

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

August 27, 2013 at 1:30 p.m.

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1. [13-27501](#)-E-13 WILLIAM/MYKELL MORGAN MOTION FOR RELIEF FROM
WFH-2 Eric Schwab AUTOMATIC STAY
7-30-13 [[28](#)]
SIERRA CENTRAL CREDIT UNION
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, all creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Relief from 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 Automatic Stay is granted. No appearance required.

Movant Sierra Central Credit Union ("Movant") seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), alleging that cause exists to allow it to continue litigation in Sutter County Superior Court. Movant states that in 2008, it entered into a stipulation for judgment in a civil action that was pending in Sutter County. Movant seeks relief from stay for the limited purpose of pursuing a motion in Sutter County to correct an error that occurred with the judgment. The stipulation provided that Movant would forebear enforcement of its judgment for one year except the Debtors agreed that Movant could record an abstract of judgment, which it did in October 2008. After the forbearance agreement expired, Movant obtained a writ of execution from the Sutter court. Movant discovered that the judge had struck out the words "AND ADJUDGED" on the order. Movant had proceeded as if the order was the final judgment. Movant states it filed a motion asking the court to enter judgment *nunc pro tunc* effective September 22, 2008, as the parties had agreed

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to and intended but for the mistake, inadvertence and excusable neglect of Movant's litigation counsel. The motion is set for September 23, 2013, but the Debtor's bankruptcy filing has stayed that proceeding.

Movant requests that this court grant relief from the stay for the limited purpose of pursuing the hearing and determining whether the Sutter Superior Court will allow Movant to fix the error on the judgment.

No party has filed opposition to the motion.

DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The basis for such relief when there is pending litigation in another forum is predicated on factors of judicial economy including whether the suit involves multiple parties or is ready for trial. See *Packerland Packing Co., Inc. v. Griffith Brokerage Co. (In re S. Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Santa Clara County Fair Ass'n, Inc. v. Sanders (In re Santa Clara County Fair Ass'n, Inc.)*, 180 B.R. 564 (9th Cir. BAP 1995); *Truebro, Inc. v. Plumberex Specialty Products, Inc. (In re Plumberex Specialty Products, Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

The court finds that the limited nature of the civil court proceeding warrants relief from stay for cause. Movant seeks to correct an error in the judgment. The court will grant relief from the automatic stay to pursue the hearing on the motion asking the court to enter judgment *nunc pro tunc*, based on the mistake, inadvertence and excusable neglect of Movant's litigation counsel.

The court shall issue a minute order modifying the automatic stay as it applies to the Debtors, and each of them, to allow Movant to continue the Sutter Superior Court civil case.

The automatic stay is not modified with respect to the enforcement of the judgment against the Debtors, Trustee, or property of the bankruptcy estate. Any judgment obtained shall be brought back to this court for the proper treatment of any claims under the Bankruptcy Code.

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 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 modified to allow Sierra Central Credit Union, its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors to continue the Sutter County Superior Court case regarding the motion asking the court to enter judgment *nunc pro tunc*.

IT IS FURTHER ORDERED that the automatic stay is not modified with respect to the enforcement of the judgment against the Debtors, Trustee, or property of the bankruptcy estate. Any judgment obtained shall be brought back to this court for the proper treatment of any claims under the Bankruptcy Code.

No other or additional relief is granted.

2. 13-27845-E-13 TIMOTHY/MICHELLE ROSEN MOTION FOR RELIEF FROM
TJS-1 William Rubendall AUTOMATIC STAY
7-26-13 [[26](#)]
CIG FINANCIAL, LLC 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, all creditors, parties requesting special notice, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 32 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 required.

CIG Financial, LLC seeks relief from the automatic stay with respect to an asset identified as a 2013 Ford Fiesta, VIN ending in 1055. The moving party has provided the Declaration of Janett Lezama to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Lezama Declaration states that the Debtor has not made two (2) post-petition payments, with a total of \$822.06 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 \$16,888.61, as stated in the Lezama Declaration.

The Lezama Declaration also seeks to introduce evidence establishing the value of the asset is \$13,700.00. 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 Janett Lezama 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 Chapter 13 Trustee filed a statement of non-opposition on July 29, 2013.

Counsel for Debtors also filed a declaration in response to the motion, stating they do not object to Movant seeking relief from the automatic stay. Dckt. 41.

DISCUSSION

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). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor 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 to the court, and no opposition or showing having been made by the Debtor or the Trustee, the court determines that there is no equity in the asset for either the Debtor or the Estate, and the asset is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue a minute order terminating and vacating the automatic stay to allow CIG Financial, LLC, 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.

Because the moving party has established that there is no equity in the asset 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 is not awarded attorneys' fees for all matters relating to this Motion.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), as Debtors are unable to show that the collateral is properly insured, and this part of the requested relief is 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 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 CIG Financial, LLC, 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 2013 Ford Fiesta, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

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

No other or additional relief is granted.

3. [13-30361](#)-E-13 ARNEL FRANCISCO
ENB-1 Pro Se

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

CITIBANK, N.A. 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 (*pro se*), Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

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. 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:

Citibank, N.A., as Trustee for Certificateholders of Structured Asset Mortgage Investments II Trust 2007-AR5, Mortgage Pass-Through Certificates, Series 2007-AR5 ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 128 Southport Court, Vallejo, California.

However, the pleading title motion is 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") in which the court and Plaintiff 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 Defendant. 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.

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The court has also observed that the more complex the Motions 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 other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

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.

4. 13-26582-E-13 VENIAMIN FURSOV AND ALLA MOTION FOR RELIEF FROM
APN-1 FURSOVA-TIMOFEYEVA AUTOMATIC STAY
Peter Macaluso 7-26-13 [24]
TOYOTA LEASE TRUST VS.

Local Rule 9014-1(f)(1) Motion - 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, all creditors, parties requesting special notice, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion for Relief from the Automatic Stay. 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:

Toyota Lease Trust seeks relief from the automatic stay with respect to an asset identified as a 2008 Lexus ES350, VIN ending in 9436. FN.1. The moving party has provided the Declaration of Mary Ibarra to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

FN.1. The court is baffled by the Debtors' attorney's inclusion of a heading entitled "Points & Authorities" in his motion. Local Bankruptcy Rule 9004-1(a) and the Revised Guidelines for Preparation of Documents ¶ (3)(a), which require that the motion, points and authorities, each declaration, and the exhibits be filed as separate electronic documents. The court notes the subheading "Points and Authorities In Support of Motion for Relief" in the motion is followed by one brief paragraph referencing 11 U.S.C. §§ 362(d)(1) and (d)(2). Counsel would be wise to consider the Local Rules more carefully, as self designating the pleading as a points and authorities is sufficient to have it denied under the Local Rules.

The Ibarra Declaration states that under and pursuant to the Chapter 13 plan put forth by Debtor, Movant is to be paid directly, pursuant to the terms of the prevailing contractual agreement. The monthly payments are in the sum of \$598.09 per month. The Ibarra Declaration states Debtor has defaulted

under the contract because the lease agreement reached maturity May 2, 2013, and Debtor remains in possession of the vehicle.

The Chapter 13 Trustee filed a statement of non-opposition on August 12, 2013.

DEBTOR'S OPPOSITION

Debtor argues that a review of the contract reveals that the debtor had a right to purchase this vehicle at the end of the contract. As such, Debtor has included the claim in both section 3.02 as "disguised PMSI" and as a class 2 claim of \$14,614.66, the payoff balance.

Debtor contends that Movant received proper notice of the filing, the plan and confirmation. No objection was made to the plan and it was confirmed on August 3, 2013. Dckt. 32. The Debtors assert they are current under the terms of the confirmed plan.

DISCUSSION

Because of the poor print quality of the Lease Agreement (both filed as Exhibit A to this Motion and to the Proof of Claim), the court is unable to read the terms of the contract. As the moving party carries the burden of providing evidence sufficient to warrant relief the court denies the motion without prejudice. The court will not guess or blindly adopt the contention of one party or the other.

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 Motion is denied without prejudice.

5. [11-23098-E-13](#) NORBERTO/MONICA BALINADO
TRM-41 John Tosney

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
7-30-13 [[76](#)]

THE BAY CLUB VACATION OWNERS
ASSOCIATION, 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, all creditors, parties requesting special notice, and Office of the United States Trustee on July 30, 2013. 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 required.

The Bay Club Vacation Owners Association, Inc., seeks relief from the automatic stay with respect to certain timeshare real property commonly known as 69-450 Waikoloa Beach Drive, Waikoloa, Hawaii. The moving party has provided the Declaration of Leanett Poling to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

Movant seeks relief pursuant to 11 U.S.C. § 362(d)(1) as it has the right to file and enforce a lien for unpaid assessments pursuant to the Bay Club Vacation Ownership Program Deed and Special Power of Attorney with Encumbrances and the Bay Club Vacation Ownership Program Declaration of Covenants, Conditions and Restrictions.

Movant asserts that Debtors Amended Chapter 13 Plan does not address said property. Movant argues that Debtors are past due for \$4,187.50, in pre-petition attorney's fees, maintenance and assessments for 2010, 2011, 2012, and 2013. Movant argues that this is cause pursuant to 11 U.S.C. § 362(d)(1).

However, no Relief from Stay Cover Sheet has been filed by Movant as required by Local Bankruptcy Rule 4001-1(a)(3). Failure to comply with local rules is grounds for denial of the motion. Local Bankr. R. 1001-1(g), 9014-1(1). However, based on the amended plan filed by the Debtors, Dckt. 85, the court waives the defect and considers the merits of the Motion.

Amended Chapter 13 Plan

After the present Motion was served, the Debtors filed a Second Modified Plan (Dckt. 85). Under the Second Modified Plan, the Debtors list the claim of Bay Club Vacation Owners Association, Inc. as a Class 3 Claim. For Class 3 Claims, the Debtors are surrendering the collateral that secures the claim and the automatic stay is modified by confirmation of the plan. The Debtors having now affirmatively addressed this claim, the court considers the merits.

The court waives the failure to provide the Relief From Stay Information Sheet, though Movant and counsel should not rely on there being such waivers in the future.

Review of Motion for Relief From Stay

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). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Cause for this Motion is asserted to be (as stated with particularity pursuant to Fed. R. Bank. P. 9013):

- A. The Motion relates to Movant's interest in timeshare property commonly known as 69-450 Waikoloa Beach Drive, Waikoloa, Hawaii.
- B. Movant has the right to file and enforce a lien for unpaid assessment owed by Debtors.
- C. The Chapter 13 Plan makes no provision for the obligation owed to Movant.
- D. The Movant has a claim in the amount of \$4,187.50, which is comprised of the following amounts,
 - 1. \$765.00 for pre-petition attorneys' fees
 - 2. 2010 maintenance and assessments of \$50.00.
 - 3. 2011 maintenance and assessments of \$1,318.64.
 - 4. 2012 maintenance and assessments of 409.04.
 - 5. 2013 maintenance and assessments of \$1,644.82.

E. Cause exists to terminate the stay because the Debtors continue to use the property without paying the required maintenance and assessments.

No proof of claim has been filed by Movant. However, the declaration of Leanette Poling has been filed that she, as an employee of Movant, testifies as to the existence of the \$4,187.50 obligation owed by Debtors.

With just the Motion, cause may well not be shown to exist to terminate the stay. Movant demonstrates that the non-payment of these expenses has not left it "not adequate protected" or were "cause" for Movant to exercise its rights in the past. Movant has carried multiple years of defaults without the need for taking any action.

While the court would be warranted in denying the Motion on the face of those pleadings, the court also consider's the Debtors' stated intention to surrender its interest in this Property pursuant to the latest proposed modified plan in this case. Dckt. 85. FN.1.

FN.1. The Debtors did not list this timeshare interest on either Schedule A or B filed in this case. Dckt. 1. Though the Debtors had gross income of \$12,125.24 a month when this case was filed (Schedule I, *Id.*), after necessary expenses (which did not include a the timeshare maintenance and assessments), the Debtors had only \$2,021.00 in Monthly Net Income. Schedule J, *Id.*

The Debtors confirmed a First Amended Chapter 13 Plan in this case, which provided for a monthly plan payment of \$2,021.00. Dckt. 36. This allowed for a 32% dividend to creditors holding general unsecured claims and "lien stripping" the Travis Credit Union deed of trust from the Debtors' home. No provision is made in the Plan for the payment of any amounts relating to the timeshare interest.

In seeking confirmation of the First Amended Chapter 13 Plan, the Debtors reaffirmed under penalty of perjury that the income and expense information on Schedules I and J were correct (which were necessary to properly compute their projected disposable income in this case). Joint Declaration, Dckt. 39.

On December 7, 2011 (10 months after the bankruptcy case was filed), the Debtor filed Amended Schedules I and J. Dckt. 65. These corrected error in the original schedules and restated the Debtors' income and expenses as of the commence of the case. The correction to Schedule A was to state that the Debtors' plan payment would be \$1,521.00 for the first month, due to a \$500.00 initial payment for their son's braces. Schedule J is amended to provide for an additional monthly expense of \$125.00 for their son's braced. This reduced the Average Monthly Income on Schedule J to \$1,896.00. No expenses are show for a timeshare.

On December 7, 2011 the Debtors Filed a Modified Plan to provide for a series of tiered plan payments which took into account the monthly payment for the Debtors' son's braces. The monthly payments range from \$2,021.00 to \$1,521.00 a month. Modified Plan, Dckt. 69. The plan makes no provision for the timeshare property or any obligation relating to the timeshare property. In seeking confirmation of the Modified Plan, the Debtors again testified under penalty of perjury that the income and expense information stated in Schedules

I and J (though they do not designate which Schedule they are referring to) are accurate. Joint Declaration, Dckt. 68. The Modified Plan was confirmed by order filed on February 9, 2012. Dckt. 73.

After the filing of the present Motion for relief from the automatic stay, the Debtors have filed a Second Modified Plan which provides for the abandonment of unidentified timeshare property to Movant by providing for Movant's Claim under Class 3 of the Second Modified Plan. Dckt. 85. No amended Schedules A or B have been filed and no corrected Schedule J was filed disclosing the ongoing maintenance costs and assessments for such timeshare property. The Second Modified Plan provides for a 33.25% dividend to creditors holding general unsecured claims.

On its face, the non-disclosure of the existence of this asset and the expenses for this asset raises significant issues for these Debtors. It does not appear that the testimony previously provided disclosed that the Debtors were retaining and paying for a vacation timeshare.

The court leaves it to creditors, the Chapter 13 Trustee, and the U.S. Trustee to determine what, if any action, is appropriate with respect to this undisclosed asset and expenses. It may be that no action is appropriate, and that this was an "honest error" which occurred multiple times. At the other extreme, this conduct may warrant the dismissal of the present bankruptcy case, quite possibly a dismissal with prejudice.

Additionally, in connection with the September 17, 2013 scheduled hearing on the motion for confirmation of the Second Modified Plan, the Debtors are expected to file supplemental pleadings disclosing all of expenses paid (including travel expenses) relating to the timeshare in Hawaii and how, who, and when it was used during this Chapter 13 Case.

Further, the creditors, Chapter 13 Trustee, and U.S. Trustee can determine if this timeshare has or had a value in excess of the \$4,187.50 owed to Movant. If so, then the Chapter 13 Debtors will have to address the additional issue of squandering a valuable asset of the estate by now surrendering it. The court could also envision this as a situation where the property is being "surrendered" so that a friend, family member, or straw buyer acquires it from Movant. Such may be a contrived "surrender" by the Debtors, Movant and the third-party to defraud the court and creditors. In such a situation, that would be relevant to any action taken by the Chapter 13 Trustee, and the U.S. Trustee with respect to the Debtors, and may result in action against Movant and the third-party.

The Debtors having confirmed that they will not make further payments for and now want to surrender this timeshare to allow the creditor to exercise its rights to take the asset from the estate, sufficient cause exists to terminate the automatic stay. The court, in granting the motion, does not make a determination that there is no value for the estate, that surrender of the property is proper, or that by doing so (and failing to administer this asset) the Chapter 13 Debtors are acting properly or fulfilling their fiduciary duties to the bankruptcy estate. Further, the granting of the Motion does not absolve the Debtors of failing to disclose the existence of this asset or the expenses relating to this asset.

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

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 that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow The Bay Club Vacation Owners Association, Inc., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of certain timeshare real property commonly known as 69-450 Waikoloa Beach Drive, Waikoloa, Hawaii.

No other or additional relief is granted.