2 STRIKE CHAPTER 7 BANKRUPTCY  
CASE DUE TO DUPLICATE FILING  
8-11-08 [[26](#)]

**Disposition Without Oral Argument:** The motion is denied as moot because the bankruptcy case was dismissed by order entered on September 5, 2008. (Dkt. 32).

The court will issue a minute order.

58. [08-27540](#)-B-7 RONALD/LINDA BRAXTON HEARING - UNITED STATES  
UST #2 TRUSTEE'S MOTION TO DISMISS  
CASE  
8-14-08 [[14](#)]

**Disposition Without Oral Argument:** This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of any party in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted and the case is dismissed pursuant to 11 U.S.C. § 707(b)(1).

The debtors filed this voluntary chapter 7 petition on June 5, 2008. On July 18, 2008, the United States Trustee ("UST") filed a statement of presumed abuse. (Dkt. 12). On August 14, 2008, the UST filed the instant motion to dismiss for substantial abuse pursuant to 11 U.S.C. § 707(b).

For the court to dismiss pursuant to 11 U.S.C. § 707(b), it must determine 1) that the debtor owes primarily consumer debt and 2) that granting the debtor a discharge would be an abuse of chapter 7. In re

Gaskins, 85 B.R. 846, 847 (Bankr. C.D. Cal 1988) (citing Zolg v. Kelley (In re Kelly), 841 F.2d 908 (9<sup>th</sup> Cir. 1988)).

Consumer debt is defined by 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." In re Kelly, 841 F.2d at 912. The debts as scheduled by the debtors are exclusively consumer debts within the meaning of § 101(8). The petition states that this is a "consumer/ non-business case." (Dkt. 1 at 1). The debtors are individuals who owe primarily consumer debts.

The court must then determine whether permitting debtor to remain in chapter 7 and receive a chapter 7 discharge "would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b). The UST argues, and the court finds, that a presumption of abuse under 11 U.S.C. § 707(b)(2) arises in this case. Debtors filed a Statement of Current Monthly Income and Means Test Calculation ("Form 22A") on June 5, 2008. (Dkt. 1 at 45-51). Debtors stated in Form 22A that the presumption of abuse arises, and the UST agrees. Form 22A states that debtors' household consists of three people. UST alleges without dispute that debtors' actual current monthly income is \$14,339.08, equaling annual income of \$172,068.96. That amount exceeds the applicable median family income of \$66,611.00 for a household of three in California. See

[http://www.usdoj.gov/ust/eo/bapcpa/20080317/bci\\_data/median\\_income\\_table.htm](http://www.usdoj.gov/ust/eo/bapcpa/20080317/bci_data/median_income_table.htm). The UST further points out that debtors' actual monthly disposable income is \$3,302.70, resulting in disposable income over 60 months of \$198,162.00. That amount exceeds the monetary limits in Section 707(b)(2)(A)(i)(II). The debtors have not opposed the motion, and the debtors have therefore failed to rebut the presumption of abuse.

Therefore, the motion is granted, and the case is dismissed as an abuse of chapter 7.

The court declines to reach the remaining issues raised by the United States trustee in the motion.

The court will issue a minute order.

59. 08-25847-B-7      GERALD DOBSON, VS.      HEARING - MOTION  
DES #2      TO AVOID LIEN  
TRI-CAP INVESTMENT      8-21-08      [19]  
PARTNERS LLC

**Tentative Ruling:** This motion has been filed pursuant to LBR 9014-1(f)(1). The court notes that the motion was served on parties in interest only 27 days before the date of the hearing. Motions filed under LBR 9014-1(f)(1) must be served at least 28 days before the date of the hearing. In this instance, the court treats the motion as filed under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

60. [07-29250](#)-B-7 MIKHAIL LIKHTAR  
MFB #3

HEARING - MOTION  
OF THE CHAPTER 7 TRUSTEE FOR  
EXTENSION OF DEADLINES  
8-11-08 [[53](#)]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

In the absence of any opposition, the motion is granted. The deadline for the chapter 7 trustee to file an objection to the debtor's discharge under 11 U.S.C. § 727 is extended to November 10, 2008.

The trustee requests an extension of the deadline for filing an objection to the debtor's discharge under 11 U.S.C. § 727. When a request for an enlargement of time to file a complaint to objecting to discharge made before the time has expired, as it was here, the court may enlarge time for cause shown. Fed. R. Bankr. P. 4004(b). Here the trustee alleges without dispute that the debtor may not properly disclosed all assets of the estate and has not complied with the trustee's requests to provide information regard potential estate assets. The trustee is presently investigating the debtor's financial affairs to determine what further actions should be taken, and requests an extension to permit him to conclude his investigation. The court finds that this constitutes sufficient cause for an enlargement of time.

The court will issue a minute order.

61. [07-29250](#)-B-7 MIKHAIL LIKHTAR  
MFB #4

HEARING - MOTION  
OF THE CHAPTER 7 TRUSTEE FOR  
ORDER COMPELLING DEBTOR TO  
TURN OVER FUNDS  
8-11-08 [[56](#)]

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance the court issues the following tentative ruling.

The motion is denied without prejudice.

The chapter 7 trustee seeks an order pursuant to 11 U.S.C. § 542 compelling the debtor to turn over personal property consisting of a income tax refunds in the amount of \$7,900.00 and post-petition rents in the amount of \$3,800.00 (collectively the "Funds").

The motion is denied as the chapter 7 trustee has not shown that he is legally entitled to the relief he seeks. All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9<sup>th</sup> Cir. BAP 2007) ("...default does not entitle a plaintiff to judgment as a matter of right or as a matter of law."). The trustee has not shown that the debtor is actually in

possession of the Funds. At best, the motion alleges trustee's belief that debtor is in possession of income tax refunds for the tax year of 2007. The motion does not allege that debtor is in possession of the post-petition rents. More importantly, the motion is not supported by a declaration, and no other evidence has been submitted with the motion to establish debtor's possession of the Funds. "The [language of Section 542] requires actual or constructive possession by a defendant as a fundamental predicate to a trustee's turnover rights." In re De Berry, 59 B.R. 891, 895 (Bankr. E.D.N.Y. 1986). The trustee bears the burden of proof of showing that debtor is in possession of the specific property the trustee seeks by way of turnover order. Id. at 896. The trustee has not carried his burden here.

The court will issue a minute order.

62. [06-23451](#)-B-7 SERGIO/SANDRA RODAS  
MAR #1

HEARING - MOTION FOR  
ORDER APPROVING TRUSTEE'S  
SALE OF NON-EXEMPT AND  
UNENCUMBERED EQUITY IN  
PERSONAL PROPERTY OF  
THE ESTATE  
8-6-08 [[192](#)]

**Tentative Ruling:** The failure of any party in interest to file written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1, Part II(a) and (c). Nevertheless, because other parties may be interested in purchasing the property, the court will issue a tentative ruling.

The estate has an interest in various personal property, including a 1986 Nissan 200 SX automobile, a 1989 BMW 750IL automobile, a 1998 Nissan Sentra automobile, and a 1999 BMW 328i automobile (collectively the "Property"). The trustee alleges without dispute that, to his knowledge, there are no liens or encumbrances on the Property with the exception of a lien in favor of BMW Financial Services in connection with the 1999 BMW 328i automobile. (Dkt. 192 at 2). The trustee seeks to sell the estate's interest in the Property, subject to any and all lien and interests that may exist, to debtors, without overbidding, for \$9,000.00, provided that the debtors also pay a surcharge in the amount of \$2,000.00 as required by an order entered on January 22, 2008 (Dkt. 173).

Pursuant to 11 U.S.C. § 363(b)(1), the motion is granted to the extent set forth herein, and the trustee is authorized to sell the Property in an "as-is" and "where-is" condition, and subject to any and all lien and interests that may exist, to debtors for \$9,000.00, provided that the foregoing sum is paid along with the surcharge of \$2,000.00. The proceeds of the sale and the surcharge shall be administered for the benefit of the estate.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

Counsel for the trustee shall submit an order that conforms to the court's ruling.

63. [06-24971](#)-B-7 BRUCE SEYMOUR HEARING - MOTION TO  
HSM #13 ABANDON REAL PROPERTY OF THE  
ESTATE (LA FONTANTA PROPERTY)  
8-20-08 [[405](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

64. [05-40773](#)-B-7 APPLGATE DRAYAGE COMPANY HEARING - TRUSTEE'S MOTION  
MAR #8 FOR AN ORDER APPROVING  
COMPROMISE OF CONTROVERSY  
8-7-08 [[330](#)]

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted and the compromise set forth in the Settlement Agreement dated as of April 20, 2007 between the trustee and Michelin North America, Inc. ("Michelin") (Dkt. 333, pp. 3-5) is approved.

The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id.

The compromise in question arises from a dispute between the debtor and Michelin over an account receivable due from Michelin to the debtor. The debtor alleges that the outstanding balance owed by Michelin to the debtor is \$136,194.63. According to the trustee, the debtor has virtually no accounting records to support this amount. Michelin, on the other hand, disputes this amount and claims that the balance owing on the account receivable totals \$107,821.44. According to the trustee, Michelin has records maintained in the ordinary course of business which substantiate this amount. Moreover, as the trustee points out, Michelin



On July 5, 2006, the debtor filed a chapter 7 petition. On July 5, 2006, Prem N. Dhawan was appointed as the chapter 7 trustee of the instant case. By order entered on September 18, 2006 (Dkt. 64), the court approved employment of Marshall & Ramos, LLP as counsel for the chapter 7 trustee. Marshall & Ramos, LLP now seek compensation for services for the period of September 26, 2006 through October 29, 2007, equaling \$18,635.50 in attorney's fees. As set forth in the attorneys' application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

The court will issue a minute order.

66. [08-30083](#)-B-7 JAMES/TERESITA PHILLIPS, VS. HEARING - MOTION  
JTN #1 TO AVOID LIEN  
UNIFUND CCR PARTNERS 8-5-08 [[9](#)]

**Disposition Without Oral Argument:** This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of any party in interest to file written opposition is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted pursuant to 11 U.S.C. § 522(f)(1)(A). The judicial lien in favor of Unifund CCR Partners Assignee of Providian Bank, recorded in the official records of Sacramento County, Book No. 20080122, Page 1010, is avoided as against the real property located at 7858 Summer Mist Court, Sacramento, CA 95828.

The subject real property has a value of \$191,000.00 as of the date of the petition. The unavoidable liens total \$279,400.12. The debtors claimed the property as exempt under California Code of Civil Procedure Section 703.140(b)(1), under which they exempted \$1.00. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtors' exemption of the real property and its fixing is avoided.

The court will issue a minute order.

67. [07-30784](#)-B-7 MICHELLE REED HEARING - MOTION  
DNL #2 TO APPROVE COMPROMISE BETWEEN  
TRUSTEE AND COPPEDGES  
8-19-08 [[35](#)]

DISCHARGED 4-22-08

**Disposition Without Oral Argument:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The instant motion involves a compromise of controversy. The motion is granted to the extent set forth herein.

The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9<sup>th</sup> Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377, 1381 (9<sup>th</sup> Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id.

The compromise in question arises from at least sixteen state court proceedings ("State Court Actions") involving the debtor and Paul Coppedge, Gabriela Coppedge, Julian Coppedge, Jacqueline Coppedge, and Jonathan Coppedge ("Coppedges"). Debtor's amended schedules disclose four of the sixteen State Court Actions. Debtor has sought an exemption of \$0.00 in the four scheduled lawsuits and has valued the four lawsuits at \$0.00. (Dkt. 24 at 7). The Coppedges filed three of the six claims in this bankruptcy case. The Coppedges' claims total approximately \$6,500.00 of the \$8,000.00 total claimed on the court's claims registry in this case.

To resolve the Coppedges' claims, the trustee and the Coppedges have agreed that the Coppedges will pay the amount of \$27,500.00 to the bankruptcy estate. In turn, the State Court Actions will be dismissed with prejudice with each party to bear its own fees and costs. Additionally, the trustee and the Coppedges shall exchange mutual releases of all claims, known and unknown.

The trustee asserts the compromise is fair and equitable. His argument first focuses on the assertion that the trustee is not likely to prevail in the State Court Actions because it appears that the debtor may be a vexatious litigant who is not a credible witness. Second, the trustee's argument focuses on the assertion that the costs, risks and delay of litigation outweigh any benefit to litigation, as the State Court Actions involve various contract and tort claims which the trustee believes would require intensive and expensive factual research. Finally, the trustee asserts that the Coppedges have filed three of the six proofs of claim in this case, thus suggesting that the motion has the support of a substantial portion of the creditors in this case. The court notes that the motion is unopposed. On the whole, the A&C factors favor the approval of the compromise.

Accordingly, the court finds that the trustee has carried the burden of persuading the court that the proposed compromise is fair and equitable, and the motion is granted.

The court will issue a minute order.

68. [05-37586](#)-B-7 KATHY GUNZ HEARING - MOTION FOR  
HSM #2 APPROVAL OF COMPROMISES OF  
CONTROVERSIES AND SETTLEMENT  
AGREEMENT, INCLUDING DISMISSAL  
OF RELATED ADVERSARY PROCEEDING  
8-18-08 [56]

**Tentative Ruling:** This matter continued to September 30, 2008 at 9:30 am for supplemental briefing regarding the value of various items of jewelry and of a timeshare (collectively the "Transferred Property") which form the basis of this motion.

On or before September 23, 2008, the chapter 7 trustee shall file with the court and serve on all parties in interest supplemental briefing regarding the value of the Transferred Property.

The court will issue a minute order.

69. [08-30699](#)-B-7 WILLIAM/CYNTHIA DETRICK HEARING - MOTION TO  
LTF #1 VACATE OR IN THE ALTERNATIVE  
DISMISS  
8-7-08 [7]

**Tentative Ruling:** The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance the court issues the following tentative ruling.

The motion is granted in part and denied in part. The case is dismissed pursuant to 11 U.S.C. § 707(a). Except as so ordered, the motion is denied.

Through the instant motion, the debtors seek an order vacating the order for relief or, alternatively, dismissing the instant bankruptcy case. The debtors also seek an order instructing the clerk's office to refund the \$299.00 filing fee paid by the debtors in this case.

As to the debtors' requests to vacate the order for relief and to receive a refund of the \$299.00 filing fee paid by the debtors in this case, the motion is denied. The debtors have not shown that they are legally entitled to the relief that they seek. All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9<sup>th</sup> Cir. BAP 2007) ("...default does not entitle a plaintiff to judgment as a matter of right or as a matter of law."). The debtors have cited no legal authority entitling them to an order vacating the order for relief or to a refund of the filing fee. Pursuant to LBR 9014-1(d)(5), each motion, opposition, and reply shall cite the legal authority relied upon by the filing party. A failure to comply with the requirements of the Local Rules applicable to motion practice is grounds for denial of the motion. LBR 9014-1(1).

As to the debtors' request to dismiss the instant case, the motion is granted. Pursuant to 11 U.S.C. § 707(a), the court may dismiss a case for cause. Here, the debtors have alleged without dispute that the petition initiating this case was filed due to the inexperience of a secretary in debtors' counsel's office. No party in interest has opposed debtors' request within the time fixed in the notice of hearing. The foregoing constitutes cause for dismissal.

The court will issue a minute order.

70. [08-28300](#)-B-7 CHARLES REESE HEARING - DEBTOR'S  
CC #1 MOTION TO CONVERT TO  
CHAPTER 13  
8-25-08 [[20](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

71. [08-30503](#)-B-7 KHALID/MUMTAZ KHAN HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-21-08 [[13](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtors filed the missing documents on August 22, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

72. [08-26318](#)-B-7 MICHAEL/JILL JONES HEARING - MOTION FOR  
MDE #1 RELIEF FROM AUTOMATIC STAY  
CITIMORTGAGE, INC., VS. 8-13-08 [[30](#)]

**Disposition Without Oral Argument:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1773 Toby Drive, El Dorado Hills, CA 95762 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$508,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$579,059.12. Without considering the junior liens of \$96,757.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make three (3) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

73. [08-26318](#)-B-7 MICHAEL/JILL JONES HEARING - UNITED STATES TRUSTEE'S MOTION TO DISMISS CASE 8-1-08 [[24](#)]  
UST #2

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). On September 15, 2008, debtors filed an ex parte application for conversion from chapter 7 to chapter 13. In this instance, the court issues the following tentative ruling.

The motion is granted in part and the case is converted with the debtors' consent to one under chapter 13.

The debtors filed this voluntary chapter 7 petition on May 14, 2008. On July 3, 2008, the United States Trustee ("UST") filed a statement of presumed abuse. (Dkt. 20). On August 1, 2008, the UST filed the instant motion to dismiss for substantial abuse pursuant to 11 U.S.C. § 707(b) or, with the debtors' consent, to convert to chapter 13.

For the court to dismiss or convert pursuant to 11 U.S.C. § 707(b), it must determine 1) that the debtor owes primarily consumer debt and 2) that granting the debtor a discharge would be an abuse of chapter 7. In re Gaskins, 85 B.R. 846, 847 (Bankr. C.D. Cal 1988) (*citing* Zolg v. Kelley (In re Kelly), 841 F.2d 908 (9<sup>th</sup> Cir. 1988)). Conversion is appropriate under 11 U.S.C. § 707(b) with the debtor's consent.

Consumer debt is defined by 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." In re Kelly, 841 F.2d at 912. The debts as scheduled by the debtors are exclusively consumer debts within the meaning of § 101(8). The petition states that this is a "consumer/ non-business case." (Dkt. 1 at 1). The debtors are individuals who owe primarily consumer debts.

The court must then determine whether permitting debtor to remain in chapter 7 and receive a chapter 7 discharge "would be an abuse of the

provisions of this chapter." 11 U.S.C. § 707(b). The UST argues, and the court finds, that a presumption of abuse under 11 U.S.C. § 707(b)(2) arises in this case. Debtors filed a Statement of Current Monthly Income and Means Test Calculation ("Form 22A") on May 28, 2008. (Dkt. 8 at 29-35). Debtors stated in Form 22A that the presumption of abuse arises, and the UST agrees. Form 22A states that debtors' household consists of two people. UST alleges without dispute that debtors' actual current monthly income is \$12,206.00, equaling annual income of \$146,472.00. That amount exceeds the applicable median family income of \$61,742.00 for a household of two in California. See [http://www.usdoj.gov/ust/eo/bapcpa/20080317/bci\\_data/median\\_income\\_table.htm](http://www.usdoj.gov/ust/eo/bapcpa/20080317/bci_data/median_income_table.htm). The UST further points out that debtors' actual monthly disposable income is \$781.50, resulting in disposable income over 60 months of \$46,890.00. That amount exceeds the monetary limits in Section 707(b)(2)(A)(i)(II). The debtors have not opposed the motion, and the debtors have therefore failed to rebut the presumption of abuse.

The court notes that on September 15, 2008, debtors filed an ex parte application for conversion from chapter 7 to chapter 13. The court construes this filing as a debtors' consent to conversion of this case. Therefore, the motion is granted, and the case is converted to one under chapter 13.

The court declines to reach the remaining issues raised by the United States trustee in the motion.

The court will issue a minute order.

74. [08-28818](#)-B-7 KEITH/HAZEL MILLER HEARING - MOTION FOR  
SW #1 RELIEF FROM AUTOMATIC STAY  
WACHOVIA DEALER 8-26-08 [\[16\]](#)  
SERVICES, INC., VS.

**Tentative Ruling:** The motion is denied as moot. The automatic stay terminated as to the collateral, a 2004 Saturn Ion (VIN 1G8AF52F4Z167100) (the "Collateral"), at 12:01 a.m. on July 31, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtors filed a statement of intention with respect to this item of personal property within the deadline established by 11 U.S.C. § 521(a)(2) and [Interim 2006] Federal Rule of Bankruptcy Procedure 1007(b)(2). The debtors stated that they would "retain collateral and continue to make regular payments." However, Section 362(h)(1)(A) requires something more. In order for the automatic stay to remain in effect with respect to personal property that the debtor is retaining, the debtor must either redeem the personal property or enter into a reaffirmation agreement with the creditor. See Dumont v. Ford Motor Credit Co. (In re Dumont), 383 B.R. 481 (B.A.P. 9<sup>th</sup> Cir. 2008). The docket indicates that neither of these requirements has been satisfied.

Pursuant to 11 U.S.C. § 521(a)(2), the debtors had until Wednesday, July 30, 2008 to file a statement of intention that properly addressed the Collateral. Because they did not file a compliant statement of intention

timely and because the collateral at issue here is personal property, the automatic stay terminated as to the Collateral at 12:01 a.m. on July 31, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

75. [08-30726](#)-B-7 DAVID SYME HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-22-08 [[9](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor filed the missing documents on September 5, 2008. (Dkt. 13). No monetary sanctions are imposed.

The court will issue a minute order.

76. [08-30228](#)-B-7 KATRINA MONETTE HEARING - MOTION FOR  
SW #1 RELIEF FROM AUTOMATIC STAY  
WACHOVIA DEALER SERVICES, 9-2-08 [[9](#)]  
INC., VS.

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtor has filed a statement of intent to surrender the Collateral, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 2004 GMC Yukon (VIN 1GKEK13T34J171115) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim including any attorneys' fees awarded herein. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is ordered waived due to the fact that the Collateral is being used by the debtor without compensation and is depreciating in value. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$18,500.00. Movant holds a lien on the Collateral in the amount of \$25,354.16. There is no equity in the Collateral and it is not necessary for an effective reorganization or rehabilitation. The lack of opposition and report of no distribution by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. Movant also alleges without dispute that debtor has not made four (4) payments. Debtor has filed a statement of intent to surrender the Collateral. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

77. [08-28634](#)-B-7 JACK/KAREN KING  
SMR #1

CONT. HEARING - MOTION  
TO COMPEL ABANDONMENT  
8-11-08 [[12](#)]

CONT. FROM 9-2-08

**Tentative Ruling:** This matter continued from September 2, 2008 for service on the chapter 7 trustee and on the United States Trustee. The matter remains in its preliminary posture as a motion filed under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

78. [08-28339](#)-B-7 RYAN SANTOS  
KAT #1  
LASALLE BANK NATIONAL  
ASSOCIATION, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-29-08 [[30](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtor has filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 611 Peytonia Court, Suisun City, CA 94585 (APN 173-621-440) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$397,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$467,805.46. Without considering the junior lien of \$110,387.50, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make six (6) mortgage payments. Debtor has filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

79. [07-21846](#)-B-7 DANA ANDREWS  
BLL #1

HEARING - MOTION FOR  
ORDER AUTHORIZING EMPLOYMENT  
OF SPECIAL COUNSEL FOR TRUSTEE  
ON A CONTINGENCY FEE BASIS  
8-25-08 [[186](#)]

DISCHARGED 4-7-08

**Disposition Without Oral Argument:** This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of the any party in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted to the extent set forth herein.

The motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. §§ 327(a) and 328(a) and Bankruptcy Rule 2014, the chapter 7 trustee is authorized to employ Byron Lee Lynch ("Lynch") as special counsel to assist the trustee with two active litigation proceedings, one of which is pending in the Third District Court of Appeals and involves a dispute over debtor's interest, if any, in a trust, and the second of which is an adversary proceeding, case no. 07-2064 which is pending in this court. As set forth in the motion, Lynch shall be compensated on a 1/3 contingency fee basis. Costs will be advanced as set forth in the motion. Lynch's contingency fee shall be calculated on recoveries net of cost reimbursements. Lynch's cost recoveries and fees, if any, shall be paid only after application pursuant to 11 U.S.C. § 330 and Bankruptcy Rule 2016. Except as so ordered, the motion is denied.

The court finds that Lynch is a disinterested person as that term is defined in 11 U.S.C. § 101(14).

Counsel for the chapter 7 trustee shall submit an order approving employment of Lynch that contains the standard terms and is consistent with the foregoing ruling.

80. [08-24850](#)-B-7 ANA AGUILERA

HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-26-08 [[39](#)]

**Tentative Ruling:** None.

81. [08-29154](#)-B-7 LESLIE DAVIS

HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-28-08 [[15](#)]

**Tentative Ruling:** None.

82. [04-26255](#)-B-7 PONCE-NICASIO BROADCASTING  
[06-2227](#) TAM #1  
BRUCE FOX, ET AL., VS.

CONT. HEARING - MOTION  
TO AMEND PRE-TRIAL ORDER TO  
AVOID MANIFEST INJUSTICE  
8-4-08 [[195](#)]

PONCE NICASIO BRODCASTING, ET AL.

CONT. FROM 9-2-08

**Tentative Ruling:** This matter continued from September 2, 2008 pursuant to a stipulated order entered on September 3, 2008. In this instance, the court issues the following tentative ruling.

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied.

Plaintiff Bruce Fox ("Plaintiff") requests that the court modify its June 13, 2008 pretrial order (Dkt. 190) (the "Pretrial Order") in this adversary pursuant to Fed. R. Civ. P. 16(e), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7016. Plaintiff seeks a modification of the part of the section of the Pretrial Order titled "Disputed Factual Issues and Legal Theories" that identifies transfers made by Ponce Nicasio Broadcasting LP ("PNB LP") or Ponce Nicasio Broadcasting Inc. ("PNB Inc.") to defendants Ron V. Briggs, Ronald J. Briggs, and Brian Briggs ("Defendants"), which transfer Plaintiff alleges are avoidable as fraudulent transfers under California law. Plaintiff seeks a modification that adds the following transfers to the list, as described by Plaintiff's expert, Jeffrey Rogers ("Rogers"):

1.) Seven "internal transfers of stock" from a "Ponce account" (Dkt. 197 at 6) to a Roth IRA account held by Ron V. Briggs, totaling \$54,403.19.

2.) Three transfers to Brian Briggs and Ronald J. Briggs totaling \$6,500.00 "that had previously been identified, but were not listed in the Pretrial Order." (Dkt. 197 at 6.)

3.) Four "internal transfers of funds totaling \$283,876.51 from a Ponce account to unknown accounts identified only by number." (Dkt. 197 at 6).

Based on the schedules relating to the above transfers and the declaration of Rogers, Plaintiff seeks to add fourteen discrete transfers to the list of allegedly avoidable transfers set forth in the Pretrial Order. Plaintiff alleges that Rogers discovered the above transfers only as of Monday, June 23, 2008, after the Pretrial Order had been entered and two days before the trial had initially been set to begin pursuant to the Pretrial Order.

Defendants oppose the motion. Pursuant to Rule 16(e) and the terms of the Pretrial Order, the court may modify the order issued after a final pretrial conference only to prevent manifest injustice. In the Ninth Circuit, a proper exercise of the court's discretion to grant or deny a motion to modify a final pretrial order requires the court to consider the following four factors: (1) the degree of prejudice to the party seeking modification resulting from a failure to modify; (2) the degree of prejudice to the non-moving party from a modification; (3) the impact of a modification at that stage of the litigation on the orderly and efficient conduct of the case; and (4) the degree of willfulness, bad faith, or inexcusable neglect on the part of the party seeking modification. United States v. First Nat'l Bank of Circle, 654 F.2d 882, 887 (9<sup>th</sup> Cir. 1981). The court will address each of the foregoing factors.

1. Degree of prejudice to Plaintiff resulting from a failure to modify. This factor weighs in favor of modification. The additional transfers identified by Plaintiff in the motion total \$344,779.70, a substantial amount. If Plaintiff is prohibited from introducing evidence related to the transfers at trial, he loses the opportunity to seek avoidance of those transfers, and thus the potential recovery of \$344,779.70.

2. Degree of prejudice to Defendants from modification. This factor weighs against modification. Plaintiff attempts to minimize the impact of adding the above transfers to the Pretrial Order by arguing that they are "limited to a few discreet transfers, similar in nature to the other transfers previously identified and that could be easily researched by Defendants and addressed in only a few minutes of trial time." (Dkt. 197 at 2). However, the additional transfers are more than "a few." They are fourteen discrete transfers. Four of the transfers, totaling \$283,876.51, were made to "unknown" payees and Plaintiff has presented no evidence as to how easily they would be researched. The ease with which the transfers could be researched by Defendants is also questionable, since all of the alleged transfers were apparently made approximately seven years ago. Even Plaintiff's expert admits that despite having spent considerable time reviewing the financial records of PNB LP and PNB Inc., he did not discover the above transfers until the eve of trial. As a result, a modification of the Pretrial Order would expand the complexity of the litigation in this proceeding and require Defendants to expend additional time and resources to prepare to defend Plaintiff's claims.

The court does not agree with Plaintiff that prejudice to Defendants is lessened or mitigated because "allowing the Plaintiff to challenge these transactions causes no prejudice to Defendants except the prejudice to them in having to answer for their wrongful conduct." (Dkt. 197 at 3). Plaintiff's argument presumes that the above transfers are fraudulent when no such determination has been made.

3. The impact of a modification at that stage of the litigation on the

orderly and efficient conduct of the case. This factor weighs against modification. Adding the above transfers to the Pretrial Order is a relatively simple task; on a forward-looking basis, modification of the Pretrial Order in the manner requested has would have little impact on the court's ability to manage the litigation. However, modifications of the type requested here, based on last-minute discoveries made on the eve of trial, undermines the court's interest in "maximizing the care and energy with which parties prepare for final pretrial conferences" and raises questions as to how carefully Plaintiff prepared for and participated in the final pretrial conference and how seriously Plaintiff took its pretrial responsibilities overall. See James Wm. Moore, et al., Moore's Federal Practice, § 16.78[b]. During the approximately three-month process of meeting with the parties regarding the form of the final pretrial order, the court repeatedly impressed on counsel for both sides the requirement that the specific transfers that would be the subject of trial must have been identified to avoid surprise or prejudice. Yet even in the final draft Pretrial Order submitted by the parties on June 6, 2008 (Dkt. 187), Plaintiff sought to include a catch-all provision supporting his allegation that "all transfers to Defendants after August 2000 from PNB Inc. and PNB LP are avoidable." (Dkt. 187 at 7). That provision was stricken from the final Pretrial Order and Plaintiff agreed to confine the factual inquiry at trial to the specific transfers identified in the Pretrial Order. Now, after the final Pretrial Order has been entered, Plaintiff again seeks to expand the list of specific transfers to be challenged at trial. Plaintiff's failure to exercise diligence in identifying all of the transfers he wished to include in the Pretrial Order during pretrial process harms the court's interest in maximizing the care and energy with which parties prepare for the final pretrial conference. Instead, it is suggestive of a desire to create uncertainty and surprise at trial by failing to come forward with specific factual allegations until the last minute when the opposing party would have little time to prepare to respond.

4. The degree of willfulness, bad faith, or inexcusable neglect on Plaintiff's part. This factor weighs against modification. On the record before it, the court does not find bad faith or willfulness on Plaintiff's part. The court does find inexcusable neglect. As stated in Defendants' written opposition, Plaintiff has been in possession of the bank records of PNB LP and PNB Inc. since January, 2004. The Rogers declaration states that he first reviewed the records and other information provided to him by Plaintiff's counsel regarding PNB LP and PNB Inc.'s financial histories over one year ago. Rogers spent many hours at this time reviewing the records in an effort to locate transfers to Defendants from PNB LP and PNB Inc. The Rogers declaration is silent regarding the three month period during which the parties were drafting the pretrial order, when the parties were supposed to identify the list of specific transfers to be examined at trial. The Rogers declaration only states that it was only on June 23, 2008, two days before the initial trial date, that he conducted a further review and discovered the additional transfers. Despite the alleged difficulties encountered by Rogers in deciphering PNB LP and PNB Inc.'s records, Rogers had ample time to examine the records fully. Plaintiff's failure to identify the additional transfers during the lengthy pretrial process shows an egregious lack of diligence on Plaintiff's part. Rule 16(e)'s provision for modification of pretrial orders due to manifest injustice was not designed to protect a party from such lack of diligence, regardless of how it may impact the party's ability to prosecute its case.

After considering the factors above, the court finds that on the whole the factors weigh against modification of the Pretrial Order.

The court will issue a minute order.

83. [04-26255](#)-B-7 PONCE-NICASIO BROADCASTING CONT. HEARING - MOTION  
[06-2228](#) TAM #1 TO AMEND PRE-TRIAL ORDER TO  
BRUCE FOX, ET AL., VS. AVOID MANIFEST INJUSTICE  
8-4-08 [[192](#)]  
PONCE NICASIO BRODCASTING, ET AL.

CONT. FROM 9-2-08

**Tentative Ruling:** This matter continued from September 2, 2008 pursuant to a stipulated order entered on September 3, 2008. In this instance, the court issues the following tentative ruling.

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied.

Plaintiff Bruce Fox ("Plaintiff") requests that the court modify its June 13, 2008 pretrial order (Dkt. 187) (the "Pretrial Order") in this adversary pursuant to Fed. R. Civ. P. 16(e), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7016. Plaintiff seeks a modification of the part of the section of the Pretrial Order titled "Disputed Factual Issues and Legal Theories" that identifies transfers made by Ponce Nicasio Broadcasting LP ("PNB LP") or Ponce Nicasio Broadcasting Inc. ("PNB Inc.") to defendants Ron V. Briggs, Ronald J. Briggs, and Brian Briggs ("Defendants"), which transfer Plaintiff alleges are avoidable as fraudulent transfers under California law. Plaintiff seeks a modification that adds the following transfers to the list, as described by Plaintiff's expert, Jeffrey Rogers ("Rogers"):

- 1.) Seven "internal transfers of stock" from a "Ponce account" (Dkt. 194 at 6) to a Roth IRA account held by Ron V. Briggs, totaling \$54,403.19.
- 2.) Three transfers to Brian Briggs and Ronald J. Briggs totaling \$6,500.00 "that had previously been identified, but were not listed in the Pretrial Order." (Dkt. 194 at 6.)
- 3.) Four "internal transfers of funds totaling \$283,876.51 from a Ponce account to unknown accounts identified only by number." (Dkt. 194 at 6).

Based on the schedules relating to the above transfers and the declaration of Rogers, Plaintiff seeks to add fourteen discrete transfers to the list of allegedly avoidable transfers set forth in the Pretrial Order. Plaintiff alleges that Rogers discovered the above transfers only as of Monday, June 23, 2008, after the Pretrial Order had been entered

and two days before the trial had initially been set to begin pursuant to the Pretrial Order.

Defendants oppose the motion. Pursuant to Rule 16(e) and the terms of the Pretrial Order, the court may modify the order issued after a final pretrial conference only to prevent manifest injustice. In the Ninth Circuit, a proper exercise of the court's discretion to grant or deny a motion to modify a final pretrial order requires the court to consider the following four factors: (1) the degree of prejudice to the party seeking modification resulting from a failure to modify; (2) the degree of prejudice to the non-moving party from a modification; (3) the impact of a modification at that stage of the litigation on the orderly and efficient conduct of the case; and (4) the degree of willfulness, bad faith, or inexcusable neglect on the part of the party seeking modification. United States v. First Nat'l Bank of Circle, 654 F.2d 882, 887 (9<sup>th</sup> Cir. 1981). The court will address each of the foregoing factors.

1. Degree of prejudice to Plaintiff resulting from a failure to modify. This factor weighs in favor of modification. The additional transfers identified by Plaintiff in the motion total \$344,779.70, a substantial amount. If Plaintiff is prohibited from introducing evidence related to the transfers at trial, he loses the opportunity to seek avoidance of those transfers, and thus the potential recovery of \$344,779.70.

2. Degree of prejudice to Defendants from modification. This factor weighs against modification. Plaintiff attempts to minimize the impact of adding the above transfers to the Pretrial Order by arguing that they are "limited to a few discreet transfers, similar in nature to the other transfers previously identified and that could be easily researched by Defendants and addressed in only a few minutes of trial time." (Dkt. 194 at 2). However, the additional transfers are more than "a few." They are fourteen discrete transfers. Four of the transfers, totaling \$283,876.51, were made to "unknown" payees and Plaintiff has presented no evidence as to how easily they would be researched. The ease with which the transfers could be researched by Defendants is also questionable, since all of the alleged transfers were apparently made approximately seven years ago. Even Plaintiff's expert admits that despite having spent considerable time reviewing the financial records of PNB LP and PNB Inc., he did not discover the above transfers until the eve of trial. As a result, a modification of the Pretrial Order would expand the complexity of the litigation in this proceeding and require Defendants to expend additional time and resources to prepare to defend Plaintiff's claims.

The court does not agree with Plaintiff that prejudice to Defendants is lessened or mitigated because "allowing the Plaintiff to challenge these transactions causes no prejudice to Defendants except the prejudice to them in having to answer for their wrongful conduct." (Dkt. 194 at 3). Plaintiff's argument presumes that the above transfers are fraudulent when no such determination has been made.

3. The impact of a modification at that stage of the litigation on the orderly and efficient conduct of the case. This factor weighs against modification. Adding the above transfers to the Pretrial Order is a relatively simple task; on a forward-looking basis, modification of the Pretrial Order in the manner requested has would have little impact on the court's ability to manage the litigation. However, modifications of

the type requested here, based on last-minute discoveries made on the eve of trial, undermines the court's interest in "maximizing the care and energy with which parties prepare for final pretrial conferences" and raises questions as to how carefully Plaintiff prepared for and participated in the final pretrial conference and how seriously Plaintiff took its pretrial responsibilities overall. See James Wm. Moore, et al., Moore's Federal Practice, § 16.78[b]. During the approximately three-month process of meeting with the parties regarding the form of the final pretrial order, the court repeatedly impressed on counsel for both sides the requirement that the specific transfers that would be the subject of trial must have been identified to avoid surprise or prejudice. Yet even in the final draft Pretrial Order submitted by the parties on June 6, 2008 (Dkt. 187), Plaintiff sought to include a catch-all provision supporting his allegation that "all transfers to Defendants after August 2000 from PNB Inc. and PNB LP are avoidable." (Dkt. 184 at 7). That provision was stricken from the final Pretrial Order and Plaintiff agreed to confine the factual inquiry at trial to the specific transfers identified in the Pretrial Order. Now, after the final Pretrial Order has been entered, Plaintiff again seeks to expand the list of specific transfers to be challenged at trial. Plaintiff's failure to exercise diligence in identifying all of the transfers he wished to include in the Pretrial Order during pretrial process harms the court's interest in maximizing the care and energy with which parties prepare for the final pretrial conference. Instead, it is suggestive of a desire to create uncertainty and surprise at trial by failing to come forward with specific factual allegations until the last minute when the opposing party would have little time to prepare to respond.

4. The degree of willfulness, bad faith, or inexcusable neglect on Plaintiff's part. This factor weighs against modification. On the record before it, the court does not find bad faith or willfulness on Plaintiff's part. The court does find inexcusable neglect. As stated in Defendants' written opposition, Plaintiff has been in possession of the bank records of PNB LP and PNB Inc. since January, 2004. The Rogers declaration states that he first reviewed the records and other information provided to him by Plaintiff's counsel regarding PNB LP and PNB Inc.'s financial histories over one year ago. Rogers spent many hours at this time reviewing the records in an effort to locate transfers to Defendants from PNB LP and PNB Inc. The Rogers declaration is silent regarding the three month period during which the parties were drafting the pretrial order, when the parties were supposed to identify the list of specific transfers to be examined at trial. The Rogers declaration only states that it was only on June 23, 2008, two days before the initial trial date, that he conducted a further review and discovered the additional transfers. Despite the alleged difficulties encountered by Rogers in deciphering PNB LP and PNB Inc.'s records, Rogers had ample time to examine the records fully. Plaintiff's failure to identify the additional transfers during the lengthy pretrial process shows an egregious lack of diligence on Plaintiff's part. Rule 16(e)'s provision for modification of pretrial orders due to manifest injustice was not designed to protect a party from such lack of diligence, regardless of how it may impact the party's ability to prosecute its case.

After considering the factors above, the court finds that on the whole the factors weigh against modification of the Pretrial Order.

The court will issue a minute order.

84. [08-27656](#)-B-7 PAUL/MARISSA DEMARTINI HEARING - MOTION FOR  
DGN #1 RELIEF FROM AUTOMATIC STAY  
FORD MOTOR CREDIT CO., VS. 9-2-08 [[33](#)]

**Tentative Ruling:** The motion is denied as moot. Considering the automatic extension provided in Bankruptcy Rule 9006(a), the automatic stay terminated with respect to the collateral, a 2004 Ford Mustang (VIN 1FAFP42X24F155326) (the "Collateral") at 12:01 a.m. on August 19, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate.

The motion is moot because the debtors' statement of intention states that they will reaffirm their obligation to movant regarding the Collateral. Considering the automatic extension provided in Bankruptcy Rule 9006(a) and pursuant to 11 U.S.C. § 521(a)(2)(B), debtors had until Monday, August 18, 2008 to perform their stated intention. There is no evidence that they did so. Thus, as the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on August 19, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

85. [08-29764](#)-B-7 DETELDRA JUNIEL HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-22-08 [[14](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor paid the missing filing fee on August 27, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

86. [08-21665](#)-B-11 PAUL/LESLIE PLATNER CONT. HEARING - MOTION FOR  
SMR #1 RELIEF FROM AUTOMATIC STAY  
FREEDOM FINANICAL 8-12-08 [[55](#)]  
FUNDING, INC., VS.

CONT. FROM 9-2-08

**Disposition Without Oral Argument:** This matter continued from September 2, 2008 to permit movant to file a relief from stay information sheet and to serve the motion, its supporting papers, a completed relief from stay

information sheet, and notice of the continued hearing on all parties in interest. Oral argument will not assist the court in resolving this matter.

The motion is denied without prejudice.

Following the hearing on September 2, 2008, the court issued a minute order which directed movant to perform several tasks ("the Order"). (Dkt. 65). First, the Order directed movant to serve the motion, its supporting papers, a completed relief from stay information sheet, and notice of the continued hearing on all parties in interest by September 9, 2008. Second, the Order directed movant to file a notice of continued hearing and relief from stay cover sheet with the court. Finally, the Order directed movant to file a proof of service within three court days thereafter. There is no evidence on the docket that movant complied with all of the foregoing directives. The court notes that movant filed a notice of continued hearing and a proof of service in connection with a notice of continued hearing on September 9, 2008 and September 10, 2008, respectively. However, there is no evidence that movant completed a relief from stay information sheet in this matter. As the court explained in the Order, movant's failure to comply with the directives of the Order constitutes grounds for denial of the motion.

The court will issue a minute order.

87. [08-21665](#)-B-11 PAUL/LESLIE PLATNER CONT. HEARING - MOTION FOR  
SMR #2 RELIEF FROM AUTOMATIC STAY  
FREEDOM FINANCIAL 8-12-08 [[58](#)]  
FUNDING, INC., VS.

CONT. FROM 9-2-08

**Disposition Without Oral Argument:** This matter continued from September 2, 2008 to permit movant to file a relief from stay information sheet and to serve the motion, its supporting papers, a completed relief from stay information sheet, and notice of the continued hearing on all parties in interest. Oral argument will not assist the court in resolving this matter.

The motion is denied without prejudice.

Following the hearing on September 2, 2008, the court issued a minute order which directed movant to perform several tasks ("the Order"). (Dkt. 66). First, the Order directed movant to serve the motion, its supporting papers, a completed relief from stay information sheet, and notice of the continued hearing on all parties in interest by September 9, 2008.. Second, the Order directed movant to file a notice of continued hearing and relief from stay cover sheet with the court. Finally, the Order directed movant to file a proof of service within three court days thereafter. There is no evidence on the docket that movant complied with all of the foregoing directives. The court notes that movant filed a notice of continued hearing and a proof of service in connection with a notice of continued hearing on September 9, 2008 and September 10, 2008, respectively. However, there is no evidence that movant completed a relief from stay information sheet in this matter. As

the court explained in the Order, movant's failure to comply with the directives of the Order constitutes grounds for denial of the motion.

The court will issue a minute order.

88. [08-31367](#)-B-7 MAURICE HOLLOWAY AND HEARING - MOTION FOR  
WGM #1 JESSICA DAVISON RELIEF FROM AUTOMATIC STAY  
AMERICAN HOME MORTGAGE 8-28-08 [8]  
SERVICING, INC., VS.

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

89. [08-31369](#)-B-7 ISSAAM MAALOUF HEARING - MOTION FOR  
WGM #1 RELIEF FROM AUTOMATIC STAY  
CHASE HOME FINANCE, VS. 8-28-08 [8]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtor has filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 8763 Sunny Breeze Way, Sacramento, CA 95828 (APN 115-1030-019-000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$150,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$179,020.61. Without considering the junior lien of \$95,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make three (3) mortgage payments. Debtor has filed a statement of intent to surrender the Property. The lack of opposition by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

90. [08-30970](#)-B-7 SAMIA FOREST, LLC HEARING - MOTION FOR  
HSM #1 RELIEF FROM AUTOMATIC STAY  
FAZIO ET AL., VS. 8-28-08 [[12](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

91. [06-24971](#)-B-7 BRUCE SEYMOUR CONT. HEARING - MOTION FOR  
HSM #12 APPROVAL OF SALE OF REAL  
PROPERTY  
8-11-08 [[397](#)]

CONT. FROM 9-2-08

**Tentative Ruling:** This matter continued from September 2, 2008. The court ordered supplemental briefs in support of the motion and notice of continuance to be served on the 20 largest creditors and on all special notice requests. Movant timely complied with these directives. This matter remains in its preliminary posture as a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

92. [08-31872](#)-B-7 LESLIE MCCORMICK HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
AND/OR IMPOSITION OF SANCTIONS  
FOR FAILURE TO TENDER FEES OR  
AN APPLICATION TO PAY FEES IN  
INSTALLMENTS WITH BANKRUPTCY  
PETITION  
8-27-08 [[8](#)]

**Disposition Without Oral Argument:** The order to show cause is discharged because the debtor paid the missing filing fee on September 4, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

93. [07-28474](#)-B-7 PAULA PIPPIN HEARING - MOTION FOR  
BSN #1 RELIEF FROM AUTOMATIC STAY  
BANK OF AMERICA, N.A., VS. 8-26-08 [[133](#)]

**Tentative Ruling:** As this motion was filed on only twenty-one days' notice, the court construes this motion as one filed under LBR 9014-1(f)(2). Opposition may be presented at the hearing. In this instance, the court issues the following tentative ruling.

The motion is denied as moot. As to the 2004 Glastron, Inc. SX-175 Power boat (Serial No. GLA40631J304) ("Boat"), the automatic stay terminated at 12:01 am on September 13, 2008 by operation of 11 U.S.C. § 362(h). The Boat has from that date no longer been property of the estate. As to the 2004 Volvo 135 HO 3.0L Boat Engine (Serial No. 4012108853) ("Engine") and the 2004 EZ Loader Single Axle Boat Trailer (VIN L8TAAKD84A001086) ("Trailer"), the automatic stay terminated at 12:01 am on July 29, 2008 by operation of 11 U.S.C. § 362(h), and the Engine and Trailer have from that date no longer been property of the estate.

By order entered on June 27, 2008, this case was converted from chapter 13 to one under chapter 7. (Dkt. 105). On July 2, 2008, debtor filed a statement of intention in this case. (Dkt. 111 at 19). Debtor's statement of intention provides that she will surrender the Boat to the movant. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtor had until Friday, September 12, 2008 to perform her stated intention. There is no evidence that she did so. Thus, as the Boat constitutes personal property, the automatic stay terminated at 12:01 a.m. on September 13, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Boat has from that date no longer been property of the estate. As to the Boat, the movant already has the relief it seeks by this motion.

The debtor did not file a statement of intention with respect to the Engine and the Trailer within the time allowed by 11 U.S.C. § 521(a)(2) and Federal Rule of Bankruptcy Procedure 1019(1)(B). As the court previously noted, the debtor filed a statement of intention on July 2, 2008; however, that statement did not list the Engine or the Trailer. The debtor had until July 28, 2008, 30 days after the entry of an order converting this case from chapter 13 to one under chapter 7 plus the automatic extension provided in Bankruptcy Rule 9006(a), to file a statement of intention that addressed the Engine and the Trailer. Because she did not file such a statement of intention timely and because the Engine and Trailer each constitute personal property, the automatic stay terminated with respect to the Engine and the Trailer at 12:01 a.m. on Tuesday, July 29, 2008, by operation of 11 U.S.C. § 362(h). The Engine and the Trailer have from that date no longer been property of the estate. As to the Engine and Trailer, the movant already has the relief it seeks by this motion.

The court will issue a minute order.

94. [07-28474](#)-B-7 PAULA PIPPIN  
MET #1  
BANK OF THE WEST, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
8-28-08 [[138](#)]

**Tentative Ruling:** This motion was properly filed under LBR 9014-1(f)(2). Opposition may be presented at the hearing. In this instance, the court issues the following tentative ruling.

The motion is denied as moot. As to the 2004 Prowler Trailer (VIN 1EC2F272141597793) ("Trailer"), the automatic stay terminated at 12:01 am on September 13, 2008 by operation of 11 U.S.C. § 362(h).

By order entered on June 27, 2008, this case was converted from chapter 13 to one under chapter 7. (Dkt. 105). On July 2, 2008, debtor filed a statement of intention in this case. (Dkt. 111 at 19). Debtor's

statement of intention provides that she will surrender the Trailer to the movant. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtor had until Friday, September 12, 2008 to perform her stated intention. There is no evidence that she did so. Thus, as the Trailer constitutes personal property, the automatic stay terminated at 12:01 a.m. on September 13, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Trailer has from that date no longer been property of the estate. As to the Trailer, the movant already has the relief it seeks by this motion.

The court will issue a minute order.

95. [08-31176](#)-B-7 GARY/KEISILINA ARVIN HEARING - MOTION FOR  
RTD #1 RELIEF FROM AUTOMATIC STAY  
THE GOLDEN ONE CREDIT UNION, VS. 8-27-08 [[7](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

96. [08-30381](#)-B-7 MARK/CYNTHIA INFUSINO HEARING - MOTION FOR  
KAT #1 RELIEF FROM AUTOMATIC STAY  
HSBC MORTGAGE CORP., VS. 8-29-08 [[14](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 20 Weywand, Buffalo, NY 14202 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$45,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$47,722.99. Considering these figures, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

97. [08-28984](#)-B-7 MICHAEL/EILEEN STAINES  
DGN #1  
FORD MOTOR CREDIT CO., VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
9-2-08 [[14](#)]

**Tentative Ruling:** This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(2). In this instance, the court issues the following tentative ruling.

The motion is denied as moot. Considering the automatic extension of Bankruptcy Rule 9006(a), the automatic stay terminated as to the subject vehicle, a leased 2006 Ford Fusion (VIN 3FAHP08186R103645) (the "Vehicle") at 12:01 a.m. on September 2, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtors' possessory interest in the Vehicle has from that date no longer been property of the estate. The court awards no fees and costs.

Debtors' petition was filed under chapter 7 on July 2, 2008. Pursuant to the applicable terms of 11 U.S.C. § 365(d)(1), the trustee may assume or reject an unexpired lease of personal property of the debtor within 60 days after the order for relief. In this case, as of September 1, 2008, sixty days after the filing of debtors' petition plus the automatic extension provided in Bankruptcy Rule 9006(a), the chapter 7 trustee had not assumed or rejected the lease of the Vehicle. Pursuant to 11 U.S.C. § 365(p)(1), where a lease of personal property is rejected or not timely assumed by the trustee under section 362(d), the debtor's interest in the leased property is no longer property of the estate and the automatic stay under section 362(a) is automatically terminated. Thus, the automatic stay terminated with respect to the Vehicle at 12:01 a.m. on September 2, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtors' possessory interest in the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that it is the holder of a secured claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

98. [07-20088](#)-B-7 VTRAC SYSTEMS, INC  
WFH #5

HEARING - APPLICATION  
FOR FINAL ALLOWANCE OF FEES  
AND COSTS OF WILKE, FLEURY,  
HOFFELT, GOULD AND BIRNEY, LLP  
(\$19,040.50 FEES; \$1,039.90  
COSTS)  
8-27-08 [[42](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

99. [08-29988](#)-B-7 KEVIN NUNEZ  
RDW #1  
PATELCO CREDIT UNION, VS.

HEARING - MOTION FOR  
RELIEF FROM AUTOMATIC STAY  
9-2-08 [[14](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtor has filed a statement of intention indicating an intent to surrender the Collateral, the court issues the following tentative ruling.

The motion is granted to the extent set forth herein. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 2005 Ford F150 (VIN 1FTPX145X5FB74913) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim including any attorneys' fees awarded herein. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is ordered waived due to the fact that the Collateral is depreciating in value. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$17,479.50. Movant holds a lien on the Collateral in the amount of \$39,146.56. There is no equity in the Collateral and it is not necessary for an effective reorganization or rehabilitation. The lack of opposition and report of no distribution by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. Movant also alleges without dispute that debtor has not made four (4) payments. Debtor has filed a statement of intention indicating an intent to surrender the Collateral. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

100. [08-30797](#)-B-7 MICHAEL MCFARLAND

HEARING - ORDER  
TO SHOW CAUSE RE DISMISSAL  
OF CASE OR IMPOSITION OF  
SANCTIONS  
8-22-08 [[8](#)]

**Tentative Ruling:** None.

101. [06-22199](#)-B-7 DENNIS/NANCY SELEY  
WFH #6

HEARING - APPLICATION TO  
EMPLOY AND COMPENSATE GONZALES  
AND SISTO, LLP AS ACCOUNTANT  
(\$1,200.00 FEES)  
8-26-08 [[83](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

102. [06-22199](#)-B-7 DENNIS/NANCY SELEY  
WFH #7

HEARING - APPLICATION TO  
FOR FINAL ALLOWANCE OF FEES AND  
COSTS OF WILKE, FLEURY, HOFFELT,  
GOULD AND BIRNEY, LLP  
(\$9,321.00 FEES; \$168.41 COSTS)  
8-26-08 [[88](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

103. [07-28751](#)-B-13J ORLANDO MARTINEZ  
[08-2046](#) SRM #1  
ANA SALINAS, ET AL., VS.

HEARING - MOTION FOR  
SUMMARY JUDGMENT OR FOR  
SUMMARY ADJUDICATION OF FACTS  
8-15-08 [[19](#)]

ORLANDO MARTINEZ

**Tentative Ruling:** This motion has been filed pursuant to LBR 9014-1(f)(1).

Plaintiffs Ana Maria Salinas de Garcia and Raul Mayorga ("Plaintiffs") motion is denied without prejudice pursuant to F.R.Bankr.P. 7056, F.R.Civ.P. 56(c) and LBR 9014-1(1).

Here, the Plaintiffs seek "summary adjudication" in the form of summary judgment under F.R.Civ.P. 56(c), made applicable to this adversary proceeding by F.R.Bankr.P. 7056. The defendant-debtor ("Defendant") has opposed the motion and lodged numerous evidentiary objections to the motion and its supporting documents. The court notes that "[a] A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L.Ed 2d 265, 274 (1986). Any such documents submitted in support of the moving party's argument for summary judgment must conform to the requirements of the Local Bankruptcy Rules, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and/or the Federal Rules of Evidence to the extent applicable. Because Plaintiffs have failed to submit

sufficient evidence in compliance with the foregoing rules, the instant motion is denied without prejudice. The court will address each of the relevant supporting evidence in turn.

Other than Plaintiffs' arguments made in the motion and supporting briefs, the Plaintiffs' motion is supported primarily by a Statement of Undisputed Facts ("Statement") (Dkt. 23) and the declaration of Steven Matulich (Dkt. 22) (the "Declaration"). The motion is further supported by exhibits attached to the Declaration, which include a verified complaint, a verified answer, requests for admission, a deposition of the debtor, a tentative ruling issued by the state court, and a judgment following trial (collectively the "Documents"). The Statement refers almost exclusively to allegations or statements in the Documents as the source of these "facts". The Documents are alleged copies of court documents from a state court action involving the Plaintiffs and the Defendant. After considering the motion and its supporting documents, including the Statement, Declaration, and Documents, the Defendant claims that the foregoing documents fail to justify Plaintiffs' request for summary adjudication of the facts.

Pursuant to the applicable provisions of Federal Rule of Civil Procedure 56(e), made applicable here via Bankruptcy Rule 7056, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. As the Defendant argues, the Declaration fails to adhere to the requirements set forth in Federal Rule of Civil Procedure 56(e). First, the Declaration does not declare or otherwise explain that the statements contained therein are within the declarant's personal knowledge. Instead, the Declaration states that Steven Matulich is the attorney for Plaintiffs in this adversary action without explaining his role in the underlying state action which allegedly generated the attached Documents. Second, the Declaration does not state or otherwise affirmatively show that Steven Matulich is competent to testify to the matters stated therein. The court again notes that the Declaration fails to explain Steven Matulich's role in the underlying state court action or provide any basis on which Steven Matulich makes the statements contained in the Declaration. Finally, the Declaration fails to state explicitly that the Documents are true and correct copies. The Declaration concedes that "[c]ertified copies of the state court records obtained from [the] clerk. . . shall be submitted to this court as soon as they become available." (Dkt. 22 at 2). No such certified copies have been filed with this motion. Based on the foregoing defects, the court will not consider the Declaration or the Documents in its determination of the instant motion.

Pursuant to the applicable provisions of Federal Rule of Bankruptcy Procedure 9006(d), when a motion is supported by an affidavit, the affidavit shall be served with the motion. Likewise, pursuant to Local Bankruptcy Rule 9014-1(d)(6), every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested. Here, Plaintiffs refer to the declaration of Adolfo Valdez in support of the instant motion; however, the moving party neither filed nor served that declaration in connection with this motion. The declaration of Adolfo Valdez was filed with the court on July 16, 2008 (Dkt. 17), prior to the filing of this motion. There is no evidence on the docket that the declaration of Adolfo Valdez was served on Defendant. Accordingly, the court will not

consider the declaration of Adolfo Valdez in its determination of the instant motion.

Based on the foregoing, Plaintiffs have provided no other evidentiary sources in support of summary adjudication of the facts. Plaintiffs have failed to carry their burden of showing that summary adjudication of facts is warranted at this time.

The court declines to reach the balance of the arguments raised by the parties.

The court will issue a minute order.

104. [04-26357](#)-B-13J LARRY/NANCY TEVIS  
[08-2004](#) MFB #2  
LARRY TEVIS, ET AL., VS.

DEPARTMENT OF VETERANS  
AFFAIRS, ET AL.

HEARING - FORMER  
CHAPTER 7 TRUSTEE'S MOTION TO  
DISMISS COMPLAINT, OR IN THE  
ALTERNATIVE REQUEST FOR A MORE  
DEFINITE STATEMENT  
8-19-08 [[184](#)]

**Tentative Ruling:** This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of the Plaintiffs to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9<sup>th</sup> Cir. 1995); LBR 9014-1(f)(1). In this instance, the court issues a tentative ruling.

The motion is granted in part. The motion of defendant Michael Burkart ("Burkart") for a more definite statement is granted. The plaintiff debtors ("Plaintiffs") shall file a second amended complaint that specifies which claims for relief set forth in the complaint are asserted against Burkart, and, if fraud is averred against Burkart, shall plead any claim for fraud with the particularity required by Federal Rule of Civil Procedure 9(b). Plaintiffs shall file and serve the amended complaint on or before September 22, 2008. If Plaintiffs do not file a second amended complaint by the foregoing date, Burkart may submit an order dismissing Burkart from the adversary proceeding without prejudice, which order shall be designated as a final, appealable order pursuant to Federal Rule of Civil Procedure 54(b). Except as so ordered, the motion is denied without prejudice.

By this motion Burkart seeks multiple and alternative forms of relief. First, he seeks his dismissal from the adversary proceeding under Federal Rule of Civil Procedure 12(b)(6), made applicable here by Federal Rule of Bankruptcy Procedure 7012, on the ground that all ten claims in the first amended complaint ("FAC") are time barred under various statutes of limitations. Alternatively, Burkart seeks a more definite statement under Federal Rule of Civil Procedure 12(e). Burkart also asks the court to award him attorneys fees of \$1,000.00 based on Burkart's costs incurred in reviewing the FAC, in filing the instant motion, and in preparing for and attending the hearing on the instant motion. Finally, through his reply, Burkart asks the court to strike Plaintiffs' opposition filed September 3, 2008 as untimely.

Burkart's arguments for his dismissal from the adversary proceeding fail. In seeking his dismissal, Burkart makes two sub-arguments. The first is

that he is immune from suit under the Barton doctrine, first set forth in Barton v. Barbour, 104 U.S. 126 (1881) because Plaintiffs failed to obtain the permission of the bankruptcy court before filing suit against him. That argument fails. The Barton doctrine, as set forth in Barton v. Barbour, 104 U.S. 126 (1881), generally provides that before suit can be brought against a court-appointed receiver, leave of the court by which he was appointed must first be obtained. The Ninth Circuit applied the doctrine relatively recently in In re Crown Vantage, Inc., 421 F.3d 963 (9<sup>th</sup> Cir. 2005) to hold that a party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity. Crown Vantage, 421 F.3d at 970. The trustee seeks to extend this holding to require that Plaintiffs have obtained permission before he filed suit against the trustee in this, the appointing court. However, the court declines to extend Crown Vantage in this fashion. The authority cited by Burkart, In re Kashani, 190 B.R. 875 (9<sup>th</sup> Cir. BAP 1995), also does not extend the doctrine in such a fashion. Like Crown Vantage, Kashani stands for the proposition that a plaintiff must seek permission from the appointing bankruptcy court before suing a bankruptcy trustee in a non-appointing court.

As to the remainder of Burkart's immunity argument, although he cites some authority in support of his proposition that he is entitled to immunity from law suits when acting within judicially-conferred authority, he does not apply that authority to the facts of this case. Dismissal of a bankruptcy trustee from an adversary proceeding requires an analysis of the nature of the specific conduct ascribed to the trustee in the complaint and whether that conduct is functionally comparable to that of a judge. See Curry v. Castillo (In re Castillo), 297 F.3d 940, 947 (9<sup>th</sup> Cir. 2002) (applying Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993)). Burkart has presented insufficient analysis showing that the applicable standard is met in this case.

Although Burkart cites some authority in support of his assertion that the "claims are barred by the statute of limitations", Burkart does not apply that authority to the facts of this case. Accordingly, Burkart has failed to persuade the court that any, let alone all ten of the claims for relief in the FAC, is barred by the statute of limitations.

Burkart argues that the ten claims for relief asserted by Plaintiffs fail to set forth a "cognizable legal theory" or that there is an "absence of sufficient facts alleged under a cognizable legal theory" such that dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted is appropriate. "For any claim pled in the Complaint, no elements are pled, nor are any facts supporting any elements pled." (Dkt. 184 at 8). However, these blanket assertions, absent any analysis of the specific claims asserted by the Plaintiffs, are insufficient to establish that dismissal under Rule 12(b)(6) is appropriate. For the court to address the argument properly and to resolve the motion on that basis, it would be required to analyze each of the ten claims for relief individually, identify the elements that are insufficiently pled, and describe how each claim is not plausibly supported by the alleged facts. Burkart's blanket assertions do not aid the court in this endeavor and impermissibly shift to the court the burden of performing a complex and lengthy analysis.

Burkart's cites no authority for his request for attorneys fees. If the request is made under Federal Rule of Bankruptcy Procedure 9011, the

request is denied because Burkart has not complied with the provisions of Bankruptcy Rule 9011(c). That subsection requires a request for sanctions to be filed separately from other motions and requests and requires the moving party to file the motion only after serving it on the party against whom sanctions are requested and allowing the party at least twenty-one days to withdraw the objectionable pleading.

Burkart's motion for a more definite statement under Rule 12(e), however, is granted. Rule 12(e) allows a party to move for a more definite statement "of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

In this case, the first amended complaint (the "FAC") filed by Plaintiffs names thirty separate defendants and sets forth ten separate claims for relief, including fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/implied contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, and negligent infliction of emotional distress. Burkart is specifically mentioned in five places in the FAC. Burkart is first mentioned in paragraphs 6 and 7 (Dkt. 35 at 3-4), for the purpose of introducing him as a named individual defendant in the proceeding; he is identified as both an individual and as a "business entity." Burkart is then mentioned in paragraph 47, where Plaintiffs allege that "The SLANDER to FRAUD Plaintiffs was used against Plaintiffs in Bankruptcy Chapter 7 Trustee Michael Burkart's Motion in October 2004." (Dkt. 35 at 9) (emphasis added). Burkart is then mentioned specifically in paragraph 60 and obliquely in paragraphs 61 and 62 in the context of Plaintiffs' allegations relating to Burkart's attempt to enter into a compromise with Cal Vet during the pendency of the parent bankruptcy case under chapter 7. Burkart is also mentioned under the seventh claim for relief for negligence, where Plaintiffs allege that "Defendants made a Agreement with the Bankruptcy Trustee undermining the Settlement Agreement with the Plaintiffs." (Dkt. 35 at 20). Burkart is also specifically mentioned, along with every other named defendant, in the prayer of the FAC. In addition, as a defendant to this proceeding Burkart is also mentioned in each of the ten claims for relief under the undefined term "Defendants." Plaintiffs have asserted each of the ten claims for relief against "Defendants" generally without specifying which of the thirty named defendants are implicated in each claim.

Motions for a more definite statement are generally not favored, because a party's pleadings are to be construed liberally to do substantial justice. "Rule 12(e)'s standard is plainly designed to strike at unintelligibility rather than lack of detail . . . . In the presence of proper, although general, allegations, the motion will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining the detailed information." James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008). Despite a general disfavor of the motion, Professor Moore goes on to describe the utility of a Rule 12(e) motion in two types of situations:

First, proper pleading under Rule 8 requires a pleading to contain allegations of each element of the claim. If it does not, and if the deficiency is not so material that the pleading should be dismissed under Rule 12(b) (6), a more definite statement is

appropriate. Second, if a complaint approaches the other extreme of being overly prolix or complex, the motion for more definite statement can assist the court in "the cumbersome task of sifting through myriad claims, many of which may be foreclosed by various defenses." Because of its potential usefulness in that respect, courts will occasionally order a more definite statement sua sponte, which they have the freedom to do.

James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008) (citations omitted). In particular, Professor Moore cites Anderson v. District Board of Trustees of Central Florida Community College, 77 F.3d 364, 366 (11<sup>th</sup> Cir. 1996) for the proposition that a court has a supervisory obligation to order a more definite statement where the complaint incorporates every antecedent allegation by reference into each subsequent claim and fails to adequately link a claim for relief to its factual predicates.

Here, each of the ten claims for relief asserted by Plaintiffs incorporates by reference each of the "general statements and allegations" set forth in paragraphs 35 through 71 of the FAC. However, Plaintiffs fail to adequately link each claim for relief to the facts alleged in paragraphs 35 through 71. The ten claims for relief set forth in the FAC contain only general allegations that do not adequately connect the alleged facts or conduct to the relief sought, making it difficult for Burkart to evaluate whether Plaintiffs assert that any of Burkart's conduct with respect to Plaintiffs constitutes fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, or negligent infliction of emotional distress. The FAC is also ambiguous as to which of the thirty named "Defendants," including Burkart, are implicated in each claim for relief. Given the large number of defendants against whom Plaintiffs seek relief, and given the large number of claims asserted in the FAC, a more definite statement is required to apprise the defendants of the conduct that Plaintiffs assert to be actionable pursuant to each claim for relief, and which defendants are implicated by each claim. A more definite statement will also assist the court in sifting through the numerous claims asserted by Plaintiffs with respect to each defendant.

Furthermore, with respect to first and second claims for relief for fraud/deceit/misrepresentation/constructive fraud against a fiduciary, and fraudulent inducement/rescission, the complaint fails to plead those claims for relief with the particularity required by Federal Rule of Civil Procedure 9(b). The Ninth Circuit Court of Appeals has interpreted Federal Rule of Civil Procedure 9(b) to require that the complaint (1) specify the averred fraudulent representations; (2) aver the representations were false when made; (3) identify the speaker; (4) state when and where the statements were made; and (5) state the manner in which the representations were false and misleading. Decker v. GlenFed Inc., (In re Glenfed, Inc. Sec. Litig.), 42 F.3d 1541, 1547, fn. 7 (9<sup>th</sup> Cir. 1994) (en banc), superseded by statute on other grounds as stated in In re Silicon Graphics, Inc., 970 F. Supp. 746, 754 (N.D. Cal. 1997); Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9<sup>th</sup> Cir. 1991); Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9<sup>th</sup> Cir. 2003). After examining the first and second causes of actions, particularly paragraphs 73-82 and 84-85, the court finds that Plaintiffs

have failed to specify the averred fraudulent representations, identify the speaker, state when and where the statements were made, and state the manner in which the representations were false and misleading.

Burkart's request to strike Plaintiffs' opposition filed September 3, 2008 (Dkt. 216) as untimely is denied. The instant motion was filed pursuant to LBR 9014-1(f)(1) on twenty-eight days' notice. Motions filed pursuant to LBR 9014-1(f)(1) permit opposition, if any, to be filed at least fourteen calendar days preceding the date of the hearing and replies, if any, to be filed at least seven calendar days preceding the date of the hearing. Here, Plaintiffs' opposition was untimely filed on September 3, 2008, only thirteen calendar days preceding the hearing. The opposition fails to comply with the LBR 9014-1(f)(1). However, the court is not required to strike a pleading that is one day late, and it does not do so here. If Burkart believes he has been prejudiced by the late filing, he can request a continuance.

The court finds that there is no just reason to delay entry of a final order as to Burkart in this adversary proceeding. Although it may not be designated as such, an order of dismissal constitutes a "judgment" for the purposes of Fed. R. Civ. P. 54(a), which defines a judgment as including "a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). See also United States v. F & M Schaefer Brewing Co., 356 U.S. 227, 239 ("[A] judgment is not confined to judicial actions so described, but includes any act of the court that performs the function of a judgment in bringing litigation to its final determination.").

The court will issue a minute order.

105. [08-26468](#)-B-11 EL DORADO HILLS SELF- HEARING - DEBTOR'S  
FWP #3 STORAGE, LLC SECOND MOTION SEEKING APPROVAL  
FOR ITS PROPOSED USE OF CASH  
COLLATERAL AND TO GRANT  
REPLACEMENT LIENS AS ADEQUATE  
PROTECTION TO SECURED CREDITORS  
8-19-08 [[113](#)]

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is granted in part. The debtor is authorized to use Cash Collateral, as that term is defined in 11 U.S.C. § 363(a), in accordance with its cash collateral budget ("Cash Collateral Budget") attached as Exhibit 1 to this motion (Dkt. 117 at 2-4), through October 28, 2008. The debtor is further authorized to spend in the aggregate up to a ten percent (10%) variance from the gross amount sought to be expended in the Cash Collateral Budget for actual and necessary costs and expenses that must be expended to preserve the assets of the estate. Secured creditors El Dorado County, Community Banks of Northern California, and Rabobank, N.A. (collectively the "Secured Creditors"), shall have replacement liens in post-petition Cash Collateral to secure an amount equal to the diminution, if any, in Secured Creditors' collateral caused by the debtor's use of Cash Collateral. Said replacement liens shall have the same validity and priority as Secured Creditors' liens as of the petition

date. The debtor shall segregate the Cash Collateral from each specific building in one or more separate operating or other accounts in accordance with the terms of this ruling. The opposition filed by CB Holdings on September 3, 2008 is overruled. The opposition filed by Rabobank, N.A. on September 2, 2008 is sustained in part and overruled in part. Except as so ordered, the motion is denied.

Through the instant motion, debtor seeks a variety of forms of relief, including further authority to use Cash Collateral, approval of a 10% variance from the Cash Collateral Budget, and granting of replacement liens to Secured Creditors to the same extent, priority, and validity as existed on the petition date. In addition, debtor seeks authority to use excess funds to " earmark " funds to create a cash reserve for certain anticipated costs and expenses of confirming a chapter 11 plan and exiting the chapter 11 case and to make a monthly deposit as a reserve for property tax payments due in December, 2008. (Dkt. 113 at 5, ¶ 27). The instant motion is debtor's second motion seeking approval for its proposed use of Cash Collateral and to grant replacement liens as adequate protection for secured creditors. The first such motion was granted by various interim orders and by final order entered on July 25, 2008. (Dkt. 102).

In response to the motion, two oppositions have been filed. First, Rabobank, N.A. filed written opposition on September 2, 2008. (Dkt. 124). In short, Rabobank opposes the instant motion, noting that debtor has failed to make any payments to Rabobank since March 2007 and that debtor owes Rabobank in excess of \$6,000,000.00 pursuant to a promissory note secured by a first priority deed of trust on real property located at 5110 Hillside Circle, El Dorado Hills, CA. By its opposition, Rabobank requests that the instant motion be denied or, alternatively, that the motion be granted through October 28, 2008 only. Second, CB Holdings, Inc. filed written opposition on September 3, 2008 (Dkt. 126). In short, CB Holdings argues that the motion should be denied because debtor failed to timely file the monthly operating report due July, 2008.

Rabobank's opposition is sustained in part and overruled in part. Rabobank's argument that debtor's authority to use Cash Collateral should be granted only through October 28, 2008 is persuasive. Except to that extent, Rabobank's opposition is overruled

CB Holdings' opposition is overruled. The debtor filed the monthly operating report for July, 2008 on September 8, 2008. (Dkt. 137).

The court is unsure of the meaning of debtor's request for authority to " earmark " funds to create a cash reserve for confirmation expenses. (Dkt. 113 at 5, ¶ 27). To the extent that this request is a request to deposit funds into a separate account for various expenses described in paragraph 27 of the instant motion, the request is granted.

Counsel for the debtor shall submit an order that is consistent with the foregoing ruling.

106. [07-24442](#)-B-7 BETSY TURNBULL  
HM #2

HEARING - MOTION  
TO COMPLETE SALE OF PROPERTY  
9-9-08 [[105](#)] O.S.T.

DISCHARGED 9-19-07

**Tentative Ruling:** This is a properly filed motion under LBR 9014-1(f)(3) (motions set on shortened time). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.