UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 8, 2014 at 1:30 p.m.

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1. 12-21207-E-13 JIM LEDESMA — **MOTION FOR RELIEF FROM AUTOMATIC STAY**
MRG-1 C. Anthony Hughes — **3-20-14 [61]**

CAPITAL ONE, N.A. VS.

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)(2). 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)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on March 20, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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 denied.

Creditor Capital One, N.A. ("Movant") seeks relief from the

automatic stay with respect to the real property commonly known as 10284 Coloma Road, Rancho Cordova, California (the "Property"). Movant has provided the Declaration of Daron Bolat to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

DOCUMENTS

The moving party filed the notice, points and authorities, declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Local Bankruptcy Rule 9004(a) and Revised Guidelines for the Preparation of Documents, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rules 9004(a), 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court. (Some running hundreds of pages.) It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents which can then be used by the court.

Movant also filed a Proof of Service under penalty of perjury "the laws of the State of California," this being Federal court the penalty of perjury is under the laws of the United states.

RELIEF FROM STAY INFORMATION SHEET

In addition, Creditor did not file a Relief From Stay Cover Sheet. Local Bankruptcy Rule 4001-1(a)(3) requires that movant file and serve as a separate document completed Form EDC 3-468. Failure to comply with local rules is grounds for denial of the motion.

MOTION

Furthermore, there does not appear to be an actual motion, stating with particularity the grounds for the relief sought. The pleading appears to be a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities"). The court (and the Debtor) are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Creditor. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and the other party.

On its face, the Motion states with particularity the following grounds upon which the requested relief is based:

> 1. Movant submits the a Memorandum of Points and Authorities in support of its Motion for Relief From Stay

Motion, Dckt. No. 61.

This Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter

similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

"The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims."

Weatherford, 434 B.R. at 649-650; see also In re White, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The Courts of Appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such

"postulations."

DISCUSSION

The Bolat Declaration states that there are "no less than seventeen (17)" defaults in the payments on the obligation secured by the Property. The Bolat Declaration does not provide the number of post petition defaults, or the amount of arrearage.

The Bolat Declaration also makes the assertion that "the current monthly payment owed to Movant is $1,363.77." However, the most recent Notice of Mortgage Payment Change, filed by Movant, states a monthly mortgage payment of only $1,039.38. Dckt. 63.

The motion is made pursuant to 11 U.S.C. § 362(d)(1). Movant's points and authorities appear to argue that Movant is entitled to relief under section 362(d)(1) because: 1) Movant is not receiving periodic cash adequate protection payments, 2) Debtor has missed payments, and 3) there is not an equity cushion protecting Movant's lien.

OPPOSITION

Opposition has been filed by the Chapter 13 Trustee. The Trustee objects to the motion on the following grounds:

1. Movant did not file and serve a Relief from Stay Information Sheet

2. The Debtor is current under the confirmed plan.

3. The Trustee has been disbursing monthly mortgage payments of $1,039.38 pursuant to Movant's last Notice of Mortgage Payment Change filed June 17, 2013 (as opposed to the $1,363.77 stated in the Bolat Declaration).

4. The Trustee has been disbursing payments to Bank of America at the address provided in Movant's proof of claim. The January disbursements for Movant were returned to the Trustee with notices from Bank of America stating that the loan has been service released to Capital One, N.A., P.O. Box 17000, Baltimore, MD 21297. No transfer has been filed by Movant. Trustee cancelled the January disbursement checks, and the February disbursements remain outstanding.

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). From the evidence provided to the court, it appears that there are not *any* missed plan payments by the Debtor, only payments that have not yet been disbursed by the Trustee. These payments have not been able to be disbursed only because of Movant's own lack of diligence in filing the appropriate

documentation relating to the apparent transfer of loan servicer.

Movant's contention that the mere lack of equity is "cause," as set forth in 11 U.S.C. § 362(d)(1) is without merit. Lack of equity is one of the two necessary elements for relief from the automatic stay under 11 U.S.C. § 362(d)(2) (which was not plead in the present motion). The fact that the debtor has no equity in the estate is not sufficient, standing alone, to grant relief from the automatic stay under 11 U.S.C. § 362(d)(1). *In re Suter*, 10 B.R. 471, 472 (Bankr. E.D. Penn. 1981); *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). Moving party has not adequately plead or provided an evidentiary basis for granting relief for "cause."

Based on the multiple and substantial deficiencies noted above, as well as Movant misstating the monthly mortgage payment amount (increasing it by more than $300, which is a nearly 30% increase), the court denies the motion for relief from the stay.

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 the creditor 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 motion is denied without prejudice.

2. 13-29251-E-13 TJS-1 | **DAMION BOATMAN** Scott D. Shumaker | **MOTION FOR RELIEF FROM AUTOMATIC STAY** 3-6-14 [79]

JPMORGAN CHASE BANK, N.A.
VS.

Final Ruling: No appearance at the April 8, 2014 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 13 Trustee, and Office of the United States Trustee on March 6, 2014. By the court's calculation, 33 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 denied as moot.

Damion Deion Boatman ("Debtor") commenced this bankruptcy case on July 12, 2013. JPMorgan Chase Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2004 Land Rover Range Rover, VIN ending in 4707 (the "Vehicle"). The moving party has provided the Declaration of Marita Sanchez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Sanchez Declaration provides testimony that Debtor has not made 4 post-petition payments, with a total of $762.80 in post-petition payments past due.

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 $10,100.96, as stated in the Sanchez Declaration, while the value of the Vehicle is determined to be $10,250.00, as stated in Schedules B and D filed by Debtor.

The Sanchez Declaration also seeks to introduce evidence

establishing the value of the asset at $11,250.00. Though the *Kelley Blue Book* valuation is attached as an Exhibit, it is not properly authenticated.

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 [name of declarant] to be that she obtained the *Kelley Blue Book* 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.

The motion notes that the Amended Plan filed by the Debtor on January 31, 2014 proposes to surrender the vehicle to Movant. A review of the Amended Plan (Dckt. No. 74) confirms this assertion, and shows that the Movant is to be treated as a Class 3 claimant under the plan. The Amended Plan was confirmed on March 25, 2014. Dckt. No. 85.

NON-OPPOSITION TO MOTION

The Trustee filed a statement of non-opposition.

RULING

As noted, the Amended Plan was confirmed on March 25, 2014. Section 2.10 of the plan, providing for Class 3 claims states: "Upon confirmation of the plan, all bankruptcy stays are modified to allow a Class 3 secured claim holder to exercise its rights against its collateral." Accordingly, the automatic stay has already terminated to allow Movant to exercise its rights against the collateral, rendering the motion is moot.

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 JPMorgan Chase Bank, 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** the automatic stay having terminated as to the 2004 Land Rover Range Rover, VIN ending in 4707, pursuant to the confirmed Chapter 13 Plan, Dckt. 74, in this case (Order Confirming Plan filed April 2, 2014, Dckt. 88), the motion is denied as moot. Order confirming Plan, Dckt. 88.

3. 14-20358-E-13 HENRY/JOSEPHINE MAGALING — MOTION FOR RELIEF FROM AUTOMATIC STAY
MRG-1 David P. Ritzinger

2-19-14 [19]

VW CREDIT, INC. VS.

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 13 Trustee, and Office of the United States Trustee on March 5, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required. That requirement was met.

Final 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). 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 respondent and other parties in interest 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. No appearance required.

VW Credit, Inc. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2012 AUDI A6, VIN ending in 6073 ("Property"). On or about December 14, 2011, Debtor Henry K. Magaling executed a "Lease Agreement – Closed End" with Movant in the original principal amount of $59,027.57. Movant has a perfected security interest in the Property for which a Certificate of Title is provided. Exhibit 1, Dckt. No. 24. Debtor Henry K. Magaling is the owner of record of the Property.

The moving party has provided the Declaration of Martha Henriquez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Henriquez Declaration states that the Debtors are due one post-petition payment, with a total of $1,087.39 in post-petition payments past due. Dckt. No. 23. The amount of Movant's claim in the property, after calculating the principal and accrued interest of $39,736.54 and late charges of $135.90, results in a total of $39,872.44 owed to Movant as of January 31, 2014.

In her Declaration, Henriquez states that the current monthly payment amount on the claim is $1,087.39. The last payment was received from Debtors was on or about December 17, 2013. An additional payment of $1,087.39 will come due on February 14, 2014. The fair market value of the Property, based on Debtors' Schedules, is $12,919.00. Debtors have not made one post-petition payment of $1,087.39 that became due on February 14, 2014.

Debtors' Schedule B lists the property as:

> Lease of 2012 Audi A6 3.0T Quattro Premium Sedan 4D in good condition with 26,000 miles.....$12,919.00

The claim of Movant is listed on Debtors' Schedule D, which describes a purchase money security in the amount of $12,919.00 for Creditor VW Credit, Inc. Movant, however, as filed Proof of Claim No. 5 on January 31, 2014, asserting that the amount of their security interest in the vehicle sold is $39,872.44, and that the amount of arrearage on the secured claim is $1,238.00. The Claim is supported an attached Lease Agreement and a Notice of Transfer and Release of Liability.

Movant argues that its interest is not adequately protected because Debtors have failed to make post-petition payments under § 362(d)(1). Because Debtors have not made the requisite post-petition payments, Movant's interest in the Property is not adequately protected and it would be inequitable to delay Movant from enforcing its remedies to obtain possession of the Property under 11 U.S.C. § 362(d)(1). The Debtors' confirmed Chapter 13 Plan, Dckt. No. 6, also lists the Movant VW Credit, Inc., as holding a secured claim that will be satisfied by the surrender of collateral. Movant asserts that because the Property is being surrendered pursuant to Chapter 13 Plan, cause exists for relief from stay and Movant has satisfied its grounds for relief from stay under 11 U.S.C. § 362(d)(1).

The Chapter 13 Trustee filed a non-opposition on February 20, 2014.

Movant has provided an authenticated copy of the Certificate of Title and Lease Agreement to substantiate its claim of the transfer of ownership of the vehicle to Debtors. Additionally, Movant provides a statement of the payments received from Debtors for the subject vehicle. Exhibit 4, Dckt. No. 24. The statement shows that Debtors have missed on payment of $1,087.39 for which the payment deadline was in February 14, 2014. *Id.* at 13. 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).

Moreover, 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 $39,872.44, as stated in the Martha Henriquez Declaration, while the value of the asset is determined to be $12,919.00, as stated in Schedules B and D filed by Debtor. Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor 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). Based on the Debtor's failure to oppose the motion, together with the evidence submitted, the court determines that the property is not necessary to an effective reorganization.

The court shall issue a minute order terminating and vacating the automatic stay to allow VW Credit, Inc., and its agents, representatives and successors, and all other creditors having lien rights against the asset, 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 merely demands that the 14-day prescribed by Federal Rule of Bankruptcy 4001(a)(3) be waived, without alleging any grounds supporting a finding that cause should be waived. The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

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 the creditor 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 VW Credit, Inc., its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2012 AUDI A6, VIN ending in 6073, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

4. 12-21472-E-13 JANA GIRON
EGS-1 David Foyil

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY
3-20-14 [117]

BAYVIEW LOAN SERVICING, LLC
VS.

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, junior lienholder, and Office of the United States Trustee on March 20, 2014. By the court's calculation, 19 days' notice was provided. 14 days' notice is required. That requirement was met.

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)(2). 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Relief from the Automatic Stay as moot, the automatic stay having been terminated by confirmation of the Chapter 13 Plan. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Bayview Loan Servicing, LLC, which identifies as the servicing agent for E*Trade Bank (described as the actual "Movant" in this matter) seeks relief from the automatic stay with respect to the real property commonly known as 443 Quailhollow Drive, Ione California.

The moving party has provided the Declaration of Kevin Escalante to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. Dckt. No. 120. Escalante provides testimony based on his personal knowledge as the Bankruptcy Coordinator of Bayview Loan Servicing, LLC, which admits to be the servicing agent of E*Trade Bank, which is the actual Movant in interest in the matter. Escalante says that his duties as an employee of Bayview Loan Servicing, LLC, includes keeping an accurate record of all transactions affecting the subject first deed of trust while it is bankruptcy.

The Declaration states that the Central Pacific Mortgage Company was the original lender of a Note dated January 3, 2005, in the principal amount of $288,000.00, which was secured by the first deed of trust recorded on January 14, 2005. Mortgage Electronic Registration Systems, Inc., the original beneficiary under the subject trust deed, transferred its beneficial interest in the deed of trust to Movant by a Corporate Assignment Deed of Trust, which is attached as Exhibit C in support of this motion. Debtor indicates in her Schedule D that there is a second deed of trust encumbering the subject property in the amount of $92,410.21 in favor of CitiMortgage, Inc.

The Declaration states that Debtor is currently due and owing for four post-petition monthly mortgage payments, for the months of December 2013, through and including March 2014. This number consists of three monthly payments of $1,500.43 that were not paid from December 1, 2013 to February 1, 2014, with an additional payment of $1,470.74 for the month of March, 2014, that was not paid. A monthly payment of $1,470.75 will become due on April 1, 2014, and the same becomes due on the first day of every month thereafter.

The total unpaid principal balance on the Movant's claim of $237,325.42. The Declaration calculates the total amount of post-petition delinquencies to be $6.998.04, but factors in attorney's fees as part of the debt owed. This is incorrect. The court does not calculate attorney fees, foreclosure costs, and the costs of sale as part of the debt owed (furthermore, because the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party would not be awarded attorneys' fees for all matters relating to this Motion). Thus, the court calculates that the total unpaid principal amount plus delinquencies would total $243,297.46. Movant also acknowledges a second deed of trust held by CitiMortgage in the amount of $92,410.21. Thus, the total liens would add up to $335,707.67.

A Proof of Claim was filed by Creditor E*Trade Bank on June 12, 2012, designed as Claim #2 on the claims registry. The Proof of Claim, however, asserts an amount of $252,070.78 as the amount owed on the secured claim as of the petition filing date. The Claim is accompanied by a Mortgage Proof of Claim Attachment that shows the principal due, and the interest due as of the date of the claim filing. The Deed of Trust is also attached. The First Deed of Trust is listed on Debtor's Schedule D, with an amount of $264,932.31 provided as the amount the claim. The court, however, will proceed to consider the motion using the figures supplied by the Escalante Declaration, filed in support of the Motion.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be $ 335,707.67(including $243,297.46 secured by movant's first trust deed), while the value of the property is determined to be $210,000.00, as stated in Schedules A and D filed by Debtor.

RULING

Debtor's Amended Chapter 13 Plan was confirmed on February 19, 2013. The Debtor's confirmed Plan lists Movant's claim as a Class 4 Creditor,

which provides that Debtor will make direct payments to the Movant. Section 2.11 of the Plan, providing for Class 4 claims states:

> Upon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.

Accordingly, the automatic stay has already terminated to allow Movant to exercise its rights against the collateral, rendering the motion as moot.

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 the creditor 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 having terminated as to the real property commonly known as 443 Quailhollow Drive, Ione California., pursuant to the confirmed Chapter 13 Plan, Dckt. No. 99, in this case (Order Confirming Plan filed on February 19, 2013), the motion is denied as moot. Order Confirming Plan, Dckt. No. 110.

5. 14-20187-E-13 JOANNA FRITTER **CONTINUED MOTION FOR RELIEF**
HSM-1 **FROM AUTOMATIC STAY**
1-14-14 [9]

EL DORADO SAVINGS BANK VS.

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 13 Trustee, and Office of the United States Trustee on January 14, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final 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). 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 respondent and other parties in interest 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. No appearance is required.

El Dorado Savings Bank ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6243 Drop Off Road, Pollock Pines, California. The Debtor and her spouse, John C. Fritter, are borrowers on a loan from the Bank. The Borrowers defaulted, the Bank recorded both a notice of default and a notice of sale, and the foreclosure sale was scheduled for January 10, 2014. Movant states that on the day before the scheduled foreclosure sale, the Debtor filed what Movant calls a "skeletal" bankruptcy case for the purpose of delaying the foreclosure.

On February 22, 2007, the Borrowers executed a promissory note in the amount of $200,000.00 with a term ending in March of 2037 ("Note") in favor of the Bank. The fixed interest rate under the Note is 6.125% per annum. In connection with the Bank's loan, the Borrower executed a deed of trust in favor of the Bank which was recorded against the real property located at 6243 Drop Off Road, Pollock Pines, California. On May 3, 2012, the Borrowers and the Bank entered into a Forbearance Agreement pursuant to which the payment due under the note ($1,215.22 principal and interest) was reduced to interest only ($934.97) starting on May 1, 2012, and continuing through April 1, 2014. The full payment ($1,215.22) is due again starting on May 1, 2014. Also, based on the Forbearance Agreement, the term of the loan was extended from March 1, 2037, to March 1, 2039.

Movant states that the Borrowers are delinquent under the Note. No payments have been credited to the loan since March of 2013. The pre-petition delinquency is $13,965.42 (ten monthly installment payments of $934.37 through the petition date, late charges of $513.92, insurance advances of $1,007.00, and $3,100.80 in foreclosure fees). Since the Note is in default, the Bank commenced foreclosure proceedings prepetition. The Bank caused a Notice of Default to be recorded on July 29, 2013. Exhibit 4, Dckt. No .13. The Bank caused a Notice of Sale to be published on December 5, 2013, and the foreclosure sale was set for January 10, 2014, at 10:00 a.m

The moving party has provided the Declaration of Sandy Rushforth to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. The Rushforth Declaration states that the Debtor has not made ten pre-petition payments, but has not provided evidence that Debtor has not been making her post-petition payments. The Declaration further states that borrowers allowed the insurance on the Property to lapse and, as a result, in June of 2013, the Bank had to advance insurance costs of $1,007.00 to obtain forced place insurance. The taxes on the Property are delinquent and the total secured taxes due on the Property as of the petition date were $7,868.18. It is unclear from the Motion and the Rushforth declaration, however, whether any tax and monthly installment payments were missed during the post-petition period.

The court maintains the right to grant relief from stay for cause when the 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). Here, the court cannot determine that cause exists for terminating the automatic stay, since it appears that Debtor has only missed pre-petition, and not post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Additionally, Movant’s calculation of the total amount owed for the purposes of this Motion for Relief incorrectly computes the foreclosure costs as part of the total amount owed to Movant. The court calculates the amount of principal and interest, late charges, and insurance advances to be 194,171.46. After factoring in the property tax lien of the El Dorado County Tax Collector, in the amount of $7,868, and the Capitol One Bank Abstract of Judgment for $5,588.25, the total amount of liens owed and secured by the subject property (subtracting the foreclosure expenses included in the Movant’s calculation) is $207,627.89.

TRUSTEE’S RESPONSE

Trustee states that the Debtor’s plan was filed on January 23, 2014, and lists El Dorado Savings Bank as a Class 1 Creditor. It appears that property at 6243 Drop Off Road, Pollock Pines, is Debtor’s primary residence and listed as collateral. The petition was filed on January 9, 2014, and the first plan payment was due on February 25, 2014. The 341 Hearing date is scheduled for February 20, 2014 at 10:30 am.

STATEMENT OF NON-OPPOSITION BY DEBTOR’S COUNSEL

On February 3, 2014, the court issued an order to continue the hearing on the motion until April 8, 2014, Dckt. 34, pursuant to a stipulation entered into between El Dorado Savings Bank and the Debtor.

On March 25, 2014, Counsel for Debtor, Gary H. Gale ("Counsel"), filed a Notice of No Opposition to Relief from Automatic Stay by El Dorado Savings Bank. Dckt. No. 42. Counsel states that the stipulation of the parties by Counsel for the time period of February 11, 2014 to April 8, 2014, also included an informal agreement between the attorneys for Creditor and for Debtor that the Motion would likely be dropped if Debtor was current was current in Plan obligations.

Counsel states that the Plan obligations include the ongoing mortgage payments to Movant. Counsel states that Debtor has stopped communicating with his office, despite numerous efforts to reach her by phone and in writing, by letter and email. *Id.*

The first plan payment was due February 25, 2014, and the second on March 25, 2014. The Trustee does not show record of receipt of payments on his website, based on Counsel's review of the website as of March 25, 2014. Debtor has not presented any basis to Counsel's office to contest the relief sought. Counsel states that absent contact from the Debtor to the contrary, Counsel does not have any basis upon which to contest the relief sought by Movant, and does not plan on appearing at the hearing.

The court continued the hearing on this matter to give Debtor an opportunity to address her delinquency under the Promissory Note, which includes missed pre-petition payments, late charges, insurance advances, and foreclosure fees that have not been paid. However, Debtor has not responded to the Movant's arguments that it is entitled relief from the stay, based on Debtor's ongoing defaults and failure to insure the property. Debtor's Counsel states that Debtor has stopped responding to his efforts to contact her about the case. Dckt. No. 42. It appears that Debtor is continuing to default on her payments, and is doing nothing to prosecute the matter.

Based on Debtor's continued delinquency, and the Notice of Non-Opposition filed by Debtor's counsel (testifying that Debtor is not current in her Plan obligations, and has stopped responding to Counsel's attempts to communicate to her regarding this matter), the Motion is granted and the automatic stay is vacated as to the real property located at 6243 Drop Off Road, Pollock Pines, California.

WAIVER OF 14-DAY STAY OF ENFORCEMENT

By general reference in the Motion ("for the above described conduct"), Movant requests that the court waive the fourteen-day stay of enforcement required under Rule 4001(a)(3). Standing on its own, such would not be stating with particularity grounds for the requested relief. Rather, it is merely directing the judge to pick and choose whatever he or she might think that Movant may want to argue, and then state such grounds for Movant. The court has generally denied such requests to provide drafting assistance to movants.

However, this is the continued hearing on the Motion. The Debtor entered into a Stipulation continuing the hearing from February 11, 2014 to

April 8, 2014 – approximately sixty-six days. Though obtaining the continuance, no opposition has been presented by the Debtor. It has been uncontradicted that Debtor has not only defaulted in the payments due under the claim, but also failed to maintain the property insurance. This necessitated Movant having to put in place forced place insurance.

Cause exists to waive the fourteen-day stay under Federal Rule of Bankruptcy Procedure 4001(a)(3). This Debtor has, through obtaining the continuance, has effectively obtained a sixty-six day stay of enforcement. Thus, this part of the requested relief is not granted. The fourteen-day stay of enforcement is waived.

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 the creditor 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 El Dorado Savings Bank, 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 6243 Drop Off Road, Pollock Pines, California.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.
>
> No additional or further relief is granted.