UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 15, 2019 at 1:30 p.m.

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1. **18-20415-E-13** **KARINA HANGARTNER** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
APN-2 **Diana Cavanaugh** **11-27-18 [44]**

TOYOTA MOTOR CREDIT CORPORATION VS.

Final Ruling: No appearance at the January 15, 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, and Office of the United States Trustee on November 27, 2018. By the court's calculation, 47 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.

Toyota Motor Credit Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2012 Toyota Tundra, VIN ending in 7667 ("Vehicle"). The moving party has provided the Declaration of Rahnae Spooner to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Karina A. Hangartner ("Debtor").

The Rahnae Spooner Declaration provides testimony that Debtor has not made 5 post-petition payments, with a total of $3,239.00 in post-petition payments past due. The Declaration also states Debtor has voluntarily surrendered possession of the Vehicle to Movant.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 50. The Trustee notes the status of Debtor's plan; that Debtor's Schedule A/B indicates the Vehicle is non-operable after having a transmission and catalytic converters stolen; that Debtor received $2,600.00 from insurance for the theft; and that Trustee does not oppose the Motion if Debtor voluntarily surrendered the Property.

DEBTOR'S NON-OPPOSITION

Debtor filed a Non-Opposition on January 9, 2019. Dckt. 53. Debtor states she does not oppose the Motion, and agrees that the 14 day stay provided by Rule 4001(a)(3) may be waived. [FN.1.]

FN.1. Relief from the 14-day stay was not requested by Movant.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $22,541.80, as stated in the Spooner Declaration, while the value of the Vehicle is determined to be $17,700.00, as stated on the NADA Valuation Report.

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 having surrendered the Vehicle. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Cusick ("the Chapter 13 Trustee"), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and (as indicated by Debtor's Non-Opposition) the property is not necessary for any effective rehabilitation in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Toyota Motor Credit Corporation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2012 Toyota Tundra, VIN ending in 7667 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> No other or additional relief is granted.

2. **17-22347-E-11** **UNITED CHARTER LLC** **PRE-EVIDENTIARY HEARING RE:**
JJG-11 **Jeffrey Goodrich** **OBJECTION TO CLAIM OF WAYNE BIER, CLAIM NUMBER 4**
9-11-18 [275]

Debtor's Atty: Jeffrey Goodrich
Creditor's Atty: Paul J. Pascuzzi

Notes:
Set by order of the court filed 10/28/18 [Dckt 308]; Close of Discovery 12/28/18

Pre-Evidentiary Hearing Statement in Support of Objection of Debtor in Possession to Proof of Claim of Wayne Bier filed 1/3/19 [Dckt 316]

Pre-Evidentiary Hearing Conference Statement of Wayne Bier filed 1/4/19 [Dckt 317]

SUMMARY OF OBJECTION TO CLAIM

United Charter LLC, the Debtor in Possession, ("Objector") requests that the court disallow the claim of Wayne Bier ("Creditor"), Proof of Claim No. 4 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $1,999,215.36. Proof of Claim, No. 4.

Objector states the following in its Motion:

1. Creditor failed to file his claim by the court-set cutoff of August 3, 2018.

2. Creditor's Proof of Claim is inconsistent with a past Declaration wherein Creditor states his claim was "a little less than the scheduled amount" of $580,000. Dckt. 214, ¶ 2.

3. Objector requests an opportunity to conduct discovery and further briefing in the event Creditor claims failure to file a timely proof of claim was due to excusable neglect.

4. Creditor's claim contradicts the parties' prepetition second modification agreement, which reduced the principal balance of the debt to $580,000.00. The Modification provides for the reinstatement of interest and penalties waved in the event of Objector's material breach, but not reinstatement of the original principal.

5. The Court has already noted that the Objector transferred postpetition the sum of $21,000 to Creditor in three separate $7,000 installments on July 27, 2017 (Docket #157, Bank Statements), August 4, 2017 (Docket

#158, Bank Statements) and August 11, 2017 (*Id*.). The Court has ruled that such payments were not authorized "under [Title 11] or by the court." Accordingly, unless and until Bier repays that amount to the estate, his claim must be disallowed.

6. In the event Objector confirms a plan which cures its default on Creditor's claim, Creditor's claim for reinstated interest and penalties should be disallowed. Creditor has received over $190,000 between February 2017 and February 2018, almost all of which (almost $170,000) was received postpetition from either the Debtor in Possession ($21,000) or the Debtor's managing member, Raymond Zhang ($169,218.50). Those payments must be applied to Creditor's claim.

7. Presuming reinstated interest and penalties exist, Objector estimates the maximum amount of Creditor's claim consists of:

September 1, 2016 principal: $580,000

Plus interest at 7.5% from September 1, 2016 to April 6, 2017: $51,961.64

Maximum Allowed Claim as of April 7, 2017: $631,961.64

Less payments made after September 1, 2016: $190,843.92

Amount of Claim for Plan Confirmation Purposes: $441,117.72

8. Creditor is not entitled to postpetition interest because the value of his collateral does not exceed the allowed amount of all senior secured debt and his allowed claim.

SUMMARY OF OPPOSITION

Creditor filed an Opposition to the Objection on October 11, 2018. Dckt. 289. The Opposition asserts the following:

1. On or about February 12, 2008, the Objector executed a promissory note in connection with a $2,000,000 loan made to the Objector in connection with the Objector's purchase of real property from Creditor. Dckt. 289 at ¶ 3.

2. On or about July 1, 2014, the parties entered into a modification agreement, which, inter alia, purported to reduce the principal balance

to $925,000, reduce the interest rate to 4.5% per annum, and provide new repayment terms. At that time, the balance due on the Note was $2,474.398. Essentially, the effect of the First Modification was to apply all of the Objector's previous payments to principal, rather than to interest and penalties, and such interest and penalties were forgiven. *Id*, at ¶ 8.

3. The Objector materially breached the First Modification by failing to make all payments when due. Although the Debtor made payments totaling $475,182.64 between August 2014 and August 2016, such payments were not made in the agreed-upon amounts at the agreed upon due dates under the First Modification. The Objector acknowledged that it defaulted on the First Modification, as recited in the Second Modification. Therefore, all the original terms of the Note and Deed of Trust, and all balances, were reinstated. *Id*, at ¶ 11.

4. As of October 2016, taking into account the breach of the First Modification and reinstatement of any amounts due that had been forgiven in the First Modification and crediting payments made, the balance due on the Note was $1,999,215.36. *Id*, at ¶ 12.

5. In April 2017, the parties entered into a second modification agreement. *Id*, at ¶ 13. The Debtor signed the agreement on April 7, 2017 - the same day that it filed this bankruptcy case. Creditor disputes whether the Objector actually signed the Second Modification before or after the time of the bankruptcy case filing. *Id*, at ¶¶ 14, 15.

6. The Second Modification purported to reduce the principal balance owed by the Objector to $580,000, by, similar to the First Modification, applying all of the Objector's previous payments to principal, rather than to interest and penalties, and such interest and penalties were forgiven. *Id*, at ¶ 16.

7. Creditor believed the Agreement to say all amounts forgiven would be reinstated, and not merely interest and penalties. The Objector materially breached the Second Modification on the same day it signed the Second Modification—April 7, 2017—when it filed its bankruptcy petition. Therefore, all the original terms of the Note and Deed of Trust, and all balances, were reinstated. In addition, not all payments were made in the amounts or on the schedule set forth in the Second Modification. *Id*, ¶¶ 17-20.

8. The Second Modification is void as Objector fraudulently misrepresented intent to perform the terms of the modification, where Debtor in Possession filed bankruptcy immediately after executing the

modification. *Id*, ¶ 21. The Second Modification is also void if entered into after the filing of the petition. *Id*, ¶ 22.

9. As of the petition date, Creditor was owed $1,999,215.36, which credits all payments made, but reinstates all amounts forgiven under the First Modification and the Second Modification, because those agreements were not complied with by the Objector (and/or are void). Additional payments in the amount of $190,843.92 were made to Bier between February 2017 and February 2018, which have brought Creditor's current claim amount to $1,808,371.44. *Id*, ¶ 23.

10. **Creditor concedes it stated in a Declaration it was owed less than $580,000. Creditor argues the Declaration was prepared by Objector's counsel,** and was signed before Creditor retained his own counsel. *Id*, ¶ 25.

[This raises an interesting professional issue for counsel. If counsel for Objector was preparing declarations to be signed by a creditor, a clearly legally adverse party, which purported to make statements of the creditor's rights and interests (which subsequently could be used against him) to whom counsel did and does owe his professional and fiduciary duties. *See* Bier Declaration ¶ 22, Dckt. 290.]

11. Creditor's Proof of Claim was deemed filed under 11 U.S.C. § 1111(a), and therefore the filing of the claim was merely an amendment to a scheduled claim. *Id*, ¶¶ 27-28. Objector is not prejudiced by the amendment to Creditor's claim, and the amendment was not filed in bad faith. *Id*, ¶¶ 34-35. As Objector believes it has not filed its claim late, it has not addressed any argument for excusable neglect. *Id*, ¶ 38.

12. Creditor's claim should not be disallowed under 11 U.S.C. § 502(d). Creditor is not aware of any court ruling or order that the Objector made $21,000 in post-petition payments to Creditor and that such payments were not authorize under Title 11 or by the Court. As Creditor holds a secured claim, it would be pointless to require the return of post-petition payments. Nevertheless, Creditor is willing to return any payments Objector establishes are avoidable. *Id*, ¶¶ 39-44.

13. Other issues raised by Objector constitute factual disputes and necessitate an evidentiary hearing. See *Id*, ¶¶ 45-47.The issue of post-petition interest should be determined in connection with the Motion to Value Collateral filed by Objector. *Id*, ¶ 49.Creditor requests an evidentiary hearing to resolve the disputes in the Objection.

FINAL BANKRUPTCY COURT JUDGMENT

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.

B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2019**.

C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before **--------, 2019**.

D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before **----------, 2019**.

E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before **----------, 2019**.

F. The Trial shall be conducted at **----x.m. on ----------, 2019**.

The Parties in their respective Pretrial Conference Statements, Dckts. ------, -------, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Debtor in Possession (ΔIP)	**Creditor**
ΔIP Jurisdiction and Venue: "There is no dispute that this Court has jurisdiction over the subject claim objection, that venue in this Court is proper and that the objection is a core proceeding. 28 U.S.C. §§ 1334, 1409 and 157(b)(2)(B)." Pre-Evidentiary Hearing Statement, Dckt. 316.	**Creditor Jurisdiction and Venue:** "This Court has jurisdiction over this Claim Objection pursuant to 28 U.S.C. §§ 157 and 1334. This matter concerns the allowance or disallowance of a claim against the bankruptcy estate, counterclaims by the estate against persons filing claims against the estate, orders to turn over property of the estate, and a determination of the validity, extent, or priority of liens, and accordingly, this is a core proceeding pursuant to 28 U.S.C. §§ 157 (b)(2)(B), (C), (E), and (K). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. Bier does not anticipate any dispute concerning jurisdiction or venue." Pre-Evidentiary Hearing Statement, Dckt. 318.
ΔIP Undisputed Facts:	

1. Bier's claim arises under the terms of an owner carry-back purchase money loan with a principal amount of $2,000,000 ("Note").

2.The note is secured by a second priority deed of trust encumbering all of the DIP's real property ("Deed of Trust").

3.The Debtor's obligations to Bier have not been guaranteed by the shareholders or any third party.

4.The following Documents are not in Dispute:

a. Bier's Note (Exhibit "A" to Bier's Proof of Claim),

b. Deed of Trust (Exhibit "B" to Bier's Proof of Claim), and the two relevant modifications of the Note, i.e.,

c. The July 1, 2014 Modification Agreement (Exhibit "C" to Bier's Proof of Claim) (hereinafter "First Modification Agreement") and

d. The April 3, 2017 Second Modification Agreement (Exhibit "D" to Bier's Proof of Claim) (hereinafter "Second Modification Agreement").

5. Throughout the performance of the Note, the parties, through certain documents as listed above, modified the Note. Prior to July 2014, all such agreements provided for payments of interest only, as did the Note.

6. Under the First Modification Agreement, the principal amount of the Note was reduced from $2,000,000 to $925,000, accrued interest and late charges were waived and cancelled, and the debtor agreed to make the following payments going forward: (1) a principal reduction payment of $250,000, upon which the principal balance of the Note would then be $675,000; and (2) thereafter, monthly installments of principal and interest of $9,382.61, representing a seven (7) year amortization of the $675,000 at 4.5% interest (instead of the Note rate of 7.5%).

7. Bier was represented by his own counsel in the negotiations and drafting of the First Modification Agreement.

8. Between the execution of the First Modification Agreement and September 2016, when the debtor first failed to make payment under the First Modification Agreement, the debtor, for more than two years, made and Bier accepted the $250,000 principal reduction payment and twenty-five (25) monthly installments of $9,382.61 each, for a total of $234,565.25 in monthly installments.

9. After applying the debtor's above-described 25 monthly installment payments between July 2014 and August 2016, shows that the principal balance of the Note was $495,782.01 as of September 1, 2016.

10. In September 2016 the debtor defaulted by failing to pay the September 2016 installment payment

and subsequent installments prior to filing for protection under Chapter 11 on April 7, 2017 ("Petition Date").

11. The total number of unpaid installments due under the terms of the Modification Agreement was eight as of the Petition Date.

12. The late charge for any late installment under the Modification Agreement was six percent (6%) of the late installment.

13. If Debtor was entitled to cure its default under the Modification Agreement without paying "all interest and penalties cancelled and waived by the execution of [the First Modification Agreement]", the amount of such cure as of April 7, 2017 was $74,902.48 (eight installments of $9,362.81 each) plus seven late charges [($9,362.81 x 6%) x 7 = $3,932.38, for a total cure of $78,834.86.

14. Bier believes that the Debtor's nonpayment under the First Modification Agreement entitled him to demand (as a cure of the debtor's default) not just payment of the above missed monthly installments and late charges, but also all amounts "waived and cancelled upon execution of the First Modification Agreement", including all prior principal forgiveness.

15. Between August 2016 and the Petition Date the debtor and Bier discussed directly and through counsel various proposals for curing the debtor's non-payment.

16. In April 2017 they reached an agreement to cure the debtor's non-payment on terms memorialized in the Second Modification Agreement (Bier's Proof of Claim, Exhibit "D").

17. Under the terms of the Second Modification Agreement, the debtor was entitled to cure its prepetition default by paying the sum of $95,153.96 by no later than April 8, 2017.

18. The amount was calculated under the Second Modification Agreement by

a. increasing the starting principal balance from $495,782.01 to $580,000 as of September 1, 2016 and amortizing that sum at 4.5% interest over 60 months to create a monthly payment of principal and interest of $10,812.95; and

b. multiplying this $10,812.95 monthly payment by the eight months between the date of default (September 1, 2016) and the date of cure (April 7, 2017) and adding a 10% penalty of $8,650.36 for late payment.

19. Debtor did not pay the cure amount required under the Second Modification on or before April 8, 2017. It is undisputed between April 8, 2017 and February 2018, Bier received the sum of $190,843.92 from the DIP, Raymond Zhang and/or Cindy Zhang, the debtor's shareholders ($21,000 of which came from the Debtor in Possession).

Creditor Undisputed Facts:

1. Bier made a $2,000,000 loan to the Debtor. On or about February 12, 2008, the Debtor entered into a valid and binding promissory note (the "Straight Note") in connection with a $2,000,000 loan made to the Debtor in connection with the Debtor's purchase of certain real property from Bier (the "Loan").

a. The Straight Note provided for interest at the rate of 7.5% per annum, and provided for monthly interest-only payments of $12,500 until March 19, 2010, when the entire unpaid principal balance, together with accrued interest, became immediately due and payable.

2. The loan was secured by Debtor's real property. The Note was secured by a valid and binding deed of trust and assignment of rents ("Deed of Trust") on Debtor's industrial warehouse real property commonly known as 1881 E. Market Street, Stockton, California 95205 and other adjacent parcels (collectively, the "Property"). The Deed of Trust was properly and duly recorded on February 22, 2008 in the San Joaquin County Recorder's Office, creating a valid and enforceable lien on the Property.

3. The Debtor defaulted on the loan. The Debtor did not pay the unpaid principal balance and accrued interest when it became due and payable on March 19, 2010 under the Straight Note. The Debtor also defaulted on the loan by not making all payments when due under he Straight Note.

4. Bier and the Debtor entered into a first modification of the loan. On or about July 1, 2014, the parties entered into a modification agreement ("First Modification"), which, *inter alia*, purported to reduce the principal balance to $925,000, reduce the interest rate to 4.5% per annum, and provide for monthly payments of $9,382.61.

5. The Debtor defaulted on the first modification. Under the First Modification, "concurrent with the execution of" that agreement,

a. Debtor was to pay Bier $250,000,

b. To be applied to the new balance under the First Modification.

c. Debtor did not pay Bier $250,000 concurrent with the execution of the First Modification.

d. Bier sent e-mails to the Debtor's attorneys on July 14, 2014 and July 22, 2014 noting that the payment should have been made by July 14, 2014, and that because no payment had been made, the agreement was "void" and "broken."

e. Bier's attorney, Steven Clair, also sent a letter on July 15, 2014, notifying the Debtor's attorney that "Wayne Bier revokes all previous settlement proposals due to nonperformance."

f. Eventually, the Debtor paid Bier $250,000 on or about July 23, 2014.

g. Debtor also defaulted on the First Modification by failing to make the required monthly payments beginning September 2016 and thereafter. The Debtor admitted in the Second Modification that the "Borrower has defaulted on the First Modification."

6. Bier and the Debtor (purportedly) entered into a second modification. On or about April 7, 2017, the parties purportedly entered into a second modification agreement ("Second Modification") which, inter alia, purported to reduce the principal balance to $580,000, kept the interest rate at 4.5% per annum, and provided for monthly payments of $10,812.95.4 The Second Modification also provided that the Debtor was to pay $95,153.96 to Bier within one day of execution of the agreement.

7. Debtor defaulted on the second modification. The Debtor defaulted on the Second Modification by filing its bankruptcy case on the same day it (allegedly) signed the Second Modification, April 7, 2017, by

a. Failing to make the $95,153.96 payment to Bier within one day of execution of the agreement, and

b. by failing to make the required monthly payments when due under the Second Modification.

8. Bier was not informed that the Debtor intended to file the bankruptcy case. At no time during its negotiation of the terms of the Second Modification, or at any other time, did the Debtor (or Debtor's representatives) inform Bier that the Debtor intended to file a bankruptcy case.

9. Bier has received payments post-petition. Bier has received payments in the total amount of $185,843.92 between April 2017 and February 2018 from various sources.

10. Bier is the only known (potentially) unsecured creditor in this bankruptcy case. Bier appears to be the only known (potentially) unsecured creditor in this bankruptcy case, with the possible exception of one other potential creditor with a claim of less than $2,500.

ΔIP Relief Sought:	**Creditor Relief Sought:**
1. Determination from this Court that the Second Modification Agreement is enforceable. 2. Allowance of Bier's claim under the terms of the Second Modification Agreement in the principal amount of $580,000 as of September 1, 2016 plus accrued interest of $15,660 (4.5% annual rate x 219 days between	1. Bier requests that the Court overrule the Debtor's Objection to his Claim and allow his Claim as a secured claim in the amount of not less than $2,148,514.75 as of the Petition Date. (Principal: $2,000,000 + Interest: $118,209.75 (net) + Penalties: $30,305 = $2,148,514.75) 2. Addition of post-petition penalties,

September 1, 2016 and April 7, 2017), plus late charges totaling $4,541.44 (7 missed prepetition payments of $10,812.95 each x 6%), for a total allowed claim of $600,201.44, less the amount of all postpetition payments Bier received that the Court applies to the payment of Bier's claim. 3. Application of all of the $190,843.92 of postpetition payments Bier received from the ΔIP and its shareholders to the principal amount of Bier's claim as of the Petition Date. 4. The current amount owed to Bier is no more than $409,357.52 ($600,201.44 - $190,843.92) under the terms of the Second Modification Agreement. 5. In the event the Court determines that the Second Modification Agreement could be rescinded by Bier and that Bier has properly rescinded it, a. Allowance of Bier's claim under the terms of the First Modification Agreement in the principal amount of $495,782.01 as of September 1, 2016, plus accrued interest of $13,386.12 (4.5% annual rate x 219 days between September 1, 2016 and April 7, 2017), plus seven late charges totaling $3,932.38 as of the Petition Date, for a total allowed claim of $513,100.51, less the amount of all postpetition payments Bier received that the Court applies to the payment of Bier's claim. b. Application of the $190,843.92 of postpetition payments Bier received from the ΔIP and its shareholders, the ΔIP asserts that the current amount owed to Bier is no more than $322,256.58 ($513,100.51 - $190,843.92) if the Second Modification Agreement is not enforced.	interest, and attorneys' fees as appropriate under the relevant agreements and the Bankruptcy Code, to the extent allowable under 11 U.S.C. § 506(b). 3. Deny the Debtor's request to compel Bier to return funds allegedly received from the Debtor post-petition.

6. Disallowance of any unmatured interest as of the Petition Date.	
ΔIP Points of Law: 1. 11 U.S.C. §502 2. Cal. Civil § 1693 (contractual interpretation) 3. Cal. Civil § 1671 (unenforceable liquidated damages provision) 4. Cal. Civil Code Section 1541 5. *Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal.4th 970 (1998) 6. *Purcell v. Schweitzer*, 224 Cal.App.4th 969, 975 (2014) 7. *Poseidon Development, Inc. v. Woodland Land Estates, LLC*, 152 8. Cal.App.4th 1106 (2007) 9. *Greentree Fin. Grp., Inc. v. Execute Sports, Inc.*, 163 Cal.App.4th495 (2008) 10. *Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 11. *Newman v. Albert*, 170, Cal.App.2d 678 (1959) 12. *Swartz v. California Claim Service, Ltd.*, 52 Cal.App.2d 47 (1942) 13. *Hofland v. Gustafson*, 132 Cal.App.907 (1955) 14.	**Creditor Points of Law:** 1. Fed. Rule Bankr. Proc. 3001(f). 2. Fed. Rule Bankr. Proc. 3003(c)(4) 3. Cal. Civ. Code §1689(b)(2) 4. Cal. Civ. Code §1688 5. *Crofoot Lumber v. Thompson*, 163 Cal.App.2d 324, 332 (1958) 6. Parole Evidence Rule Cal. Code Civ. Proc. §§ 1856(e), (f), & (g); *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association*, 55 Cal. 4th 1169 (2013) *Martin v. Sugarman*, 218 Cal. 17, 19 (1933); *Ferguson v. Koch*, 204 Cal. 342, 347 (1928) *Jennings v. Petrol Corp.*, 87 Cal.App.2d 63, 65-66 (Cal. App. 1948) Cal. Civ. Code §1625 7. *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996) 8. Cal. Civ. Code § 1709; *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 394, 415 (1996) 9. Cal. Civ. Code § 3399; *Am. Home Ins. Co. v. Travelers Indem. Co.*, 122 Cal.App. 3d

	951, 961 (1981). 10. Cal. Civ. Code §§ 1636, 1640, 1641, 1649 & 1650. 11. 11 U.S.C. §506(b) 12. 11 U.S.C. § 502(d); *In re Sierra-Cal*, 210 B.R. 168, 173 (Bankr. E.D. Cal. 1997)
ΔIP Abandoned Issues: 1. None	**Creditor Abandoned (by ΔIP) Issues:** 1. Timeliness of Bier's Filed Proof of Claim 2. Whether Declaration Prepared by Debtor's Counsel Can be Used as Evidence of Bier's Claim Amount
ΔIP Witnesses: 1. Raymond Zhang 2. Wayne Bier 3. Chijeh Hu	**Creditor Witnesses:** 1. Wayne Bier 2. Chijeh "CJ" Hu, Esq. 3. Raymond Zhang 4. Cindy Zhang 5. Jeffrey Goodrich, Esq.
ΔIP Exhibits: 1. First Modification Agreement 2. Second Modification Agreement 3. 2008 Promissory Note 4. Amortization Schedule under First Modification Agreement 5. Amortization Schedule under Second Modification Agreement 6. Email thread between Chijeh Hu and Wayne Bier between February 5 and February 12,	

2017.

7. Email thread between Chijeh Hu and Wayne Bier between October 12 and October 20 2016.

8. Email thread between Chijeh Hu and Wayne Bier on April 11, 2017.

9. Email thread between Chijeh Hu and Wayne Bier between January 16, 2017 at 10:41 and January 18, 2017 at 2:52.

10. Email thread between Chijeh Hu and Wayne Bier on January 19 between 5:18 and 5:59.

11. Email thread between Chijeh Hu and Wayne Bier between January 21, 2017 at 7:10 and January 23, 2017 at 11:30.

12. Email thread between Chijeh Hu and Wayne Bier between February 13, 2017 at 9:59 and February 14, 2017 at 12:31, including attached "analysis" from Steve Clair.

Creditor Exhibits:

1. Promissary [sic] Note signed January 9 & 10, 2008. Bates Stamp WB-0001.

2. Straight Note dated February 12, 2008 (Straight Note"). Bates Stamp WB-0028- 0029.

3. Short Form Deed of Trust and Assignment of Rents recorded February 22, 2008 ("Deed of Trust"). Bates Stamp WB-0030-0063.

4. Buyer Estimated Closing Statement dated February 22, 2008. Bates Stamp WB-0074-0076.

5. Lender's Escrow Instructions dated April 25, 2008. Bates Stamp WB-0077-0082.

6. Short Form Deed of Trust and Assignment of Rents recorded "11-2009" (or alternatively, "11-20-09"). Bates Stamp WB-0002-0027.

7. E-mails from Bier to John Curtis and Chris Steele dated March 2-3, 2011 re loan defaults, possible foreclosure. Bates Stamp WB-0721-0724.

8. E-mail from Bier to Joyce Lu dated June 21, 2011 re "First Note Amendment" dated June 24, 2011 and "Forbearance Agreement" dated June 15, 2010 (including those agreements as attachments). Bates Stamp WB-0748-0764.

9. Several versions of an "Extension and Modification Agreement of a Promissory Note dated January 9th, 10, 2008 and Forbearance Agreement" dated in and around July of 2011 that were never executed. Bates Stamp WB-0804-0817.

10. Facsimile from Agustin Pifia to Bier dated June 22, 2011 re *Bier v. Zhang, et al.*/ Defendant's Notice of Motion to Set Aside Entry of Default and Supporting Documents. Bates Stamp WB-0963-1000.

11. E-mails (including attachments for all emails designated as exhibits by Creditor) Between Bier and Chijeh "CJ" Hu dated June 12-17, 2013 re modification negotiations. Bates Stamp WB-0106-0109.

12. E-mails Between Bier and Chijeh "CJ" Hu (and Richard Nace of Hu's office) dated April 11- July 26, 2014 re modification negotiations. Bates Stamp WB-0110-0279.

13. E-mails Between Bier and Linda Peh, Richard Nace, and Chijeh "CJ" Hu dated July 1, 2014 re escrow instructions and payment of $250,000. Bates Stamp WB-0280-0282.

14. E-mails Between Bier and Chijeh "CJ" Hu and Richard Nace dated July 2-10, 2014 (including forwarded e-mails to and from Steve Clair) re modification negotiations. Bates Stamp WB-0283-0301.
-0302—304.

15. E-mails Between Bier and Linda Peh and Richard Nace dated July 10, 2014 re escrow instructions and payment of $250,000. Bates Stamp WB-0302—304.

16. Modification Agreement dated July 1, 2014 ("First Modification"). Bates Stamp WB-0064-0069.

17. Versions of Escrow Instructions (and Wire Instructions) for First Modification dated July 1, 2014, July 10, 2014, July 16, 2014, and [undated]. Bates Stamp WB-0083-0089.

18. E-mails Between Bier and Linda Peh, Richard Nace, and Chijeh "CJ" Hu dated July 10-22, 2014 re escrow, default in payment of $250,000, agreement void. Bates Stamp WB-0302-0312.

19. Letter from Steve Clair to Richard Nace dated July 15, 2014 re Bier revokes all previous settlement proposals due to nonperformance. Bates Stamp WB-0310.

20. Copy of Check/Receipt for $250,000 payment. Bates Stamp WB-0912.

21. Letter from Bier to Raymond and Cindy Zhang dated October 3, 2016 re First Modification breached and now void. Bates Stamp WB-0728.

22. Letter from Dual Arch International to Bier dated October 4, 2016 re information on foreclosure. Bates Stamp WB-0920-0927.

23. E-mails Between Bier and Chijeh "CJ" Hu dated October 2-21, 2016 re First Modification breached and now void, new modification negotiations begin. Bates Stamp WB-0318-0367.

24. E-mails Between Bier and Chijeh "CJ" Hu dated October 12-21, 2016 re new modification negotiations, initialed by parties. Bates Stamp WB-0090-0099.

25. E-mail from Bier to Chris Steele dated November 2, 2016 re possible sale of note. Bates Stamp WB-0734.

26. E-mail from Bier to Raymond Zhang dated December 11, 2016 re breach of First Modification, effect of breach. Bates Stamp WB-0735-0737.

27. E-mails Between Bier and Chijeh "CJ" Hu dated October 21, 2016- April 7, 2017 re continued modification negotiations, attempts to formalize into agreement, note balance back to $2 million, early drafts of Second Modification, effect of breach of Second Modification, other issues. Bates Stamp WB-0368-0719.

28. Second Modification Agreement signed on April 6 & 7, 2017 ("Second Modification"). Bates Stamp WB-0070-0073.

29. E-mail from Bier to Chijeh "CJ" Hu dated April 11, 2017 re did not receive funds due under Second Modification, saw notice of bankruptcy. Bates Stamp WB-0720.

30. Spreadsheets by Bier showing the Debtor's pre-petition payment history for the years 2010, 2011, 2012, 2013, 2014. Bates Stamp WB-0899-0911.

31. E-mails between Bier and Kurth DeMoss dated November 28, 2016 and January 18, 2018 re East West Bank. Bates Stamp WB-0928-0930.

32. E-mail from Bier to Raymond Zhang dated April 18, 2017 re Zhang is going to "loan" Bier $30,000.

33. E-mail from Bier to Chijeh "CJ" Hu dated April 11, 2017 re Bier doesn't know if debtor is allowed to transfer property or funds post-filing.

34. Outgoing Wire Transfer Request dated April 20, 2017 re $30,000 from Cindy Zhang to Bier.

35. Check and Receipt dated January 18, 2018 re $5,000 payment to Bier.

36. Receipt dated May 3, 2017 re $7,000 payment to Bier.

37. E-mail from Bier to Chijeh "CJ" Hu dated March 19, 2018 re new agreement needed, "took us almost 2 months…and he filed BK the very next day."

38. Demonstrative Exhibit Payment History Table with Calculations.

39. Bier Proof of Claim (Claim #4) filed on June 25, 2018.

ΔIP Discovery Documents: 1. Wayne Bier's "Response to United Charter, LLC's Interrogatories, Set One" 2. Wayne Bier's "Response to United Charter, LLC's Request for Admissions"	**Creditor Discovery Documents:** 1. None
ΔIP Further Discovery or Motions: 1. ΔIP is considering filing a motion for summary judgment or motion for partial summary judgment.	**Further Discovery or Motions**: 1. None
Stipulations: 1. ΔIP suggests that the Parties meet in the future to determine if a stipulation on computation of amounts may be made by the Parties.	**Stipulations:** 1. None Anticipated
ΔIP Amendments: 1. None	**Creditor Amendments:** 1. None
ΔIP Dismissals: 1. None	**Creditor Dismissals:** 1. None
ΔIP Agreed Statement of Facts: 1. ΔIP believes that a future statement may be possible.	**Creditor Agreed Statement of Facts:** 1. Creditor believes that a future statement may be possible.
ΔIP Attorneys' Fees Basis: 1. Contractual	**Creditor Attorneys' Fees Basis:** 1. Note and Deed of Trust
ΔIP Additional Items	**Creditor Additional Items**

1. None	1. None
ΔIP Trial Time Estimation: 1-2 Days	**Creditor Trial Time Estimation:** 1 Day

3. **17-22347-E-11 JJG-12** **UNITED CHARTER LLC** **Jeffrey Goodrich** **CONTINUED MOTION TO VALUE COLLATERAL OF WAYNE BIER 9-27-18 [283]**

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. No Certificate of service has been provided to evidence when notice was served, and who notice was served upon. However, the creditor whose claim is the subject of this Motion filed an Opposition on October 11, 2018. Dckt. 293. Therefore, notice was likely provided. The Notice of Hearing was filed September 27, 2018. Dckt. 284. Presuming notice was actually provided that day, 28 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim 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 to Value Collateral and Secured Claim of Wayne Bier ("Creditor") is continued to XXXXXXXXXXXXXX.

The Motion to Value filed by United Charter LLC ("Debtor in Possession" or "ΔIP") to value the secured claim of Wayne Bier ("Creditor") was filed on September 27, 2018. Motion, Dckt. 283. The Declaration of John Hillas, MAI SRA, is filed in support of the Motion. Declaration, Dckt. 285. An exhibit cover sheet has been filed with the Motion, which states that one exhibit, "Appraisal Report of Valbridge Property Advisors dated August 31, 2018" is provided as Exhibit A. Dckt. 286. No Exhibit A is attached to the cover sheet. The Declaration of Mr. Hillis states that he is the "appraiser responsible for directing and supervising the preparation of . . . [the] appraisal report. . . ." Declaration ¶ 2, Dckt. 285.

Debtor in Possession is the owner of the subject real property located in Stockton, California ("Property"). In the Motion, the Debtor in Possession identifies the real property as "a 17+ acre industrial warehouse property located in Stockton, California. Motion, p. 2:3-5; Dckt. 283. By this description, it appears that there is one 17+ acre parcel of property that secures the claim.

The Motion offers no identification of the 17+ acre parcel, but instead merely instructs the court and parties in interest are to review Proof of Claim No. 4 with any questions about the claim that is the subject of this Motion. *Id.* at 2:5.

When one reviews Proof of Claim, No. 4, a Deed of Trust is attached which identifies the real property subject to the encumbrance. The Deed of Trust provides the legal descriptions and Assessor Parcel Numbers for at least twenty (20) different parcels with different APNs. Proof of Claim No. 4, p. 16-16. The court is unsure why the Debtor in Possession could not state these parcel numbers and clearly identify the property subject to the Deed of Trust when stating with particularity the grounds upon which the relief is based and the relief requested (as required in Fed. R. Bankr. P. 9013).

Debtor (who is now serving as the ΔIP) valued the Property at $7,855,018.99. Schedule A/B, Dckt. 12. Some time thereafter, Creditor East West Bank ("EWB") holding a senior mortgage filed a motion seeking relief from automatic stay. Dckt. 80. EWB filed as a supporting Exhibit an appraisal asserting the value of the Property is $5,330,000.00. Dckts. 87-94. Debtor in Possession now seeks to use that appraisal to support the current Motion. Debtor in Possession does not explain why its prior valuation, declared in its Schedules under penalty of perjury, was high by more than $2 million.

Debtor in Possession filed the Declaration of John Hillas, the Appraiser who drafted the appraisal report. Dckt. 285. The Hillas Declaration provides no detail other than Hillas created the report and can testify as to the value of the Property being $5,330,000. As stated, *supra*, Debtor in Possession also sought to file as an Exhibit the appraisal report, but the report itself is not included in the filing. *See* Dckt. 286.

Proof of Claim

Creditor filed Proof of Claim, No. 4, on June 25, 2018. Creditor asserts a claim in the amount of $1,999,215.36 secured by Debtor in Possession's real property valued at $7,855,018.99. The Proof of Claim notes Creditor's valuation relies on Debtor in Possession's Schedules.

RESPONSE OF CREDITOR EAST WEST BANK

EWB filed a Declaration in Response to the Motion on October 10, 2018. Dckt. 287. The Declaration Furth Demoss states the amount of the EWB's claim as of September 30, 2018 is $5,006,168.66.

CREDITOR'S OPPOSITION

Creditor filed an "Objection" To Debtor's Motion on October 11, 2018, which the court interprets to be an opposition. Dckt. 293. Creditor requests that the Court value the Property at $7,230,000 ("as-is" market value) or $7,730,000 (prospective market value).

Creditor states its appraisal report reviews all collateral properties (each within Stockton, California), including:

> (1) industrial park buildings at 1881 E. Market Street valued individually at $4,860,00,
>
> (2) industrial park buildings at 1531, 1555, & 1617 E. Main Street valued individually at $2,250,000,

(3) vacant industrial lots at 1531 & 1555 E. Main Street valued individually at $330,000,

(4) vacant industrial lots at 1904 to 1936 E. Weber Avenue valued individually at $170,000, and

(5) two residential-zoned lots at 1914 & 1918 E. Myrtle Street valued individually at $120,000.

Creditor notes that its claim was also secured by a San Francisco property which was foreclosed in 2010.

Creditor requests an evidentiary hearing to determine the value of the Property, noting that it does not consent to the use of affidavits in accordance with Federal Rules of Civil Procedure 43(c).

OCTOBER 25, 2018, HEARING

At the October 25, 2018, hearing the Parties agreed that the appropriate course of action is to first litigate the Objection to Proof of Claim (Dckt. 275) and then, upon conclusion of that contested matter, address valuation issue, if any. The court agreed and continued the hearing on the Motion to trail the proceedings on the Objection to Proof of Claim No. 4. Dckt, 307.

APPLICABLE LAW

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S.

Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

DISCUSSION

The valuation advanced by Debtor in Possession is more than a slight drop from its original value. Furthermore, Debtor in Possession (due to apparent clerical error) has not provided the court with any actual appraisal report.

As discussed at the October 25, 2018, hearing, this Motion has been set to trail the proceedings on the Objection to Proof of Claim No. 4.

At the hearing, **XXXXXXXXXXXX**.

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 Value Collateral and Secured Claim filed by United Charter LLC ("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 the hearing on this Motion is continued to **XXXXXXXXXXXXXX**.

4. **18-23365-E-13 DJD-1** **TENA ROBINSON** **Jason Borg** **MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **12-5-18 [106]**

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, Chapter 13 Trustee, and Office of the United States Trustee on December 5, 2018. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Confirm Absence of the Automatic Stay is granted.

Specialized Loan Servicing, LLC, as servicer for HBSC BANK USA, NATIONAL ASSOCIATION, as Indenture Trustee, for the FBR Securitization Trust 2005-2 Callable Mortgage-Backed Notes, Series 2005-2 ("Movant") moves the court for an order confirming that the automatic stay is not in effect in this case pursuant to 11 U.S.C. § 362(j). Movant seeks confirmation from the court that no automatic stay in effect on 5611 34th Avenue, Sacramento, California ("Property") is not in effect pursuant to the debtor Tena H. Robinson's ("Debtor") Plan.

The grounds stated with particularity in the Motion are:

1. Debtor's case was filed on May 30, 2018. Dckt. 1.

2. Debtor filed an Amended Plan on July 19, 2018. Dckt. 43.

3. The Plan was confirmed on December 4, 2018. Dckt. 105.

4. The terms for treatment of the Class 4 Claim of Movant, include the following (emphasis added), Plan ¶ 3.11, *Id.*,:

a) Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are (1) terminated to allow the holder of a Class 3 secured claim to exercise its rights against its collateral; (2) **modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract**;…" Accordingly, Creditor contends there is no automatic stay in effect on the Property and seeks and order confirming as such.

Based on the above, Movant requests relief from the court as follows: "1. For an Order stating that no automatic stay applies to the Property; 2. For an Order modifying the automatic stay to protect the interest of Movant, as the Court deems proper. . . ." Motion, Dckt. 106 at 3:2.5-4.5.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 116. The Trustee states that the Amended Plan was confirmed December 4, 2018, and that Movant is included as a Class 4 of the confirmed plan.

DEBTOR'S OPPOSITION

Debtor filed an Opposition to the Motion on December 27, 2018. Dckt. 119. Debtor agrees that if the Debtor is in the arrears to a Class 4 creditor, then the Class 4 creditor may elect to pursue foreclosure. Debtor argues a comfort order is unnecessary and redundant.

DISCUSSION

Movant contends that Class 4 of the Plan confirmed on December 4, 2018, states that "Upon Confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." *See* Dckt. 43.

Movant's contention is that the above plan provision results in the following: "there is no automatic stay in effect on the Property. . . ." Motion, Dckt. 106 at 2:18.5–19.5. However, under the plain language of the Class 4 treatment, the automatic stay has only been Modified, not terminated, by operation of that provision. The modification is for the limited purpose, "to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." The automatic stay exists, but it is modified. (The court does not endeavor to determine if there are other provisions of the Plan that might affect the automatic stay, leaving such to Movant in later motion(s) if necessary.)

There is no allegation of there being a default. However, the modification of the automatic stay is not dependent upon a default. The stay is modified by confirmation of the Plan, and the modification is for the limited purpose of the holder of a Class 4 Claim asserting its rights against its collateral.

The court recognizes that creditors may need an order specifying the continuing effect and

modification of an automatic say when state recording and filing law come into play, as well as for title insurance purposes.

The Ninth Circuit Court of Appeal has recognized the basic "discretion is the better part of valor" principle when it comes to the automatic stay. Seeking a separate order clearly specifying the scope of the relief granted in the Plan is not inappropriate.

The court grants the Motion, granting relief that under the terms of the confirmed Chapter 13 Plan, Dckt. 43, in this bankruptcy case, "all bankruptcy stays are modified to allow HBSC BANK USA, NATIONAL ASSOCIATION, as Indenture Trustee, for the FBR Securitization Trust 2005-2 Callable Mortgage-Backed Notes, Series 2005-2 , and its agents and successors, as the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.

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 Confirm Absence of the Automatic Stay filed by Specialized Loan Servicing, LLC, as servicer for HBSC BANK USA, NATIONAL ASSOCIATION, as Indenture Trustee, for the FBR Securitization Trust 2005-2 Callable Mortgage-Backed Notes, Series 2005-2 ("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 relief is granted pursuant to the Motion and the court confirms that the confirmed Chapter 13 Plan in this bankruptcy case provides for the secured claim of HBSC BANK USA, NATIONAL ASSOCIATION, as Indenture Trustee, for the FBR Securitization Trust 2005-2 Callable Mortgage-Backed Notes, Series 2005-2 , and its agents and successors, for which the real property commonly known as on 5611 34th Avenue, Sacramento, California (the "Property") as Class 4 secured claim, modifying the automatic stay in the Plan as follows: for which the Plan provides:
>
> > Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are . . . (2) modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract . . . .
>
> Confirmed Chapter 13 Plan, Dckt. 43; Order Confirming, Dckt. 105.

5. **17-22866-E-13 JHW-1** **ABEL RUSFELDT** **Dale Orthner**

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-12-18 [125]

FIRST INVESTORS FINANCIAL SERVICES VS.

Final Ruling: No appearance at the January 15, 2019, 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, parties requesting special notice, and Office of the United States Trustee on December 12, 2018. By the court's calculation, 34 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.

First Investors Financial Services ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2011 Nissan Altima, VIN ending in 8763 ("Vehicle"). The moving party has provided the Declaration of Virginia Nichols to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Abel Ram Rusfeldt ("Debtor").

The Nichols Declaration provides testimony that Debtor is $7,715.16 delinquent in plan payments.

Movant also supports the Motion with the Declaration of Jennifer Wang. Dckt. 129. The Wang Declaration introduces evidence to authenticate Exhibit E [FN.1.], identified as a list of Debtor's Chapter 13 Plan payment history. Exhibit E, Dckt. 130. The Wang Declaration states the Debtor is $7,715.16 in default in plan payments.

FN.1. The Wang Declaration references Exhibit "D" and not "E." Exhibit "D" is Debtor's Chapter 13 plan. Exhibit D, Dckt. 130. From the Declaration, which references Debtor's payment history, it is clear Wang was referring to Exhibit "E" and made a scrivener's error.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on December 27, 2018. Dckt. 133. Trustee states Debtor is delinquent $12,044.04 under the confirmed plan. The Response also indicates $64,488.00 has been paid under the plan, and $2,480.12 has been paid to Movant.

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 post-petition payments that have come due (while Movant has not clarified how much Debtor is delinquent specifically to Movant, Debtor is delinquent several months in plan payments and thereby is not providing for Movant's claim). 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.

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 2011 Nissan Altima, VIN ending in 8763 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

No other or additional relief is granted.

6. **18-26681-E-13 CJC-5** **SOPHIE MAYCHROWITZ** **Peter Macaluso**

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
12-3-18 [12]

FEDERAL HOME LOAN MORTGAGE CORPORATION 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.

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, Chapter 13 Trustee, and Office of the United States Trustee on December 4, 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.

Federal Home Loan Mortgage Corporation ("Movant") seeks relief from the automatic stay with respect to Sophie Ella Maychrowitz's ("Debtor") real property commonly known as 609 Lincoln Avenue, Williams, California ("Property"). Movant has provided the Declaration of Adrienne Morris to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Adrienne Morris Declaration states that Movant is the owner of the Property, having acquired title at a Trustee's Sale on August 17, 2018. Dckt. 14 at ¶ 3. The Declaration states further Debtor was served with a three-day notice to quit by Movant, and did not comply with said notice. *Id*. at ¶¶ 4-5.

Movant also filed as Exhibit 1, a Recorded Grant Deed. Exhibit 1, Dckt. 15. The Exhibit was properly authenticated. Dckt. 14 at ¶ 3.

DECEMBER 18, 2018 HEARING

At the December 18, 2018, hearing on the Motion, the court interpreted Movant's Second Amended Notice to be an *Ex Parte* request for continuance of the hearing (Dckt. 27) and continued the hearing to January 15, 2019. Dckt. 29.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response to the Motion on December 27, 2018. Dckt. 31. Trustee states Debtor is current under the plan; Trustee's Objection to Confirmation is scheduled to be heard January 15, 2019; Movant is not provided for directly or indirectly in the proposed plan (Dckt. 2); and no payments of $600 or more have been made to Movant within 90 days prior to filing according to the Statement of Financial Affairs. Dckt. 1 at p. 33.

DISCUSSION

Debtor has not filed a Response or Opposition to the Motion.

From the evidence provided to the court, including Debtor's Schedule D, the Property was sold pursuant to a foreclosure pre-petition. Schedule D, Dckt. 1; Dckt. 14 at ¶ 3; Exhibit 1, Dckt. 15. Therefore, Debtor has no interest in the Property.

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)[FN.1].. Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or the Chapter 13 Trustee, the court determines that there is no equity in the Property for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

FN.1. Movant argues, citing *In re Branch,* 10 B.R. 227, 229 (Bankr. E.D.NY. 1981), that a creditor need not prove the property is not necessary to an effective reorganization where the bankruptcy proceeding is brought under Chapter 13. Motion, Dckt. 12 at ¶ 7. That case is not binding authority.

Colliers discusses the approach adopted by a majority of courts:

> In cases under chapters 12 and 13, debtors do not really reorganize. Instead, they are rehabilitated. **Although section 362(d)(2) uses the term "necessary for an effective reorganization," the better approach is to recognize that if property is necessary for the debtor's effective rehabilitation, relief from the stay should be denied.**

> For example, a chapter 13 debtor who needs her car in order to get to the job that will generate the income to fund the plan should be able to avoid a repossession even if the debtor has no equity in the car. In recognition of the all-encompassing nature of individual rehabilitation under chapter 13, it has also been held that even a vehicle that is not necessary for business or work may nevertheless be necessary for an effective rehabilitation where the vehicle is the sole vehicle available to the debtors for personal use by the family. By contrast, a boat used exclusively for recreational fishing and skiing was found not to contribute to the probability that the debtor's chapter 13 plan would be funded and, thus, was not necessary to an effective rehabilitation.

3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)(emphasis added). Furthermore, the approach of *In re Branch* has been explicitly rejected by some courts. *See In re Siciliano*, 167 B.R. 999, 1010 (Bankr. E.D. Pa. 1994). The court in *In re Siciliano* provided the following commentary:

> There are certain older cases which have held that the § 362(d)(2)(B) element is not applicable in a Chapter 13 case and therefore relief cannot be obtained by a creditor under § 362(d)(2) in a Chapter 13 case. [citation]. The better rule, followed by most courts, including the bankruptcy courts of this district, is that, if a creditor satisfies both prongs of § 362(d)(2), it may be granted relief from the automatic stay in a debtor's Chapter 13 case.

Id.

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 in the prayer at the end of the Motion that the court waive the Rule 4001(a)(3) stay. While the Motion does state with particularity grounds for relief from the stay (Fed. R. Bankr. P. 9013), the Motion contains no statement of grounds for which setting aside the fourteen day stay as impose in Rule 4001(a)(3) adopted by the Supreme Court.

The court cannot presume to state grounds for a party upon which that party could possibly seek relief.

The court notes that this Motion was filed on December 3, 2018, and set for hearing on December

18, 2018. Notice of Hearing, Dckt. 24. Movant then sought and had the hearing continued to January 15, 2018. This has resulted in there being thirty-seven days from the filing of the Motion to the actual hearing date. If the hearing had been conducted on December 18, 2018, and this relief granted, the fourteen day stay would have already expired.

The Chapter 13 Plan filed in this case makes no provision for payment of Movant's claim. Plan, Dckt. 2 On Schedule D Debtor lists Movant as having the secured claim and describes the property securing the claim as "FORECLOSED FORECLOSED." Dckt. 1 at 19, 20 (emphasis in original).

One could envision simple grounds stated in the Motion such as: (1) Movant has foreclosed on the Property, (2) Debtor acknowledges the foreclosure, (3) Debtor does not make provision for payment of any claim held by Movant, (4) the Property is not property of the bankruptcy estate, and (4) Movant needs to move promptly to obtain possession of its real property. However, such simple statement of grounds was not made by Movant, and the Court will not presume to advocate for a party.

The prayer for waiver of the Federal Rule of Bankruptcy Procedure 4001(a)(3) stay is denied.

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 Federal Home Loan Mortgage Corporation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Federal Home Loan Mortgage Corporation, 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 609 Lincoln Avenue, Williams, 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.

7. 18-27182-E-13 MOHAMAD SALIM
AP-1 Pro Se
11-27-18 [12]
WELLS FARGO BANK, N.A. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY

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

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—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 the Department of Justice on November 27, 2019. By the court's calculation, 49 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.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Mohamad Salim's ("Debtor") real property commonly known as 4906 Kokomo Drive, Sacramento, California ("Property"). Movant has provided the Declaration of Jessica Rudynski to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Rudynski Declaration states that there are 132 pre-petition payments in default, with a pre-petition arrearage of $278,360.09. Dckt. 15.

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 significant pre-petition default and failure to actively prosecute this case. 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.

Prospective Relief from Future Stays

Movant argues the Debtor continues to file bankruptcies as part of a scheme to hinder, delay or defraud the Movant with no real feasible methods to reorganize the debt owed to the Movant or other creditors. Movant notes Debtor only listed the Movant and Movant's foreclosure trustee on the Master Address List when filing this case, indicating Debtor only filed another bankruptcy case to reimpose the automatic stay in an attempt to frustrate the Movant's attempts to foreclose on a loan that is one month short of being eleven (11) years delinquent.

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.*

The Debtor in this case filed the following prior cases:

A. Case No. 07-28190
   1. Filed: 10/4/2007

2. Chapter 11
3. Final Decree and Close of Case Without Discharge: 6/10/2011

B. Case No. 17-22363
1. Filed: 4/9/2017
2. Chapter 13
3. Dismissal Date: 11/7/2017. Dckt. 69.
4. Reason for Dismissal: Delinquency in plan payments and unreasonable delay in filing a new plan after confirmation of prior plan was denied. Dckt. 68.

C. Case No. 18-23177
1. Filed: 5/21/2018
2. Chapter 13
3. Dismissal Date: 10/11/2018. Dckt. 47.
4. Reason for Dismissal: Delinquency in plan payments and unreasonable delay in filing a new plan after confirmation of prior plan was denied. Dckt. 46.

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 the "skeletal petition" having been filed, Debtor continuing to proceed in *Pro Se*, and significant arrearages on Debtor's primary residence that he cannot reasonably hope to cure. At best, Debtor is just continuing to hinder Creditor's collection efforts with a Chapter 13 placeholder case under the premise that Debtor may eventually at some later date decide to actively prosecute the case. Worse, Debtor may just be filing to delay what he knows is inevitable.

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.

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 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 that is recorded against the real property commonly known as 4906 Kokomo Drive, 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.

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."

No other or additional relief is granted.

8. **13-29685-E-13 AP-1** | **YAROSLAV ZAKHARNEV AND INNA PESHKOVA** | **MOTION FOR RELIEF FROM AUTOMATIC STAY**
Peter Macaluso | **12-4-18 [110]**

SETERUS, INC. VS.

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

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.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties in interest, and Office of the United States Trustee on December 4, 2018. 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). 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 is granted, with the court entering an order that the automatic stay has been modified by the confirmed Chapter 13 Plan in this case.

Federal National Mortgage Association ("Movant") seeks relief from the automatic stay with respect to Yaroslav Vasilyevich Zakharnev and Inna Aleksandrouna Peshkova's ("Debtor") real property commonly known as 4631 Luxford Court, Sacramento, California ("Property"). Movant has provided the Declaration of Paulette Pickard to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Paulette Pickard Declaration states that there are 3 post-petition defaults in the payments on the obligation secured by the Property, with a total of $2,412.64 in post-petition payments past due.

TREATMENT OF MOVANT'S CLAIM IN CONFIRMED PLAN

Debtor's Chapter 13 Plan (Dckt. 5) was confirmed on November 5, 2013. Dckt. 86. Among other claims, the Confirmed Plan provided for the claim of Bank of America Home Loans secured by the Property as a Class 4 claim to be paid by Debtor directly. As to Class 4 claims, the Confirmed Plan stated:

> Upon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.

Plan ¶ 2.11, Dckt. 5.

DISCUSSION

Movant seeks relief from stay pursuant to 11 U.S.C. § 362(d)(1) for cause based on Debtor's default in post-petition payments.

However, not only is there a confirmed plan in this case, but the Plan has been completed (Trustee's Final Report, filed November 14, 2018; Dckts. 106, 107, 108) and the Debtor's discharge entered (Dckt. 121). The present Motion was filed on December 4, 2018, three weeks after the notice of plan completion and the Trustee final report were served.

As discussed above, the automatic stay has already been modified to allow Movant to exercise its rights in its collateral. The court recognizes that creditors may need an order specifying the continuing effect and modification of an automatic say when state recording and filing law come into play, as well as for title insurance purposes.

The Ninth Circuit Court of Appeal has recognized the basic "discretion is the better part of valor" principle when it comes to the automatic stay. Seeking a separate order clearly specifying the scope of the relief granted in the Plan is not inappropriate.

The court grants the Motion, granting relief that under the terms of the confirmed Chapter 13 Plan, Dckt. 43, in this bankruptcy case, "all bankruptcy stays are modified to allow Federal National Mortgage Association, its agents, representatives, and successors, and trustee under the trust deed against the real property commonly known as 4631 Luxford Court, Sacramento, California, ("Property") as the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract.

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 Confirm Absence of the Automatic Stay filed by Federal National Mortgage Association ("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 relief is granted pursuant to the Motion and the court confirms that the confirmed Chapter 13 Plan in this bankruptcy case provides for the secured claim of Federal National Mortgage Association, its agents, representatives, and successors, and trustee under the trust deed that is recorded against the real property commonly known as 4631 Luxford Court, Sacramento, California, ("Property") as Class 4 secured claim, modifying the automatic stay in the Plan as follows:
>
> > Upon confirmation of the plan, the automatic stay of 11 U.S.C. § 362(a) and the co-debtor stay of 11 U.S.C. § 1301(a) are . . . (2) modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract . . . .
>
> Confirmed Chapter 13 Plan, Dckt. 5; Order Confirming, Dckt. 86
>
> No other or additional relief is granted.

9. **17-27397-E-13 18-2014** **GEVORG/ARMINE POLADYAN** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT 5-10-18 [31]**

TRIVEDI V. POLADYAN ET AL

[*Adversary Proceeding Consolidated with Adversary Proceeding 2018-2130*]

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Peter L. Cianchetta

Adv. Filed: 2/14/18
Answer: none

Amd. Cmplt. Filed: 5/10/18
Answer: 1/2/19 [Dckt 66]
Amd. Answer: 1/2/19 [Dckt 67]

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

The Status Conference is xxxxxxxxxxxxxxxxxxxx.

Notes:
Continued from 11/14/18. Parties to each file updated Status Conference Reports.

[PGM-2] Order granting Motion to Consolidate filed in adversary case #2018-2130 11/19/18 [Dckt 38]

Order Vacating Stay of Adversary Proceeding filed 11/20/18 [Dckt 61]

Answer to Complaint Causes of Action 2, 4, and 5 filed 1/2/19 [Dckt 65]

Amended Answer to Complaint Causes of Action 2, 4, and 5 filed 1/2/19 [Dckt 67]

SUMMARY OF COMPLAINT

Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat, filed an Amended Complaint on May 10, 2018. Dckt. 31. By order filed on November 19, 2018, the court dismissed the First, Third, Sixth, and Seventh Causes of Action. Order, Dckt. 63. The complaint seeks a determination of

nondischarageability of obligations arising out of transaction between Defendant-Debtor and Ms. Ambrus-Cernat. It is alleged that the obligation is nondishcargeable based on fraud, 11 U.S.C. § 523(a)(2); and willful and malicious injury, 11 U.S.C. § 523(a)(6). It is further alleged that Defendant-Debtor should be denied a discharge in the related bankruptcy case because of the transfer of property with the intent to hinder, delay, or defraud a creditor or officer of the bankruptcy estate, 11 U.S.C. § 727(b)(2)(A).

SUMMARY OF ANSWER

Gevorg Poladyan and Armine Asatryan, Defendant-Debtor, filed an Amended Answer on January 2, 2019. Dckt. 67. In the Amended Answer Defendant-Debtor admits and denies specific allegations in the Amended Complaint. The Amended Answer states three Affirmative Defenses.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (L), and to the extent any issues are non-core, to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Amended Complaint ¶¶ 10, 11, Dckt. 31. In the Answer, Defendant-Debtor Gevorg Poladyan and Armine Asatryan admits the allegations of jurisdiction and core proceedings, and the consent to the bankruptcy judge issuing all final order and judgment in this Adversary Proceeding. Amended Answer ¶ 3, Dckt. 67. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

a. Plaintiff Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (L), and to the extent any issues are non-core, to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Amended Complaint ¶¶ 10, 11, Dckt. 31. In the Answer, Defendant-Debtor Gevorg Poladyan and Armine Asatryan admits the allegations of jurisdiction and core proceedings, and the consent to the bankruptcy judge issuing all final order and judgment in this Adversary Proceeding. Amended Answer ¶ 3, Dckt. 67. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before **-----, 2019**.

c. Expert Witnesses shall be disclosed on or before **----------, 2019**, and Expert Witness Reports, if any, shall be exchanged on or before **----------, 2019**.

d. Discovery closes, including the hearing of all discovery motions, on **----------, 2019**.

e. Dispositive Motions shall be heard before **----------, 2019**.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at **------- p.m. on ----------, 2019**.

10. **17-27397-E-13 18-2130** **GEVORG/ARMINE POLADYAN** **CONTINUED STATUS CONFERENCE RE: COMPLAINT 8-8-18 [1]**

POLADYAN ET AL V. TRIVEDI

[*Adversary Proceeding Consolidated with Adversary Proceeding 2018-2014*]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 8/8/18
Answer: 9/6/18

Nature of Action:
Declaratory judgment

Notes:
Continued from 11/15/18

[PGM-2] Order granting Motion to Consolidate filed 11/19/18 [Dckt 38]

Defendant's Status Statement filed 1/3/19 [Dckt 39]

Plaintiff's Status Conference Statement filed 1/3/19 [Dckt 41]

The Status Conference is xxxxxxxxxxxxxxxxxxxxx.

SUMMARY OF COMPLAINT

Gevorg Poladyan and Armine Asatryan, Plaintiff-Debtor, has filed this Complaint objecting to the claim filed by Defendant Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat. Dckt. 1. Because this relates to Defendant's related Adversary Proceeding to have that claim determined nondischargeable, Adv. Pro. 18-2014, this Objection Complaint has been consolidated procedurally with the other Adversary Proceeding.

SUMMARY OF ANSWER

Defendant Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat has filed an Answer that admits and denies specific allegations in the Complaint. Dckt. 7. The Answer asserts four Affirmative Defenses.

FINAL BANKRUPTCY COURT JUDGMENT

Gevorg Poladyan and Armine Asatryan, Plaintiff-Debtor alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and to the extent any matter are non-core, consents to the bankruptcy judge issuing all final orders and judgement in this Adversary Proceeding. Complaint ¶¶ 1, 4, Dckt. 1. In the Answer, Defendant Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat admits the allegations of jurisdiction and core proceedings, as well as the consent to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Answer ¶ 3, Dckt. 7. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

a. Gevorg Poladyan and Armine Asatryan, Plaintiff-Debtor alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and to the extent any matter are non-core, consents to the bankruptcy judge issuing all final orders and judgement in this Adversary Proceeding. Complaint ¶¶ 1, 4, Dckt. 1. In the Answer, Defendant Tapan Trivedi, Administrator for the Estate of Ortansa Ambrus-Cernat admits the allegations of jurisdiction and core proceedings, as well as the consent to the bankruptcy judge issuing all final orders and judgment in this Adversary Proceeding. Answer ¶ 3, Dckt. 7. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before **-----, 2019**.

c. Expert Witnesses shall be disclosed on or before **----------, 2019**, and Expert Witness Reports, if any, shall be exchanged on or before **----------, 2019**.

d. Discovery closes, including the hearing of all discovery motions, on **----------, 2019**.

e. Dispositive Motions shall be heard before **----------, 2019**.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at **------- p.m. on ----------, 2019**.