UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 11, 2014 at 9:30 a.m.

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1. 13-33154-E-7 PHILLIP/STEPHANIE BURNS
TJP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-5-14 [69]

CARFINANCE CAPITAL VS.

Final Ruling: No appearance at the December 11, 2014 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 Debtors, Debtors' Attorney, Chapter 7 Trustee, and Office of the United States Trustee on November 5, 2014. By the court's calculation, 36 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

Philip and Stephanie Burns ("Debtors") commenced this bankruptcy case on October 10, 2013. Carfinance Capital ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2006 Ford Mustang, VIN ending in 1966 (the "Vehicle"). The moving party has provided the Declaration of Amanda Loud to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Loud Declaration provides testimony that Debtor has not made 6 post-petition payments, with a total of $2,237.25 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $19,989.97, as stated in the Loud Declaration, while the value of the Vehicle is determined to be $15,425.00, as stated in Schedules B and D filed by Debtor.

The Loud Declaration also seeks to introduce evidence establishing the value of the asset. Though the *Kelley Blue Book* valuation is attached as an Exhibit, it is not properly authenticated.

The court will *sua sponte* take notice that the *Kelley Blue Book* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Loud to be that she obtained the *Kelley Blue Book* valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court. The *Kelly Blue Book* valuation for the Vehicle is $12,117.00.

RULING

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 since 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).

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. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, 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 to allow Carfinance Capital, 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.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by Carfinance Capital("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 2006 Ford Mustang, VIN ending in 1966 ("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 (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.
>
> No other or additional relief is granted.

2. 14-21964-E-7 DAVE/MICHELLE SMITH
PPR-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
10-15-14 [141]

BANK OF AMERICA, N.A. VS.

Final Ruling: No appearance at the December 11, 2014 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, and Chapter 7 Trustee on October 15, 2014. By the court's calculation, 57 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties 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.

Don and Michelle Smith ("Debtors") commenced this bankruptcy case on February 28, 2014. Bank of America, N.A. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2004 Monarch 30PDD, VIN ending in 4241 (the "Vehicle"). The moving party has provided the Declaration of Tara Evans to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Evans Declaration provides testimony that Debtor has not made 2 post-petition payments, with a total of $541.39 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $48,509.16, as stated in the Evans Declaration, while the value of the Vehicle is determined to be $24,478.00, as stated in Schedules B and D filed by Debtor.

The Evans Declaration also seeks to introduce evidence establishing the value of the asset. Though the *NADA* valuation is attached as an Exhibit, it is not properly authenticated.

The court will *sua sponte* take notice that the *NADA* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, and because no opposition has been asserted by the Debtor, the court will presume the Declaration of Evans to be that she obtained the *NADA* valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court. The valuation is $20,880.00.

RULING

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 since 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).

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. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, 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).

Debtor was granted a discharge in this case on November 4, 2014. 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 Bank of America, N.A., 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.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

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

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

The Motion for Relief From the Automatic Stay filed by Bank of America, 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 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 2004 Monarch 30PDD, VIN ending in 4241 ("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 to the extent the Motion seeks relief from the automatic stay as to Dave and Michelle Smith ("Debtor"), the discharge having been granted in this case, the motion is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C) as to Debtor.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived.

No other or additional relief is granted.

3. 12-28879-E-11 ANNETTE HORNSBY
SK-5 Sunita Kapoor

APPROVAL OF AMENDED DISCLOSURE STATEMENT FILED BY DEBTOR
10-7-14 [306]

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.

Correct Notice Provided. The Proof of Service states that the Disclosure Statement and supporting pleadings were served on creditors holding the 20 largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on October 7, 2014. By the court's calculation, 65 days' notice was provided.

The Motion for Approval of Disclosure Statement is xxxxxx.

REVIEW OF THE DISCLOSURE STATEMENT

Case filed: May 8, 2012

Background: Annette Hornsby, Debtor, is a retired nurse and the widow of a deceased file captain, She also receives income from the rental of part of her home and one residential property. Debtor's gross income from January 2014 to October 2014 was: (1) Rental Income for 2319 Bennington Drive - $20,600.00; (2) Rental Income for 324 Moonraker Drive - $16,400.00; (3) Retirement Income - $56,051.84; (4) Social Security Income - $13,010.00; (5) TOTAL FROM JANUARY 2014 TO OCTOBER 2014 - $106,061.84.

Creditor/Class	**Treatment**	
Administrative Fees	**Claim Amount**	$650.00
	Impairment	Impaired
	Under this plan, Administrative Expenses shall be paid in full on the effective date of the Plan.	
Attorney's Fees and Expenses not including retainer that are outstanding	**Claim Amount**	$5,800.00
	Impairment	Impaired
	Under this Plan, Administrative expenses shall be paid in full on the effective date of the Plan. Debtor has provided a retainer of $7,500.00.	
Class 1: Wells Fargo Bank, N.A.	**Claim Amount**	$462,000.00
	Impairment	Impaired

	Under the proposed plan, the Debtor will retain this property secured by Class 1 claimant. Debtor has obtained a loan modification. The new principal value of the note will be $467,807.28, $5,807.28 of the new principal shall be deferred and treated as a non interest bearing principal forbearance. The new principal balance less the deferred principal balance is $462,000.00. The new interest rate is 4.125%. Under the plan, Debtor shall pay Wells Fargo Bank a monthly principal and interest payment of $1,966.95 plus an escrow payment for taxes of $1,006.19, which may adjust periodically. Debtor has also an insurance payment of $120.00. The Debtor and Wells Fargo have entered into a stipulation allowing the Debtor in possession to use Wells Fargo's cash collateral for debt service and to pay towards the monthly mortgage installment. The docket entry for the stipulation is Dckt. 250. Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor maintains all rights and protections of California Real Property and Foreclosure Law.	
Class 2: Stan Shore Trust	**Claim Amount**	$115,000.00
	Impairment	

	Stan Shore Trust, Stan Shore Trustee (“Shore”) claim is secured against the real property commonly known as 2319 Bennington Drive, Vallejo, California in the amount of $115,000.00. On July 28, 2014, Shore made an election pursuant to 11 U.S.C. § 1111(b) (Dckt. 260.) Interest rate is 5.5% with payments amortized over 20 years for payments of principal and interest of $791.07 per month. The balance of the Loan will be due in 10 years or upon sale or refinance of the property. Payments are due on the 1st and late after the 10th. If payments are late, the late fee is 6% - $47.46. If there is more than one late payment in any consecutive six month period, the interest rate on the loan shall increase to 6.5%. There shall be no pre-payment penalty. Debtor will send the previous monthly statements from the senior to Shore every month. If the first is ever more than two months in arrear, Shore can bring the senior current and immediately proceed with a foreclosure action.	
Class 3: Franchise Tax Board	**Claim Amount**	$6,642.49
	Impairment	Impaired
	A secured claim has been filed by the Franchise Tax Board in the amount of $6,642.49. The Franchise Tax Board has agreed to Debtor making a monthly payment of $125.60 including 3% interest, starting ten (10) days from the effective date of the plan. Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor maintains all rights and protections of California Real Property and Foreclosure Law.	
Class 4: Wells Fargo Bank, N.A.	**Claim Amount**	$310,577.37
	Impairment	Impaired

	The Moonraker Drive property has a value of $212,000.00, pursuant to a stipulation with Wells Fargo, N.A. Dckt. 163. Wells Fargo Bank, N.A.'s first secured claim against this property is limited to $212,000.00. The remaining portions of Wells Fargo Bank, N.A.'s first secured claim and second secured claim are now unsecured and shall receive the treatment of other general unsecured claims as described below in class 7. Under the Plan, Debtor shall pay Wells Fargo Bank, N.A. the full amount of its secured claim as follows: Monthly Payments of: $1,057.61 for P&I and property taxes ($456.67) for a total monthly payment of $1,514.28. Calculated at 5.25% interest for a period of 40 years. Material default of either treatment includes missing a payment, as well as failure to maintain taxes and insurance post-confirmation. This default can be cured if, within 10 days of receiving notice of such default, Debtor makes the payment. Claimant shall retain its lien on the collateral until the payment proposed under this plan is complete. Material default of either treatment includes missing a payment, as well as failure to maintain taxes and insurance post-confirmation. This default can be cured if, within 10 days of receiving notice of such default, Debtor makes the payment. Payments begin on the 1st of the month, following the effective date of Debtor's Plan. In the event of a default, this Claimant may exercise all of its remedies available under applicable state law. Likewise, Debtor maintains all rights and protections of California Real Property and Foreclosure Law.	
Class 5: Wells Fargo Bank, N.A.	**Claim Amount**	$310,577.37
	Impairment	Impaired

	Wells Fargo Bank, N.A. second Deed of Trust secured against the real property commonly known as 2319 Bennington Drive, Vallejo, California is determined to be secured in the amount of $0.00 and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. This property is encumbered by a senior lien securing claims which exceed the value of this property.	
Class 6: General Unsecured Class (including unsecured portions of claims by secured creditors)	**Claim Amount**	$256,277.23
	Impairment	Impaired
	Debtor shall make sixty (60) monthly payments to the general unsecured class. Each participating member of the unsecured call shall receive a pro rata share of these monthly payments in accordance with the ration in the amount of their claim against the Debtor and the total overall amount of the general unsecured claims against the Debtor. Unsecured creditors will receive a pro rate share of all of Debtor’s disposable income left over after payment of Debtor’s personal expenses and plan payments. Payments to begin on the 1st of the month following the effective date of Debtor’s Plan.	
Class 7: the interest of the individual Debtor in the Property of the Estate	**Claim Amount**	
	Impairment	

	Debtor shall retain all property of the estate and any other property to which the Debtor had a right to prior to filing Bankruptcy and to which Debtor's may obtain rights to receive in the future. Application to Absolute Priority Rule: Debtor submits that the absolute priority rule does not bar the viability of this Plan under the particular circumstances of the case. Pursuant to 11 U.S.C. § 1129(b)(2)(B)(ii): "The Absolute priority rule does not apply to an individual Chapter 11 Debtor, provided the plan allocates at least 5 years worth of the Debtor's projected disposable income to fund plan payments to unsecured creditors" March & Ahart, CAL. PRAC. GUID: BANKRUPTCY, § 11:1634.1; (The Rutter Group 2010). Debtor filed Chapter 11 in her individual capacity. As discussed below, Debtor proposes to apply all of her disposable income for the five year duration of the plan to make payments to unsecured creditors. Therefore, the restrictions of the absolute priority rule should not limit the plan.

A. C. WILLIAMS FACTORS PRESENT

__Y__Incidents that led to filing Chapter 11

__Y__Description of available assets and their value

__Y__Anticipated future of the Debtor

__Y__Source of information for D/S

__Y__Disclaimer

__Y__Present condition of Debtor in Chapter 11

____Listing of the scheduled claims

__Y__Liquidation analysis

__N__Identity of the accountant and process used

____Future management of the Debtor

__Y__The Plan is attached

In re A.C. Williams, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

OBJECTIONS:

No objections have been filed.

DISCUSSION:

1. Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains "adequate information" to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).

2. "Adequate information" means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

3. Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g., In re A.C. Williams, supra*.

4. There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Services, Inc.*, 39 B.R. 567 (Bankr. N.D.Ga. 1984). "Adequate information" is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. In re Michelson, 141 B.R. 715, 718-19 (Bankr. E.D.Cal. 1992).

5. The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

In the fifth Amended Disclosure Statement Debtor identifies the following income sources and expenses. Dckt. 306 at 9-10.

Income Source		**Related Expenses**		**Net Income**
2319 Bennington Dr. Rental Income	$1,500.00	Senior lien - P, I, T, I, and HOD	($3,093.14)	
		Landscaping & Repairs	($881.86)	
		Stan Shore Trust Secured Claim	($791.07)	($3,266.07)
324 Moonraker Dr	$2,200.00	Lien P,I,T,I	($1,683.00)	
		Repairs	($842.43)	

		Maintenance & Vacancy Factor	($195.00)	($520.43)
Retirement	$5,605.23	Living Expenses	($2,775.00)	$2,830.23
Social Security	$1,301.00			
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Total Income	$10,606.23	Total Expenses	($10,261.50)	

For living expenses, in the fifth Amended Disclosure Statement Debtor lists the following:

A. Electricity/Heating.....$420.00
B. Sewer & Garbage.....$ 95.00
C. Cable/Internet.....$220.00
D. Home Maintenance.....$180.00
E. Food.....$577.00
F. Clothing.....$200.00
G. Laundry.....$100.00
H. Medical and Dental.....$ 50.00
I. Transportation.....$230.00
J. Car Insurance.....$111.00
K. Life Insurance.....$ 60.00
L. Prescriptions.....$ 75.00
M. Supplies.....$ 50.00
N. AAA.....$ 15.00
O. ADT Alarm.....$ 44.00
P. Costco Dues.....$ 17.00
Q. Recreations/Dining Out.....$200.00
R. Long Term Insurance.....$ 61.00

No provision is made for payment of any income taxes. It may be that the Debtor believes that with the losses from operating two rental properties there will be no income tax owning.

Under the Loan Modification with Wells Fargo Bank, N.A., the principal balance of the senior secured claim is $467,807.28 ($110,597.56 in arrearage having been forgiven). $5,807.28 of the principal balance will be non-interest bearing, with payment deferred. Interest at the rate of 4.125% will accrue on the $462,000.00 remaining principal balance, to be paid over 480 equal installments, with the $5,807.28 deferred principal due in one balloon payment in the 480th month. Loan Modification Agreement, Exhibit A, Dckt. 113.

A support document provided with the fifth Amended Disclosure Statement are Bid Proposals for repairs to be made to the two real properties. For the Bennington Drive Property the price is stated to be $53,937.00 and for the Moonraker Property the price is stated to be $62,245.62. It appears that the budget may have a monthly expense for these items, but is not clear on how the

Debtor in Possession will obtain $116,182.62 in financing to pay for the repairs.

4. 12-28879-E-11 ANNETTE HORNSBY
HC-1 Sunita Kapoor

CONTINUED MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE TO CHAPTER 7
9-10-14 [278]

No Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

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.

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, parties requesting special notice, and Office of the United States Trustee on September 10, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss or Convert Chapter 11 Case has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss or Convert Chapter 11 Case is xxxxxxx.

Stan Shore ("Creditor") filed the instant Motion to Dismiss or Convert Chapter 11 Case on September 10, 2014. Dckt. 278.

MOTION

Creditor seeks to have the case dismissed or converted because Annette Hornsby ("Debtor") has failed to prosecute this case with reasonable diligence, has acted in bad faith, has failed to comply with court orders, and has failed to file a disclosure statement and confirm a plan within a reasonable time. Specifically, Creditor makes the instant motion because:

5. The bankruptcy case is already over two years old.

6. The Debtor has filed four plans and disclosure statements, none of which were confirmable. The proposed plans and disclosure statements suffered service issues and Debtor keeps referencing a possible contingent claim on a condominium in San Francisco.

7. The most recent plan that Debtor has filed is unconformable as Debtor is seeking to impermissibly modify a claim secured by Debtor's primary residence.

8. Debtor has filed 16 bankruptcy cases in the last seven years. The instant case was the Debtor's seventh bankruptcy filing since 2007 in her individual name and the sixteenth bankruptcy filing related to her. Every single one of Debtor's cases except for one (No. 0835711) was dismissed for Debtor's failure to adequately prosecute.

9. Debtor has repeatedly failed to serve her motions and disclosure statements in a proper manner. For example, Debtor's first two motions to value were denied because of procedural defects by the Debtor.

10. Debtor failed to comply with an order of the court to file an amended disclosure statement on or before September 2, 2014. Dckt. 252. Debtor did not file a disclosure until September 5, 2014 and is an example of her repeated abuse.

Creditor argues that a dismissal, rather than a conversion, of the case is appropriate because there are no assets to liquidate and the Debtor has mismanaged the estate. Furthermore, the Creditor argues that since the Debtor has already received a discharge, no discharge may be issued in this case. Creditor argues there are no assets worth selling for the benefit of the creditors.

Creditor argues that there are no compelling circumstances that justify deviating from the time frames required by 11 U.S.C. § 1112(b)(3).

On October 1, 2014, Creditor filed a Reply to the Motion to Dismiss. Dckt. 291. In the reply, Creditor argues that pursuant to Local Rule 9014-1(f)(1)(ii), "failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion." Creditor states that since no party has filed an opposition, the instant motion should be granted.

DEBTOR IN POSSESSION RESPONSE

On October 7, 2014, Debtor in Possession's Counsel filed her declaration stating that Movant agreed to continue the hearing to the date and

time of the hearing on the Fifth Amended Plan and Disclosure Statement. Dckt. 299.

OCTOBER 7, 2014 PLAN AND DISCLOSURE STATEMENT

On October 7, 2014, the Debtor in Possession filed her proposed fifth amended plan and disclosure statement. Dckt. 305, 306. The court has reviewed these in considering this Motion. The secured portion of Movant's Claim, $115,000.00 is to be amortized over twenty years with a 5.5% interest rate, with the balance due in full in ten years. This amount is consistent with the Movant's Proof of Claim, No. 10, which states a $113,095.68 secured claim. The plan provides for the claim secured by a senior lien on the collateral for Movant's claim to be paid pursuant to the terms of a loan modification. Fifth Amended Plan, Dckt. 305. The court approved the Loan Modification, order filed on June 12, 2013, Dckt. 130.

In the fifth Amended Disclosure Statement Debtor identifies the following income sources and expenses. Dckt. 306 at 9-10.

Income Source		Related Expenses		Net Income
2319 Bennington Dr. Rental Income	$1,500.00	Senior lien - P, I, T, I, and HOD	($3,093.14)	
		Landscaping & Repairs	($881.86)	
		Stan Shore Trust Secured Claim	($791.07)	($3,266.07)
324 Moonraker Dr	$2,200.00	Lien P,I,T,I	($1,683.00)	
		Repairs	($842.43)	
		Maintenance & Vacancy Factor	($195.00)	($520.43)
Retirement	$5,605.23	Living Expenses	($2,775.00)	$2,830.23
Social Security	$1,301.00			
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Total Income	$10,606.23	Total Expenses	($10,261.50)	

For living expenses, in the fifth Amended Disclosure Statement Debtor lists the following:

A. Electricity/Heating.....$420.00

B. Sewer & Garbage.....$ 95.00
C. Cable/Internet.....$220.00
D. Home Maintenance.....$180.00
E. Food.....$577.00
F. Clothing.....$200.00
G. Laundry.....$100.00
H. Medical and Dental.....$ 50.00
I. Transportation.....$230.00
J. Car Insurance.....$111.00
K. Life Insurance.....$ 60.00
L. Prescriptions.....$ 75.00
M. Supplies.....$ 50.00
N. AAA.....$ 15.00
O. ADT Alarm.....$ 44.00
P. Costco Dues.....$ 17.00
Q. Recreations/Dining Out.....$200.00
R. Long Term Insurance.....$ 61.00

No provision is made for payment of any income taxes. It may be that the Debtor believes that with the losses from operating two rental properties there will be no income tax owning.

Under the Loan Modification with Wells Fargo Bank, N.A., the principal balance of the senior secured claim is $467,807.28 ($110,597.56 in arrearage having been forgiven). $5,807.28 of the principal balance will be non-interest bearing, with payment deferred. Interest at the rate of 4.125% will accrue on the $462,000.00 remaining principal balance, to be paid over 480 equal installments, with the $5,807.28 deferred principal due in one balloon payment in the 480th month. Loan Modification Agreement, Exhibit A, Dckt. 113.

A support document provided with the fifth Amended Disclosure Statement are Bid Proposals for repairs to be made to the two real properties. For the Bennington Drive Property the price is stated to be $53,937.00 and for the Moonraker Property the price is stated to be $62,245.62. It appears that the budget may have a monthly expense for these items, but is not clear on how the Debtor in Possession will obtain $116,182.62 in financing to pay for the repairs.

OCTOBER 9, 2014 HEARING

The court continued the hearing to 3:00 p.m on December 11, 2014. No supplemental declarations or pleadings have been filed by any party.

DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b)(4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough,

two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

Here, the Creditor believes that because Debtor has failed to prosecute this case with reasonable diligence, has acted in bad faith, has failed to comply with court ordered deadlines, and has failed to file a disclosure statement and confirm a plan within the two and a half years this case has been pending, the motion should be granted. The court is inclined to agree with the Creditor. The court finds sufficient cause for relief to be granted under 11 U.S.C. § 1112.

There are numerous discrepancies and inconsistencies that remain on Debtor's plans and disclosures statements that have not been corrected in the two years this case has been pending. Debtor has failed time and time again to properly serve parties or to abide by the simplest court ordered deadline, most notably failing to file an amended plan and disclosure statement by September 2, 2014. A debtor's "unexcused failure to satisfy timely any filing or reporting requirement established under this title or by any rule applicable to this case under this chapter …" constitutes "cause" to convert or dismiss a Chapter 11 case. See 11 U.S.C. § 1112(b)(4)(F). Debtor has also grossly mismanaged her estate, wasting the resources of the estate and the creditors by the Debtor dragging her feet for the past two and a half years with no plan confirmed.

Additionally, this is Debtor's seventh individual bankruptcy case, but continues to be remiss in her responsibilities as a Debtor. FN.1. The Debtor's previous bankruptcy cases are:

1. 07-44398 (N.D. Ca., Oakland; dismissed for failure to file the schedules and other documents);

2. 08-40528 (N.D. Ca., Oakland; dismissed for failure to file the schedules and other documents);

3. 08-41908 (N.D. Ca., Oakland; dismissed for failure to file documents);

4. 08-29857 (E.D. Ca., Sacramento; dismissed for failure to file documents);

5. 08-35711 (E.D. Ca., Sacramento; Chapter 7 discharge)

6. 12-21050 (E.D. Ca., Sacramento; dismissed for failure to file documents)

7. 12-28879 (E.D. Ca., Sacramento; instant case)

FN.1. For the sake of argument, the court is not including the additional eight bankruptcies that the Creditor argues were related to the Debtor due to the interrelated properties in those cases. Seven bankruptcies in Debtor's individual name since 2007 suffices for purposes of the present Motion.

These cases were filed within the last eight years. Local Rule 1015-1 requires the Debtor to file a Notice of Related Cases. See LBR 1015-1 (Bankr. E.D. Cal., May 1, 2012). The Debtor failed to file a Notice of Related Cases.

A Chapter 11 Debtor's inability to effectuate plan of reorganization and that a prejudicial delay to creditors warranted conversion of the Debtor's case to one under Chapter 7 and even dismissal. 11 U.S.C. § 1112(b), (b)(1). *In re Johnston*, 149 B.R. 158 (B.A.P. 9th Cir. 1992). The Debtor has been unable to have a plan confirmed since the filing of this case. Due to the numerous bankruptcies Debtor has filed in the past seven years, the multiple failed attempts at filing a confirmable plan, and Debtor's inability to abide by Local Rules or court orders, there are multiple grounds of cause to dismiss the case. Furthermore, it appears that the continuation of the case will result in more detriment to creditors than keeping the case open because of the administrative expenses that are depleting the estate and the lack of any assets that would benefit the interests of the creditors.

Even considering the Debtor's fifth Amended Plan, it is premised on the Debtor pouring income into over-encumbered, negative cash flowing properties. While one could argue that making such payments on a residence, rather than renting, is at least cash neutral, there does not appear to be such business rationale for the Bennington Property. The fair market value for the Bennington property is stated to be $476,063.00. It is encumbered by the Wells Fargo Bank, N.A. modified loan with the principal balance of $476,063.00, and the Stan Shore Trust lien securing a $115,000.00 claim. Thus, the property is over-encumbered by 25% and is losing money at the rate of ($3,266.07) a month. Losing over ($36,000.00) from renting the property, it does not appear that gambling on a reasonable rise in the real estate market ever provides the Debtor with a positive recovery. FN.2.

FN.2. If one were to assume a 3% increase in value per year and ignoring costs of sale, the following ten year chart is generated, to show the economic value of this property when the ten-year balloon payment on Movant's claim comes due in year ten.

Value		**3% Annual Increase, compounded**		**Annual Loss ($3,266.07 x 12 months)**		**Net Increase/(Decrease) of Appreciation over Operational Loss**
Beginning Value	$476,063.00	$14,281.89		($39,192.84)		($24,910.95)
End Year 1	$490,344.89	$14,710.35		($39,192.84)		($24,482.49)
End Year 2	$505,055.24	$15,151.66		($39,192.84)		($24,041.18)
End Year 3	$520,206.89	$15,606.21		($39,192.84)		($23,586.63)
End Year 4	$535,813.10	$16,074.39		($39,192.84)		($23,118.45)
End Year 5	$551,887.49	$16,556.62		($39,192.84)		($22,636.22)
End Year 6	$568,444.12	$17,053.32		($39,192.84)		($22,139.52)
End Year 7	$585,497.44	$17,564.92		($39,192.84)		($21,627.92)
End Year 8	$603,062.37	$18,091.87		($39,192.84)		($21,100.97)
End Year 9	$621,154.24	$18,634.63		($39,192.84)		($20,558.21)
End Year 10	$639,788.86	$19,193.67		($39,192.84)		($19,999.17)
	Total Appreciation over Ten Year Period	$168,637.64	Losses Over Ten Year Period	($431,121.24)	Net Loss Over Ten Year Period	($223,290.76)

Thus, it appears that even with a modest, annual increase in value, compounded, the Debtor would still lose almost a quarter of a million dollars. Even with an annual appreciation in value of 6% compounded, at the end of ten years the gross appreciation in value would almost equal, still a ($4,140.27) loss, the annual loses from operation. The 6% compounded appreciated value would be $828,427. If one assumes 8% for sales commissions and costs of sale, that would generate sales costs of ($66,274.16). Thus, even with an aggressive, compounded appreciation in value, the Debtor still loses ($70,000.00) after spending ten years paying Wells Fargo Bank, N.A. on the claim secured by the senior lien and the Stan Shore Trust on the claim secured by the junior lien.

The Debtor has now been in this Chapter 11 case for two and one-half years, unable to prosecute a plan. The fifth Amended Chapter 11 Plan does not appear to be based on economic reality.

DECEMBER 11, 2014 HEARING

At the hearing xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

Cause XXXXX exists to dismiss the Chapter 11 case, and appears to be in the best interests of creditors and the estate. The Motion is xxxxx and the case is xxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by the United States 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 is xxxxxx and the case is xxxxx.