

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

September 10, 2020 at 10:00 a.m.

1. [20-90349-E-11](#) **R. MILLENNIUM TRANSPORT,** **CONTINUED MOTION FOR RELIEF**
[JWC-1](#) **INC.** **FROM AUTOMATIC STAY AND/OR**
David Johnston **MOTION FOR ADEQUATE PROTECTION**
7-8-20 [49]

BMO HARRIS BANK, N. A. VS.

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 11 Trustee, and Office of the United States Trustee on July 6, 2020. By the court's calculation, 31 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 11 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.

The Motion for Relief from the Automatic Stay is ~~XXXXX~~.

Sumitomo Mitsui Finance and Leasing Company, Ltd. ("Movant") seeks relief from the automatic stay with respect to assets identified as:

- a. Two 2016 Western Star Model 5700 XE SLP truck tractors, VIN ending in 9069 and VIN ending in 1606,
- b. Two 2018 Great Dane SS refrigerated trailer, VIN ending in 5802 and VIN ending in 5803 (collectively "Vehicles").

The moving party has provided the Declaration of Miki Sashimura to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by R. Millennium Transport, Inc. ("Debtor").

Movant provides evidence that there are ten (10) pre-petition payments in default, with a pre-petition arrearage of \$103,533.90. Declaration, Dckt. 42. Declarant Sashimura also testifies that despite the requirement for proof of insurance by the Debtor, there has been no such proof and without such documentable proof of coverage, Movant can only assume that there is no insurance as required by the Agreement. *Id.* at ¶ d.

DISCUSSION

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 \$246,240.91 (Declaration, Dckt. 42), while the value of the Vehicles is determined to be \$210,000.00 as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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 JE Livestock, Inc. v. Wells Fargo Bank, N.A. (In re JE 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 JE 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 relief.

11 U.S.C. § 362(d)(2)

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).

STIPULATION FOR ADEQUATE PROTECTION ^{FN. 1}

FN. 1. The Stipulation purports to be between Movant and R. Millennium Transport, just as the “Debtor.” The court presumes that it is intended to also include the Debtor in Possession as the fiduciary of the bankruptcy estate (in light of “debtor” being a statutorily defined term to mean the pre-petition entity that filed bankruptcy).

Movant and the Debtor in Possession have filed a Stipulation for Adequate Protection. Dckt. 67. The terms of the Stipulation are:

- a. Beginning on or before July 25, 2020, and continuing by the 25th day of each month thereafter, the Debtor in Possession and Debtor shall make monthly adequate protection payments of \$4,151.67, which shall continue until confirmation of Debtor's chapter 11 plan.
- b. In the event of a default, with said terms stated in the Stipulation, written notice of the default will be given to the Debtor and Debtor in Possession, and counsel for the Debtor in Possession by First Class Mail. The Debtor and Debtor in Possession shall have five days after transmission of the notice of default to cure the default.
- c. If the Debtor or Debtor in Possession do not timely cure the default, Movant will be entitled to *ex parte* relief from the stay and the waiving of the 14-day stay of enforcement arising under Federal Rule of Bankruptcy Procedure 4001(a)(3).

The court grants relief pursuant to the Adequate Protection Stipulation.

August 20, 2020 Stipulation

On August 20, 2020, the parties filed a Stipulation requesting the court continue the August 27, 2020 hearing to September 10, 2020 at 10:00 a.m. on the grounds that a good faith dispute has arisen as to whether all the requisite payments have been made. Dckt. 83. Negotiations have been affected by the recent hurricane in Cedar Rapids, Iowa (Movant's headquarters) and as such parties require additional time. *Id.*

September 10, 2020 Hearing

At the hearing, **xxxxxxx**

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 Sumitomo Mitsui Finance and Leasing Company, Ltd. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is **xxxxxxx**.

FINAL RULINGS

2. [20-90432-E-7](#) SHAWN/CARLEIGH KOUNTZ MOTION FOR RELIEF FROM
[MMJ-1](#) Pro Se AUTOMATIC STAY
7-28-20 [15]

EXETER FINANCE, LLC VS.

Final Ruling: No appearance at the September 10, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on July 28, 2020. By the court’s calculation, 44 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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). 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 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.

Exeter Finance, LLC (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2016 Dodge Journey SXT Sport Utility 4D, VIN ending in 4102 (“Vehicle”). The moving party has provided the Declaration of Nancy Wafer to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Shawn Matthew Kountz and Carleigh Marie Kountz (“Debtor”).

Movant argues Debtor has not made 8.350 post-petition payments, with a total of \$3,845.56 in post-petition payments past due. Declaration, Dckt. 17. Movant also provides evidence that there are 1.00 pre-petition payments in default, with a pre-petition arrearage of \$460.54. *Id.*

Movant has also provided a copy of the Kelley Blue Book 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).

DISCUSSION

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 \$16,948.34 (Declaration, Dckt. 17). Debtor values the Vehicle at \$6,281.00, as stated in Schedules A/B and D. Dckt. 1. The KBB Report provided by Movant values the Vehicle at \$9,857.00. Exhibit C, Dckt. 19.

Debtor's Statement of Intention provides for the surrender of the Vehicle. Dckt. 1.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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.

11 U.S.C. § 362(d)(2)

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). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the 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.

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 that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has 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 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 Exeter Finance, LLC (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Dodge Journey SXT Sport Utility 4D, VIN ending in 4102 (“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 waived for cause.

No other or additional relief is granted.

NISSAN MOTOR ACCEPTANCE
CORPORATION VS.

Final Ruling: No appearance at the September 10, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor’s Attorney, Chapter 7 Trustee, and Office of the United States Trustee on July 31, 2020. By the court’s calculation, 41 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). 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 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.

Nissan Motor Acceptance Corporation (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2016 Nissan Frontier, VIN ending in 3864 (“Vehicle”). The moving party has provided the Declaration of Dennis Pleasant to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Gabriel Barraza and Josephine Hurtado Barraza (“Debtor”).

Movant argues Debtor has not made two (2) post-petition payments, with a total of \$1,522.44 in post-petition payments past due. Declaration, Dckt. 18. Movant also provides evidence that there are three (3) pre-petition payments in default, with a pre-petition arrearage of \$2,269.40. *Id.*

DISCUSSION

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 \$27,690.90 (Declaration, Dckt. 18), while the value of the Vehicle is determined to be \$15,071.00, as stated in Schedules A/B and D filed by Debtor.

Debtor's Statement of Intention provides for the surrender of the Vehicle. Dckt. 1.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

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.

11 U.S.C. § 362(d)(2)

The motion also requests relief pursuant to 11 U.S.C. § 362(d)(2). Grounds for this type of relief include lack of equity and whether the property is necessary for an effective reorganization. However, Movant does not provide analysis or facts as to this request and as such the court denies relief under this subsection.

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.

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 Nissan Motor Acceptance 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 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 Nissan Frontier, VIN ending in 3864 ("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.

No other or additional relief is granted.