UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

August 2, 2018, at 10:00 a.m.

---

1. **18-90123-E-11** **LORENA ALVARADO** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
MSK-1 **Anh Nguyen** **6-18-18 [34]**

THE BANK OF NEW YORK MELLON
VS.

Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, and Office of the United States Trustee on June 18, 2018. By the court's calculation, 45 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion is granted, with adequate protection conditions imposed as provided in Stipulation and relief from stay in the event of a default.

The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2007-16CB Mortgage Pass-Through Certificates, Series 2007-16CB ("Movant") seeks relief from the automatic stay with respect to Lorena Alvarado's ("Debtor in Possession") real property commonly known as 5019 Morgan Street, Salida, California ("Property"). Movant has provided the Declaration of Sandra McCoy to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

According to the Sandra McCoy Declaration, there are five post-petition defaults in the payments on the obligation secured by the Property, and sixty-three pre-petition payments in default, with a total of $266,068.57 payments past due.

DEBTOR'S IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on July 19, 2018. Dckt. 42. Debtor in Possession asserts that hypothetical costs of sale should not be deducted from Property's fair market value to determine whether there is equity in Property and that Debtor in Possession has submitted adequate protection payments to Movant for the months of April, May, and June.

The Opposition then takes a more complex turn. Debtor in Possession asserts that she and her late husband were victims of fraud committed by Efrain Ramirez, a former employee of another bankruptcy attorney in the area. It is alleged that Debtor in Possession's late husband was the debtor in bankruptcy case 13-90863. It is asserted that over the course of two years Debtor in Possession and her husband paid $120,000 in bankruptcy plan payments, most of which they assert that Mr. Ramirez diverted to his own use.

The Opposition references that this court issued an order authorizing the use of cash collateral on March 28, 2018, authorizing Debtor in Possession to make adequate protection payments to Movant. The adequate protection payments of $998.45 monthly were to be made beginning with April 2018. The Opposition alleges that there was a lump sum payment of $2,995.35 on or around July 18, 2018 (representing the payments for April, May, and June 2018). Opposition, Dckt. 42.

Debtor in Possession asserts that she will file a Plan by the end of August 2018. *Id.*

Debtor in Possession concludes asserting that Mr. Ramirez's fraud in diverting monies to his own use would create a $180,000 "windfall" to Movant. Debtor in Possession does not explain how Mr. Ramirez—an employee of Debtor in Possession's late husband's attorney—stealing money results in a "windfall" for Movant whose claim is secured by property of this bankruptcy estate.

Debtor in Possession provides her Declaration in opposition to the Motion. Dckt. 43. In it, she testifies that she "inherited" the Property from her late husband—who she states passed away in 2014. *Id.* at ¶ 4. She also testifies that she "believes" that the Property, which she stated in Schedule A/B to have a value of $274,000 filed on February 27, 2018, now has a value of $297,000 and "believes" that such increases in value will continue. *Id.*, ¶ 5.

Debtor in Possession testifies that she made the lump sum adequate protection payment, however, she does not explain why the payments were not timely made, or why the lump sum payment was made shortly before the present hearing. She does not provide any testimony about the payments alleged to have been made to Mr. Ramirez.

STIPULATION

On July 30, 2018, the parties filed a proposed Stipulation in this matter. Dckt. 50. The Stipulation proposes that the automatic stay remain in effect on the Property as long as Debtor in Possession make regular monthly adequate protection payments of $998.45, commencing August 1, 2018, and continuing until a plan, if any, is confirmed. The Stipulation includes that Debtor in Possession is allowed to use cash collateral derived from the Property to provide insurance and to perform maintenance.

In the event of default, Movant shall notify Debtor in Possession and provide ten days to cure. After that time, Movant may file a declaration regarding the default and an order for relief from the automatic stay. Movant does not argue that it will move for the court to enter an *ex parte* order but instead appears to propose that it will file its own order. No authority has been cited for Movant to act as its own judge on a matter.

The Stipulation contains additional points, including that Debtor in Possession shall maintain property taxes and insurance if the Property is not escrowed, that Movant's acceptance of a non-conforming payment does not waive its stipulated rights, that the fourteen-day stay of enforcement of the court's order granting relief from the automatic stay is waived (no authority has been presented for how the parties can unilaterally waive a rule imposed by the Supreme Court), that the Stipulation is only binding on the parties while there is an active case, that Movant is allowed to negotiate various refinancing deals with Debtor in Possession, and that the August 2 hearing is removed from the calendar.

DISCUSSION

As with her Opposition, the present Motion presents a more complex scenario for the court. The court did issue an order on April 13, 2018, authorizing Debtor in Possession to use cash collateral. Dckt. 33. It authorized Debtor in Possession to use the cash collateral to make the monthly payment of $998.45 to Movant and $50.00 per month to pay for maintenance expenses for the Property. The authorization expired on June 30, 2018. The court continued the hearing on the Motion to Use Cash Collateral to June 21, 2018, with Debtor in Possession to file supplemental pleadings on or before June 7, 2018, for the court to authorize the further use of cash collateral. That continued hearing procedure has been developed by the court to provide a cost effective, orderly prosecution of such requests when the court has not authorized a long-term use of cash collateral.

Debtor in Possession failed to file the supplemental pleadings, and the order authorizing the use of cash collateral expired on June 30, 2018. Order, Dckt. 41. Debtor in Possession's lump sum payment was made on July 18, 2018—after June 30, 2018.

The court's cash collateral order went further, affirmatively ordering Debtor in Possession to make the monthly adequate protection payments to Movant, the Order expressly stating:

> "**IT IS FURTHER ORDERED** that Debtor in Possession shall begin to make monthly adequate protection payments of $998.45 to Shellpoint Mortgage Servicing, beginning April 2018."

Order, Dckt. 33. The court did not allow Debtor in Possession, if she chose, to make an adequate protection payment, at whatever time in the future she chose, in whatever lump sum amount. Debtor in Possession was required to make monthly adequate protection payments, which she did not.

On July 19, 2018, Debtor in Possession flied what she titles a "Countermotion" seeking authorization to use cash collateral. That "Countermotion" uses the same Docket Control Number for the prior cash collateral motion that has now been denied due to Debtor in Possession's failure to prosecute the prior motion.

In the Declaration filed with the "Countermotion," Debtor in Possession states that the Property has a value of $274,000. Declaration ¶ 5, Dckt. 45. She further testifies that the Property is currently vacant and requires "minor repairs" and maintenance of $500 per month (for an unstated period of time). *Id.* at ¶¶ 8, 9. Debtor in Possession provides no testimony as to these damages and what $500 per month expenses are required.

Relief Granted Pursuant to Stipulation

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 $266,068.57 (including $265,000.00 secured by Movant's first deed of trust), as stated in the Sandra McCoy Declaration and Schedule D. The value of the Property is determined to be $274,000.00, as stated in Schedules A and D.

Though the court ordered that monthly adequate protection payments be made, Debtor in Possession failed to make the payments, waiting until the middle of July (after the cash collateral order expired) to make the payment as part of her defense to the Motion now before the court. Now, the parties have stipulated that those adequate protection payments will begin again, this time on August 1, 2018.

The proposed order lodged with the court by counsel for Movant merely provides the court ordering "Stipulation is approved." It does not contain any of the terms that the court is ordering, but merely that some stipulation is approved.

The court does not issue blanket approvals or vague orders. The court specifies exactly what is being ordered so that all parties have a clear record.

Fortunately, the court can structure an order affording actual relief from the court (not merely saying some other contract is approved), provide Movant with adequate protection, and afford Debtor the opportunity to proceed with a reorganization. Pursuant to the Motion and Stipulation by the Parties, the court shall issue an order:

(1) Requiring Debtor in Possession to:

A. Make adequate protection payments of $998.45, commencing with the August 1, 2018 payment to Movant; and

B. Timely pay the property taxes and insurance on the Property securing Movant's claim.

(2) If Debtor fails to timely make an adequate protection payment, Movant shall provide written notice of the default to Debtor and Counsel for Debtor. Debtor shall have ten days from the mailing, or the facsimile or electronic delivery of the notice of default to cure the monetary default.

(3) If the monetary default is not cured, Movant may file an *ex parte* motion to amend this adequate protection order and seek the termination of the automatic stay based on the default in one or more of the terms of this adequate protection order.

The *ex parte* motion and supporting evidence of the default and failure to cure (if it is a monetary default) shall be served on Debtor, Counsel for Debtor, and the U.S. Trustee.

Debtor shall have ten days from service to file an opposition to the *ex parte* motion, with the only issue being whether Debtor failed to timely cure a default in any adequate protection payment required under this order. Debtor shall notice a hearing on the *ex parte* motion to amend this Order for the first regular law and motion hearing date on this court's Modesto calendar, which is at least fourteen days after service of the *ex parte* Motion by Movant.

The only issues for the court at the hearing are whether Debtor defaulted in adequate protection payments or other monetary amounts set forth in this Order, and if a monetary default, if such default was not timely cured.

(4) The fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(e) is waived.

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 Stay filed by Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2007-16CB Mortgage Pass-Through Certificates, Series 2007-16CB ("Movant") having been presented to the court, Movant and Lorena Alvarado, Debtor, having filed their Stipulation (Dckt. 50) resolving this Contested Matter, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted to provide for the making of the payment of the following amounts as adequate protection during this bankruptcy

case (subject to the terms of any confirmed plan or further order of this court). Debtor shall timely make the following payments:

A. Monthly adequate protection payments of $998.45 each, commencing with the August 1, 2018 payment and continuing each month thereafter to Movant; and

B. If such are non-escrow amounts for this obligation, the property taxes and insurance on for the real property commonly known as 5019 Morgan St., Salida, California ("Property) that secures Movant's claim.

If Debtor fails to timely make an adequate protection payment, Movant shall provide written notice of the default to Debtor and Counsel for Debtor. Debtor shall have ten days from the mailing, or the facsimile or electronic delivery of the notice of default to cure the monetary default.

IT IS FURTHER ORDERED that Debtor is authorized to use the cash collateral subject to Movant's lien to make the above payments and expenses for the maintenance of the Property.

IT IS FURTHER ORDERED that if the monetary default is not cured, Movant may file an *ex parte* motion to amend this adequate protection order and seek the termination of the automatic stay based on the default in one or more of the terms of this adequate protection order.

The *ex parte* motion and supporting evidence of the default and failure to cure (if it is a monetary default) shall be served on Debtor, Counsel for Debtor, and the U.S. Trustee.

Debtor shall have ten days from service to file an opposition to the *ex parte* motion, with the only issue being whether Debtor failed to timely cure a default in any adequate protection payment required under this order. Debtor shall notice a hearing on the *ex parte* motion to amend this Order for the first regular law and motion hearing date on this court's Modesto calendar, which is at least fourteen days after service of the *ex parte* Motion by Movant.

The only issues for the court at the hearing are whether Debtor defaulted in adequate protection payments or other monetary amounts set forth in this Order, and if a monetary default, if such default was not timely cured.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(e) is waived.

2. **18-90234-E-7** **LARRY/RHONDA MCDONALD** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
APN-1 **Mary Anderson** **7-3-18 [18]**

WELLS FARGO BANK, N.A. VS.

Tentative Ruling: 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.

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

Sufficient 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 July 3, 2018. By the court's calculation, 30 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Evidentiary Hearing on the Motion for Relief from the Automatic Stay shall be conducted at 8:30 a.m. on August 23, 2018.

Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 Hyundai Elantra ("Vehicle"). The moving party has provided the Declaration of Arland Bishop Jr. to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Larry McDonald and Rhonda McDonald ("Debtor").

The Arland Bishop Jr. Declaration provides testimony that Debtor has not made 3 post-petition payments, with a total of $1,130.07 in post-petition payments past due. Dckt. 22. The Declaration also provides evidence that there is one pre-petition payment in default, with a pre-petition arrearage of $395.52. *Id*.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. Though the NADA Valuation Report is attached as an Exhibit, it is not properly authenticated. In the Bishop Declaration, the witness testifies that the NADA exhibit is "a true and correct copy." However, merely stating it is a true and correct copy, this witness does not authenticate it as required under Federal Rules of Evidence 901 *et seq*. Possibly, the witness is testifying that he went to the NADA Guide, looked up the Vehicle, copied/scanned the page, and provided it to Movant's counsel to be included as an exhibit in

support of the Motion. Or, the witness may be testifying that he signed the declaration, having been provided a copy of the NADA valuation generated by someone else and is testifying "yeah, this is a true copy of the copy that I was given from somebody else, I do not know if it is accurate, but I sure like it because it means my employer wins." Or, the witness may actually have just signed the Declaration, trusting that counsel would attach a true copy and not have the witness commit perjury. The court does not know and will not guess.

Though Movant does not reference it, Debtor has stated a value for this Vehicle in the Schedules. On Schedule A/B, Debtor states that the Vehicle has a value of $9,983.00 Dckt. 13 at 3. Debtor further states that this five-model-year-old vehicle is in good condition. *Id.*

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 $14,208.53, as stated in the Arland Bishop Jr. Declaration, while the value of the Vehicle is determined to be $9,883.00, as stated in Schedules B and D filed by Debtor.

Movant argues that Debtor contacted Movant and stated an intent to surrender possession of Vehicle. Dckt. 18. Debtor's Statement of Intention indicates Debtor intends to retain the Vehicle, though, and the Vehicle is listed on Schedule C as exempt. Dckt. 13.

No evidence of the purported conversation with Debtor is provided. Mr. Bishop, in his Declaration, provides no testimony as to any such conversation.

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Here, Debtor has stated an intention to retain this five-model-year-old vehicle, which is in good condition. As is commonly known, after the first three years, vehicle depreciation slows greatly. (That has been shown in many motions for relief from federally insured financial institutions and motions to value secured claims of such institutions.) Retention of a vehicle based on the value thereof is often a financially advantageous endeavor for both the debtor and creditor.

Rather than denying the Motion based upon these unsupported allegations the court allows Movant to have an evidentiary hearing as provided below.

Request for Waiver of Fourteen-Day Stay of Enforcement

The Supreme Court has adopted Federal Rule of Bankruptcy Procedure 4001(a)(3), which imposes a fourteen-day stay of enforcement for an order for relief from the stay, unless the court orders otherwise. Movant slips into the prayer that this court, for no particular grounds stated, grant additional relief by terminating the stay imposed by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

If this were the first, second, or even tenth time the court had addressed this defective pleading practice of Movant, the court would be inclined to just deny the relief slipped into the prayer and provide an explanation as to the defective pleading practice. But Movant continuously does this, leaving the court to believe that either: (1) Movant has no intention of complying with the law and Rules, believing it can exempt itself therefrom, or (2) Movant has a special knowledge and expertise as to why its pleading practice is proper and can education the court as to such.

In light of the court affording Movant the opportunity to prosecute this Motion through an evidentiary hearing, the court will afford such for this issue as well.

The evidentiary hearing will be conducted at 8:30 a.m. on August 23, 2018 (the court expediting the hearing in light of this being a motion for relief from the automatic stay).

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

B. On or before noon on August 20, 2018, Wells Fargo Bank, N.A. ("Movant") shall lodge with the court direct testimony statements and documentary evidence in support of the Motion. Additionally, Movant shall provide a points and authorities addressing the pleading issues concerning the additional requested relief for the waiver of the Federal Rule of Bankruptcy Procedure 4001(a)(3) stay, as well as evidence to be presented in support of any grounds asserted.

C. The Default of Debtor having been entered, no opposition having been filed, no responsive pleadings are to be lodged by Debtor with the court.

The court has made the provisions of Federal Rule of Civil Procedure 41(a)(1)(A) and Federal Rule of Bankruptcy Procedure 7041 and 9014 not applicable in this Contested Matter, allowing dismissal only by order of 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 Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("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 an evidentiary hearing on the Motion for Relief will be conducted at 8:30 a.m. on **August 23, 2018** (the court expediting the hearing in light of this being a motion for relief from the stay).

A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1, with all witness testimony to be presented in person (no telephonic testimony permitted) at the evidentiary hearing.

B. On or before noon on **August 20, 2018**, Wells Fargo Bank, N.A. ("Movant") shall lodge with the court direct testimony statements and documentary evidence in support of the Motion. Additionally, Movant shall provide a points and authorities addressing the pleading issues concerning the additional requested relief for the waiver of the Federal Rule of Bankruptcy Procedure4001(a)(3) stay, as well as evidence to be presented in support of any grounds asserted.

C. The Default of Debtor having been entered, no opposition having been filed, no responsive pleadings are to be lodged by Debtor with the court.

The court has, by separate order, made the provisions of Federal Rule of Civil Procedure 41(a)(1)(A) and Federal Rule of Bankruptcy Procedure 7041 and 9014 not applicable in this Contested Matter, allowing dismissal only by order of the court.

3. **18-90149-E-11** **SOUZA PROPERTIES, INC.** **CONTINUED MOTION FOR RELIEF**
FWP-1 **David Johnston** **FROM AUTOMATIC STAY**
6-7-18 [42]

JUDITH ANSHIN VS.

Final Ruling: No appearance at the August 2, 2018 hearing is required.

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on June 7, 2018. By the court's calculation, 14 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) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). Debtor, Creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Objection and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Objection. The defaults of the non-responding parties in interest are entered.

The hearing on the Motion for Relief from the Automatic Stay is removed from calendar, the court having entered an order thereon pursuant to the stipulation of the parties.

Judith Anshin as Trustee of the Judith Anshin Family Trust; Robert H. Baker and Lynette R. Raisbeck as Trustees of the RHB and LRR Trust dated July 7, 2011; Alan E. Bartholemy, Jr. as Trustee of the amended Alan E. Bartholemy, Jr. Living Trust dated April 25, 1996; Polycomp Trust Company as Custodian FBO Christopher T. Cleland Roth IRA Acct. No. 044251; Carol Ann Cleland; IRA Services Trust Company as Custodian FBO David T. Christensen IRA Acct. No. 030016; Charles E. Dorn and Mary G. Dorn as Trustees of the Dorn Family Trust; and Jack W. Klassen and Myrna L. Klassen as Trustees under the Klassen Trust Agreement dated December 5, 1997 ("Movant") seek relief from the automatic stay with respect to Souza Properties, Inc.'s ("Debtor") real property commonly known as the northeast corner of North Golden State Boulevard and West Canal Drive in Turlock, California, containing Debtor in Possession's business, a warehouse, and five houses ("Property"). Movant has provided the Declaration of William Watson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Watson Declaration states that there are two notes held by Movant on the Property. For the first note, there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of $6,343.47 in post-petition payments past due. For the second note, there are also three post-petition defaults totaling $30,234.39.

The Declaration also provides evidence that there are eleven pre-petition payments in default on each note, with a pre-petition arrearage of $18,676.13 on the first note and $110,859.43 on the second note.

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 $1,598,256.15 secured by Movant's first and second deeds of trust, as stated in the Watson Declaration and Schedule D. The value of the Property is determined to be $1,800,000.00, as stated in Schedules A and D. The Watson Declaration presents testimony that there are various problems with the Property that may lower its value—such as structural deficiencies, electrical wiring, and plumbing—but the Declaration does not present any testimony about what the value is currently or about how much the value listed on Schedule A should be reduced. *See* Dckt. 44 at 4–5.

Aside from missed payments, the Watson Declaration also states that Debtor in Possession has not achieved certain benchmarks in this case (related to sales of real property) that had been negotiated as conditions for post-petition use of cash collateral. *Id.* at 5.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][I] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.*

For this Motion, Movant has not provided any evidence as to the Property being a value other than as stated on Schedule A. Instead, Movant has argued that prospective purchasers value the Property at less than $1.8 million and there are necessary repairs that reduce the value. Despite those allegations, Movant has not presented the court with anything more than allegations; that is insufficient.

JUNE 21, 2018 HEARING

At the hearing, the parties requested that the court set a briefing schedule and final hearing. Dckt. 51. The court set a final hearing for 2:00 p.m. on July 12, 2018, and ordered supplemental pleadings to be filed by June 25, 2018, with opposition due by July 2, 2018, and any replies due by July 6, 2018. Dckt. 54.

SUPPLEMENTAL DECLARATION OF WILLIAM WATSON

William Watson, as President of The Money Brokers, Inc., and agent for Movant, filed a Supplemental Declaration on June 22, 2018. Dckt. 52. Mr. Watson reviews the facts leading to this Motion including how he negotiated a loan with Debtor's principal, Lawrence Souza. He testifies that he negotiated on behalf of Movant for a partial release of Movant's lien to permit a pre-petition sale of property to cure part of the obligation owed to Movant. He testifies that Movant agreed to Debtor using cash collateral if Debtor filed timely monthly operating reports, provided additional information about income and expenses upon request, and if Debtor and Movant agreed about benchmarks by April 30, 2018.

Mr. Watson states that Debtor has not suggested any benchmarks for performance to Movant, and accordingly, Movant withdrew consent for the use of cash collateral on May 7, 2018.

SUPPLEMENTAL DECLARATION OF LAWRENCE SOUZA

Lawrence Souza filed a Supplemental Declaration on July 2, 2018. Dckt. 55. Mr. Souza testifies that there were two breaches of lease in the related Chapter 11 case of Souza Propane, Inc., leading to loss of $11,000.00 in monthly income. Mr. Souza then describes entering into a contract to sell property in August 2017 while making forebearance payments to Movant. Mr. Souza states that all conditions of sale had been met but that the purchasing party breached the contract.

Mr. Souza states that a second offer was received from another buyer for $975,000, which Debtor's broker countered with $1,200,000. Debtor states that currently, there are two proposed sales with listing prices totaling $2,500,000.

Mr. Souza proposes a series of benchmarks:

A. Bona fide sale of a portion of the real property to be in escrow by September 30, 2018;

B. Bona fide sale of remaining portion of the real property to be in escrow by October 31, 2018;

C. Close of escrow of a portion of the real property by December 31, 2018; and

D. Close of escrow of the remaining portion of the real property by January 31, 2019.

MOVANT'S REPLY

Movant filed a Reply on July 6, 2018. Dckt. 57. Movant maintains that relief is warranted because the Property value is overestimated, because this case is not being prosecuted, and because Movant is not willing to consent to a partial sale of property unless paid fully. Nevertheless, Movant states that if the court agrees with Debtor's proposed benchmarks, then Movant requests that Debtor have only until September 30, 2018, to have in escrow a bona fide sale of the Property that will pay Movant in full and includes a significant earnest money deposit and that if such a sale is in escrow by September 30, 2018, that Debtor have only until November 30, 2018, to close escrow on the sale.

JULY 11, 2018 HEARING

At the hearing, the parties reported that they have settled this contested matter, agreeing to benchmark dates and terms for Debtor in Possession to be in contract, to open escrow (September 30, 2018, with $50,000 deposit and proof of funds or loan commitment), and to consummate a sale (by January 2, 2019) of the Property. The parties requested a continuance of the hearing to document the settlement and propose an order with the court. In the event of a default, the parties agreed that Movant may obtain an order documenting relief from the automatic stay by *ex parte* application. Dckt. 70.

The court continued the hearing to 10:00 a.m. on August 2, 2018.

PROPOSED STIPULATION

On July 25, 2018, the parties filed the discussed Stipulation. Dckt. 73. The Stipulation requires Debtor in Possession to have a sale (or sales) in escrow by September 30, 2018, that will pay Movant's claim fully and that will include a minimum $50,000 deposit and proof that the buyer has sufficient funds to close the sale.

Second, if a sale is in place on time, then Debtor in Possession has have until January 2, 2019, to close escrow and pay Movant in full. Failure to meet either deadline will result in Movant having full and immediate relief from the automatic stay, which Movant may seek with the court by *ex parte* application. If Movant files such an *ex parte* application, Debtor in Possession shall have ten calendar days from the date of service to respond, with the only issue being whether a default under the Stipulation occurred.

If Debtor in Possession responds timely, then the matter may be set for hearing, but if no response is filed, then Movant may receive relief by its *ex parte* application.

The parties agree that the August 2, 2018 hearing be "vacated."

On July 26, 2018, the court entered an order approving of the proposed stipulation, including removing this matter from calendar.

4. **18-90450-E-7** **RAKIYA SMITH** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
APN-1 **Kathleen Crist** **7-5-18 [10]**

TOYOTA MOTOR CREDIT CORPORATION VS.

Final Ruling: No appearance at the August 2, 2018 hearing is required.

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

Sufficient 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 June 5, 2018. By the court's calculation, 58 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is set for final oral argument at 10:00 a.m. on September 6, 2018.

Toyota Motor Credit Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Lexus ES350, VIN ending in 3314 ("Vehicle"). The moving party has provided the Declaration of Rahnae Spooner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Rakiya Smith ("Debtor").

The Rahnae Spooner Declaration provides testimony that Debtor has not made one post-petition payments, with a total of $568.23 in post-petition payments past due. The Declaration also provides evidence that there are three pre-petition payments in default, with a pre-petition arrearage of $1,550.50. Movant directs the court to the Statement of Intention filed by Debtor on June 18, 2018, Debtor intends to surrender the Vehicle to Movant. Dckt. 1.

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 $30,602.33, as stated in the Rahnae Spooner Declaration, while the value of the Vehicle is determined to be $20,000.00, as stated in Schedules B and D filed by Debtor.

DISCUSSION

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (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 that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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 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.

Denial of Prayer Request for Waiver of 14-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3), as enacted by the United States Supreme Court, stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not stated with particularity the grounds and evidence in support thereof to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Request for Additional Relief Making This Order Effective in the Event of Conversion of the Bankruptcy Case

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.
>
> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Toyota Motor Credit Corporation and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Toyota Motor Credit Corporation and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

However, Movant and other clients of Counsel continue to repeatedly request such relief notwithstanding the court having addressed this issue multiple times for all of them. This could be that Movant either: (1) intentionally seeks to request relief for which no proper legal basis exists, or (2) has a better legal understanding but has refrained from presenting that legal basis to the court.

Therefore, to afford Movant the opportunity to enlighten the court if it is the latter alternative or if there is some other basis, the court sets this matter for further briefing and final oral argument.

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 Toyota Motor Credit Corporation("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 hearing is continued to 10:00 a.m. on September 6, 2018, for final oral argument.
>
> **IT IS FURTHER ORDERED** that on or before noon on August 29, 2018, Movant shall file a supplemental brief providing the legal authority for the additional relief requested in the prayer of the Motion as:
>
> > "3. That the Order hereon be binding and effective despite any conversion of this bankruptcy case to a case under any other chapter of the Bankruptcy Code;"
>
> why such relief is necessary and the legal effect of such an order, the grounds stated with particularity in the Motion upon which relief is stated to be based, and the evidence filed in support of such requested relief in the prayer of the Motion. The filing of other additional pleadings is not authorized.
>
> **IT IS FURTHER ORDERED** that Austin Nagel, Esq., counsel for Movant, shall appear in person at the continued hearing—No Telephonic Appearance Permitted. The court does not require a representative of Movant to attend this hearing.

5. **18-90376-E-12 SW-1** **CARLOS/BERNADETTE ESTACIO** **David Jenkins** **MOTION FOR RELIEF FROM AUTOMATIC STAY** **7-16-18 [28]**

ALLY FINANCIAL INC. VS.

Tentative Ruling: 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)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, and Office of the United States Trustee on July 16, 2018. By the court's calculation, 17 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). Debtor, creditors, the Chapter 12 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 offer 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. At the hearing, ----------.

The Motion for Relief from the Automatic Stay is granted.

Ally Financial Inc. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Jeep Cherokee, VIN ending in 60888 ("Vehicle"). The moving party has provided the Declaration of Pauline Batcha to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Carlos Estacio III and Bernadette Estacio ("Debtor").

The Pauline Batcha Declaration provides testimony that Debtor has not made 1 post-petition payments, with a total of $368.31 in post-petition payments past due. Dckt. 30. The Declaration also provides evidence that there are 14 pre-petition payments in default, with a pre-petition arrearage of $5,170.68. Dckt. 32.

NADA Valuation Report Provided

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).

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 $19,999.70, as stated in the Pauline Batcha Declaration, while the value of the Vehicle is determined to be $17,825.00, as stated in the NADA Valuation Report.

DISCUSSION

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). 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. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (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 that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or Jan Johnson ("the Chapter 12 Trustee"), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 12 case.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for generic reasons, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no specific, urgent grounds for such relief argued, the court will not grant additional relief.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 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 Ally Financial 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 a 2016 Jeep Cherokee, VIN ending in 60888 ("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-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.
>
> No other or additional relief is granted.