UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

December 1, 2016, at 10:00 a.m.

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1. **16-90602-E-7** **VIRGIL AUGSBURY** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
AP-1 **Jessica Dorn** **10-19-16 [13]**

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the December 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on October 19, 2016. By the court's calculation, 43 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.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1921 Don Pedro Road, Ceres, California ("Property"). The moving party has provided the Declaration of Jamielle Davis to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Davis Declaration states that there are three post-petition defaults in the payments on the obligation secured by the Property, with a total of $4,313.22 in post-petition payments past due. The

Declaration also provides evidence that there are three pre-petition payments in default, with a pre-petition arrearage of $4,094.32.

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 $295,565.51 (including $231,006.51 secured by Movant's first deed of trust), as stated in the Davis Declaration. The value of the Property is determined to be $198,368.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). 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.

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Debtor was granted a discharge in this case on October 21, 2016. Granting of a discharge to an individual in a Chapter 7 case terminates the automatic stay as to that debtor by operation of law, replacing it with the discharge injunction. *See* 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the Motion is denied as moot as to Debtor. The Motion is granted as to the Estate.

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

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Wells Fargo Bank, N.A., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as1921 Don Pedro Road, Ceres, California.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to Virgil Augsbury ("Debtor"), the discharge having been entered in case, the Motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).

No other or additional relief is granted.

2. **16-90603-E-7** **MARK ONE CORPORATION** **MOTION FOR RELIEF FROM**
DRJ-1 **Cecily Dumas** **AUTOMATIC STAY**
10-27-16 [49]

VICKIE WIELAND VS.

Final Ruling: No appearance at the December 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 27, 2016. By the court's calculation, 35 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.

Vickie Wieland ("Movant") seeks relief from the automatic stay to permit her to prosecute to judgment a lawsuit seeking to determine and liquidate her claim for enforcement of the claim against insurance coverage and/or against any persons having vicarious liability for Mark One Corporation's ("Debtor") actions. Recovery will be limited to available insurance coverage, if any. Movant has provided the Declarations of Vickie Wieland and David Thelen to introduce evidence to authenticate the documents upon which it bases its claim.

TRUSTEE'S NON-OPPOSITION

The Chapter 7 Trustee also filed a statement of non-opposition on November 3, 2016, requesting that Trustee's counsel have the opportunity to approve the proposed order on the Motion prior to it being lodged with the court. Dckt. 56.

DISCUSSION

A party may seek relief from stay when the party needs to obtain a judgment against the debtor in name only in order to recover from the debtor's insurer. *IBM v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731 (7th Cir. 1991). When the court is reasonably confident that the policy proceeds will be sufficient to satisfy the creditor's claims paid under the policy, the court should grant relief from the stay to permit an action. Because the policy proceeds will be available only to the creditors with claims covered by the policy, there is no depletion of assets that would otherwise be available to general, unsecured claims, and there is no reason to delay the creditor seeking to recover under the policy. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

Given that the movant would not seek to enforce any judgments against the Debtor and will proceed against the Debtor only to the extent its claims can be satisfied from the Debtor's insurance proceeds, the court concludes that cause exists for the granting of relief from the automatic stay.

The court shall issue a minute order terminating and vacating the automatic stay, pursuant to 11 U.S.C. § 362(d)(1), to allow Movant to prosecute the claims against the Debtor, but not enforce any judgments against the Debtor or the Estate other than against available insurance coverage, if any.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Rule 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 Vickie Wieland ("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 modified to allow Vickie Wieland, her agents, representatives, and successors to allow the Movant to prosecute the claims against the Debtor, but not enforce any judgments against the Debtor or the Estate other than against available insurance coverage, if any.

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

No other or additional relief is granted.

3. 16-90953-E-7 JOSIE CRUZ — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1 Pro Se — 11-2-16 [11]

TD AUTO FINANCE, LLC VS.

Final Ruling: No appearance at the December 1, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on November 2, 2016. By the court's calculation, 29 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.

Josie Cruz ("Debtor") commenced this bankruptcy case on October 19, 2016. TD Auto Finance LLC (Movant") seeks relief from the automatic stay with respect to an asset identified as a 2012 Mercedes Benz C250, VIN ending in 3908 ("Vehicle"). The moving party has provided the Declaration of Tiffanie Daniels to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Daniels Declaration provides testimony that there are two pre-petition payments in default, with a pre-petition arrearage of $1,474.81.

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 $13,435.82, as stated in the Daniels Declaration, while the value of the Vehicle is determined to be $10,419.00, as stated in Schedules B and D filed by Debtor.

DISCUSSION

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause does not exist for terminating the automatic stay because Movant has provided no evidence that the Debtor and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

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

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375–76 (1988). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Vehicle is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue an order terminating and vacating the automatic stay pursuant to 11 U.S.C. § 362(d)(2)—but not 11 U.S.C. § 362(d)(1)—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.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from 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.

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. As noted by another bankruptcy judge, such (unsupported by any grounds or legal authority),

> "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 TD Auto Finance LLC and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted TD Auto Finance 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 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 TD Auto Finance LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2012 Mercedes Benz C250 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.

4. **16-90765-E-7** **DONALD/CATHERINE MASON** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
AP-1 **David Foyil** **10-17-16 [10]**

PNC 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—No Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Creditor on October 20, 2016. The Office of the U.S. Trustee was not served. By the court's calculation, 42 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 hearing on the Motion for Relief from the Automatic Stay is continued to 10:00 a.m. on December 15, 2016.

PNC Bank, National Association, successor by merger to National City Bank, successor by merger to National City Mortgage, a division of National City Bank of Indiana ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6442 Usher Drive, Valley Springs, California ("Property").

FACIAL SERVICE DEFICIENCIES

The Proof of Service states that the Department of Justice was served, instead of the Office of the U.S. Trustee. Without all proper parties being served yet, the court cannot render an equitable decision. Additionally, Movant has not provided a declaration sworn under penalty of perjury relating to the underlying default. The court does not have any evidence of how many payments have been missed pre- or post-petition, and there is no evidence as to the amount of missed payments.

REVIEW OF MOTION

The Motion, Dckt. 10, states with particularity the grounds (Fed. R. Bankr. P. 9013) upon which the requested relief is based:

A. "February 10, 2005, Catherine G Mason and Donald E Mason ("Debtors") executed a promissory note in the principal sum of $272,000.00 (the "Note"), which was made payable to National City Mortgage a division of National City Bank of Indiana."

B. "PNC's records reflect that PNC Bank, National Association, successor by merger to National City Bank, successor by merger to National City Mortgage, a division of National City Bank of Indiana holds possession and/or is in control of the original Note. The Note is endorsed and payable in blank."

C. "Debtors are in default of their obligations under the Note for failure to make payments due and owing to Movant as of January 1, 2016."

D. "As of September 1, 2016, the arrearage owed under the Note is $16,814.22."

E. "As of September 1, 2016, the estimated payoff owing under the Note is the approximate sum of $232,561.44."

F. "Pursuant to 11 U.S.C. § 362(d)(2), the debtors have no equity in the Property and the Property is not necessary to an effective reorganization. The equity analysis for the Property is as follows:

Fair Market Value:	$272,700.00
Less:	
Movant's Trust Deed	$232,561.44
Ditech Financial LLC's 2nd Deed of Trust	$195,384.79
Costs of Sale (8%)	$ 21,816.00
Equity in the Property:	$(177,062.23)"

The Motion makes reference to a declaration that provides the proper evidence for the facts alleged in the Motion. Unfortunately, a review of the Docket shows that no declaration has been filed in support of the motion.

A review of the Docket reflects that the Points and Authorities and the Relief From Stay Information Sheet were filed twice. Dckts. 11–14. The Motion complies with Federal Rule of Bankruptcy Procedure 9013 and the motion, points and authorities, and exhibits are filed as separate pleadings as required by Local Bankruptcy Rule 9004-1and the Revised Guidelines for Preparation of Documents in this District.

It appears that there may have been some clerical confusion with the filing of the documents. The court is confident that Creditor's counsel can quickly remedy this human error and allow for the prompt ruling on the present Motion.

Motion to Abandon

On November 1, 2016, Debtor filed a motion to compel the abandonment of the Property, asserting that it has a value of $272,700.00, and is subject to the lien of Creditor to secure a $226,000 debt (providing a 20%, $50,000, equity cushion) and the junior lien securing a $199,489.67 debt owed to Ditech Financial, LLC. Motion to Abandon, Dckt. 23. The motion to abandon also asserts that the "trustee has claimed no interest in the real property because it is fully encumbered." *Id.*, ¶ 5. This is curious language, because property of the Debtor automatically became property of the bankruptcy estate when this case was filed, with no action of the trustee required. 11 U.S.C. § 541(a).

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 PNC Bank, National Association, successor by merger to National City Bank, successor by merger to National City Mortgage, a division of National City Bank of Indiana ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
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> **IT IS ORDERED** that the hearing on the Motion for Relief from the Automatic Stay is continued to 10:00 a.m. on December 15, 2016. Supplemental pleadings shall be filed and served, and notice provided to the U.S. Trustee on or before December 5, 2016.