UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

January 15, 2015 at 10:00 a.m.

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1. 12-90414-E-7 YESENIA RAMIREZ
JFL-1 Pro Se

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
11-13-14 [39]

FEDERAL NATIONAL MORTGAGE ASSOCIATION VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on November 13, 2014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the Motion and supporting pleadings, no opposition having been filed, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

The hearing on the Motion for Relief From the Automatic Stay is granted

Federal National Mortgage Association c/o Seterus, Inc., its successors and assigns ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 631 Hillstock Court, Patterson, California (the "Property"). Movant has provided the Declaration of Rose Ngi to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

DECEMBER 18, 2014 HEARING

At the December 18, 2014 hearing, the court found that the original Motion did not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it did not state with particularity the grounds upon which the requested relief is based. The motion merely stated that it incorporates accompanying pleadings without providing any factual grounds for the relief

sought. This was not sufficient.

In light of this being counsel's first encounter with this issue and the Debtor having already receiving a discharge, the court continued the hearing for the filing of a supplemental pleading properly stating the grounds which should have been stated in the Motion.

DISCUSSION

The Ngi Declaration states that there are 18 post-petition defaults in the payments on the obligation secured by the Property, with a total of $18,497.66 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $153,463.47 (including $153,463.47 secured by Movant's first deed of trust), as stated in the Ngi Declaration.

Yesenia Ramirez ("Debtor") did not list the Property not the Creditor's deed of trust in her schedules. The Movant provides the Broker's Price Opinion of George G. MacMaster in order to establish the fair market value of the Proprety as of October 5, 2014. However, the Movant does not provide the declaration of the broker to authenticate the price opinion nor any hearsay exceptions that would permit the price opinion to be entered. The Broker's Price Opinion represents an out of court statement for which no witness is present to testify to. The court finds little credibility in such hearsay statements for which no exception to the hearsay rule is provided to the court. Fed. R. Evid. 601, 602, 802. However, the failure to provide such evidence is not fatal to the present Motion.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Debtor was granted a discharge in this case on June 4, 2012. Granting of a discharge to an individual in a Chapter 7 case terminates the automatic stay as to that debtor by operation of law, replacing it with the discharge injunction. *See* 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is denied as moot as to Debtor. The Chapter 7 Trustee has not filed any opposition to the Motion. The Motion is granted as to the Estate.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Attorneys' Fees Requested

The prayer contains a general demand for attorneys' fees. The Motion does not identify any basis for the award of fees. (Either statute or contractual provision). The Motion does not request any amount of fees to be allowed. The court has not been presented with credible, admissible evidence of value to determine if there is value in the property in excess of the claim to support allowing attorneys' fees. The court denies the request for attorneys' fees. Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

Movant also includes in the prayer what appears to be a general request to waive the 14-day stay of enforcement arising under Federal Rule of Bankruptcy Procedure 4001(a)(3). The Motion does not plead for such relief and does not state the grounds upon which Movant asserts supports the granting of such relief. Movant has not pleaded adequate grounds and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Federal National Mortgage Association c/o Seterus, Inc., its successors and assigns ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Federal National Mortgage Association c/o Seterus, Inc., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 631 Hillstock Ct., Patterson, California.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to Yesenia Ramirez ("Debtor"), the discharge having been entered in case, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.

IT IS FURTHER ORDERED that Movant having established that the value of the Property subject to its lien not having a value greater than the obligation secured, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

No other or additional relief is granted.

2. 14-91318-E-7 XENIA VALLE — MOTION FOR RELIEF FROM AUTOMATIC STAY
JCW-1 Thomas O. Gillis — 12-4-14 [12]

SELECT PORTFOLIO SERVICING, INC. VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on December 2, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Select Portfolio Servicing, Inc., servicing agent for Wilmington Trust,

National Association, as successor trustee to Citibank, N.A., as trustee for Structured Asset Mortgage Investments II Trust 2007-AR5, Mortgage Pass-Through Certificate Series 2007-AR5 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1845 Dale Avenue, Merced, California (the "Property"). Movant has provided the Declaration of Ayn Bartlett to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Bartlett Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of $907.10 in post-petition payments past due. The Declaration also provides evidence that there are 13 pre-petition payments in default, with a pre-petition arrearage of $5,896.15.

Furthermore, Movant notes that Debtor intends to surrender the Property. Dckt. 16, Exhibit 7.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $201,503.09 (including $183,470.09 secured by Movant's first deed of trust), as stated in the Bartlett Declaration and Schedule D filed by Xenia Carolina Valle ("Debtor"). The value of the Property is determined to be $76,694.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition and pre-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981). Additionally, the Debtor's intent to surrender the Property further justifies the relief from stay.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Select Portfolio Servicing, Inc., servicing agent for Wilmington Trust, National Association, as successor trustee to Citibank, N.A., as trustee for Structured Asset Mortgage Investments II Trust 2007-AR5, Mortgage Pass-Through Certificate Series 2007-AR5 ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Select Portfolio Servicing, Inc., servicing agent for Wilmington Trust, National Association, as successor trustee to Citibank, N.A., as trustee for Structured Asset Mortgage Investments II Trust 2007-AR5, Mortgage Pass-Through Certificate Series 2007-AR5, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 1845 Dale Avenue, Merced, California.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.
>
> No other or additional relief is granted.

3.	**14-91519-E-7** **BHT-1**	**SHAWN SHAW AND LOIS CARTER-SHAW** **Scott D. Mitchell**	**MOTION FOR RELIEF FROM AUTOMATIC STAY** **12-10-14 [10]**

DEUTSCHE BANK NATIONAL TRUST COMPANY VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 10, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital Inc., Trust 2006-NC3, its successors and assigns ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 417 Algen Court, Modesto, California (the "Property"). The moving party has provided the Declaration of Javier Rivera to introduce evidence as a basis for Movant's contention that Shawn Shaw and Lois Carter ("Debtors") do not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on October 14, 2014. Based on the evidence presented, Debtor would be at best tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Stanislaus on October 30, 2014. Exhibit 3, Dckt. 13.

Movant has provided a properly authenticated/certified copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The court shall issue an order terminating and vacating the automatic stay to allow Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital Inc., Trust 2006-NC3, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 417 Algen Court, Modesto, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The Movant has not alleged adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3).

The Movant also requests that the court make a 11 U.S.C. § 362(d)(4)(A) determination. The Movant has not pleaded any facts or arguments to support a claim that the "petition was part of a scheme to delay, hinder, or defraud creditors." The Motion (which is subtitled "Memorandum of Points and Authorities," notwithstanding the combining of points and authorities with the motion not permitted under the Local Bankruptcy Rules) does not state what grounds that Movant relies upon as the basis for such requested relief. The court will not guess what grounds could be argued by the Movant. Therefore, this request for relief is denied.

The Movant further requests that the Sheriff or Marshall may evict Debtor and any other occupant from the Property regardless of any future bankruptcy filing concerning the Property fo a period of 180 days from the date of the hearing on this Motion without further notice. This appears to be a request of the Movant for the court to issue an order directing the Sheriff to take and turnover possession of the property – with Movant bypassing the procedures and safeguards built into California law. No basis has been shown for the court issuing an order of possession of real property from the Debtor to the Movant via the Sheriff. Such requested relief grossly exceeds the provisions of 11 U.S.C. § 362(d) basis stated in the Motion. Therefore, the request is denied. FN.1.

FN.1. When faced with a motion that requests relief for which an adversary proceeding is required under Fed. R. Bankr. P. 7001, such as a creditor or owner of property seeking to obtain possession from the debtor, one judge in the District deems the motion to be an adversary proceeding. That judge then sets an initial status conference, ordering the movant/plaintiff to pay the adversary proceeding filing fee, obtain a summons, and prosecute the request for relief as an adversary proceeding. Rather than causing Movant such delay, the court denies the inappropriate relief, concluding that what Movant wants is relief from the stay so it can exercise its rights in state court, notwithstanding the additional relief requested.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital Inc., Trust 2006-NC3 ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital Inc., Trust 2006-NC3 and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 417 Algen Court, Modesto, California.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.
>
> No other or additional relief is granted.

4. 14-91235-E-7 TERRENCE/LAURIE HUGHES MOTION FOR RELIEF FROM
MDE-1 Patrick B. Greenwell AUTOMATIC STAY
11-26-14 [11]

DEUTSCHE BANK NATIONAL TRUST COMPANY VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on November 26, 2014. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Deutsche Bank National Trust Company, as Trustee for FFMLT Trust 2005-FF11, Mortgage Pass-Through Certificates, Series 2005-FF11 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3620 Fawndale Drive, Modesto, California (the "Property"). Movant has provided the Declaration of Michele L. Crampton to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Crampton Declaration states that there are 2 post-petition defaults in the payments on the obligation secured by the Property, with a total of $3,790.44 in post-petition payments past due. The Declaration also provides evidence that there are 4 pre-petition payments in default, with a pre-petition arrearage of $7,580.88.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $354,738.98 (including $271,145.98 secured by Movant's first deed of trust), as stated in the Crampton Declaration and Schedule D filed by Terrence Emmit

Hughes and Laurie Ann Hughes ("Debtor"). The value of the Property is determined to be $185,000.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition and pre-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Deutsche Bank National Trust Company, as Trustee for FFMLT Trust 2005-FF11, Mortgage Pass-Through Certificates, Series 2005-FF11 ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Deutsche Bank National Trust Company, as Trustee for FFMLT Trust 2005-FF11, Mortgage Pass-Through Certificates, Series 2005-FF11, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under

the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 3620 Fawndale Drive, Modesto, California.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.

No other or additional relief is granted.

5. 14-91443-E-7 LEONEL ISIDORO — **MOTION FOR RELIEF FROM AUTOMATIC STAY**
APN-1 Thomas O. Gillis — **12-18-14 [10]**

SANTANDER CONSUMER USA INC.
VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 18, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Leonel Isidoro ("Debtor") commenced this bankruptcy case on October 25, 2014. Santander Consumer USA Inc. Dba Chrysler Capital ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2013 Dodge Ram

1500, VIN ending in 9674 (the "Vehicle"). The moving party has provided the Declaration of Jorge Escalante to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Escalante Declaration provides testimony that Debtor has not made 1 post-petition payments, with a total of $704.58 in post-petition payments past due. The Declaration also provides evidence that there are 2 pre-petition payments in default, with a pre-petition arrearage of $1,650.08.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $29,175.77, as stated in the Escalante Declaration, while the value of the Vehicle is determined to be $24,814.00, as stated in Schedules B and D filed by Debtor.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. Fed. R. Evid. 803(17).

However, though authenticated, the Movant has not provided the court with a basis for determining that this out of court statement is admissible hearsay. Fed. R. Evid. 802, 803. The court will *sua sponte* take notice that the *Kelley Blue Book* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Escalante to be that he obtained the NADA valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

Therefore, in accordance with the NADA valuation the car has a replacement value of $21,950.00.

RULING

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Santander Consumer USA Inc., and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Santander Consumer USA Inc. dba Chrysler Capital ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2013 Dodge Ram 1500 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.
>
> No other or additional relief is granted.

6. 14-91346-E-7 SUKHMINDER SANDHU
JHW-1 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-11-14 [26]

MERCEDES-BENZ FINANCIAL SERVICES USA, LLC VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on December 11, 1014. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Sukhminder Singh Sandhu ("Debtor") commenced this bankruptcy case on September 30, 2014. Mercedes-Benz Financial Services USA LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2008 Kenworth, VIN ending in 8459 (the "Vehicle"). The moving party has provided the Declaration of Jennifer Montiel to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Montiel Declaration provides testimony that Debtor has not made 2 post-petition payments, with a total of $3,284.70 in post-petition payments past due. The Declaration also provides evidence that there are 7 pre-petition payments in default, with a pre-petition arrearage of $11,496.45.

Furthermore, pursuant to the Statement of Intention, Debtor acknowledges intent to surrender the Vehicle and has filed no opposition to Movant's Motion. Dckt. 30, Exhibit C

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $18,038.56, as stated in the Montiel Declaration, while the value of the Vehicle is determined to be $18,000.00, as stated in Schedule B and D filed by Debtor.

RULING

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Mercedes-Benz Financial Services USA LLC , and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Mercedes-Benz Financial Services USA LLC (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2008 Kenworth (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of

enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

No other or additional relief is granted.

7. 14-91448-E-7 MVF-1 **RICARDO GOMEZ AND MARISOL TORRES** **MOTION FOR RELIEF FROM AUTOMATIC STAY 12-4-14 [13]**

BANK OF AMERICA, N.A. VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 4, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Bank of America, N.A. ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6255 Jackson Avenue, Riverbank, California (the "Property"). Movant has provided the Declaration of Maribel Magdaleno to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Magdaleno Declaration states that there are 1 post-petition defaults in the payments on the obligation secured by the Property, with a total of $963.12 in post-petition payments past due. The Declaration also provides evidence that there are 3 pre-petition payments in default, with a pre-petition arrearage of $2,889.36.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $127,463.00 (including $127,463.00 secured by Movant's first deed of trust), as stated in the Magdaleno Declaration and Schedule D filed by Ricardo Gomez and Marisol Torres ("Debtor"). The value of the Property is determined to be $130,457.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Bank of America, N.A. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Bank of America, N.A., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against

the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 6255 Jackson Avenue, Riverbank, California.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.

No other or additional relief is granted.

8. 14-91454-E-11 THE CIVIC PLAZA, LLC **CONTINUED MOTION FOR RELIEF**
MMW-2 C. Anthony Hughes **FROM AUTOMATIC STAY**
11-20-14 [56]

WESTAMERICA BANK VS.

Tentative Ruling: The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-in-Possession, Debtor-in-Possession's counsel, creditors, and the Office of the United States Trustee on November 20, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion for Relief From the Automatic Stay is set for evidentiary hearing on xxxxx

Westamerica Bank ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1727 N Street, Merced, California (the "Property"). Movant has provided the Declaration of Danny Shappy to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

DECEMBER 18, 2014 HEARINGS

At the December 18, 2014 hearing, the court continued the hearing to 10:00 a.m. on January 15, 2015. Dckt. 98.

The court noted that the Debtor in Possession having filed an extensive

opposition and the Movant's "Points and Authorities" reads like the Motion, ***for purposes of this contested matter only***, the court will treat the points and authorities as the "motion" for purposes of this Contested Matter. and authorities as the "motion" for purposes of this Contested Matter.

BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM THE AUTOMATIC STAY

Movant argues in its Brief in Support of Motion for Relief from the Automatic Stay (Dckt. 58) three grounds that justify relief from the stay: (1) 11 U.S.C. § 362(d)(1)- lack of equity, lack of payments, uncertain status of Movant's cash collateral leaves Movant without adequate protection, and bad faith filing; (2) 11 U.S.C. § 362(d)(2)- lack of equity and is not necessary for an effective reorganization; and (3) 11 U.S.C. § 362(d)(4) - the case filing was part of a scheme to hinder, delay, or defraud Movant.

11 U.S.C. § 362(d)(1)

Movant argues that as of the petition date, the Movant was owed a total of $957,980.67 on two loans exclusive of attorneys' fees and costs. The Movant values the Property at $944,000.00 on an As Is-Market Value basis based on the appraisal done on August 26, 2014 by Scott E. Rurik, MAI who has properly authenticated the appraisal in his supporting Declaration. Dckt. 61 and 62.

Movant states that the last payments on the loans for the Property were made in March 2014 by Mr. Mendoza, the former owner of the Property and the party obligated on the loans. The loans matured on June 11, 2014. Debtor in Possession has not made any payments since the filing of the instant bankruptcy case nor has it sough court authority for the use of Movant's cash collateral.

Movant further argues that this is a case of "new debtor syndrome." Movant states that a trustee's sale for the distressed Property was noticed by Movant for October 24, 2014. On October 17, 2014, Mr. Mendoza formed Debtor in Possession. On October 20, 2014, Mr. Mendoza fraudulently transferred the Property to Debtor in Possession without consideration and without Movant's consent. Thereafter, on October 22, 2014, Debtor in Possession filed a voluntary chapter 11 case. The Movant argues that these facts raise to the level of a bad faith filing which constitutes cause for relieve under § 361(d)(1).

11 U.S.C. § 362(d)(2)

Movant states that the Debtor in Possession has no equity in the property, based on its analysis under § 362(d)(1) and the Property is not necessary for an effective reorganization. The Movant argues that there is no reorganization potential since the Debtor in Possession is not the borrower, the loans on the Property were accelerated and then matured in June 2014, and Movant will not support a plan. Additionally, the Debtor in Possession's sole source of income are the proceeds from the Property which are Movant's cash collateral.

11 U.S.C. § 362(d)(4)(A)

Movant argues that the instant bankruptcy is part of a scheme to hinder, delay, or defraud Movant. Movant states that Mr. Mendoza was in default on both of his loans for the Property. Within about one week of the foreclosure

sale, Mr. Mendoza formed Debtor in Possession and then transferred the Property to Debtor in Possession to prevent Movant from completing its foreclosure. Mr. Mendoza can articulate no good faith business reason for transferring the Property to Debtor in Possession. The Movant argues that this evidences a scheme to hinder, delay, or defraud.

Debtor in Possession'S OPPOSITION

Debtor in Possession filed an opposition on December 2, 2014. Dckt. 65. The Debtor in Possession addresses the Movant's grounds in order.

11 U.S.C. § 362(d)(1)

The Debtor in Possession states that it is prepared to make adequate protection payment to Movant during the pendency of this case, even though Movant is adequately protected. Debtor in Possession proposed terms to Movant on November 18, 2014 and again on December 1, 2014 by and through Debtor in Possession's counsel via e-mail communication. Debtor in Possession proposed to pay the terms as outlined in the filed Plan of $5,692.85. This payment is based on a $950,000.00 note, amortized over 25 years at 5.25% interest. Debtor in Possession states that it is prepared to make this payment prior to the hearing date provided Movant agrees to the proposed cash collateral use.

The Debtor in Possession also states that managing member Mr. Mendoza has been managing the Property and has been able to keep the occupancy rate at 88%. Furthermore, Debtor in Possession states it is current on its insurance policies and maintains hazard insurance up to $1,159,500.00 and flood insurance up to $500,000.00.

11 U.S.C. § 362(d)(2)

The Debtor in Possession first addresses the lack of equity argument of the Movant. The Debtor in Possession's contention arises under the appraisal value provided for by the Movant. The Debtor in Possession states that Mr. Mendoza, in his experiences, believes that the valuation is improper because: 1) Movant's comparable properties are unusable; and 2) Movant's appraiser ignored the fact that the Property is located within two blocks of free parking zone, which the city provides, and provides for 40-50 parking spaces. To the latter, the Debtor in Possession states that it was estimated to cost $20,000.00 per year to operate a parking lot of this size and provides value to the Property which was not addressed.

The Debtor in Possession states that it obtained an appraisal on June 7, 2013. However, the appraiser, Patrick von Merveldt, has since retired and Debtor in Possession has been unable to reach Mr. von Merveldt to file a declaration to authenticate the appraisal. Debtor in Possession also argues that Movant's accounting of the notes is improper. The Debtor in Possession points to its Schedule D which lists the total of the liens on the Property to be $931,000.00.

The Debtor in Possession requests an evidentiary hearing regarding the disputed facts of the Property's appraised value.

As to the second prong, the Debtor in Possession argues that the proposed plan would pay Movant's claim in full and reorganize the terms of the

notes, provide for secured property taxes and pay the general unsecured creditors in full. Though the loans have matured, that does not bar Debtor in Possession from reorganizing the debt. As to the claim that Movant will not support the plan, the Debtor in Possession states the Debtor in Possession is willing to propose favorable terms to Movant that provides both parties agreeable terms. In the event Movant is unwilling to agree to such terms, Debtor in Possession anticipates in confirming a cram down plan under 11 U.S.C. § 1129(b) from the support of the general unsecured creditors class. Furthermore, the Debtor in Possession states that the Property is necessary because it is the sole generating source of income.

11 U.S.C. § 362(d)(4)

The Debtor in Possession argues that it did not file this case as a scheme to hinder, delay, or defraud Movant. Prior to the maturing of the Movant's notes, Mr. Mendoza diligently tried to work with Movant to refinance the notes and extend the deadlines without any success. Debtor in Possession is working at an expedited pace to confirm this Plan, as evidence of the filed Disclosure Statement and Plan with the Court.

The Debtor in Possession states that Mr. Mendoza formed Debtor in Possession in the midst of the foreclosure, as the result of Movant proceeding with foreclosure which would have caused the loss of over $300,000.00 in equity and defaulting on payments to creditors of the Property. Debtor in Possession states that the Property generates sufficient rental income of over $16,000.00 per month, Debtor in Possession is willing to make adequate protection payments during the pendency of the case, and Debtor in Possession's plan provides that Movant will be paid in full.

MOVANT'S REPLY

The Movant filed a reply on December 11, 2014. Dckt. 71.

The Movant first states that Movant has aptly demonstrated the absence of any equity in the Property. First, the Movant argues that Debtor in Possession's appraisal is inadequate because it is over a year old and it is hearsay since the appraisal is unauthenticated. The Movant states that there is no need for an evidentiary hearing because the only appraisal value is the one provided for by Movant and should control. Furthermore, the Movant states that the Debtor in Possession has not carried the burden of proof and has not sufficiently shown that the Movant is adequately protected. The Movant also highlights that the Debtor in Possession did not address the "new debtor syndrome" grounds for relief under § 362(d)(1).

Next, the Movant argues that there is no reasonable possibility of successful reorganization because: 1) Debtor in Possession is not obligated on the loan; 2) Movant will not support a plan; and 3) there are no actual unsecured creditors so Debtor in Possession is incapable of effecting a cram down under § 1129(b). FN.1.

FN.1. Movant does not explain what is meant by "actual unsecured creditors." Possibly it is a reference to Debtor in Possession listing on Schedule F $19,721.79 in general unsecured claims. The listed creditors appear to be for routine maintenance expenses and utilities for the property. The court understands this contention to be along the lines of Movant asserting that it

holds such a large majority of claim that effecting a cram down over its objection would not be a good faith plan in a Chapter 11 case.

Lastly, the Movant reiterates the argument that the instant case was to hinder, delay, or defraud creditors and points out that the Debtor in Possession has not provided a good faith business reason why the Debtor in Possession was formed.

DEBTOR IN POSSESSION'S SUPPLEMENTAL OPPOSITION

Debtor in Possession filed a supplemental opposition on December 11, 2014. Dckt. 74. The Debtor in Possession explains that it filed the supplemental opposition because it was waiting for a response from its appraiser but was unable to get the appraiser to sign a declaration authenticating the original appraisal. The Debtor in Possession has hired a new appraiser and requests a 3 week continuance to complete the new appraisal and an evidentiary hearing to be set because the Debtor in Possession argues that the valuation is the most important element of the instant Motion.

Again, the Debtor in Possession argues that there is equity in the Property based on the earlier appraisal.

The Debtor in Possession then argues that the Movant is actually adequately protected because, under the Debtor in Possession's valuation, there is equity and that the Movant's appraisal is flawed since it does not consider the value of the parking lot.

The Debtor in Possession argues that the Movant is incorrect on the accounting concerning payments, namely the Debtor in Possession argues that the Movant's records are inaccurate since it allegedly has a large amount of "reversals" or bank generated suspect full charges. In the fall of 2013, after Debtor in Possession complained to the Federal Reserve about Movant's actions, Movant mailed Debtor in Possession many "corrected" documents and reversals that were incoherent and totally inaccurate. The Debtor in Possession alleges that the Movant never explained exactly why the reversals or the reason the money was returned, but only after the Debtor in Possession complained to others about Movant's charges.

The Debtor in Possession next addresses the "new debtor syndrome" argument. The Debtor in Possession argues that the fact that: (1) Movant is still entitled to adequate protection and (2) Debtor in Possession is able to put forth a feasible Plan or reorganization which would pay Movant's claim in full, does not exhibit a bad faith filing.

Lastly, the Debtor in Possession argues that the fact that Debtor in Possession filed its Proposed Plan of Reorganization is evidence of a reasonable possibility of a successful reorganization within a reasonable time.

Debtor in Possession'S APPRAISAL

Andy Constantinou, certified appraiser for Debtor in Possession, filed a supplemental declaration and a appraisal report on December 17, 2014. Dckt. 95 and 96. Mr. Constantinou states that on December 11, 2014, he completed an appraisal of the Property which was based on a physical analysis of the

improvements, a locational analysis of the neighborhood and city, and an economic analysis of the market for properties such as the Property. Mr. Constantinou values the Property at $1,650,000.00.

Mr. Constantinou states in his declaration that the cost approach was not considered in arriving at the stated value and instead used the market and income approach.

SUPPLEMENTAL DECLARATION OF JOHN-PIERRE MENDOZA

Mr. Mendoza filed a supplemental declaration on January 13, 2015. Dckt. 110. The Declaration discusses Mr. Mendoza's background and the list of improvements Mr. Mendoza took in the Property.

Mr. Mendoza then continues to discuss the rental history of the Property and addresses some of the court's prior concerns over the adequacy of the cash flow from the rents for the Property based on early Monthly Operating Reports.

APPLICABLE LAW

11 U.S.C. § 362(d)(1)

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

11 U.S.C. § 362(d)(2)

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2).

Bad Faith Filing

The existence of bad faith in commencing a bankruptcy case constitutes cause for granting relief from the stay pursuant to § 362(d). In re Walter, 108 B.R. 244, 247 (Bankr. C.D. Cal.1989). The term "new debtor syndrome" identifies a pattern of conduct which exemplifies bad faith cases. In re Duvar Apt., Inc., 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996) (internal citation omitted). Indicia of the new debtor syndrome include: (1) transfer of distressed property into a newly created corporation; (2) transfer occurring within a close proximity to the bankruptcy filing; (3) transfer for no consideration; (4) the debtor has no assets other than the recently transferred property; (5) the debtor has no or minimal unsecured debt; (6) the debtor has no employees and no ongoing business; and (7) the debtor has no means, other than the transferred property, to service the debt on the property. Id. (citing *In re Yukon Enter., Inc.*, 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984).

The B.A.P. in *In re Duvar Apt., Inc.* provided an analysis on the burden

in these types of cases:

> A creditor can establish a prima facie case of bad faith filing by showing the transfer of distressed property to the debtor within close proximity to the bankruptcy filing. Id. Once a prima facie case is established, the burden shifts to the debtor to demonstrate a good faith business reason for the transfer and the filing. *In re Eighty South Lake, Inc.*, 63 B.R. 501, 508 (Bankr. C.D. Cal.1986), aff'd, 81 B.R. 580 (9th Cir. BAP 1987). "If, in addition to the prima facie showing of bad faith, the creditor proves that its substantive or procedural rights have been adversely affected by the transfer and filing, "cause" is established pursuant to 11 U.S.C. § 362(d)(1) and the Court must lift the stay." Yukon, 39 B.R. at 921-22. In considering harm to a creditor, delay in and of itself does not constitute bad faith. In re Thirtieth Place, Inc., 30 B.R. 503, 506 (9th Cir. BAP 1983). However, a court can consider delay coupled with other bad faith factors in determining the harm to a particular creditor. Id. The fact that the creditor's rights have not been adversely affected is not sufficient for the debtor to overcome the presumption of bad faith. Yukon, 39 B.R. at 922.

Id. at 200-01.

DISCUSSION

Movant and the Debtor in Possession have provided appraisals with valuations of the Property with a differences in valuation in the amount of over $700,000.00. While the Movant's argument concerning bad filing and "new debtor syndrome" remain, a significant portion of the decision concerning the instant Motion is the valuation of the Property. Additionally, the good faith, for cause grounds may well turn on the credibility of Mr. Mendoza, which the court would determine from having him in court subject to cross examination.

Therefore, disputed issues have been presented to the court and Debtor in Possession seeking an evidentiary hearing for the determination of factual issues pursuant to Federal Rule of Bankruptcy Procedure 9014(d), the court will promptly conduct an evidentiary hearing for this Motion.

The court will issue an evidentiary hearing order substantially in the following form, holding that:

a. This Motion for Relief from the Automatic Stay is a core matter pursuant to 28 U.S.C. § 157, for which jurisdiction in this bankruptcy exists pursuant to 28 U.S.C. § 1334 and the reference to this bankruptcy court by the United States District Court for the Eastern District of California.

b. On or before xxxxxx, 2015, The Civic Plaza, LLC., the Debtor-in-Possession, ("Debtor-in-Possession") shall file with the court and serve on the Westamerica Bank ("Movant") a list of witnesses and exhibits (excluding possible rebuttal witnesses and exhibits) to be presented at the evidentiary hearing for Debtor in Possession's case in chief.

c. On or before xxxxxx, 2015, Movant shall file and serve on Debtor in Possession a list of witnesses and exhibits (excluding possible rebuttal witnesses and exhibits) to be presented at the Evidentiary Hearing for Movant's case in chief.

d. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.

e. Movant, shall lodge with the court and serve their Testimony Statements and Exhibits on or before xxxxxx, 2015.

f. Respondent, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before xxxxxx, 2015.

g. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before xxxxxx, 2015.

h. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before xxxxxx, 2015

i. The Evidentiary Hearing shall be conducted at xxxxxx.m. on xxxxxx, 2015.

The court shall issue an Evidentiary Hearing Scheduling Order.

9. 14-91369-E-7 EAT-1 | **ALDO LEONARDI TOSO AND MEREDITH LEONARDI** Gary Ray Fraley | **MOTION FOR RELIEF FROM AUTOMATIC STAY** 12-15-14 [16]

NATIONSTAR MORTGAGE, LLC VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 15, 2014. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

Nationstar Mortgage, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1787 Quail Oaks Court, Valley Springs, California (the "Property"). Movant has provided the Declaration of Shemar Ursin to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Ursin Declaration states that there are 16 pre-petition payments in default, with a pre-petition arrearage of $26,551.28.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $443,941.54 (including $310,066.77 secured by Movant's first deed of trust), as stated in the Ursin Declaration and Schedule D filed by Aldo Dante Leonardi Toso and Meredith Joy Leonardi ("Debtor"). The value of the Property is determined to be $247,689.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a

means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). [This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Nationstar Mortgage, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Nationstar Mortgage, LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 1787 Quail Oaks Court, Valley Springs, California.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause shown by Movant.

No other or additional relief is granted.

10. 14-91290-E-7 EDWIN GODINHO
PD-1 Martha Passalaqua

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-21-14 [21]

PNC BANK, N.A. VS.

Final Ruling: No appearance at the January 15, 2015 hearing is required.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on November 21, 2014. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief From the Automatic Stay is granted.

PNC Bank, National Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 409 South Orange Street, Turlock, California (the "Property"). Movant has provided the Declaration of Gaynelle Bronson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Bronson Declaration states that there are 7 pre-petition payments in default, with a pre-petition arrearage of $6,306.83.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $119,780.40 (including $118,470.40 secured by Movant's first deed of trust), as stated in the Bronson Declaration and Schedule D filed by Edwin Oscar Godinho ("Debtor"). The value of the Property is determined to be $114,537.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Attorneys' Fees Requested

Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

Because the Debtor is intending to surrender the Property, Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by PNC Bank, National Association ("Movant") having been presented to the

court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow PNC Bank, National Association, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 409 South Orange Street, Turlock, California.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

IT IS FURTHER ORDERED that Movant having established that the value of the Property subject to its lien not having a value greater than the obligation secured, Movant is not awarded attorneys' fees as part of Movant's secured claim for all matters relating to this Motion.

No other or additional relief is granted.

11. 14-91633-E-11 SOUZA PROPANE, INC.
NEU-3

KIVA ENERGY, INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY O.S.T. 1-9-15 [35]

THIS MATTER WILL BE HEARD ON THE 10:30 A.M. CALENDAR ALONG WITH MOVANT'S MOTION TO APPOINT TRUSTEE

Tentative Ruling: The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 9, 2015. By the court's calculation, 6 days' notice was provided.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing ----------.

The Motion for Relief From the Automatic Stay is granted.

Souza Propane, Inc. ("Debtor") commenced this bankruptcy case on December 17, 2014. Kiva Energy, Inc. ("Movant") seeks relief from the automatic stay with respect to an asset identified as:

> all L.O. [liquid Petroleum] gas tanks, LP gas, L.P. gas Equipment, other Equipment, Vehicles, Inventory, receivables, Accounts, contract rights, General Intangibles, chattel paper, documents, instruments, money, leasehold interests including any interest in all L.P. gas tanks leased to others, trademarks and tradenames; all replacements thereof, all attachments, accessories, parts and tools belonging thereto and/or for use in connection therewith, and all products and Proceeds.

(the "Property") as defined in the Security Agreement (Dckt. 39, Exhibit 2).

The Movant argues that it is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(1) on three grounds:

1. Debtor filed this action in bad faith, on the eve of a hearing in state court, solely to prevent Movant from exercising its contractual right to take possession and control of its collateral under its Security Agreement with Movant;

2. Debtor is making unauthorized use of Movant's cash collateral; and

3. Debtor has breached its Security Agreement with Movant by, among other things, conveying security interests in Movant's collateral to other parties without Movant's consent and by refusing to turn over books, records, and other information that the Debtor is obligated to provide, despite Movant's pre-petition demand that it do so. Without that information, Movant has been unable to confirm the amount, condition, and location of its collateral, which remains subject to being sold, transferred, concealed, or disposed of, without independent verification or supervision.

BAD FAITH FILING

Movant argues that Debtor filed the instant bankruptcy case in bad faith in order to prevent the state court action. Specifically, the Movant states that Debtor defaulted under the Wholesale Agreement shortly after it was executed. On August 19, 2014, Movant filed an action for breach of contract against Debtor in state court. Movant held off on pursuing the litigation while Debtor purportedly was in negotiations with AmeriGas, a third party, to purchase its business and pay off its creditors. The litigation proceeded after the potential AmeriGas deal fell through and Movant became concerned that its security was being imperiled by Debtor's inability to adequately service its customers.

To support this conclusion, the Movant states that: 1) Movant had learned that Debtor did not have a reliable gas supply and has been forced to purchase gas for resale on cash-on-delivery basis; (2) records provided by Debtor reflect a steep drop in gallons of propane delivered and that hundreds of accounts were listed despite the fact that the customer had not purchased propane from Debtor is over a year; (3) in late November 2014, Movant received notice from Crossroads Equipment Lease and Finance, LLC that the company had repossessed 18 vehicles from Debtor.

UNAUTHORIZED USE OF MOVANT'S CASH COLLATERAL

Movant argues that Debtor is continuing to operate its business through the use of Movant's cash collateral without Movant's consent and without authority from the court. Movant argues that Debtor used funds generated by Debtor's business or collateral, those funds are the cash collateral of Debtor's secured creditors. Debtor has not obtained court authorization to use Movant's cash collateral, and neither Movant nor Turner Gas Company have consented to Debtor's use of their cash collateral. As evidence, the Movant states prior to the bankruptcy filing, Debtor frequently purchased propane gas from Movant wholesale and was required to pay cash at the time of delivery. Movant states that Debtor purchased five such loads in November 2014 and another on December 3, 2014, immediately before Movant's motion in state court were filed. Debtor would almost assuredly not have been purchasing gas from Movant on a cash-on delivery basis if it could have purchased gas on credit elsewhere.

BREACH OF ITS SECURITY AGREEMENT WITH MOVANT

Movant argues that Debtor's default for failure to pay its indebtedness to Movant, Debtor has materially breached the Security Agreement in a manner that is seriously prejudicial to Creditor.

Namely, the Movant argues that Debtor violated the Security Agreement in the following ways:

1. In violation of paragraph 5 of the Security Agreement, Debtor has granted a prior security interest in much of the same collateral to Turner Gas, and presently owes that company almost $400,000.00

2. In violation of paragraph 2 and 8 of the Security Agreement, Debtor has failed to defend the Property against such claims, allowing the collateral to become subject to tax liens in favor of the California Board of Equalization and allowing a competing creditor, Ferrellgas, L.P., to obtain an attachment lien against the collateral.

3. In violation of paragraph 11 of the Security Agreement, Debtor has failed and refused to deliver records and schedules showing the status, condition and location of the Property. Movant has not been permitted to identify its collateral or to evaluate its condition, and that collateral remains at risk of being sold, transferred, concealed, or disposed of without independent verification. Movant states that it is concerned that Debtor may be liquidating propane tanks or other equipment to obtain funds to continue to operate its business, and without an opportunity to verify its collateral, Movant may be unable to track or accurately identify the disposition of its collateral.

DECLARATIONS PRESENTED BY MOVANT

Movant provides several declarations in support of the Motion. The first is by Jan Peterson, Movant's CFO. Dckt. 38. In addition to authenticating documents and the amount of the secured claim, Ms. Peterson testifies to the litigation leading up to the bankruptcy case being filed. She confirms that Movant has not consented to the use of its cash collateral.

The second declaration is provided by Saroya Leonardini, an attorney who represents Movant. Dckt. 40. She represented Movant in connection with the

attempted sale by Debtor of its business to AmeriGas. Her testimony relates to the Debtor refusing to provide information about the attempted sale and Movant's right of first refusal for the purchase of the Debtor's business. Ms. Leonardini also testifies to an asserted senior lien, which was not disclosed, in collateral to another creditor, Turner Gas Company. Finally, she testifies concerning the failure of Debtor to provide copies of books and records to Movant.

RULING

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). Courts have also found that the failure of the debtor to receive court permission to use cash collateral as "cause" because the debtor has not secured alternative, long-term financing for its operation. *In re OccMeds Billing Servs., Inc.*, No. 07-28444-A-11, 2008 WL 73690, at *3 (Bankr. E.D. Cal. Jan. 3, 2008)

The court determines that cause exists for terminating the automatic stay since the debtor and the estate have not filed any motion authorizing the use of cash collateral. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The Congressionally mandated prohibition on the use of cash collateral without the consent of the creditor or order of the court is automatic. 11 U.S.C. § 363(c)(2). Though no Monthly Operating Report has been filed (the first report not due until January 14, 2015), the Debtor in Possession has been operating in this Chapter 11 case since December 17, 2015. No cash collateral or other "first day" orders common in business Chapter 11 cases have been filed. Commonly, there would be a payroll which came due at the end of December 2014, and possibly multiple payrolls if the business pays its employees twice a month or every two weeks. Such use of cash collateral is a basis for this court to modify the stay so that Movant may proceed in state court to protect its rights and interests.

While Movant asserts that the bankruptcy case was filed in "bad faith" to thwart the state court litigation, such could be said about many Chapter 11 cases. A debtor driven to the ragged edge of operation in state court litigation can still file a bankruptcy case and prosecute it in good faith. Often times it is the failure of the state court litigation that leads a debtor to consult competent, experienced bankruptcy knowledgeable counsel to save the business. Merely because all of the State Court cards had been played does not, in and of itself, render the filing of bankruptcy in bad faith.

Additionally, the asserted violation of the Security Agreement, namely failing to provide requested documentation to the Movant pursuant to the Security Agreement grounds for terminating the automatic stay. Nor is the contention that the Debtor granted a competing security interest to Turner Gas without seeking Movant's permission grounds for granting relief from the stay. Such conduct may well go to whether the Debtor in Possession should be removed and a trustee appointed or converting the case if the court concludes that the Debtor in Possession could not fulfill its fiduciary duties.

The court shall issue an order terminating and vacating the automatic stay to allow Kiva Energy, Inc., and its agents, representatives and

successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Kiva Energy, Inc. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as:
>
> > all L.O. [liquid Petroleum] gas tanks, LP gas, L.P. gas Equipment, other Equipment, Vehicles, Inventory, receivables, Accounts, contract rights, General Intangibles, chattel paper, documents, instruments, money, leasehold interests including any interest in all L.P. gas tanks leased to others, trademarks and tradenames; all replacements thereof, all attachments, accessories, parts and tools belonging thereto and/or for use in connection therewith, and all products and Proceeds.
>
> (the "Property") as defined in the Security Agreement (Dckt. 39, Exhibit 2), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> No other or additional relief is granted.