UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 20, 2018 at 1:30 p.m.

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1. **18-26342-E-13 JHW-1** | **RUDY/KAREN MENDEZ** | **Anh Nguyen** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **10-11-18 [7]**

FIRST INVESTORS FINANCIAL SERVICES VS.

Final Ruling: No appearance at the November 20, 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 13 Trustee, and Office of the United States Trustee on October 11, 2018. By the court's calculation, 40 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 granted.

First Investors Financial Services ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Acura ILX, VIN ending in 7104 ("Vehicle"). The moving party has provided the Declaration of Jennifer Wang to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Rudy Mendez and Karen Pancho Mendez ("Debtor").

The Wang Declaration provides testimony that Debtor not made a payment since March 2018, and has missed 7 pre-petition payments, with a pre-petition arrearage of $4,389.54 (inclusive of late charges).

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 $30,021.77, as stated in Proof of Claim, No. 1, while the value of the Vehicle is determined to be $14,800, as stated in Schedules B and D filed by Debtor.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 6, 2018. Dckt. 26. Trustee requests the court consider several matters which comprise general case overview, including that no plan payments have come due, and that the Vehicle was purchased less than 910 days prior to filing.

PRIOR FILINGS

This bankruptcy case is not Debtor's first time at the rodeo. Within the recent decade, Debtor has had the following filings:

Case Number	Date Filed	Date Dismissed/ Discharged	Case Summary
10-23141	2/10/2010	7/20/2015	Debtor made payments under the Confirmed Plan, including a dividend to unsecured claims amounting $142,806.67. Trustee's Final Report and Account, Case No. 10-23141, Dckt. 41. The case was completed March 4, 2015. *Id.*
17-25045	7/31/2017	10/4/2017	The court granted Debtor's *Ex Parte* Application for Dismissal of the case. Order, Case No. 17-25045, Dckt. 15.
18-25290	8/23/2018	9/10/2018	The case was dismissed for failure to timely file documents. Order, Case No. 18-25290, Dckt. 9.

Debtor's first case shows that Debtor understands what it takes to carry out a successful Chapter 13 case.

Notably, the current case was filed October 8, 2018. Debtor's case dismissed October 4, 2017 (17-25045) is just a few days shy of being pending within a year of the current case.

Debtor's case filed August 2018 (18-25290) was pending within the year prior to filing the current case. Therefore, the stay in this case terminated as to Debtor within 30 days of filing this case. 11 U.S.C. § 362(c)(3). Debtor has not filed a motion seeking to extend the stay.

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 pre-petition payments. 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.

Current Chapter 13 Case Issues

The proposed Chapter 13 Plan Debtor provides for payment of Movant's purchase money claim in Class 2. Dckt. 18 at 4. The Plan is proposed as a thirty-six month plan, with monthly plan payments of $1,589.00. However, Debtor proposes to pay only $14,800 of the reported $30,506.80 purchase money claim. The Trustee has filed an objection to confirmation, which highlights issues arising under the Plan now being proposed. Dckt. 29.

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 asserts as grounds for this relief that Movant has already repossessed the Vehicle as of October 8, 2018.

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 First Investors Financial 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 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 Acura ILX, VIN ending in 7104 ("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.

2. **18-25150-E-13** **RICHARD GREENE** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY**
APF-1 **Lucas Garcia**

ENTERPRISE GROUP VS.

10-26-18 [41]

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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on October 26, 2018. By the court's calculation, 25 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 denied without prejudice.

Enterprise Group ("Movant") seeks relief from the automatic stay to allow Enterprise Group v. Richard S. Greene et al, Case No. SCV 0041570 now pending in the Superior Court of the State of California, County of Placer ("State Court Litigation") to be concluded. Movant has provided the Declarations of Jan Haldemand (Dckt. 45) and Anthony Fritz (Dckt. 44) to support and introduce evidence to authenticate the documents upon which it bases the Motion.

The Motion, supported by the aforementioned Declarations, states that the State Court Litigation revolves around Debtor Sterling Greene's ("Debtor") interest in Enterprise, a California general partnership formed to build and manage a 19,000 square foot commercial building on land it owns located at 11800-11900 Enterprise Drive, Auburn, California ("Enterprise"). Debtor acquired an 8.94 percent partnership interest by making capital contributions to Enterprise totaling $36,522.14 toward Enterprise's purchase of the land and costs of constructing the building and related improvements at the Property.

However, the Partnership Agreement for Enterprise required partners provide contributions for ongoing ordinary expenses of Enterprise's property and as determined necessary by partners with a majority interest. Where ongoing contributions are not made by a partner, the Partnership Agreement provides a right to the other partners to buyout the non-paying partner.

In April 2018, a majority of partners determined a contribution was required for roofing repairs; Debtor's portion of the contribution was $4,262.18. After Debtor did not make the required contribution (and prerequisite notice having been provided as required under the Partnership Agreement), Enterprise commenced the State Court Litigation to determine Enterprise's right to interplead the funds ($36,522.14) and Debtor, and various lien claimant defendants' (including the IRS, the FTB, and Aronowitz Skidmore & Lyon holding a judgment lien) rights to the interpleaded funds.

Movant asserts that Debtor does not presently hold or own a partnership interest in Enterprise or an interest in the Property, but that he is entitled to the $36,522.14 buyout of his partnership interest provided under the Partnership Agreement.

The Motion states with particularity the following grounds as good cause under 11 U.S.C. § 362(d)(1) for relief:

1. The total value of Debtor's assets significantly exceed his total debts as of the Chapter 13 petition date; Debtor's partnership interest (the determination of which is the subject of the State Court Litigation) in Enterprise is not needed to fund any portion of Greene's Chapter 13 plan.

2. The claims and causes of action asserted in the State Court Litigation arise under California State law and can be most expeditiously resolved in the Placer County Superior Court forum.

3. The State Court Litigation will determine Debtor's partnership interest and each defendant's rights and claims to interpleaded funds.

4. The Interpleader Action is not stayed under 11 U.S.C. § 362(a).

TRUSTEE'S RESPONSE

Trustee filed a Response to the Motion on November 2, 2018, indicating nonopposition. Dckt. 51.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to the Motion on November 8, 2018. Dckt. 56. Debtor opposes the Motion based on the following:

1. Debtor seeks to fund the Chapter 13 case primarily from the sale of his partnership interest.

2. The property held by Enterprise is currently valued around $2.5 million. Debtor asserts there is currently a prospective buyer of the partnership interest seeking financing for $2000,000.

3. The State Court Litigation is has been commenced to take away Debtor's interest in the Enterprise partnership, and further characterizes the litigation as an attempt to repossess Enterprise's property.

4. The bankruptcy court is better suited to determined the value of Debtor's interest to the Estate and maximize proceeds to satisfy claims in this case.

5. Because the proposed Amended Plan will rely on the sale of the partnership interest sale, disposal of the asset through state court litigation would be improper as the asset is necessary for an effective reorganization.

6. Movant provided only 25 days' notice, which does not meet the requirements of the Local Bankruptcy Rules. Debtor argues the Motion should be treated as one under Local Bankruptcy Rule 9014-1(f)(2).

7. The proposed Amended Plan contemplates a 100 percent distribution, therefore providing adequate protection.

8. Debtor intends to file Amended Schedules to reflect that Debtor does not own an interest in the Enterprise property–Debtor holds an interest only in Enterprise.

9. Movant has not cited appropriate statutory grounds for relief from stay.

MOVANT'S REPLY

Movant filed a Reply to Debtor's Opposition on November 13, 2018. Dckt. 58. Movant asserts that Debtor has not provided any contrary evidence, and essentially argues that the State Court Litigation should not go forward because Debtor might otherwise be able to sell the interest (though no evidence has been provided supporting the proposed sale).

Movant argues further that Debtor cannot sell the partnership interest until the State Court Litigation is resolved, as Debtor currently only has a disputed interest. Movant believes Debtor could be subject to liability to a purchaser if he fails to disclose the litigation and the Superior Court later determines that the partnership interest is only worth $36,500. Further, because Greene is a general partner of Enterprise, his omissions and non-disclosures could expose Enterprise to liability as well.

Movant also notes that the Debtor is solvent, and therefore any plan does not necessarily depend on the sale of Debtor's partnership interest.

DISCUSSION

Insufficient Notice of Motion

As discussed, supra, Movant provided 25 days' notice. Local Bankruptcy Rule 9014-1(f)(1) requires 28 days' notice.

Debtor's Opposition was filed November 8, 2018, 12 days prior to the hearing on the Motion. Local Bankruptcy Rule 9014-1(f)(1) requires written opposition be filed 14 days prior to the hearing.

Given that both parties have responded to the Motion, and no prejudice appearing to any party in interest, the court waves the defects in notice.

Outstanding, Unaddressed Issues

Debtor argues that relief should not be granted as Debtor's proposed Amended Plan relies on the sale of Debtor's partnership interest, and the State Court Litigation is essentially an action for the repossession of Debtor's interest.

Movant disagrees with that characterization, essentially arguing that the interpleader action in the State Court Litigation is a determination of rights. Movant argues that because Debtor's rights have not been determined, Debtor cannot sell his partnership interest.

The elephant in the room is a simple (at least simply posed) question: was the provision permitting Enterprise's partners to buyout defaulting partners (those defaulting under the Partnership Agreement by not making required contributions) automatic, such that Debtor's partnership interest immediately changed in character? Or, did the provision merely trigger a right to buyout akin to the how a note might give a right to foreclosure which then must be elected? Further, is the unidentified provision an attempted "forfeiture" of Debtor's, now what would be the bankruptcy estate's, interest?

Neither party provides legal authority for their side in this question. Movant provides argument about interpleader actions generally. However, Movant not alleging that it already exercised its right to buyout Debtor's partnership interest, it appears that the State Court Litigation is primarily an avenue for Enterprise's partners (other than Debtor) to exercise a right to buyout Debtor's interest.

The court also notes that Congress has vested the federal courts with exclusive (subject to the federal judge choosing to abstain) jurisdiction over property of the bankruptcy estate–which includes determining what is property of the bankruptcy estate. One factor to be considered by this federal court is how much time, judicial resources, and expense the parties have invested in the state court proceeding.

The termination of the Debtor's partnership interest is stated by Movant to arise under Paragraph 3.3 of the Partnership Agreement, which states the partner's obligation to meet a call for investing necessary operating capital into the partnership. Then, when Debtor failed to meet the capital call, Movant summarizes the partnership agreement terms as providing:

> Paragraph 3.3 of the Partnership Agreement provides that if, within fifteen (15) calendar days after Enterprise gives written notice to a partner that the partner is delinquent in making an additional capital contribution required under the Partnership Agreement and such Partner fails to make the additional capital contribution, **Enterprise may purchase the interest of the defaulting partner** for an amount equal to the defaulting partner's **capital contribution** made to the partnership.

Motion, p. 4:19-23. As characterized by Movant, the purchase of the partnership interest is divorced from the actual value of that interest, but is merely the capital contribution the defaulting partner had made into the partnership. [Fn.1.]

FN.1. As a starting point, termination of a partner's interest and the acquisition of it is discussed in 9 Witkin, Summary of California Law, Partnership:

1. [§ 45] In General.

> (1) Statutory Development. Under the UPA and the aggregate view, a partner's withdrawal from the partnership meant dissolution of the partnership. (See former Corp.C. 15029 and 15031(7).) Adopting the entity theory of partnership (supra, § 26), the 1994 Act introduced the concept of "dissociation" to describe the change in relationship caused by a partner ceasing to be associated with the partnership business. Thus, the law governing partnership dissolution was comprehensively revised, and a partner's dissociation does not necessarily cause a dissolution and winding up of the partnership business. (See 6 (Part II) U.L.A. (Master Ed.), Comment to § 603.) (On dissociation generally, see C.E.B., 2 Advising California Partnerships 3d, § 16.1 et seq.)
> . . .
>
> (4) Statement of Dissociation. A dissociating partner or the partnership may file a statement of dissociation where the business is not wound up (infra, § 51 et seq.). (Corp.C. 16704.) The filing acts as a limitation on the authority of the dissociated partner under specified conditions. (Corp.C. 16704(b), (c).)

2. Events Causing Dissociation.

> (a) [§ 46] In General
> . . .
>
> (2) Terms of Partnership Agreement. A dissociating event agreed to in the partnership agreement occurs. (Corp.C. 16601(2).)
> . . .
> (7) Expulsion. In a variety of circumstances, a partner may be expelled, resulting in dissociation. (See infra, § 47.)

(b) [§ 47] Expulsion.

A partner's expulsion results in dissociation. Expulsion may occur under the following circumstances:

(1) Partnership Agreement. Pursuant to the partnership agreement. (Corp.C. 16601(3).)

. . .

4. Buyout of Dissociating Partner's Interest.

(a) [§ 49] In General

(1) Nature of Right. Corp.C. 16701 et seq., following the entity approach, deal with a partner's dissociation that does not result in a dissolution and winding up of the partnership business. Remaining partners may continue the business, and the dissociating partner has the right to be paid the value of that partner's partnership interest. (On dissociating partner's continuing relationship with partnership and third parties, see supra, § 48; on indemnification of dissociated partner against partnership liabilities, see Corp.C. 16701(d), supra, § 48.)

(2) Buyout Price. The buyout price is the amount that would have been distributable to the dissociating partner under Corp.C. 16807(b) (excess of credits over charges following winding up and liquidation of partnership assets) if, on the date of dissociation, the partnership's assets were sold at a price equal to the greater of (a) liquidation value, or (b) going concern value without the departing partner, plus interest from the date of dissociation to the date of payment. (Corp.C. 16701(b).)

The term "liquidation value" as used in Corp.C. 16701(b) means the sale price of the partnership's separate assets based on their market value as determined by a willing and knowledgeable buyer and a willing and knowledgeable seller, neither of which is under any compulsion to buy or sell. This differs from the common definition of "liquidation," which generally implies some urgency for immediate cash. Thus, a "buyout price" is the liquidation value, discounted to present value as of the date the partner dissociated. (Rappaport v. Gelfand (2011) 197 C.A.4th 1213, 1228, 129 C.R.3d 670 [trial court correctly applied statute in determining buyout price for attorney dissociating from law firm by calculating value as of date of dissociation based on individual assets being liquidated over time and then bringing value back to date of dissociation].)

The Motion continues, stating that the capital contribution has been $36,522.14, and that is the price to be paid for the partnership interest.

Movant has not provided the court with a copy of the partnership agreement as an exhibit in support of this motion. Exhibits, Dckt. 46.

In reviewing the Declarations filed in support of the Motion, they fail to comply with the personal knowledge testimony which a declaration testifies to under penalty of perjury. F.R.E. 602, [Fn.2.] and 28 U.S.C. § 1746. For both declarations presented, the respective declarants state:

> 1. I make this declaration under penalty of perjury based on facts known by me to be true **except as to those matters stated on information and belief** and as to those matters I believe them to be true.

Declarations, ¶ 1; Dckts. 44, 45. Each declarant states that there is some portion of the testimony that they do not have personal knowledge of, but merely are informed and believe it to be true and the declarant tries to provide evidence for that side to prevail.

FN.2. Federal Rule of Evidence 602

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Before the court could begin to determining whether to grant the requested relief and abstain from exercising the exclusive grant of jurisdiction over property of the bankruptcy estate, [Fn.3.] more information if required. The Status of the State Court Litigation. The actual contractual terms to be litigated. If the State Court Litigation is being prosecuted consistent with California law. How fast a final judgment can be obtained in the State Court Litigation as compared to the federal courts.

FN.3. 28 U.S.C. §1334(d)

§ 1334. Bankruptcy cases and proceedings

> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--
>
> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 157

§ 157. Procedures

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Hole in Proposed Plan Concerning Disputed Ownership

Debtor has now filed an amended proposed Chapter 13 plan. In the Additional Provisions of the First Amended Plan, Debtor provides for the sale of the partnership interest at issue. Dckt. 64 at 7. However, the proposed Amended Plan does not address the open dispute concerning of the rights of the Bankruptcy Estate and the Partnership. Merely because Debtor says it is in dispute does not mean that Debtor's conclusions are correct. The filing of a bankruptcy case does not deprive parties of their right to have disputes adjudicated and their property rights and interests protected.

The court concludes that everyone will be better off starting with a new, clean motion. The parties can prepare credible, proper evidence, provide copies of the documents at issue, and how adjudicating the property rights, if any, of the bankruptcy estate in state court is consistent with the efficient administration of this bankruptcy case.

The Motion is denied without prejudice.

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 Enterprise Group ("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 for Relief From Stay is denied without prejudice.

3. **18-20473-E-13 DPC-1** | **PATRICIA DI GRAZIA** **Peter Macaluso** | **CONTINUED MOTION TO DISMISS CASE** **3-29-18 [28]**

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on March 29, 2018. By the court's calculation, 62 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor (*pro se*) has not filed opposition. If the *pro se* Debtor appears at the hearing, the court shall consider the arguments presented and determine if further proceedings for this Motion are appropriate.

The Motion to Dismiss is XXXXXXXXXXXXXXXXX.

David Cusick ("the Chapter 13 Trustee") argues that Patricia Di Grazia ("Debtor") did not commence making plan payments and is $1,394.16 delinquent in plan payments, which represents multiple months of the $697.08 plan payment. Before the hearing, another plan payment will be due. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

The Chapter 13 Trustee argues that the Plan is based upon a plan form that is no longer effective now that the court has adopted a new plan form as of December 1, 2017. The Plan is based on a prior plan form, which is a violation of Federal Rule of Bankruptcy Procedure 3015.1 and General Order 17-03.

The Chapter 13 Trustee argues that Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor has not provided the Chapter 13 Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv); FED. R. BANKR. P. 4002(b)(2)(A). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee asserts that Debtor did not properly serve the Plan on all interested parties and has yet to file a motion to confirm the Plan. The Plan was filed after the notice of the Meeting of Creditors was issued. Therefore, Debtor must file a motion to confirm the Plan. *See* LOCAL BANKR. R. 3015-1(c)(3). A review of the docket shows that no such motion has been filed. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee asserts that Debtor failed to file a Credit Counseling Certificate. The Bankruptcy Code requires that the credit counseling course be taken within a period of 180 days ending on the date of the filing of the petition for relief. 11 U.S.C. § 109(h)(1). Federal Rule of Bankruptcy Procedure 1007(b)(3)(A), (C), and (D) and Rule 1007(c) require that a debtor file with the petition a statement of compliance with the counseling requirement along with either:

A. an attached certificate and debt repayment plan;

B. a certification under § 109(h)(3); or

C. a request for a determination by the court under § 109(h)(4).

DEBTOR'S INITIAL *PRO SE* OPPOSITION

Debtor filed an initial Opposition on May 16, 2018. Dckt. 36. The Opposition is two pages long, but the bottom of the two pages are numbered "1" and "3." Reading the Opposition, clearly there are several paragraphs missing from the unfiled page 2.

Page 3's first full paragraph is number "5" which argues that Debtor has prepared a motion to confirm that will be filed. Paragraph 6 argues that Debtor has attached the missing credit counseling certificate as an exhibit. *See* Exhibit F, Dckt. 35.

Also on May 16, 2018, Debtor filed a Declaration Requesting Entry of Order Confirming Chapter 13 Plan Without Chapter 13 Trustee's Approval of Form of Order. Dckt. 35. The court is unsure what such a document is, but it appears to be Debtor's attempt at filing a motion to confirm the plan in this case.

The Declaration contains stock legal conclusions that are unsupported by any evidence and appear to be copy-and-pasted by Debtor without any consideration of the statements' impact. At the end of the Declaration, there are six exhibits, the ones at least partially referenced in the Opposition.

Exhibit A appears to be two print-outs from Golden1 Credit Union for two checks, one in the amount of $1,394.16 and the other in the amount of $697.08. The Chapter 13 Trustee is listed as the payee for each check.

Exhibit B is a plan submitted on the court's current plan form. Nothing is attached to Exhibit C because the pages appear to be out of order. Exhibit D is a letter detailing retirement benefits received by Roland Di Grazia and a Residential Lease Agreement. Exhibit E is a profit and loss statement for Roland Di Grazia. Finally, Exhibit F is a Certificate of Debtor Education for Debtor.

MAY 30, 2018 HEARING

At the hearing, Debtor acknowledged the shortcomings in this case and the need for legal counsel. Dckt. 37. The court continued the hearing to 10:00 a.m. on July 11, 2018, to allow Debtor time to obtain counsel. Dckt. 38.

JULY 11, 2018, HEARING

At the July 11, 2018, hearing, the court continued the hearing on the Motion to Dismiss to September 5, 2018, at 10:00a.m. Dckt. 39.

SEPTEMBER 5, 2018 HEARING

After the September 5, 2018 hearing on the Motion, the court issued an Order granting the Motion and dismissing the case. Dckt. 51. The findings stated within the civil minutes for that hearing include:

> Although Debtor appears to be trying to address the grounds raised by the Chapter 13 Trustee, there are outstanding problems in this case still. There is no evidence that Debtor has provided her tax returns or pay advices. Debtor has not served the Plan on all creditors. Debtor has not filed a motion to confirm the plan and has not set that motion for a confirmation hearing.
>
> Looking at the Plan form attached as an exhibit to the declaration, the court notes that it is deficient in several ways:
>
> A. Monthly Plan Payment is $697.06 for sixty months.
>
> B. Class 1 Claim of "Fay Servicing" consists of:
>
> 1. Regular Monthly Post-Petition Installment of $697.08, and
> 2. Cure Payment for $41,824.96 Arrearage over sixty months of $697.08.
>
> C. The Class 2, 3, 4, 5, 6, and 7 (general unsecured) portions of the Plan form are left blank.
>
> Dckt. 35 at 6–11.
>
> Schedule I lists Debtor and non-debtor spouse having monthly income of $5,535.00. Dckt. 24 at 20–21. No provision is made for the payment of income or self employment taxes on Schedule I. No statement of business gross income and expenses is provided with Schedule I showing how Debtor computes $3,000 in net monthly business income.
>
> Schedule J lists Debtor having $4,512.99 in monthly expenses, which includes $3,146.88 payment for mortgage (and presumably insurance and taxes). *Id.* at 22. On Schedule J, Debtor also states:
>
> A. Home Maintenance Expenses of $0.00

B. Water, Sewer, Garbage Expenses of.....$0.00

C. Phone, Internet, Cable Expenses of.....$0.00

D. Transportation Expenses of.....$0.00

E. Entertainment Expenses of.....$0.00

F. Tax Expenses of $0.00

Id. at 22–23.

The Statement of Financial Affairs is not completed, with no income information provided in Sections 4 and 5. *Id.* at 27. Debtor affirmatively states under penalty of perjury that she had no income in calendar years 2018, 2017, and 2016.

Civil Minutes, Dckt. 50.

MOTION TO RECONSIDER AND OCTOBER 2, 2018 HEARING

On September 27, 2018, Debtor filed an *Ex Parte* Motion to Reconsider the Order granting this Motion. Dckt. 56. On October 2, 2018, the Debtor appeared at a hearing on a motion for relief from the automatic stay in their case. *See* Dckt. 44. Debtor described efforts to obtain counsel and discussed a potential $80,000.00 in equity in Debtor's property set to be foreclosed upon.

In reviewing the *Ex Parte* Motion and oral arguments made, the court issued an Interim Order Vacating Order Dismissing Bankruptcy Case. Interim Order, Dckt. 57. The Interim Order set this Motion to be heard October 10, 2018 at 2:00 p.m.

OCTOBER 10, 2018 HEARING

At the October 10, 2018 hearing on the Motion, Debtor failed to make an appearance despite the court's Order expressly requiring Debtor, Debtor's husband, and Debtor's counsel, and each of them, to appear in person in court. Dckt. 76. Debtor's counsel explained Debtor's husband had been hospitalized, after counsel initially attempted to assert ignorance of the court's express Order which was clearly explained to Debtor and her husband when they appeared at the October 2, 2018 hearing.

The court issued an order continuing the hearing on the Motion to October 15, 2018, at 11:00 a.m., again expressly requiring the appearance of Debtor, Debtor's husband, Debtor's counsel Dckt. 79. The Order further notes that, in the event of Debtor's husband failing to appear for medical reasons, the court require subsequent hearings and medical testimony to document the inability to attend. *Id*.

OCTOBER 15, 2018 HEARING

At the October 15, 2018, hearing, Debtor, Debtor's spouse, and Debtor's counsel addressed some of the pending issues. The court continued the hearing on the Motion to November 20, 2018, ordering as a condition that Debtor make a $1,200.00 adequate protection payment to Metropolitan Life Insurance company on or before noon on October 19, 2018, and on or before noon on November 27, 2018.

It was further reported to the court that the Debtor made an initial payment of $2,500.00 and then a subsequent payment of $1,500 to ICANCASA to assist in debtor obtaining a trial loan modification and then in filing of the bankruptcy case.

It was additionally reported that a law suit was filed in Placer County Superior Court in the name of Debtor. Counsel of record in that action is Ho Van Tran, Esq., an attorney in Garden Grove, California. It is a verified complaint (being verified by counsel) which names Metropolitan Life Insurance and its counsel in this bankruptcy case as defendants. Debtor's counsel reports that Debtor has not met with Ho Van Tran, she was unaware of the state court lawsuit, and did not authorize the filing of a complaint naming her as plaintiff.

SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on November 13, 2018. Dckt. 97. Debtor declares under penalty of perjury that she paid ICANCASA $2,500 for beginning the modification process and another $1,500 for filing a lawsuit on Debtor's behalf against Metropolitan Life. Debtor testifies that she and her husband did not understand the reasons for the lawsuit, but that ICANCASA told them it would mean they could stay in their home. Declaration ¶1, *Id.*

Debtor declares further that ICANCASA instructed Debtor to file bankruptcy, that after demanding to speak with an attorney, Hoa Van Tran, Esq., filed a lawsuit on Debtor's behalf. *Id.* ¶ 2. Debtor further testifies that the attorney, Hoa Van Tran, did not meet with the Debtor nor reviewed the complaint filed for Debtor. *Id.*

The testimony continues, addressing the Debtor's delay in obtaining counsel to represent her and protect her interests and rights in federal court.

> 10. When we were informed ICANCASA of what the Judge suggested us to, to get legal counsel, ICANCASA said it wasn't necessary. We were torn between what the Judge was telling us to do versus what ICANCASA was telling us. We asked them for legal counsel to appear in court on October 10, 2018. They said it wasn't necessary and that we did not have to go to court due to the filing of the last motion. I phoned them and left a message. They did not reply. I wanted to know a definite answer, yes or
> no.
>
> 11. They never called back.

Id., ¶¶ 10, 11. Taking Debtor's testimony at face value, it appears that ICANCASA was providing legal advice to Debtor.

Debtor declares finally that on October 9, 2018, Debtor was in the emergency room for severe stress, and was discharged October 10, 2018. *Id.* ¶ 13.

AMENDED SCHEDULES

Amended Schedule A/B have been filed. Dckt. 100. With the assistance of their counsel, Debtor has filed a more complete disclosure of assets. For personal property, Debtor lists an obligation of $4,000 owed by Ican CASA, which appears to be for the monies paid for the advice concerning these federal court proceedings and commencing litigation in Debtor's name, but not the consequences thereof.

Taken at face value, Debtor's residence has a value of $502,606. Amended Schedule A/B, Dckt. 100 at 5. On Amended Schedule D Debtor lists the following claims being the obligations secured by their residence: (1) Fay Servicing, ($459,440) and (2) Real Time Resolutions, ($40,903.22). *Id.* at 4-5. Thus, while it appears based on the Original Schedules that Debtor had a substantial equity in the residence that could be exempted, Debtor's newly Amended Schedules makes clear there is unlikely to be any significant equity.

DISCUSSION

The court has previously ordered that the Debtor make an adequate protection payment to the creditor holding the "Fay Servicing" secured claim.

At the hearing, **XXXXXXXXXXXXXXXXXXXX**.

~~Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.~~

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 to Dismiss the Chapter 13 case filed by David Cusick ("the Chapter 13 Trustee") 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 to Dismiss is **XXXXXXXXXX**.

4.	**18-20473-E-13** **DPC-1**	**PATRICIA DI GRAZIA** **Peter Macaluso**	**CONTINUED MOTION TO RECONSIDER DISMISSAL OF CASE** **9-27-18 [56]**

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.

The Motion to Reconsider Dismissal of Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. 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 to Reconsider Dismissal of Case is xxxxx.

BACKGROUND

Debtor commenced this Bankruptcy Case on January 30, 2018. The dismissal was not quick in coming, with the Chapter 13 Trustee's Motion to Dismiss having been filed on March 29, 2018. The Trustee's Motion was based on several grounds. Dckt. 28. First, Debtor was $1,394.16 delinquent in payments (two monthly payments), with no payments having been made when the Motion was filed. Second, Debtor did not use the required Chapter 13 Plan, but a general "Official Form" not used in this District. Third, Debtor failed to provide copies of pay advices. Fourth, Debtor failed to serve the proposed Chapter 13 Plan and motion to confirm on creditors. Fifth, Debtor failed to filed the required credit counseling certificate.

Debtor filed her Notice of Opposition to the Motion to Dismiss on May 16, 2018. Dckt. 36. As the court addresses in the Civil Minutes from the May 30, 2018 hearing, the Opposition form filed is incomplete, with page 2 missing. On page 3 reference is made to Exhibits D, E, and F, none of which were filed with the court.

The Opposition form has a fax header at the top, which reads: "From: Member Support 5 Fax: (888) 880-1562. An Internet search ties that phone number to Financial Education Services for an entity named "ICAN CASA"). [FN.1]. Debtor and her husband made reference to "ICAN CASA" at the October 2, 2018 emergency hearing on the *Ex Parte* Motion to Vacate the Order Dismissing the Bankruptcy Case. Debtor stated that they were receiving assistance from ICAN in the prosecution of this bankruptcy case. ICANCASA, LLC webpage describes itself as:

> ICANCASA is a for profit membership organization, working with a network of 5O1 (c) 3 Non-Profit Organizations, lawyers nationwide, forensic auditors, counselors, and funders who believe that every member of an American household deserves a better financial future (American Dream). Financially stable homes will "Make America Great Again".

https://icancasa.org/. From the website it appears that uses of the service pay a monthly fee.

FN.1. https://www.financialeducationservices.com/default.aspx?rid=jlim3.

The court's Civil Minutes from the May 30, 2018 hearing address some serious "challenges" of the Debtor in this case. Dckt. 37. These comments include:

> Although Debtor appears to be trying to address the grounds raised by the Chapter 13 Trustee, there are outstanding problems in this case still. There is no evidence that Debtor has provided her tax returns or pay advices. Debtor has not served the Plan on all creditors. Debtor has not filed a motion to confirm the plan and has not set that motion for a confirmation hearing.
>
> Looking at the Plan form attached as an exhibit to the declaration, the court notes that it is deficient in several ways:
>
> A. Monthly Plan Payment is $697.06 for sixty months.
>
> B. Class 1 Claim of "Fay Servicing" consists of:
>
> 1. Regular Monthly Post-Petition Installment of $697.08, and
>
> 2. Cure Payment for $41,824.96 Arrearage over sixty months of $697.08.

C. The Class 2, 3, 4, 5, 6, and 7 (general unsecured) portions of the Plan form are left blank.

Dckt. 35 at 6–11.

Schedule I lists Debtor and non-debtor spouse having monthly income of $5,535.00. Dckt. 24 at 20–21. No provision is made for the payment of income or self employment taxes on Schedule I. No statement of business gross income and expenses is provided with Schedule I showing how Debtor computes $3,000 in net monthly business income.

Schedule J lists Debtor having $4,512.99 in monthly expenses, which includes $3,146.88 payment for mortgage (and presumably insurance and taxes). Id. at 22. On Schedule J, Debtor also states:

A. Home Maintenance Expenses of $0.00
B. Water, Sewer, Garbage Expenses of.....$0.00
C. Phone, Internet, Cable Expenses of.....$0.00
D. Transportation Expenses of.....$0.00
E. Entertainment Expenses of.....$0.00
F. Tax Expenses of $0.00

Id. at 22–23.

The Statement of Financial Affairs is not completed, with no income information provided in Sections 4 and 5. Id. at 27. Debtor affirmatively states under penalty of perjury that she had no income in calendar years 2018, 2017, and 2016.

At the hearing Debtor acknowledged the shortcomings and the need for counsel. The court continues the hearing to afford Debtor the opportunity to obtain counsel.

At the May 30, 2018 hearing, these significant shortcomings having been identified, Debtor requested that the hearing be continued so that she could obtain counsel. As discussed below, even as of the October 2, 2018 emergency hearing on the *Ex Parte* Motion to Vacate (one hundred and twenty-five (125) days later) Debtor still had not obtained counsel to represent her in this case.

The continued hearing, was conducted on July 11, 2018. Though continued for the express purpose of allowing Debtor to engage counsel to address the shortcomings in this case, no counsel was substituted in as counsel for her in this case. The Civil Minutes for that continued hearing notes the continuing challenges (deficiencies) in Debtor prosecuting this case. Dckt. 39. The hearing on the Motion was further continued to September 5, 2018.

At the continued hearing on September 5, 2018, the court determined that the case should be dismissed. No appearance was made by Debtor at the September 5, 2018 hearing.

The court entered its order dismissing this Bankruptcy Case on September 10, 2018. Dckt. 51.

The only document filed by Debtor after the incomplete Opposition on May 16, 2018, was a pleading titled "Motion for Referral to Mortgage Modification Mediation Program." Dckt. 41. This is a "Check the Box" form. In the bottom left-hand corner is the designation "FORM ND-MMM-!00." This appears to be a form used in the U.S. Bankruptcy Court for the Northern District of California. No such "Mediation Program" exists for the U.S. Bankruptcy Court for the Eastern District of California. The "Motion for Referral" was filed *ex parte*, not set for hearing, and was not addressed by or brought to the attention of the court.

On August 23, 2018, Metropolitan Life Insurance Company ("Creditor") filed a Motion for Relief From the Stay as to the Debtor and Co-Debtor. Dckt. 44. The co-debtor is identified in the Motion as Roland Di Grazia. Creditor alleges that Debtor defaulted in the obligations secured by the Deed of Trust for the property at issue, with a notice of default recorded on June 8, 2017, a Notice of Trustee's sale on November 9, 2018, and then a foreclosure sale set for August 29, 2018. Motion for Relief ¶ 8, Dckt. 44.

The Motion for Relief From the Stay was set for hearing on October 2, 2018. The Notice given was pursuant to Local Bankruptcy Rule 9014-1(f)(1), which required Debtor to file an opposition at least fourteen days before the October 2, 2018 hearing. Notice, Dckt. 45. No opposition was filed by the Debtor.

MOTION TO VACATE DISMISSAL ORDER

On September 27, 2018, Debtor filed (in *pro se*) a pleading titled "Ex-Parte to Reopen My Bankruptcy Case and Ex-Parte Motion for Reconsideration of the Court's Order Dated Granting Motion/Application to Dismiss." Dckt. 56. The grounds stated with particularity in the Motion upon which such relief is based (Fed. R. Bankr. P. 9013) are:

> Furthermore, reconsider its Order of Granting Trustee's Motion/ Application to dismiss my bankruptcy case prior to the hearing on October 2, 2018 for the Motion for Relief from Automatic Stay filed by Metropolitan Life Insurance Co. which denies my opposition on that motion being heard which I have filed on September 14, 2018.

Ex Parte Motion, p. 1:18-22. No "opposition" was filed by Debtor on September 14, 2018, or any other date (other than the Opposition to the Motion to Dismiss filed in May 2018).

> In support of this request the Debtor states that, through inadvertence, a timely objection to the motion was filed but deemed incomplete.

Id., p.1:22-24. Other than the May 2018 Opposition reference above, there is no "timely" objection which was deemed "incomplete" and rejected because it was "incomplete."

FILED PROOFS OF (SECURED) CLAIM

Proof of Claim No. 4.

Movant filed a Proof of Claim, No. 4 on April 9, 2018, asserting a claim of $459,440.26 secured by the Property. The pre-petition arrearage for the obligation upon which Proof of Claim No. 4 is based is stated to be $42,650.50. Proof of Claim No. 2, p. 2. In the Attachment to Proof of Claim No. 4, Creditor breaks down the arrearage as follows:

Principal and Interest	$28,373.76
Prepetition Fees	$ 5,047.82
Escrow Deficiency (funds advanced)	$ 6,576.08
Projected Escrow Shortage	$ 2,652.91

Proof of Claim No. 4 Attachment, p. 5.

Proof of Claim No. 2.

Real Time Resolutions, Inc. as agent for RRA CP OPPORTUNITY TRUST 1 filed a Proof of Claim, No. 2 on March 22, 2108 asserting a claim of $40,903.22 also secured by the Property. Debtor does not list this claim on Schedule D. Dckt. 1 at 10.

Proofs of Claim Nos. 5 and 7

Proofs of Claim, Nos. 5 and 7 are for claims secured by real property identified as 312 Bryan Avenue, Roseville, California (Bryan Property). Debtor does not list this Property on her Original and Amended Schedules A/B. Dckt. 1 and 24.

For Proof of Claim No. 5, the Promissory Note attached is signed by both Roland Di Grazia and Patricia Di Grazia Proof of Claim No. 5, p. 21-30. The Deed of Trust identified as securing this claim is granted by Roland Di Grazia and Patricia, as husband and wife. *Id.*, p. 7-8.

For Proof of Claim No. 7, the loan modification agreement is signed by Roland Di Grazia and Patricia Di Grazia. Proof of Claim No. 7, p. 22. The Deed of Trust securing this claim is granted by Roland Di Grazia and Patricia Di Grazia, as husband and wife. *Id.*, p. 27. The adjustable rate note identified as the basis for this claim is signed by Roland Di Grazia and Patricia Di Grazia.

REVIEW OF SCHEDULES, PLAN, AND CONDUCT OF DEBTOR

At the emergency hearing on the *Ex Parte* Motion, October 2, 2018, the court addressed with Debtor and her husband, in plain language, the grossly deficient conduct of Debtor in prosecuting this case. Further, as discussed below, Debtor's failure to follow through on her representation that she would obtain counsel if the court continued the prior hearings on the Motion to Dismiss.

On the Petition, Debtor lists her residence as 7176 Ludlow Drive. Petition, Question 4, p. 2; Dckt. 1. On Schedule A/B, Debtor lists owning only the 7176 Ludlow Drive Property ("Property"). *Id.* at 9. On it, Debtor states that the Property has a value of $502,606.00, that only the Debtor has an interest in the Property, and that Debtor's interest had a value of only $80,158.16. *Id.* at 9.

On her Chapter 13 Statement of Current Monthly Income Debtor states that she has $1,500.00 in net monthly income from her business. Dckt. 22 at 1. Debtor also states that she has $1,500.00 in net income from rental or other real property. *Id.* Though stating that she is married, no income information is listed for her spouse. *Id.* Debtor states that her income in the six months proceeding this case was limited to only $3,000.00 a month.

On February 27, 2018, Debtor filed an Amended Schedule A/B. Dckt. 24. Debtor lists owning an interest only the 7176 Ludlow Property. *Id.* at 3. Debtor does not list owing any business on Schedule A/B. *Id.* at 7-11.

While listing only the Ludlow Property, on Schedule C, Debtor claims an exemption (not stating the legal basis for an exemption) in real property identified as 213 Bryan Ave. *Id.*, p. 13. On Schedule E/F Debtor states under penalty of perjury that she has no creditors with unsecured claims.

On Schedule I, Debtor states that she receives $3,000.00 a month in net income from rental property or a business and $638.00 in Social Security income. *Id.* at 21. Debtor does not include the required statement of gross income and expenses from her business and rental of real property. Debtor also states that her spouse receives $1,897.00 in monthly Social Security income. *Id.*

On Schedule J, Debtor states that she has one dependent, her "wife." *Id.* at 22. For expenses on Schedule J, Debtor states under penalty of perjury that the total monthly expenses for Debtor and her spouse are $4,512.88. *Id.* at 24. Of this, ($3,146.88) is listed for the monthly mortgage payment. (This is 69.7% of Debtor's stated total monthly expenses.) On Schedule J, Debtor states under penalty of perjury that she:

4c. No Home Maintenance or Repair Expense
6b. No Water, Sewer, Garbage Collection Expense
6c. No Telephone, Cell Phone, Internet, Satellite, and Cable Services Expense
12. No Transportation (including gas, maintenance, registration) Expense

The court notes that on Schedule A/B Debtor states under penalty of perjury owning a 2002 Honda Odyssey. *Id.* at 4.

13. No Entertainment Expense
15. No Vehicle Insurance
16. No Taxes For Debtor's $3,000 Monthly Business/Rental Income

Schedule J Information, *Id.* at 22-24.

On the Statement of Financial Affairs, in the three years preceding the Bankruptcy Case Debtor lived at no other place than the 7176 Ludlow Property. Statement of Financial Affairs Question 2, *Id.* at 26. Debtor then states under penalty of perjury that notwithstanding being married and living at the Ludlow

Property located in California, that she has not lived with her spouse in California. Statement of Financial Affairs Question 1, *Id.*

In response to Questions 4 and 5, Debtor states under penalty of perjury that she had no employment, business, rental, or other income for 2018, 2017, and 2016. *Id.* at 27. All of the other questions in the Statement of Financial Affairs are "no."

In sum, Debtor's statements of assets (the real property) and claims (the creditors holding secured claims) are incorrect. Debtor owns at least one other real property not disclosed on the Schedules. Debtor has at least three other creditors with secured claims not disclosed on the Schedules.

Debtor's statement of there being $80,000 of equity in the Property appears to be "incorrect," with there being at least an additional $40,000 secured by the Property.

PROSECUTION OF THIS BANKRUPTCY CASE

At the October 2, 2018 emergency hearing on the *Ex Parte* Motion to Vacate, Debtor and her spouse stated that they had been consulting various legal service providers, including ICAN CASA. They had talked to attorneys, identifying one by name. They advised the court that the attorney stated to them that "there was nothing he could do to help them in this case."

It appears that there have been "outside forces" directing Debtor and her spouse in the prosecution of this bankruptcy case. Debtor was desperately seeking the court to vacate the order dismissing the case to stop the foreclosure on the 7176 Ludlow Property. The foreclosure sale was stated to be set for October 3, 2018.

Debtor also appears to have intentionally not completely, accurately, and truthfully completing the Schedules and Statement of Financial Affairs in this case. Given Debtor and Debtor's spouse's statement that they have relied on various services provided to them by others (represented to include ICANCASA), such "omissions" would not appear to be inadvertent, but part of a scheme in the presentation of this Bankruptcy Case to the Court.

Though not listed on the Schedules, it appears that Debtor also owns the 213 Bryan Avenue property.

Debtor's "prosecution" of this case has been "non-active," appearing to only enjoy the relief of the automatic stay and not attempt to comply with the requirements of Chapter 13 under the Bankruptcy Code. From the Schedule I income information and the Schedule J expense information it appears that Debtor's ability to afford a $3,000+ monthly mortgage payment and the cure of the arrearage is highly questionable. Debtor argues the secured claim encumbering Debtor's residence has an $80,000.00 equity cushion, rendering it oversecured. However, discussed *supra*, this asserted equity relies on Debtor's omission of secured claims.

EMPLOYMENT OF COUNSEL

At the October 2, 2018 emergency hearing on the *Ex Parte* Motion, Debtor and her spouse told the court that they were hiring an attorney, with whom they would be meeting that afternoon. To the extent that Debtor's "missteps" putting at risk the loss of the represented $80,000.00 of equity were caused by inadvertence or innocent mistake, finally hiring knowledgeable bankruptcy counsel would remedy that in short order. If not inadvertent or innocent, such "remedy" may not be possible.

The court notes that on October 5, 2018, a substitution of attorney was filed in which Peter G. Macaluso, Esq., an experienced and well known consumer attorney in the Eastern District of California, was substituted in as counsel for Debtor. Dckt. 74.

INTERIM ORDER VACATING THE ORDER DISMISSING THE CASE

On October 2, 2018, the court determined that an Interim Order Vacating the Order Dismissing the case was proper. *See* Order, Dckt. 57. In granting the Interim Order, the court reasoned as follows:

> Several factors, notwithstanding the limited "grounds" set forth in the *Ex Parte* Motion weigh in favor thereof. First, if Debtor and her spouse have been drawn into a scheme to frustrate creditors and "get a house for free," by Debtor's count there is $80,000.00 in equity. If Debtor actually hires competent counsel, such equity could be preserved, rather than lost to foreclosure, even if the house cannot be "saved."
>
> Second, the Trustee reports that he is holding in excess of $4,700.00 in plan payments to date. Such monies may be used to provide adequate protection for Creditor caused due to the ineffective prosecution of this case by Debtor.
>
> Third, the Schedules and Statement of Financial Affairs do not appear to be fully and accurately completed. It appears that Debtor owns more assets than disclosed on Schedule A/B.
>
> Thus, the court determined that the Order Dismissing the Bankruptcy Case would be vacated on an interim basis, with an initial hearing on the Motion to Vacate to be conducted at 2:00 p.m. on October 10, 2018 (special set date and time). At the initial hearing, the court will determine what portion, or all, of the $4,700.00 held by the Trustee is to be paid to Creditor for the cost, expense, delay, caused by Debtor's failure to prosecute this case but pleading with the court to vacate the dismissal to derail the October 3, 2018 foreclosure sale so the Debtor would not lose the 7176 Ludlow Property (or the $80,000.00 equity Debtor asserts exists therein). The payment of even the full $4,700.00 to be applied to Creditor's post-petition fees and expenses, and post-petition payments that have come due, is not unfair or inappropriate.

> The court further notes that Debtor affirmatively states under penalty of perjury that in addition to the $697.08 a month Chapter 13 Plan payment (Plan ¶ 2.1, Dckt. 23) Debtor has $3,146.88 to make the current post-petition month mortgage payments to Creditor. Schedule J, Dckt. 24 at 22-23; Chapter 13 Plan ¶ 3.1, Dckt. 23 at 2.
>
> Taken at face value there is $25,175.04 that has been paid to Creditor for the period February through September 2018 (8 months x $3,146.88 current monthly mortgage payment) or there is $25,175.04 that the Debtor has set aside pending making that payment to Creditor. The court shall address at the hearing on the Motion to Vacate the status of such current post-petition payments and the location of the $25,175.04.

Order, Dckt. 68.

On October 4, 2018, the court issued an Order Setting Hearing On Motion To Vacate Order Dismissing Bankruptcy Case. Order, Dckt. 68. In setting the hearing, the court provided :

> **IT IS ORDERED** that an initial noticed hearing on the Motion to Vacate the Order Dismissing this Bankruptcy Case (the court previously having issued an Interim Order Vacating the Dismissal Order pending further hearing on the Motion to Vacate) will be conducted at **2:00 p.m. on October 10, 2018**. No written opposition is required to be filed, with such opposition grounds being allowed to be presented orally at the hearing. If further proceedings are warranted, the court will set a briefing schedule.
>
> **IT IS FURTHER ORDERED** that at the October 20, 2018 hearing the court will determine what portion, or all, of the $4,700+ in Chapter 13 Plan payments received by the Chapter 13 Trustee will be paid to creditor Metropolitan Life Insurance Company for the post-petition payments that have come due on its claim and the costs and expenses caused by Debtor's ineffective and non-diligent prosecution of this Bankruptcy Case. Additionally, the court shall address the status of the $3,146.88 monthly post-petition mortgage payment provided for in Debtor's budget for the eight post-petition months which have transpired in this case.
>
> **IT IS FURTHER ORDERED** that Debtor Patricia Di Grazia and Roland Di Grazia (identified as the Debtor's husband), and each of them, and Patricia Di Grazia's attorney in this bankruptcy case shall appear in person at the October 10, 2018 hearing - No Telephonic Appearances Permitted.

Id.

OCTOBER 10, 2018 HEARING

At the October 10, 2018 hearing on the Motion, Debtor failed to make an appearance despite the court's Order expressly requiring Debtor, Debtor's husband, and Debtor's counsel, and each of them, to appear in person in court. Dckt. 77. Debtor's counsel explained Debtor's husband had been hospitalized (after initially attempting to assert ignorance of the court's express Order which was clearly explained to Debtor and her husband when they appeared on October 2, 2018).

The court issued an order continuing the hearing on the Motion to October 15, 2018, at 11:00 a.m., again expressly requiring the appearance of Debtor, Debtor's husband, Debtor's counsel Dckt. 81. The Order further notes that, in the event of Debtor's husband failing to appear for medical reasons, the court require subsequent hearings and medical testimony to document the inability to attend. *Id*.

SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on November 13, 2018. Dckt. 97. Debtor declares under penalty of perjury that she paid ICANCASA $2,500 for beginning the modification process and another $1,500 for filing a lawsuit on Debtor's behalf against Metropolitan Life. Debtor testifies that she and her husband did not understand the reasons for the lawsuit, but that ICANCASA told them it would mean they could stay in their home. Declaration ¶1, *Id.*

Debtor declares further that ICANCASA instructed Debtor to file bankruptcy, that after demanding to speak with an attorney, Hoa Van Tran, Esq., filed a lawsuit on Debtor's behalf. *Id.* ¶ 2. Debtor further testifies that the attorney, Hoa Van Tran, did not meet with the Debtor nor reviewed the complaint filed for Debtor. *Id.*

The testimony continues, addressing the Debtor's delay in obtaining counsel to represent her and protect her interests and rights in federal court.

> 10. When we were informed ICANCASA of what the Judge suggested us to, to get legal counsel, ICANCASA said it wasn't necessary. We were torn between what the Judge was telling us to do versus what ICANCASA was telling us. We asked them for legal counsel to appear in court on October 10, 2018. They said it wasn't necessary and that we did not have to go to court due to the filing of the last motion. I phoned them and left a message. They did not reply. I wanted to know a definite answer, yes or no.
>
> 11. They never called back.

Id., ¶¶ 10, 11. Taking Debtor's testimony at face value, it appears that ICANCASA was providing legal advice to Debtor.

Debtor declares finally that on October 9, 2018, Debtor was in the emergency room for severe stress, and was discharged October 10, 2018. *Id.* ¶ 13.

AMENDED SCHEDULES

Amended Schedule A/B have been filed. Dckt. 100. With the assistance of their counsel, Debtor has filed a more complete disclosure of assets. For personal property, Debtor lists an obligation of $4,000 owed by Ican CASA, which appears to be for the monies paid for the advice concerning these federal court proceedings and commencing litigation in Debtor's name, but not the consequences thereof.

Taken at face value, Debtor's residence has a value of $502,606. Amended Schedule A/B, Dckt. 100 at 5. On Amended Schedule D Debtor lists the following claims being the following obligations secured by their residence: (1) Fay Servicing, ($459,440) and (2) Real Time Resolutions, ($40,903.22). *Id.* at 4-5. Thus, while it appears based on the Original Schedules that Debtor had a substantial equity in the residence that could be exempted.

DISCUSSION

The court's initial Interim Order Vacating Dismissal of the Case relied in the appearance of approximately $80,000.00 in equity in Debtor's Property. As discussed above, a review of Debtor's filing and claims filed demonstrate that it is unlikely any equity exists.

The court has previously ordered that the Debtor make an adequate protection payment to the creditor holding the "Fay Servicing" secured claim.

At the hearing, Debtor's Counsel explained **XXXXXXXXXXXXXX**.

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 to Reconsider Dismissal of Case is filed by Patricia Di Grazia ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **XXXXXXXXXXXXXXXXX**.

5. **18-20473-E-13** **PATRICIA DI GRAZIA**
EAT-1 **Peter Macaluso**

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
8-23-18 [44]

METROPOLITAN LIFE INSURANCE CO., 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 (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on August 23, 2018. By the court's calculation, 40 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 xxxxxxxxxxxxxx.

METROPOLITAN LIFE INSURANCE COMPANY ("Movant") seeks relief from the automatic stay with respect to Patricia Di Grazia ("Debtor") real property commonly known as 7176 Ludlow Drive, Roseville, California ("Property"). Movant has provided the Declaration of James Stefani to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Stefani Declaration states that there are 6 post-petition defaults in the payments on the obligation secured by the Property, with a total of $19,132.86 in post-petition payments past due. The

Declaration also provides evidence that there are 17 pre-petition payments in default, with a pre-petition arrearage of $50,217.00.

FILED PROOFS OF (SECURED) CLAIM

Proof of Claim No. 4.

Movant filed a Proof of Claim, No. 4 on April 9, 2018, asserting a claim of $459,440.26 secured by the Property. The pre-petition arrearage for the obligation upon which Proof of Claim No. 4 is based is stated to be $42,650.50. Proof of Claim No. 2, p. 2. In the Attachment to Proof of Claim No. 4, Creditor breaks down the arrearage as follows:

Principal and Interest	$28,373.76
Prepetition Fees	$ 5,047.82
Escrow Deficiency (funds advanced)	$ 6,576.08
Projected Escrow Shortage	$ 2,652.91

Proof of Claim No. 4 Attachment, p. 5.

Proof of Claim No. 2.

Real Time Resolutions, Inc. as agent for RRA CP OPPORTUNITY TRUST 1 filed a Proof of Claim, No. 2 on March 22, 2108 asserting a claim of $40,903.22 also secured by the Property. Debtor does not list this claim on Schedule D. Dckt. 1 at 10.

Proofs of Claim Nos. 5 and 7

Proofs of Claim, Nos. 5 and 7 are for claims secured by real property identified as 312 Bryan Avenue, Roseville, California (Bryan Property). Debtor does not list this Property on her Original and Amended Schedules A/B. Dckt. 1 and 24.

For Proof of Claim No. 5, the Promissory Note attached is signed by both Roland Di Grazia and Patricia Di Grazia Proof of Claim No. 5, p. 21-30. The Deed of Trust identified as securing this claim is granted by Roland Di Grazia and Patricia, as husband and wife. *Id.*, p. 7-8.

For Proof of Claim No. 7, the loan modification agreement is signed by Roland Di Grazia and Patricia Di Grazia. Proof of Claim No. 7, p. 22. The Deed of Trust securing this claim is granted by Roland Di Grazia and Patricia Di Grazia, as husband and wife. *Id.*, p. 27. The adjustable rate note identified as the basis for this claim is signed by Roland Di Grazia and Patricia Di Grazia.

REVIEW OF DEBTOR'S PETITION AND SCHEDULES

Debtor asserts the value of the Property is $502,606.00. Amended Schedule A/B, Dckt. 24. While Debtor states on her Schedules that her interest in the Property is $80,158.16, this appears to be Debtor's belief as to the equity in the Property not consumed by Movant's claim.

On her Schedule C, Debtor claims an exemption of 353,321.00 in the Bryan Property. Schedule C, Dckt. 24. No exemption is claimed for the Property.

On her Schedule D, Debtor identifies as the sole creditor with a secured claim "FAY SERVICING," with a claim of $422,447.84. Schedule D, Dckt. 1. While Debtor notes an unsecured portion of the claim being 480,158.16, it again appears Debtor is referring to the alleged equity in the Property. Nowhere does Debtor list secured claims against the Bryan Property.

On her Schedule E/F, Debtor states under penalty of perjury that she has no unsecured claims.

As addressed above, these statements of assets (the real property) and claims (the creditors holding secured claims) are incorrect. Debtor owns at least one other real property not disclosed on the Schedules. Debtor has at least three other creditors with secured claims not disclosed on the Schedules.

Debtor's statement of there being $80,000 of equity in the Property appears to be "incorrect," with there being at least an additional $40,000 secured by the Property.

SEPTEMBER 5, 2018 MOTION TO DISMISS HEARING

After the September 5, 2018 hearing on the Motion, the court issued an Order granting the Motion and dismissing the case. Dckt. 51. The findings stated within the civil minutes for that hearing include:

> Although Debtor appears to be trying to address the grounds raised by the Chapter 13 Trustee, there are outstanding problems in this case still. There is no evidence that Debtor has provided her tax returns or pay advices. Debtor has not served the Plan on all creditors. Debtor has not filed a motion to confirm the plan and has not set that motion for a confirmation hearing.
>
> Looking at the Plan form attached as an exhibit to the declaration, the court notes that it is deficient in several ways:
>
> A. Monthly Plan Payment is $697.06 for sixty months.
>
> B. Class 1 Claim of "Fay Servicing" consists of:
>
> 1. Regular Monthly Post-Petition Installment of $697.08, and
> 2. Cure Payment for $41,824.96 Arrearage over sixty months of $697.08.
>
> C. The Class 2, 3, 4, 5, 6, and 7 (general unsecured) portions of the Plan form are left blank.

Dckt. 35 at 6–11.

Schedule I lists Debtor and non-debtor spouse having monthly income of $5,535.00. Dckt. 24 at 20–21. No provision is made for the payment of income or self employment taxes on Schedule I. No statement of business gross income and expenses is provided with Schedule I showing how Debtor computes $3,000 in net monthly business income.

Schedule J lists Debtor having $4,512.99 in monthly expenses, which includes $3,146.88 payment for mortgage (and presumably insurance and taxes). *Id.* at 22. On Schedule J, Debtor also states:

A. Home Maintenance Expenses of $0.00

B. Water, Sewer, Garbage Expenses of.....$0.00

C. Phone, Internet, Cable Expenses of.....$0.00

D. Transportation Expenses of.....$0.00

E. Entertainment Expenses of.....$0.00

F. Tax Expenses of $0.00

Id. at 22–23.

The Statement of Financial Affairs is not completed, with no income information provided in Sections 4 and 5. *Id.* at 27. Debtor affirmatively states under penalty of perjury that she had no income in calendar years 2018, 2017, and 2016.

Civil Minutes, Dckt. 50.

MOTION TO RECONSIDER AND OCTOBER 2, 2018 HEARING

On September 27, 2018, Debtor filed an *Ex Parte* Motion to Reconsider the Order granting this Motion. Dckt. 56.

At the October 2, 2018, hearing on this Motion, Debtor appeared and described efforts to obtain counsel and discussed a potential $80,000.00 in equity in Debtor's property set to be foreclosed upon.

In reviewing the Ex Parte Motion and oral arguments made, the court issued an Interim Order Vacating Order Dismissing Bankruptcy Case. Interim Order, Dckt. 57. The Interim Order set this Motion to be heard October 10, 2018 at 2:00 p.m.

TRUSTEE'S SUPPLEMENTAL RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Supplemental Response on October 4, 2018. Dckt. 61. Noting the Motion to Vacate Dismissal, Trustee adds that $4,508.01 is available in the event the court considers any adequate protection payments.

The Trustee notes further the Property may have been sold pending contract.

STATUS OF POST-PETITION MORTGAGE PAYMENTS TO CREDITOR

As the court has discussed in connection with the Debtor's Motion to Vacate the Order Dismissing this Case, Debtor's financial information shows that there is $3,146.88 in funds available monthly to pay Creditor for its post-petition current mortgage payments. The Debtor's proposed Chapter 13 Plan provides for such payments to be made in this case. There are now eight post-petition months for which such payments have come due, with a total amount of $25,175.04 which should have been paid or which exists to so pay Creditor.

At the hearing Debtor reported, **xxxxxxxxxxxxxxxxxx**

ADEQUATE PROTECTION PAYMENT REQUIRED TO BE MADE TO CREDITOR

As discussed in connection with the Motion to Vacate the Order Dismissing the Bankruptcy Case (for which the court issued an *ex parte* interim order on October 2, 2018):

A. Debtor has failed for four months to engage counsel, though advising the court she would obtain counsel.

B. The Motion to Dismiss Debtor's bankruptcy case was continued multiple times based on Debtor's promise to obtain bankruptcy counsel, which she failed to do.

C. Debtor did not appear at the September 5, 2018 continued hearing on the Motion to Dismiss the Bankruptcy Case.

D. Though the court entered its order dismissing the Bankruptcy Case on September 10, 2018, (Dckt. 51), Debtor took no action to vacate such order except filing an *Ex Parte* Motion for Reconsideration until September 27, 2018. Dckt. 56. The *Ex Parte* Motion offers no real basis for vacating the order dismissing the bankruptcy case.

E. Debtor filed no opposition to Creditor's Motion for Relief from the Automatic Stay that was set for hearing on October 2, 2018. Debtor showed up late at the hearing, requesting the court deny the motion and vacate the order dismissing the bankruptcy case.

F. The grounds for vacating the dismissal was that a foreclosure was pending the next day. In reviewing the file, the court noted (now identified as erroneously) that there was approximately $80,000 of equity in the property given that the only secured claim as stated under penalty of perjury on the Schedules was that of Creditor.

G. The court further noted that Debtor's lack of prosecution, delay, and the court vacating on an interim basis the dismissal of the case and "derailing" the scheduled foreclosure sale causes Creditor to incur further otherwise unnecessary expense.

H. However, in light of the Chapter 13 Trustee holding $4,700+ in Plan Payments, the court could fashion an adequate protection payment to Creditor for the costs, expenses, and damages caused by Debtor's inaction and ex parte action.

The Chapter 13 Trustee has confirmed that of the monies held, after allowing for Chapter 13 Trustee fees and expenses, there is $4,508.01 which is available to disburse to creditors.

The court orders that the Chapter 13 Trustee immediately disburse $4,508.01 to Creditor for application of: (1) not more than $1,000.00 for post-petition legal fees, costs, and expenses, and (2) the balance of the monies to the post-petition obligations of the Debtor on the claim secured by the Property.

OCTOBER 10, 2018 HEARING

At the October 10, 2018 hearing on the Motion, Debtor failed to make an appearance despite the court's Order expressly requiring Debtor, Debtor's husband, and Debtor's counsel, and each of them, to appear in person in court. Dckt. 75. Debtor's counsel explained Debtor's husband had been hospitalized (after initially attempting to assert ignorance of the court's express Order which was clearly explained to Debtor and her husband when they appeared on October 2, 2018).

The court issued an order continuing the hearing on the Motion to October 15, 2018, at 11:00 a.m., again expressly requiring the appearance of Debtor, Debtor's husband, Debtor's counsel Dckt. 80. The Order further notes that, in the event of Debtor's husband failing to appear for medical reasons, the court require subsequent hearings and medical testimony to document the inability to attend. *Id*.

SUPPLEMENTAL DECLARATION

Debtor filed a Supplemental Declaration on November 13, 2018, in support of Debtor's Opposition to this Motion for Relief. Dckt. 95. Debtor declares under penalty of perjury that she paid ICANCASA $2,500 for beginning the modification process and another $1,500 for filing a lawsuit on Debtor's behalf against Metropolitan Life.

Debtor declares further that ICANCASA instructed Debtor to file bankruptcy, that after demanding to speak with an attorney Hoa Van Tran, esq., filed a lawsuit on Debtor's behalf without Debtor meeting the attorney or reviewing the complaint filed. Debtor also declares that, after informing ICANCASA a bankruptcy judge advised they retain counsel, ICANCASA conveyed retaining counsel was unnecessary. While Debtor tried to call ICANCASA, Debtor never received a return call.

Debtor declares finally that on October 9, 2018, Debtor was in the emergency room for severe stress, and was discharged October 10, 2018.

DISCUSSION

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 $513,253.49 (including Movant's first deed of trust in the amount of $459,440.26, and the second deed of trust held by RRA CP OPPORTUNITY TRUST 1 in the amount of $40,903.22), as stated in the Stefani Declaration and Proofs of Claims, Nos. 2 and 4. The value of the Property is determined to be $502,606.00, as stated in Schedules A and D.

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 and Debtor's failure to proceed with her bankruptcy case in good faith. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.~~

Additionally, Movant requests relief from the co-debtor stay under 11 U.S.C. § 1301(a). Movant states within the Motion "any co-debtor stay should also be terminated as it has not been shown to have any basis to exist independent of the stay under 11 U.S.C. §362(a)." Dckt. 44 at ¶ 11.

The Motion identified Roland Di Grazia as a co-borrower who has not filed bankruptcy with the Debtor. Motion ¶ 5, Dckt. 44. Upon granting relief from the automatic stay as to the Debtor, granting relief pursuant to 11 U.S.C. § 1301(c) is proper for the co-debtor stay.

At the hearing, Counsel for Debtor explained that Debtor was now pursuing a course of reorganization to preserve or recover her equity in the Property by **xxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

Counsel for Debtor further explained that in the prospective good faith prosecution of this case amendments to the Schedules and Statement of Financial Affairs and **xxxxxxxxxxxxxxxxxxxxxxxx**

~~The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights,~~

~~and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.~~

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 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 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.

Request for Prospective Injunctive Relief

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 METROPOLITAN LIFE INSURANCE COMPANY and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted METROPOLITAN LIFE INSURANCE COMPANY and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

No other or additional relief is granted by the court.

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

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by METROPOLITAN LIFE INSURANCE COMPANY ("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 for Relief From the Automatic Stay is denied without prejudice/continued to xxxxxxxxxxxxxxxxx~~

~~**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow METROPOLITAN LIFE INSURANCE COMPANY, 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 that is recorded against the real property commonly known as 7176 Ludlow Drive, Roseville, California, ("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 to obtain possession of the Property.~~

IT IS FURTHER ORDERED that the request to terminate the co-debtor stay of Roland Di Grazia of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the forgoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

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.

6. **18-26477-E-13 SMR-1** **JEANNE RENNERT**
Jeffrey Meisner

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
10-19-18 [8]

AUTUMN OAKS-200, LLC VS.

No 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, Co-Debtor, Chapter 13 Trustee, and Office of the United States Trustee on October 19, 2018. By the court's calculation, 32 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 XXXXXXXXXXXX.

Autumn Oaks-200, LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1431 Kingswood Drive #167, Roseville, California ("Property"). The moving party has provided the Declaration of Holly Warden to introduce evidence as a basis for Movant's contention that Jeanne C Rennert ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property and Debtor, along with Deanne Gonzales ("Co-Debtor") are merely tenants renting the Property pursuant to a month-to-month rental agreement. The Warden Declaration also provides evidence that Debtor is delinquent $1,673.50 in prepetition payments and has accrued $3,905.50 in postpetition holdover damages. Dckt. 10.

On September 22, 2018, Movant served a three day notice to pay rent or quit on debtor. *See* Exhibit B, Dckt. 11. Debtor failing to vacate the Property within the three day notice period, Movant commenced an unlawful detainer action in California Superior Court, County of Placer entitled Autumn Oaks-200,LLC v. Rennert, et al. , Placer County Superior Court Case No. MCV0071520. *See* Exhibit C, Dckt. 11.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on November 6, 2018. Dckt. 29. Trustee notes the Debtor's plan is not confirmed, the Meeting of Creditor's is scheduled for November 15, 2018, no payments have come due under the proposed plan, and Movant is not included in Section 4.2 of the plan.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to this Motion on November 7, 2018. Dckt. 38. Debtor argues the following in Opposition to the Motion:

1. Movant did not first file a motion to compel postpetition rental payments, and failed to demonstrate a legal basis for relief from the automatic stay, good cause for relief from the automatic stay, and or that Movant is not adequately protected.

2. Debtor has filed a Chapter 13 plan, and now anticipates filing an amended plan to assume the rental agreement she has with Landlord under section 4.02 of the plan, which will be confirmable and very likely to successfully be completed given her income and expenses. Debtor has attempted to make postpetition payments which Movant rejected.

3. Debtor has a 26-year-old permanently disabled daughter, who Debtor cares for and is legally responsible for full time. Her daughter has no other person willing or able to care for her.

4. Prior to September 1, 2018, Debtor and her daughter were never late on their rent owed to Landlord. Debtor filed Chapter 13 bankruptcy in this case due to a currently pending eviction/unlawful detainer action.

5. Debtor filed a prior Chapter 13 case (18-23694) in June 2018 which she voluntarily dismissed July 2018, believing that she would not be able to make the proposed plan payments of $585. Debtor also filed a Chapter 7 case (16-26091) and received a discharge in December 2018.

6. Debtor and her daughter are delinquent on their rent to Movant for the months of September and October of 2018 due to Debtor having to obtain a new vehicle loan and pay a down payment so that she could have necessary transportation to and from work. However, Debtor made a partial payment in the amount of $394.66 on September 1, 2018 (the date her rent was due) towards her September rent in a good faith effort to show her Landlord she intends to pay the amount of her delinquent rent.

7. If Debtor and her daughter are evicted from the Property by Movant, then they will have nowhere to live. As of the date of this Opposition, Debtor and her daughter have been unable to secure alternate housing for the two of them.

8. Debtor initially sought to find alternative housing; therefore, her proposed plan filed does not assume Movant's lease. Debtor was in part reluctant to assume Movant's lease due to an insect infestation.

9. Debtor intends to file an objection to Movant's claim for postpetition "holdover damages."

10. The court should consider scheduling an evidentiary hearing to determine whether Movant abused the legal process and should be sanctioned pursuant to Pursuant to 11 U.S.C. §362(k)(1) for failure to work with the Debtor and for willful violation of 11 U.S.C. § 362(a).

MOVANT'S REPLY

Movant filed a Reply to Debtor's Opposition on November 13, 2018. Dckt. 43. Movant argues Debtor's Opposition was required by the Local Rules to be filed 14 days prior to the this hearing and therefore is untimely. Movant further argues that (1) Debtor has not shown adequate protection exists for Movant's claim because Movant's lease is not assumed in the proposed plan, and (2) the Property is not necessary for an effective reorganization because Debtor "is free to relocate her residence to whatever location is best suited for her," and because Debtor's true motivation for remaining in the Property is Debtor's unconsented subletting.

DISCUSSION

Untimely Opposition

Debtor filed its Opposition on November 7, 2018. Dckt. 38. Local Bankruptcy Rule 9014-1(f)(1) requires written opposition be filed 14 days prior to the hearing on the motion. By the court's calculation, only 13 days' notice were provided. Such a delay is of *di minimis* impact and will not prevent Debtor from "having her day in court." If Movant believes that the one day impaired Movant's ability to respond, the court can continue the hearing at Movant's request.

Relief From Stay

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).

Based on the evidence provided, Debtor missed slightly more than one prepetition payment of $1,395 under the rental agreement. Declaration, Dckt. 10. Since the filing of the petition, two payments have come due. While Debtor attempted to make a partial payment in October 2018 and a full payment in November 2018, Movant has rejected any payment. Declaration, Dckt. 39. Debtor intends to file an amended plan to assume Movant's executory lease agreement. *Id.* The court finds that Movant has failed to show good cause for relief from automatic stay.

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 rehabilitation. 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); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized).

Movant has provided a properly authenticated copy of the rental agreement. Exhibit A, Dckt. 11. Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate, as Debtor's interest is merely possessory. 11 U.S.C. § 362(d)(2).

Less clear is to what extent the Property is necessary for an effective rehabilitation. Debtor initially sought alternative housing, but has to date been unsuccessful. Declaration, Dckt. 38.Debtor is the sole caretaker for her disabled daughter. *Id.* Debtor has not clearly articulated whether this caretaker role causes abnormal difficulty in securing alternative housing.

At the hearing, **XXXXXXXXXXXXXXX**.

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 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 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.

Request for Prospective Injunctive Relief

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 Autumn Oaks-200, LLC and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Autumn Oaks-200, LLC and

other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Autumn Oaks-200, LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **XXXXXXXXXXXXXXXXX**.

7. **14-30278-E-13 AP-1** | **GARY SHREVES AND KAREN BAYSINGER- SHREVES** | **Mark Wolff** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **10-19-18 [265]**

U.S. BANK, N.A. VS.

Final Ruling: No appearance at the November 20, 2018, 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, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on October 19, 2018. By the court's calculation, 32 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.

U.S. Bank National Association as trustee for the RMAC Trust, Series 2016-CTT("Movant") seeks relief from the automatic stay with respect to Gary Wayne Shreves and Karen Lee Baysinger-Shreves's ("Debtor") real property commonly known as 6642 Badger Court, Sacramento, California ("Property"). Movant has provided the Declaration of Michael Ruiz to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Michael Ruiz Declaration states that there are 32 post-petition defaults in the payments on the obligation secured by the Property, with a total of $36,151.34 in post-petition payments past due.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to Movant's Motion on November 6, 2108. Dckt. 272. Trustee asserts that Debtor is delinquent $3,006.00 under the Confirmed Plan, and that Trustee's Motion To Dismiss is set to be heard November 14, 2018.

DISCUSSION

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 $249,540.97, as stated in Proof of Claim, No. 17. The value of the Property is determined to be $180,000.00, as stated in Schedules A and D.

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 substantial 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 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.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by U.S. Bank National Association as trustee for the RMAC Trust, Series 2016-CTT("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow U.S. Bank National Association as trustee for the RMAC Trust, Series 2016-CTT("Movant") , 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 that is recorded against the real property commonly known as 6642 Badger Court, Sacramento, California, ("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 to obtain possession of the Property.
>
> No other or additional relief is granted.

8. **18-26585-E-13** **JULIAN PEREZ**
PJK-1 **Pro Se**
MARY JENKINS VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION, MOTION FOR AN *IN REM* ORDER REGARDING THE SUBJECT PROPERTY PROHIBITING THE IMPOSITION OF AN AUTOMATIC STAY AS A RESULT OF FUTURE BANKRUPTCY FILINGS
11-6-18 [17]

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 (*pro se*), Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 6, 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). 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. 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.

Creditors Mary Jenkins, Raymond Cordeiro, and Terese Cordiero ("Movant") seek relief from the automatic stay with respect to Julian Perez's ("Debtor") real property commonly known as 311 Bromley Cross Drive, San Jose, California ("Property"). Movant has provided the Declaration of Michael Pedrotti, Elizabeth Godbey, and Patric Kelley to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

In the Pedrotti Declaration, Pedtrotti identifies himself as chief executive of Private Capital Investments, ("Loan Servicer") the servicing agent for Movant. Dckt. 20. The Pedtrotti Declaration provides evidence that Movant is the holder of the note secured by the Property in the principal amount of $121,415.00 (exclusive of costs, late fees, and attorney's fees).

The Pedrotti Declaration further states that one post petition payment has been made, but that Movant has not consented to a transfer of the Deed of Trust to Debtor. Movant holds a second Deed of Trust, junior to the first Deed of Trust held by World Savings Bank in the principal sum of $370,534.99. Arrearages on the senior deed of trust total $14,302.45.

Notice of Default was recorded May 5, 2017, and Notice of a Trustee's Sale was published June 2018. *Id.*

The Property is Debtor's personal residence. *Id*. at ¶ 10. Neither Movant nor Debtor has provided the value of the Property, and no Schedules have been filed.

Alleged Fraudulent Scheme

Foremost in Movant's armunets for relief is its assertion that the current bankruptcy case is part of a fraudulent multi-bankruptcy, state-wide scheme to hinder Movant's foreclosure efforts. The Motion states the following facts with particularity:

1. The owner of the Property, Hong Xuan Vo (the "True Owner") and her husband Qui Vo are debtors in numerous other bankruptcies (*See* Exhibits J, K, and L, Dckt. 19) and have caused three additional bankruptcies (including this one) to be filed with three different debtors, to hinder Movant's foreclosure.

2. Judge Johnson in San Jose has already dismissed the last of two recent bankruptcies filed by True Owner based upon bad faith and put a one year bar on her or her husband's re-filing. Exhibit P, Dckt. 19.

3. Three junior lienholders have recorded their deeds of trust in violation of the Hong Vo bankruptcy case, case no. 17-51938. Exhibit K, Dckt. 19. Each of those lienholders then filed skeletal bankruptcy petitions (without schedules, statements of finacial affairs, or proposed plans).

4. The True Owner of the Property has not made payments since March 2018. Dckt 20 at ¶3. True Owners have failed to make payments despite an issued court order in case number 17-51938. Exhibit I, Dckt. 19.

5. Debtor has not filed Schedules and other required documents, instead filing a Motion to Extend the Time for filing those documents. Dckt. 11.

6. The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion to Extend Time on November 2, 2018. Dckt. 15. The Trustee noted the court should set the matter for hearing due to irregularities, including Debtor's prior case (18-24429) being filed without schedules, Debtor there also filing a motion to extend the time, and Debtor failing to file documents resulting in the case's dismissal August 17, 2018. Dckt. 22.

7. After Debtor filed this case, the True Owner faxed a request on October 24, 2018, for the "cancellation" of her foreclosure sale to the foreclosure trustee, the Loan Servicer, because she "filed" Debtor's alleged junior deed of trust and Debtor was in Bankruptcy. Debtor's Petition lists a trust entitled "AKA TKC Trust" as an additional name used by Debtor; that trust is listed as a beneficiary along with True Owner under the fraudulent deed of trust.

8. True Owner faxed a another (substantially identical) "cancellation" request notifying the Loan Servicer of a bankruptcy case filed by Arif Pasha on September 5, 2018, Case No. 18-52019. The Pasha debtor filed a skeletal petition as with the other debtors involved in the fraudulent scheme. The Pasha Debtor had done the same in at least two other bankruptcy cases. The most recent Pasha case was dismissed October 4, 2018.

9. True Owner faxed a another (substantially identical) "cancellation" request notifying the Loan Servicer of a bankruptcy case filed by Lavahn Johnson on October 2, 2018, Case No. 2:18-bk-21676-VZ. The Johnson debtor filed a skeletal petition as with the other debtors involved in the fraudulent scheme. The Johnson case was dismissed October 22, 2018.

10. True Owner filed a bankruptcy petition August 14, 2017, case no. 17-51938, while Movant was in the process of foreclosing on the Property. After obtaining a modification on Movant's claim approved by the court in that case and later defaulting, the court there granted a motion for relief from stay.

11. Subsequently, and while her case was still pending, True Owner transferred her interest in the Property to her husband, Qui Vo, and filed bankruptcy case 18-51485 the next day.

12. Due to True Owner and her husbands numerous filings in bad faith, Judge Johnson in the bankruptcy case no. 18-51485 granted the trustee's motion to dismiss the case and issued a one year bar to refiling by those debtors.

Movant asserts the following grounds give cause for relief:

1. No post petition payments having been made, and based on Debtors fraudulent scheme to hinder the foreclosure on the Property along with True Owner.

2. Debtor was barred from filing pursuant to 11 U.S.C. § 109(g)(1), which prohibits filing of a case within 180 days of dismissal of a case for willful failure of the debtor to abide by orders of the court.

3. Debtor filed the petition in bad faith, thereby failing 11 U.S.C. § 1325(a)(3).

4. Debtor is in default in the amount of $14,302.45 under the senior lien.

5. This bankruptcy was part of a scheme to delay, hinder, and defraud creditors that involved multiple bankruptcy filings affecting the Property under 11 U.S.C. § 362(d)(4).

DISCUSSION

Debtor has not filed an opposition to this Motion.

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.

As discussed below, based on the evidence provided, the present case was filed in bad faith as a part of a scheme to hinder foreclosure on the Property. This forms independent good cause for relief from the automatic stay.

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

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (I) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.*

Here, the True Owner filed her bankruptcy case August 14, 2017, case no. 17-51938. After an order was issued granting relief from stay as to the Property, True Owner transferred part of her interest in the Property to her husband and filed the joint case, 18-51485. When that case was dismissed, True Owner transferred her interest to three separate individuals who would each go on to file skeletal bankruptcy case (cases where no schedules or statement of financial affairs was filed, but where debtors simply sought a motion to extend time to file necessary documents in order to further delay foreclosure).

The present case is Debtor's second attempt at causing delay. The prior case (18-24429) was filed July 16, 2018, and dismissed October 17, 2018 for failure to timely file documents. Case No. 18-24429, Dckt. 22.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case cannot have been for any bona fide, good faith reason in light of Debtor not having an interest in the Property and not prosecuting the case beyond filing the skeletal petition. In effect, this is a series of bankruptcy attempts by the True Owner to keep the stay in effect now that she herself is barred from filing bankruptcy.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some

bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.

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 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 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.

Request for Prospective Injunctive Relief

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 Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Creditors Mary Jenkins, Raymond Cordeiro, and Terese Cordiero ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Creditors Mary Jenkins, Raymond Cordeiro, and Terese Cordiero ("Movant"), 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 that is recorded against the real property commonly known as 311 Bromley Cross Drive, San Jose, California, ("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 to obtain possession of the Property.
>
> **IT IS FURTHER ORDERED** that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:

"If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording."

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.

9. 18-27069-E-13 JAN SCHUMANN **ORDER TO SET DOCUMENT FILING CONFERENCE**
Pro Se
11-9-18 [2]

The Document Filing Conference is xxxxxxxxxxxxxxxxxxxx

On November 9, 2018, the court issued an Order setting a Document Filing Conference for November 20, 2018, at 1:30p.m. at which the Debtor (who may appear telephonically for this Document Filing Conference), the Chapter 13 Trustee, and a representative of the U.S. Trustee, and each of them, shall appear at to address any questions, issues, or concerns relating to the proper and sufficient redaction of the documents and the procedure for authorizing access to the unredacted documents as necessary in this bankruptcy case.

On November 7, 2018, Debtor Jan A. Schumann filed with the court a bankruptcy petition and Schedules to commence her Chapter 13 bankruptcy case. In addition, she filed with the court an *Ex Parte* Motion requesting that pursuant to 11 U.S.C. § 107(c) the court file the Petition and Schedules under seal, and that redacted versions be filed to protect the Debtor's current address from public disclosure. Debtor provides the court with certification that she is a participant in the State of California Safe at Home Confidential Address Program which provides for the maintaining confidential the address for Victims of Domestic Violence, Sexual Assault, and Stalking (Cal. Gov. Code §§ 6205 – 6210.)

Congress provides in 11 U.S.C. § 107(c) for protecting persons who seek relief or are parties in a case under the Bankruptcy Code:

(c) (1) The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property:

(A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title.

(B) Other information contained in a paper described in subparagraph (A).

(2) Upon *ex parte* application demonstrating cause, the court shall provide access to information protected pursuant to paragraph (1) to an entity acting pursuant to the police or regulatory power of a domestic governmental unit.

(3) The United States trustee, bankruptcy administrator, trustee, and any auditor serving under section 586(f) of title 28–

(A) shall have full access to all information contained in any paper filed or submitted in a case under this title; and

(B) shall not disclose information specifically protected by the court under this title.

Federal Rule of Bankruptcy Procedure 9037 further addresses the filing of documents, redaction, and filing of documents under seal.

Debtor has filed a letter issued by the California Secretary of State certifying that Debtor and her children are active participants in the Safe at Home Confidential Address Program.

NOVEMBER 20, 2018 FILING CONFERENCE

At the November 20, 2018 Filing Conference xxxxxxxxxxxxxxxxxxxxxxxxxxx

10. **18-90029-E-11 MF-36** **JEFFERY ARAMBEL** **Matthew Olson** **CONTINUED MOTION TO USE CASH COLLATERAL** **10-24-18 [678]**

No 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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The court ordered Debtor in Possession to provide telephonic notice by 10:00 a.m. on October 26, 2018; transmit by email or facsimile copies of the Motion, supporting pleadings, and notice of the October 30, 2018 hearing, to the respective counsel for each of the creditors asserting a lien against the cash collateral; and deposit in the U.S. Mail for service the Motion, supporting pleadings, and notice by the close of business on Friday October 26, 2018. Dckt. 680. By the court's calculation, 4 days' notice was provided.

The Motion to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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. At the hearing ----------.

The Motion to Use Cash Collateral is XXXXXXXXXXXXX.

On October 24, 2018, Jeffery Arambel, the Debtor in Possession, filed a Motion to Use Cash Collateral. Motion, Dckt. 678. The grounds stated with particularity in the Motion are summarized as follows:

1. The bankruptcy case was commenced on January 17, 2018.

2. The Debtor in Possession is operating property of the bankruptcy estate consisting of several thousands acres of land in Stanislaus County, which includes stone-fruit orchards, grazing land, and development and industrial properties.

3. During the month of September 2018, the Debtor in Possession has received rent monies totaling approximately $180,557.00. These monies are cash collateral, subject to the liens of various creditors in this case.

The Monthly Operating Report for September 2018 states that rents in the amount of $281,285.00 were received in September 2018. Dckt. 675 at 2. The September Monthly Operating Report further states that the aggregate rents collected in the case, including the $281,285.00, for the eight months of the case total only $301,091.00. *Id.*[FN.1.]

FN.1. Presumably the explanation is that the "rent" is paid from crop proceeds, that were harvested the end of summer and received by the tenant farmer in September 2018. However, such an explanation was not provided in the Motion or supporting Declaration (Dckt. 679).

In looking at the August 2018 monthly operating report it states that the aggregate rents collection as of that month were only $19,806.00. Dckt. 609 at 2.

1. The Debtor in Possession previously obtained authorization to use unencumbered monies of the estate to fund the expenses in the budget and make the adequate protection payments to Metropolitan Life on its secured (property on which Debtor's residence is located) claim.

2. By the start of October 2018, there existed only $9,000.00 of such unencumbered monies (which is significantly less than the Debtor in Possession's normal expenditures).

3. Debtor in Possession seeks authorization to now use cash collateral over the months of October through December 2018 in the aggregate amount of $165,850.00 ($57,017.00 in October, $64,917.00 in November, and $42,911.00 in December).

4. The unencumbered monies of the bankruptcy estate, $9,000.00 as of October 1, 2018, being insufficient to make the necessary payments, Debtor in Possession now seeks by the October 24, 2018 emergency authorization to make the following payments pending final hearing on the Motion:

Farming Expenses	
Water and Power	$5,000
Labor	$4,500
Fuel	$1,467
Parts	$600

Insurance	$28,100
Contract labor (office)	$1,000
Pharmacy	$300
Home maintenance + HOA	$400
Food, Clothing, and household	$650
Utilities (includes water)	$650
Transportation/gas	$150
Total Cash Out Operating	$42,817

5. It is asserted that the value of the property securing the claims (asserted to be in excess of $100,000,000.00) provides adequate protection for the use of the cash collateral.

See Motion, Dckt. 678.

Denial of Stipulation

On October 1, 2018, the court entered its order denying a Motion for Approval of Compromise. Dckt. 661. While the pleading styled as a "Compromise" contained many terms that appeared reasonable for a plan of reorganization, the court concluded that the purported "compromise" was a *de facto* plan, could not be "approved" or "granted" outside of the statutory confirmation process. Civil Minutes, Dckt. 656. The court also found several terms objectionable and not permissible under the Bankruptcy Code, including interpreting one provision as effectively making the creditor that was the party to the "compromise" a receiver in control of property of the bankruptcy estate. *Id.*

The Debtor had a prior motion to use cash collateral set for hearing in conjunction with the Motion to Approve Compromise. The use of cash collateral was based on the consent of the creditor as provided in the "compromise" which was not approved by the court. Order, Dckt. 662. This may have led to the Debtor in Possession not having the current Motion, in light of the October 1, 2018 unencumbered cash shortage, set for a hearing prior to November 1, 2018, believing that the Compromise would provide the needed use of cash collateral.

OPPOSITION - AMERICAN AGCREDIT FLCA

Though set on shortened time, American AgCredit FLCA ("American") was proactive and filed a written opposition to afford the court opportunity to consider such issues in preparation for the emergency hearing. American first notes that in making the request, the Debtor in Possession aggregates all of the cash

collateral into one pot, without regard to the property and lien which is at issue for those rental proceeds.

American directs the court to the Motion which identifies the cash collateral as being approximately $75,000, rents monies from the Zacharias Ranch and "other ranches." The Objection focuses the points into four main grounds.

First, American objects to the apparent commingling of cash collateral from different properties, subject to liens of different creditors, into one spending pot. It is asserted that this does not respect the specific, and different, lien rights of various creditors. Also, it does not match the use of cash collateral to expenses relating to the property that is generating the cash collateral.

American questions (objects to) the Debtor in Possession using rent monies from American's collateral to pay for the residence and residence expenses of the Debtor in Possession. It is asserted that the real property subject to American's deed of trust is rented as cattle grazing land, for which there is little cost and expense to the Bankruptcy Estate.

Second, American indicates consent to the use of its cash collateral for the expenses relating to the property subject to its deed of trust. The court is directed to the Stipulation for Stay Relief (Dckt. 475) which includes the provision that the Debtor in Possession shall maintain insurance on American's collateral. Stipulation ¶ 5, Dckt. 475. However, American does not consent, and does not believe the court has evidence that the value of the property otherwise provides adequate protection for American's secured claim to permit the use of cash collateral.

Third, American asserts that it holds the first deed of trust on the Zacharias Ranch (6,187 acres of native pasture agricultural land). American asserts further that its claim now exceeds $6,000,000, and American values its collateral (based on a recent appraisal) at $6,810,000.

Based on American's appraisal, it appears that there is $810,000 in value in excess of its claim, a 13% equity cushion.

Fourth, American cites back to the Stipulation for Relief, which has been approved by order of this court. Order, Dckt. 539. Under the Order, American could proceed with exercising its lien rights, and further, that the Debtor in Possession has agreed in the Stipulation that American's lien rights will not be impaired in any plan of reorganization, adversary proceeding, or contested matter. Stipulation ¶ 6, Dckt. 475. Additionally, the Debtor in Possession relinquished any surcharge rights. Stipulation ¶ 17, *Id.*

REVIEW OF SEPTEMBER 2018 MONTHLY OPERATING REPORT

The Monthly Operating Report for September 2018 states that $281,285 in rent monies were received in that month. Dckt. 675 at 2. The Variance to Statement of Operation attached to the Monthly Operating Report, states for rents the actual is $181,255, the forecast was $0, and the variance was $181,255. *Id.* at 3. It identifies the lease payments as

"$17k Cammy Wells. $89k + $74k in new cattle leases"

This appears to be in conflict with the information on Page 2 of the Monthly Operating Report stating that there was $281,285 in rent income, with a variance of $281,285.

On the Statement of Cash Receipts and Disbursements attached to the September 2018 Monthly Operating Report, the "Rents/Creditors/Other Cash-in" is stated to be $281,285. *Id.* at 13. For the bank statements attached to the Monthly Operating Report, the following deposits are reported:

Acct -866,	Office Deposit	$106,250
Acct-798,		
	Office Deposit	$75,662.98
	Office Deposit	$25,064.79
	Wire Transfer	$74,307.00

Id. at 19-20, 23.

OCTOBER 30, 2018 HEARING

At the October 30, 2018 hearing on the Motion the court granted the Motion, allowing Debtor in Possession to pay the following expenses on an emergency basis pending final hearing on the Motion:

Category	**Monthly Amt.**
Water and Power	$ 5,000
Labor	$ 4,500
Fuel	$ 1,467
Parts	$ 600
Insurance	$28,100
Contract labor (office)	$ 1,000
Pharmacy	$ 300
Home maintenance + HOA	$ 400
Food, Clothing, and household	$ 650
Utilities (includes water)	$ 650
Transportation/gas	$ 150
Total	$42,817

Dckt. 693. The court further ordered that the final hearing on this Motion be set for November 20, 2018 at 1:30 p.m., that Debtor in Possession file supplemental pleadings on or before November 9, 2018, and that Opposition be filed on or before November 16, 2018. *Id*.

DEBTOR IN POSSESSION'S SUPPLEMENTAL PLEADINGS

Debtor in Possession filed a Supplemental Declaration of Jeffrey Arambel In Support of this Motion on November 9, 2018. Dckt. 696.

The Declaration specifies the amounts of rents received (previously only described in the aggregate of $180,557 received in September 2018) as follows:

Ranch Asset	Rent Received	Creditors With an Interest
Murphy Ranch and Murphy 240 Ranch	$16,932	Stanislaus County Tax Collector and SBN V Ag I, LLC ("Summit")
Stadtler Ranch and Filbin Ranch	$89,318	Stanislaus County Tax Collector; Carolyn Dilday and Dan Stadtler Trustees; the Filbin Creditors1; and Summit
Zacharias Ranch, Cazale Ranch, and Begun Ranch	$74,307	Stanislaus County Tax Collector; American AgCredit; West Valley Ag. Services; Tom Cazale; IDC; and Summit

The Declaration states further that Debtor in Possession has received an addition $74,307 as a second payment on the Zacharias, Cazale, and Begun Ranches. *Id*. at ¶ 4.

The Declaration clarifies the claims and interests (excluding claims by the Stanislaus County Tax Collector holding claims in each property) in the various properties as follows:

Ranch	Creditor	Claim Amount	Property Value	Equity Cushion
Murphy Ranch and Murphy 240 Ranch	Summit	$39,423,265.90	$2,500,000	Cross-Collateralized
Stadtler Ranch	Filbin Creditors (POC 26)	$2,328,909.29	$2,665,850	$7,181,940.71
	Filbin Creditors (POC 27)	$663,442.91		$6,518,497.80
	Carolyn Dilday and Dan Stadtler, Trustees	$1,610,768.60		$4,907,729.20
	Summit	$39,423,265.90		Cross-Collateralized

Filbin Ranch	Filbin Creditors (POC 26)	$2,328,909.29	$6,845,000	$7,181,940.71
	Filbin Creditors (POC 27) (portion)	$663,442.91		$6,518,497.80
	Carolyn Dilday and Dan Stadtler, Trustees (portion)	$1,610,768.60		$4,907,729.20
Zacharias Ranch	American AgCredit	$5,713,696.67	$10,000,000	$4,286,303.33
	West Valley Agricultural Services, LLC	$3,610,488.70		$675,814.63
	Summit	$39,423,265.90		Cross-Collateralized
Cazale Ranch	Tom Cazale	$1,229,382.00	$1,800,000	$570,618.00
	IDC	$277,860.25		$292,757.75
Begun	Summit	$39,423,265.90	$2,776,000	Cross-Collateralized

Declarant states he has revised the monthly cash-collateral budgets for October through December 2018 to show the allocation of the rents collected to each property, the direct operating costs for the properties, and the allocation of costs associated with other properties of the estate that proposed to be used in the cash collateral to fund. *Id*. at ¶ 6. The revised budget also proposes to pay the 2018-2019 December installment of property taxes for those properties which generated the rents at issue in this motion. *Id*.

Declarant notes that the revised budgets do not spend all of the rents collected, with approximately $44,287 in rents remaining on hand at the end of the quarter. *Id*. at ¶ 8.

Declarant provides a description of his two properties in Patterson, California: one at 49 Echo Court and a second at 433 Roxanne Drive. Declarant describes the first property as primarily being a place where Declarant lives, but where Declarant also has an office and two rooms for file storage. Declarant describes the second property as being necessary for Declarant's business operations, and retention of business records (essentially Declarant claims a second home is necessary as a storage unit).

Declarant adds that the mortgage on the second property is $844 monthly, which is less than the cost of a 600 square foot storage space (the storage cost being $1,014).

Declarant describes another home located on the land owned by the separate estate of Filbin Land and Cattle Company currently occupied by contractor Rocky Fillipini, who provides security services to the two estates. Mr. Fillipini is responsible for all utilities and other costs associated with the home on the land owned by Filbin Land and Cattle Company, but pays no rent.

Declarant finally describes his administrative assistant Alanna Terry. Ms. Terry provides traditional administrative-assistant services, including preparing reports for water districts and other regulatory agencies, pulling necessary permits for various business operations (such as burn permits), file management, processing mail, copying documents, coordinating services of hired hands on the ranches, providing access to properties when requested by appraisers or secured creditors, and provide other clerical support. Declarant states Ms. Terry's services, at a cost of approximately $450 per week, are necessary to the estate because she allows Declarant to focus his time on administering the estate, working with his professionals, and making decisions for the resolution of this case.

As described in the Arambel Declaration, Debtor in Possession also filed supplemental Exhibits in support of the Declaration consisting of revised cash collateral budgets for the months of October, November, and December 2018. Exhibits B-D, Dckt. 697. Also filed is a budget summary for the entire fourth quarter of 2018. Exhibit E, Dckt. 697. The Exhibits reflect the following budget summaries:

October Direct costs		**October Indirect Costs**	
Category	**Monthly Amt.**	**Category**	**Monthly Amt.**
Water and Power	0	Water and Power	5,000
Labor	0	Labor	9,000
Fuel	0	Fuel	1,467
Parts	0	Parts	600
Insurance	24,484	Insurance	3,616
Contract labor (office)	1,743	Contract labor (office)	257
Pharmacy	261	Pharmacy	39
Home maintenance + HOA	349	Home maintenance + HOA	51
Home Mortgage + Escrow	5,838	Home Mortgage + Escrow	862
Food, Clothing, and household	1,176	Food, Clothing, and household	174
Utilities (includes water)	958	Utilities (includes water)	142
Office Supplies	87	Office Supplies	13
Transportation/gas	349	Transportation/gas	51
Misc	436	Misc	64
Prop taxes	0	Prop taxes	0
Total	35,680	**Total**	21,337
October Total		57,866	

November Direct costs	**November Indirect costs**

Category	**Monthly Amt.**
Water and Power	0
Labor	0
Fuel	0
Parts	0
Insurance	2
Contract labor (office)	1,743
Pharmacy	261
Home maintenance + HOA	349
Home Mortgage + Escrow	5,838
Food, Clothing, and household	1,176
Utilities (includes water)	958
Office Supplies	87
Transportation/gas	349
Misc	436
Prop taxes	0
Total	38,207

Category	**Monthly Amt.**
Water and Power	10,000
Labor	9,000
Fuel	1,467
Parts	600
Insurance	3,990
Contract labor (office)	257
Pharmacy	39
Home maintenance + HOA	51
Home Mortgage + Escrow	862
Food, Clothing, and household	174
Utilities (includes water)	142
Office Supplies	13
Transportation/gas	51
Misc	64
Prop taxes	0
Total	26,710

November total	64,917
December Direct Costs	**December Indirect Costs**

Category	**Monthly Amt.**
Water and Power	0
Labor	0
Fuel	0
Parts	0
Insurance	8,793
Contract labor (office)	1,743
Pharmacy	261
Home maintenance + HOA	349
Home Mortgage + Escrow	5,838
Food, Clothing, and household	1,176
Utilities (includes water)	958
Office Supplies	87
Transportation/gas	349
Misc	436
Prop taxes	44,853
Total	64,842

Category	**Monthly Amt.**
Water and Power	10,000
Labor	9,000
Fuel	400
Parts	600
Insurance	1,299
Contract labor (office)	257
Pharmacy	39
Home maintenance + HOA	51
Home Mortgage + Escrow	862
Food, Clothing, and household	174
Utilities (includes water)	142
Office Supplies	13
Transportation/gas	51
Misc	64
Prop taxes	0
Total	22,952

December total	**87,794**

SUPPLEMENTAL OBJECTION OF AMERICAN AGCREDIT, FLCA

On November 14, 2018, American AgCredit, FLCA ("American") filed a Supplemental Objection. Dckt. 705. American objects on the basis that Debtor in Possession continues to commingle costs without specific attribution to the associated property. As example, American notes that the Zacharias Ranch is an abandoned dead orchard with very low associated expenses leased to third parties.

American has provided the Declaration of Thomas Mouzes to authenticate copies of leases provided by Debtor in Possession's counsel reflecting one or more of the prepetition grazing leases of American's collateral. The Lessee in that lease is responsible for the utilities, insurance, and workers compensation costs. Therefore, the Debtor in Possession should be incurring little operational costs related to the operation of the Zacharias 26 Ranch. The budget expenses provided by Debtor in Possession do not reflect the low costs for specific properties and high costs associated with other properties.

FN.2. Counsel's testimony is that these documents are documents that he was told by counsel for Mr. Arambel are true and accurate copies of the leases. Counsel does not purport to authenticate the documents based on his personal knowledge.

American further argues that Debtor in Possession has failed to address the propriety of leasing the Zacharias Ranch to a third party for a period to August/September 2019 when the Debtor in Possession knows that American has stay relief and has commenced foreclosure proceedings of the Zacharias Ranch, and absent some unforeseen circumstance will conclude its foreclosure proceedings in January/February 2019.

American reasserts its initial objection that it is not adequately protected. Debtor in Possession has not provided appraisals to demonstrate the various property values represented in this case. Several appraisals filed along with American's Objection indicate the Zacharais Ranch is valued approximately $6,810,000. American's claim secured by this property is $6,284,408.09.

Finally, American asserts that a court approved Stipulation (Exhibit A, Dckt. 475; Order, Dckt. 539) prevent any attempted change to, alteration of and/or challenge to the American's claims.

American consents to the use of cash collateral for payment of real property taxes attributable to its collateral and for direct insurance costs.

OBJECTION OF FILBIN TRUSTEES

On November 15, 2108, Dorothy Arnaud, individually and as co-trustee of the Margaret Filbin Trust; Helen Jackson, individually and as co-trustee of the Margaret Filbin Trust; The Margaret Filbin Trust; Garry DeWolf; and Deborah DeWolf ("Filbin Trustees") filed an Objection to the Motion. Dckt. 715.

Filbin Trustees argue that the Motion relies on an assertion of an equity cushion in various properties held by Debtor in Possession, but that no appraisal has been filed establishing property values.

Filbin Trustee's argue further that creditors in this case should not be required to front the costs of Debtor in Possession's private homes other than his permanent residence. One of Debtor in Possession's three homes is alleged to be occupied by Mr. Fillipini in exchange for security services, but no detailed description is provided for those services.

Filbin Trustees assert Debtor in Possession continues to lump all cash collateral together, commingling As example, Filbin Trustee's promissory notes are in non-watered cattle grazing land–the costs associated with upkeep on this land are minimal.

Filbin Trustees request the court deny the Motion or in the alternative require further evidence of property values, the use of the Roxanne Drive property, and the specific services provided by Mr. Fillipini.

CONDITIONAL OBJECTION OF STADLER TRUSTEES

On November 16, 2018, Dan Stadler and Carolyn Dilday, successor trustees to the Stalder Trustee, Stadtler FLP, individually and as successor in interest to Cow Camp L.P. ("Stadler Trustees") filed a Conditional Objection to the Motion. Dckt. 717.

Stadler Trustees argue the housing expenses on Debtor in Possession's primary residence ($6,286.87 monthly) are excessive in the context of a bankruptcy proceeding. Furthermore, Debtor in Possession is maintaining a second home. Stadler Trustees propose the consolidation of Filbin and Arambel operations into a single location.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> (A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

. . . .

(c)(1) If the business of the debtor is authorized to be operated under section 721 , 1108 , 1203 , 1204 , or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

At the hearing,**XXXXXXXXXXXX**.

~~Debtor in Possession has shown that use of the funds is in the best interest of the estate. The proposed use again provides for expenses of the farming business, which generate income.~~

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 Authority to Use Monies of the Bankruptcy Estate Pursuant to Budget filed by Jeffery Arambel ("Debtor in Possession") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that **XXXXXXXXXXXXXXXXXX**

11. **18-90029-E-11** **JEFFERY ARAMBEL** **CONTINUED MOTION FOR RELIEF**
JCW-1 **Matthew Olson** **FROM AUTOMATIC STAY**
6-4-18 [381]

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 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 4, 2018. By the court's calculation, 38 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 xxxxxxxxxxx.

REVIEW OF MOTION

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to the Estate's real property commonly known as 49 Echo Court, Patterson, California ("Property"). Movant has provided the Declaration of George Plowden, Jr., to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Motion states with particularity (Federal Rule of Bankruptcy Procedure 9013) the following grounds upon which the particularly stated relief is based:

A. Debtor executed a promissory note that secured by a mortgage or deed of trust (it not being specified which legal document it is in the Motion).

B. The promissory note is either made payable to Movant or has been duly endorsed (Movant apparently not being able to state whether it is the named payee on the note or is asserting rights as the holder of an endorsed note).

C. Movant is either the original mortgagee or beneficiary (apparently unable to identify if the security interest is a mortgage or deed of trust) or an assignee (apparently unable to state if it is the original beneficiary or an assignee) of the mortgage or deed of trust.

D. Movant values the Property securing the claim at $450,000 (providing what is identified as a "Broker's Price Opinion" as evidentiary support).

E. After payment of Movant's secured claim and 8% for costs of sale, Movant computes there to be a negative equity for the Estate in the Property of ($370,000).

F. Debtor in Possession (Motion states "Debtor," but presumably Movant is referring to Debtor in Possession as the fiduciary of the bankruptcy estate in which all of Debtor's assets are now located) has not made four post-petition payments on the obligation.

G. Relief Requested: Based on the above grounds, Movant requests relief from the automatic stay to conduct a non-judicial foreclosure sale under the Deed of Trust, to apply the proceeds to the secured debt, and for the purchaser to obtain possession of the Property.

Motion, Dckt. 381. Movant also requests in the prayer attorneys' fees in an unspecified amount, with no grounds for such fees stated in the Motion. (Though the Federal Rules of Bankruptcy Procedure do not require a request for attorneys' fees be stated as a separate claim in the Motion and such fees may be allowed by post-judgment/order motion, if clearly stated in the Motion the court may be able to award such fees as part of the order granting relief, especially when no opposition is filed.)

In Movant's properly pleaded separate Points and Authorities, the legal basis for the relief is stated to arise pursuant to 11 U.S.C. § 362(c)(d)(2)—lack of equity for the Estate and not necessary for an effective reorganization. As provided in 11 U.S.C. § 362(g), Movant has the burden of proof on the equity issue, and Debtor in Possession has the burden of proof on the necessary for effective reorganization point.

Steve Ziettlow has provided his Declaration in Support of the Motion as the appraiser providing an expert opinion as to the value of the Property. Dckt. 385. His opinion is that the Property has a value of $450,000.00. Declaration ¶ 4, *Id.*

Though stated in the Motion and the Index to the Exhibits as a Broker's Price Opinion, both the above Declaration and Exhibit 3 filed in support of the Motion make it clear that it is an Appraisal, with the testimony being provided by a licensed real estate appraiser. Declaration ¶ 2, *Id.*

The Appraisal Report states that it is a "Desktop Appraisal" and is a "Restricted Appraisal Report." Exhibit C, Dckt. 383 starting at 38. On page 2 of the Desktop Appraisal, the following definitions and qualifications are provided:

> "PURPOSE:
> The purpose of this appraisal is to estimate the market value of the real property that is the subject of this report based on a sales comparison analysis solely for the use by the client identified in the report."

The identified client is Wells Fargo Bank, N.A.

> "INTENDED USE:
>
> The Intended use of this appraisal report is for internal asset review and/or loan servicing (Including default) by the client. The report is not intended for any other use."
>
> "INTENDED USER:
>
> The intended user of this report is limited solely to the identified client. This is a Restricted Appraisal Report and the rationale for how the appraiser arrived at the opinions and conclusions set forth in the report may not be understood properly without additional information in the appraiser's workfile."

In reaching his opinion as to value, Mr. Ziettlow identified six comparable properties that he used for this Desktop Appraisal. These all are stated to be built in the same time period, are of similar construction and condition (though condition appears to be assumed because this is a "Desktop Appraisal"), and are not REO or shortsale properties.

Mr. Ziettlow provides a map of the comparables and the Property at issue, showing their physical proximity. *Id.* at 42. One difference between the Property and the comparables is that the size of the Property lot is two times that of the comparables: 19,131 square fee compared to 6,750–9,393 square feet.

The living area for the Property is 3,829 square feet (5 bedroom, 4 bath), while the comparables ranged from 2814 (4 bedroom 2 ½ bath) to 3825 (5 bedroom, 3 ½ bath) square feet.

For the comparable properties, five have sales closing dates range from July 7, 2017 through March 18, 2018 (with only one sale being in 2018). The closing for the sale of the sixth comparable has not closed, with a listing price of $440,000 shown for a 3,835 square foot home (5 bedrooms, 3 ½ bath) on a 6,750 square foot lot (approximately 35% the size of the lot for the property at issue).

The sales prices for the five comparables for which escrow has closed are (in order of comparable identification number): $451,000 (3,777 sq. ft. home), $450,000 (2,939 sq. ft. home), $439,000 (2,884 sq. ft. home), $438,000 (2,885 sq. ft. home), and $419,000 (2,814 sq. ft. home).

For the sixth comparable property, the listing price is $440,000 (3,835 sq. ft., with an "inferior view").

Using the five actual sales, it appears that the value per square foot of the home is $150.00. For the Property, with a 3,829 square foot home, that would equal $574,350.

In looking at the Desktop Appraisal the court could not find where Mr. Ziettlow made adjustments for differences in the value for things such as "inferior views" or "superior garages" or of the property lot being almost three times size of the comparables.

Thus, it appears from looking just at Movant's expert testimony, the value of the Property would be in excess of $600,000 (which is 133% of the value opined by Movant's expert).

Other than the Property being larger than the comparables and the house generally larger, the only identified difference appears to be that for two of the sales Mr. Ziettlow found that those two homes had "superior" garages.

Movant also provides the Plowden Declaration, which states that there are four post-petition defaults in the payments on the obligation secured by the Property, with a total of $25,192.60 in post-petition payments past due. The Declaration also provides evidence that there are pre-petition defaults, with a pre-petition arrearage of $2,405.49.

DEBTOR IN POSSESSION'S OPPOSITION

Debtor in Possession filed an Opposition on June 28, 2018. Dckt. 447. Debtor in Possession asserts that it has obtained its own broker's price opinion reflecting that the Property has a value of at least $925,000.00. Debtor in Possession argues that this matter should be set for an evidentiary hearing to determine the Property's value and whether there is sufficient equity to afford Movant adequate protection and whether the Property is necessary for an effective reorganization.

Debtor in Possession provides the Declaration of George MacMaster, a licensed real estate broker, to provide his opinion as to the value of the Property. Dckt. 448. While testifying that he is licensed real estate broker, he purports to have "appraised" the Property and concluded that it is worth $925,000. *Id.*, ¶ 4. He then continues to state that his "Residential Broker Price Opinion" is filed as Exhibits A in opposition to the Motion. *Id.*, ¶ 5. Presumably, his use of the "appraisal" work was a slip of the tongue and not intended to represent that he is a licensed appraiser, as is Movant's expert.

Mr. MacMaster's Broker Price Opinion is filed as Exhibit A, Dckt. 449, starting at 3. He too identifies six comparables, with the homes ranging from 3,215 square feet to 4,045 square feet. *Id.* at 3–4.

For lot size, he identifies the Property as being 0.4392 acres, with the comparables ranging from 0.23 to 0.5168 acres.

Most of the comparables used by Mr. MacMaster have a pool, which the Property at issue does not.

The sales dates for Mr. MacMaster's comparables range from June 1, 2018 to 22, 2018, for which only three sales are provided. The other three comparables only provide the listing price. Though Mr. Ziettlow identified additional actual sales within the past year, Mr. MacMaster only provided three.

For the three actual sales, the prices per square foot of the residence range from $224 to $3,282. For the last one, Comparable 3, with a $3,282 per square foot allocation of the sales price, it appears to be a gross outlier and not a reliable comparable. The court also notes that this home was built in 1992, a decade prior to the Property at issue and the other comparables, and may be a substantially different type of property.

For the three comparables that have not sold, the listing prices range from $797,000 to $1,395.000.

From the two comparable sales, for which the properties appear to be similar to the Property at issue, based on the testimony of Mr. MacMaster, a per square foot price of $210 could be found. That would equate to a value around $800,000.

Debtor in Possession then argues that the Property does have sufficient equity above Movant's lien and that it is necessary for an effective reorganization because it will be retained as Debtor's home.

JULY 12, 2018, HEARING

At the July 12, 2018, hearing, the court continued the hearing to August 23, 2018, at the joint request of the Parties. Civil Minutes, Dckt. 504.

AUGUST 23, 2018 HEARING

At the hearing August 23, 2018, Debtor in Possession and Movant advised the court that they have agreed to terms for an adequate protection stipulation, which will be reduced to writing and presented to the court. Under the terms of the Stipulation, the Debtor in Possession will make adequate protection payments of $6,036.87.

The amount of the adequate protection payment raised consternation from several creditors, but in the context of whether Debtor in Possession was working for a liquidation of assets to pay creditors, or merely maintaining a standard of living based on impractical financial "beliefs."

The court continued the hearing on the Motion to November 8, 2018 at 1:30 p.m. to provide time for the filing of a settlement and any supplemental pleadings.

SEPTEMBER 24, 2018 STIPULATION

On September 24, 2018 Movant and Debtor filed an Adequate Protection Stipulation and Request to Continue the Motion For Relief From Automatic Stay. Dckt. 643. The Stipulation provides the following:

1. Commencing August 1, 2018, Debtor shall make regular monthly post-petition payments under the Note and Deed of Trust to Movant to be paid towards

contractual arrears on the loan. These payments shall be applied contractually to the loan.

2. The current PITI is $6,036.87 ($5,399.45 plus $637.42 in taxes). The loan is an adjustable rate mortgage and payment amounts are subject to change.

3. Payments shall be made directly to Wells Fargo Bank, NA , P.O. Box 14507, Des Moines IA 50306.

4. Debtor shall timely perform all of their obligations under Movant's loan documents as they become due, including the payment of real estate taxes and maintaining insurance coverage.

5. Debtor shall continue to make timely post-petition payments until claim treatment can be determined via the Chapter 11 Plan and/or a Stipulation for Claim Treatment.

6. Movant shall notify Debtor and counsel, in writing, if Debtor defaults or untimely performs any obligations under the stipulation. Debtor has 10 calendar days from the date of the written notification to cure the default.

OCTOBER 9, 2018, STATUS REPORT

Movant and Debtor filed a Status Report on October 9, 2018. Dckt. 674. The Status Report Debtor shall continue regular monthly post-petition payments (pursuant to the aforementioned Stipulation) until claim treatment can be determined via the Chapter 11 Plan. The parties anticipate a Chapter 11 Plan will be filed by the end of October, 2018, and will provide for arrears to be cured. It is also anticipated that the parties will extend the Stipulation pending plan confirmation.

NOVEMBER 8, 2018 HEARING

At the November 9, 2018 hearing, the court continued the hearing on the Motion to November 20, 2018, at 3:00p.m. Dckt. 695.

DISCUSSION

At the hearing, **XXXXXXXXXX**.

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, N.A. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that **xxxxxxxxxxxxxxxx**.