

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through April 30, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

March 31, 2020 at 1:30 p.m.

1.	<u>20-20920-E-13</u> MICHAEL MORRIS <u>JCC-1</u> Peter Macaluso LAGUNA PAVILION S.C., LLC VS.	MOTION FOR RELIEF FROM AUTOMATIC STAY 3-2-20 [15]
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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, parties requesting special notice, and Office of the United States Trustee on March 2, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

<p>The hearing on the Motion for Relief from the Automatic Stay is continued to 3:00 p.m. on April 28, 2020.</p>

Laguna Pavilion S.C., LLC (“Movant”) seeks relief from the automatic stay to allow Laguna Pavilion, S.C., LLC a California limited liability company vs. Michale Morris DBA Wingstop (Case No. 20UD00306) (the “State Court Litigation”) to be concluded. Movant has provided the Declaration of Steve Hussey to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Michael Lamonte Morris (“Debtor”).

Movant argues that Debtor is not entitled to possession of the premises per the Commercial Lease Agreement entered into on October 19, 2010, and expiring on or about October 31, 2020. Movant argues Debtor has not complied with Paragraph 9 of said lease by operating without the permission of Wingstop Franchising LLC, a Delaware limited liability company, to sell products under the Wingstop name since on or about December 18, 2018. Movant further argues that Debtor has defaulted on the payment of rent for December 2019, January 2020, and February 2020 owing \$19,293.12. Declaration, Dckt. 18.

TRUSTEE’S RESPONSE

David Cusick, Chapter 13 Trustee (“Trustee”) filed a Response on March 13, 2020. Dckt. 26. Trustee does not oppose Movant’s motion. Trustee indicates that the first Meeting of Creditors is scheduled for April 4, 2020, Debtor does not report any Contracts or Leases on Schedule G, and Debtor’s proposed Plan does not list Movant.

Trustee’s Status Report

Trustee filed a Status Report on the current motion on March 24, 2020. Dckt. 45. Trustee indicates that Debtor has opposed the motion and appears to dispute material facts. Trustee requests that the matter be continued for additional briefing, potentially to May 12, 2020 at 1:30pm.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on March 17, 2020. Dckt. 30. Debtor asserts that he has substantially cured the arrears owed to Movant leaving a balance of \$2,221.76; the lease with Movant does not expire until October 31, 2020; and Debtor has pending litigation as to the franchise agreement which Movant is not a party to.

Declaration of Debtor

Debtor has provided his Declaration in support of the opposition to Movant’s motion for relief from the automatic stay. Dckt. 31. In his Declaration, Debtor asserts that:

- A. His commercial lease with Movant expires on October 31, 2020.
- B. He is in litigation with Wingstop Franchising LLC, a Delaware limited

liability company to determine the validity of the Franchise Agreement which would determine the status of his license to operate as a Wingstop as of December 2018.

- C. He has paid all but \$2,221.76 of pre-petition arrears and is prepared to pay the on-going lease payments of \$6,431.04.
- D. The balance of the pre-petition lease payments are intended to be paid in an amended plan as an executory lease with payments of \$37.00 a month.

EXHIBITS IN SUPPORT OF DEBTOR'S DECLARATION

Debtor has provided properly authenticated Exhibits A and Exhibit B in support of his Declaration. Dckt. 32.

Exhibit A is the Complaint for Improper Termination of Franchise. Debtor has provided an unsigned, unfiled copy of a complaint against Wingstop Franchising LLC. Dckt. 32. The general allegations are that Wingstop Franchising LLC ("Wingstop LLC") engaged in a corporate takeover of Wingstop Restaurants sometime after 2008; has failed to deal fairly with Plaintiff and has interfered with Plaintiff's contractual relationships with third parties in an attempt to devalue his investment and force him into bankruptcy with regards to his Wingstop restaurant located at 3541 North Freeway Boulevard, Suite 115, Sacramento, CA. Debtor lists three causes of action (1) Improper Termination of Franchise; (2); and (3) Breach of the Covenant of Good Faith and Fair Dealing.

Exhibit B is what Debtor argues is Proof of Lease Arrears Payment. Debtor has provided copies of blurry photos of a Cashier's Check and a transaction receipt from Wells Fargo Bank. Dckt. 32. The Cashier's Check issued by US Bank is made to the order of Laguna Pavilions in the amount of \$17,071.36. The date and signature are illegible. The Wells Fargo transaction receipt for account ending in 1269 is for a total deposit of \$17,071.36. The date is illegible.

MOVANT'S RESPONSE

Movant filed a Response on March 24, 2020. Dckt. 46. Movant asserts that:

- A. Debtor's opposition attaches a Complaint filed by non-party Morris CM Enterprises, LLC, and not Debtor, Michael L. Morris.
- B. The Complaint indicates litigation involving a dispute over a Wingstop restaurant located at 3531 North Freeway Boulevard, Suite 115, Sacramento, CA. The subject real property of this Motion is located at 7440 Laguna Boulevard, Ste 116, Elk Grove, CA 95758. There is no litigation over the validity of the Franchise Agreement for the Elk Grove restaurant.
- C. Debtor presently owes \$2,221.76 in arrears, a post-petition payment of \$6,431.04, and an additional \$6,431.04 due in April 2020.

- D. Debtor does not refute the validity of the Termination Agreement barring him from operating under the Wingstop name.
- E. Pursuant to the Termination Agreement, Debtor was served with a 15 day Notice to cure on or about December 26, 2019. After his failure to respond or cure the breach of the Lease within the 15 day period, Movant elected to terminate the lease.
- F. Debtor has made no showing that the subject property is necessary for an effective reorganization.

Declaration of Jeffrey Chiao

Movant has provided the Declaration of Jeffrey Chiao. Dckt. 47. Mr. Chiao asserts that:

- A. A review of the bankruptcy filings shows Debtor did not report any Contracts or Leases on Schedule G.
- B. Debtor's proposed plan does not include Movant.
- C. Debtor's recent Amended Schedules do not amend Schedule G.
- D. There is a post-petition payment of \$6,431.04 owed for March 2020 and neither Debtor nor his counsel have contacted him to pay this post-petition payment or pre-petition balance of \$2,221.76.
- E. Another post-petition payment of \$6,431.04 will come due in April 2020.

DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine “whether cause exists to allow litigation to proceed in another forum, ‘the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.’” *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int’l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass’n v. Sanders (In re Santa Clara Cty. Fair Ass’n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

As is show from a discussion of the Motion and the Opposition, many complex issues arise concerning the franchise dispute and ongoing litigation in the District Court. While Movant makes reference to the limitation on the scope of this review, it raises and then invites arguments over the broader issues over the franchise agreement and whether Debtor has a bona fide dispute that is relevant to this Motion.

Relevant Asserted Grounds

Movant states the following grounds with particularity that are relevant to the present Motion for Relief From the Automatic Stay:

- a. Debtor entered into a lease for the Property. Motion ¶ 1, Dckt. 15. A copy of the lease is provided as Exhibit A.
- b. Movant is the assignee of the Lease from the original lessor. *Id.*, ¶ 2.
- c. Debtor defaulted on the payment of rent due under the lease. *Id.*, ¶ 9.
- d. On January 14, 2020, Movant served a Three (3) Day Notice to Pay Rent or Quit (“Three Day Notice”) the leased property based on the rent payment default. *Id.* No copy of the Three Day Notice is reference as being provided as an exhibit.
- e. On January 22, 2020, Movant filed an unlawful detainer action in the California Superior Court for Sacramento County, Case No. 20UD00306. (A copy of the unlawful detainer complaint is filed as Exhibit D.)
- f. The unlawful detainer trial was set to be conducted on February 20, 2020, but was stayed by Debtor commencing this bankruptcy case on February 19, 2020. *Id.*, ¶¶ 12, 11.

Movant also asserts that the alleged improper use of the Wingstop franchise name is also a default under the lease and is a basis for granting relief from the stay. But Movant also alleges that such issue is part of active, ongoing litigation in the District Court. Movant provides a copy of a preliminary injunction decision and Order, Exhibit C. But this is just an order on a preliminary injunction and not a final judgement of the District Court.

Movant provides the declaration of Steve Hussey in support of the Motion. Mr. Hussey provides detailed testimony as to having provided a notice of default based on the disputed termination of the franchise and that such asserted default has not been cured.

As to the simple grounds of a monetary default, Mr. Hussey is only able to provide

incomplete testimony in the same limited way as stated in the Motion by Movant's counsel. The allegations stated by the attorney in the Motion and the personal knowledge testimony of Mr. Hussey (Fed. R. Evid. 601, 602) are compared side by side below:

Allegation Stated in Motion By Counsel Motion ¶ 9, Dckt. 15.	Personal Knowledge Testimony By Steve Hussey Declaration ¶ 10, Dckt. 18.
"9. Debtor has also defaulted on the payment of rent. On January 14, 2020, Debtor was served with a Three Day (3) Notice to Pay Rent or Quit. The rent, common area maintenance (CAM) fees, and late fees owed for the months of December, January, and February 2020, total \$19,293.12."	"10. Debtor has also defaulted on the payment of rent. On January 14, 2020, Debtor was served with a Three Day (3) Notice to Pay Rent or Quit. The rent, common area maintenance (CAM) fees, and late fees owed for the months of December, January, and February 2020, total \$19,293.12."

As is obvious, Mr. Hussey's testimony is exactly the same as counsel for Movant has written Paragraph 9 of the Motion. This caused the court to go back and compare Mr. Hussey's personal knowledge testimony to that of the grounds alleged in the Motion.

Comparing the paragraphs on the Motion stating the grounds by counsel for Movant and Mr. Hussey's personal knowledge testimony discloses that Mr. Hussey's "testimony" is merely reading and parroting what has been written in the Motion for the following paragraphs:

Motion Paragraph Alleging Grounds as Stated By Counsel for Movant	Paragraph in Declaration of Steven Hussey that Recites Word for Word Paragraph from Motion
1	2
2	3
3	4
4	5
5	6
6	7
7	8
8	9
9	10
10	11

11	12 (with the reference to Debtor changed to Debtor in the declaration from Respondent in the Motion)
12	13
13	14
14	15

It is obvious that Mr. Hussey's testimony is merely repeating what counsel has stated in the Motion. This includes Mr. Hussey's legal opinion as to the effect of the Termination Agreement between Wingstop and the Debtor. Declaration ¶ 5. He testifies as to events relating to the Termination Agreement and purports to authenticate the Termination Agreement (using the exact language from the Motion). However, Mr. Hussey offers no testimony as to how he has any personal knowledge of this Termination Agreement and why he can testify as to the legal effect of the Termination Agreement. Mr. Hussey also testifies that Wingstop is a Delaware Corporation, but offers no testimony as to how he has personal knowledge of such.

Mr. Hussey also testifies that the copy of the District Court preliminary injunction order is a "true and correct copy" of such order, again, using exactly the same language in the Motion. Mr. Hussey offers no testimony as to how he has personal knowledge that it is a "true and correct copy" of the District Court's order.

Based on the Declaration of Mr. Hussey, the court concludes that he has not, and cannot, provide personal knowledge testimony in this Contested Matter. Rather, it appears that Mr. Hussey has been enlisted to be the "testimony for hire" person to merely repeat what Movant's counsel tells him will let Movant win. This raises serious issues for both Mr. Hussey and Movant's counsel. See Fed. R. Bankr. P. 9011.

Opposition of Debtor Indicates Relief Should Be Granted

Debtor takes advantage of Movant seeking to have the issue of the status of the franchise being an essential part of the grounds for the Motion now before the court. In the Opposition Debtor admits that the pre-petition default amounts have been paid, except for \$2,221.76. Opposition, p. 2:2-3; Dckt. 30. Debtor states that his intention is to cure the remaining default through the Chapter 13 Plan. Debtor also admits that, on its face, the lease expires on October 31, 2020, seven months from now. *Id.*, p. 2:4. In his Declaration Debtor testifies that he will cure the \$2,221.76 unpaid pre-petition rent at the rate of \$37 a month through a Chapter 13 plan as an "executory lease." Declaration ¶ 6; Dckt. 31.

While Movant has neglected to provide the court with testimony and evidence of the Notice of Default and the failure to cure the defaulted rent payments, Debtor acknowledges that \$2,221.76 is unpaid. Debtor does not state if the cure of the Notice of Default amounts were made within the three day period under state law.

While Debtor asserts there is a lease, no action has been taken to assume the lease. The Bankruptcy Code expressly requires that unexpired lease must be assumed by the Debtor if he intends to continue to use the leased property. 11 U.S.C. § 365.^{FN. 1}

FN. 1. The court notes that in the Opposition Debtor discusses providing for the “executory lease” in the Chapter 13 plan, curing the default as stated by the Debtor at \$37 a month over 60 months. There is no such thing as an “executory lease.” There are “executory contracts” and “unexpired leases” that are the subject of 11 U.S.C. § 365.

For the assumption of an unexpired lease, the Debtor must do the following prior to confirmation of a plan (11 U.S.C. § 365(d)(2)):

(b)

(1) **If there has been a default in an** executory contract or **unexpired lease** of the debtor, the trustee **may not assume such contract or lease unless**, at the time of assumption of such contract or lease, the trustee—

(A) **cures, or provides adequate assurance** that the trustee will **promptly cure, such default . . .;**

(B) **compensates, or provides adequate assurance** that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for **any actual pecuniary loss to such party resulting from such default;** and

(C) **provides adequate assurance of future performance** under such contract or lease.

11 U.S.C. § 365(b) (emphasis added).

Debtor’s opposition states that he will not comply with the requirements of 11 U.S.C. § 365(b), but only cure the default over five years, which are more than four years after the lease has terminated by the expiration of the lease term.

In addition, neither the Debtor nor Movant (who one would expect to so do) have addressed well established Ninth Circuit law that upon the expiration of the three day period to cure on a notice of default for a lease, and the cure has not been paid, and the unlawful detainer action has been filed, the lease terminates by operation of California law, leaving nothing to assume. *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1471 (9th Cir. 1988), holding:

We hold that under California law a lease terminates for nonpayment of rent at least by the time the lessor files an unlawful detainer action, provided that a proper three-days' notice to pay rent or quit has been given, and the lessee has failed to pay the rent in default within the three-day period, and further provided that the lessor's notice contained an election to declare the lease forfeited. *See In re Escondido West Travelodge*, 52 Bankr. 376, 379 (S.D. Cal. 1985).

Continuance for Further Supplemental Briefing and Providing of Admissible Evidence

As discussed above, Movant has failed to provide the court with credible evidence in support of the Motion. Debtor has provided opposition indicating that the Motion should be granted. Rather than merely denying the Motion without prejudice and send everyone to start again, the court will carefully craft supplemental pleadings to be filed by the Parties.

The hearing on the Motion is continued to 3:00 p.m. on April 28, 2020.

On or before April 10, 2020, Movant shall file supplemental exhibits, which are properly authenticated under the Federal Rules of Evidence, relating to the January 14, 2020 Three (3) Day Notice to Pay Rent or Quit the leased property based on the rent payment default to establish the Notice of Default given, the failure to cure the default, and the exercise of the Movant's rights after the cure period expired. This will be supported by credible, personal knowledge testimony provided by declaration of a person with personal knowledge. Such testimony shall not be merely parroting paragraphs in the Motion, but shall objectively show why and how the declarant has personal knowledge of the facts stated in the testimony, and comply with Federal Rules of Evidence 601 et seq. ^{FN. 2}

FN. 2. While Movant's counsel may be tempted to tell the court to dig through the exhibits and find an unauthenticated copy of the notice of default attached to the unauthenticated unlawful detainer complaint, the court does not accept such unauthenticated exhibits as admissible, credible evidence upon which to grant relief. Such a request would indicate that the failure to present properly authenticated, admissible, credible evidence that complies with the Federal Rules of Evidence was not a "mere" error, but part of an intentional scheme by Movant to abuse the federal judicial system.

On or before April 21, 2020, Debtor shall file a supplemental declaration, exhibits, and legal authorities, if any, pertaining to the asserted Three day Notice to cure the rent default and why the lease has not terminated.

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 Laguna Pavilion S.C., LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Relief From the Automatic Stay is continued to 3:00 p.m. on April 28, 2020.

IT IS FURTHER ORDERED that on or before April 10, 2020, Movant shall file supplemental exhibits, which are properly authenticated under the Federal Rules of Evidence, relating to the January 14, 2020 Three (3) Day Notice to Pay Rent or Quit the leased property based on the rent payment default to

establish the Notice of Default given, the failure to cure the default, the exercise of the Movant's rights after the cure period expired. This will be supported by supplemental points and authorities pertaining to the termination of the lease based on that Three Day Notice (if Movant believes that supplemental authorities are appropriate) and credible, personal knowledge testimony provided by declaration of a person with personal knowledge. Such testimony shall not be merely parroting paragraphs in the Motion, but shall objectively show why and how the declarant has personal knowledge of the facts stated in the testimony, and comply with Federal Rules of Evidence 601 et seq.

IT IS FURTHER ORDERED that on or before April 21, 2020, Debtor shall file a supplemental declaration, exhibits, and legal authorities, if any, pertaining to the asserted Three day Notice to cure the rent default and why the lease has not terminated.

IT IS FURTHER ORDERED that the no other supplemental or additional pleadings are authorized to be filed for the continued hearing.

FINAL RULINGS

2. [20-20308](#)-E-13 **RICHARD DE ROSA** **MOTION FOR RELIEF FROM**
[JHK-1](#) **Steven Shumway** **AUTOMATIC STAY**
DAIMLER TRUST VS. **2-18-20 [17]**

Final Ruling: No appearance at the March 31, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 18, 2020. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted.
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Daimler Trust ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 Mercedes-Benz GLE350W4, VIN ending in 1669 ("Vehicle"). The moving party has provided the Declaration of Monica Senter to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Richard Lee De Rosa ("Debtor").

Movant argues Debtor has not made one (1) post-petition payment, with a total of \$795.83 in post-petition payments past due. Declaration, Dckt. 20. Movant also provides evidence that there are 1.9 pre-petition payments in default, with a pre-petition arrearage of \$1,583.32. *Id.*

TRUSTEE'S NON-OPPOSITION

The Chapter 13 Trustee, David Cusick, ("Trustee") filed a non-opposition on March 13, 2020. Dckt. 29. Trustee points out that Movant is not included in §4.02 of the Proposed Plan which has not been confirmed. Movant is listed on Schedule G of Debtor's Petition. Dckt. 11.

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 \$47,119.80 (Declaration, Dckt. 20). The value of the Vehicle is indeterminable because of the lack of evidence provided by Movant.

A review of Debtor's Plan shows that Debtor does not provide for this Creditor. However, Movant appears on Debtor's Schedule G for as an unexpired lease.

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

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Daimler Trust (“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 2018 Mercedes-Benz GLE350W4, VIN ending in 1669 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

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

No other or additional relief is granted.

3. [20-20309-E-13](#) MYKOLA VARHA
[JHK-1](#) Mark Shmorgon
MERCEDES-BENZ FINANCIAL
SERVICES USA LLC VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
2-13-20 [\[33\]](#)

Final Ruling: No appearance at the March 31, 2020 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 13, 2020. By the court's calculation, 46 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.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Mercedes-Benz Financial Services USA LLC DBA Daimler Truck Financial ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 Freightliner PT126SLP, VIN ending in 0377 ("Vehicle"). The moving party has provided the Declaration of Anita Walker to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Mykola Varha ("Debtor").

Movant provides evidence that there are nine (9) pre-petition payments in default each in the amount of 2,867.62. Declaration, Dckt. 37.

TRUSTEE'S NON-OPPOSITION

The Chapter 13 trustee, David Cusick, ("Trustee") filed a non-opposition on March 13, 2020. Dckt. 47. Trustee does not oppose Movant's Motion because Debtor's Plan has not been confirmed.

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 \$122,372.94 (Proof of Claim, 1-1), while the value of the Vehicle is determined to be \$80,000.00, as stated in Schedules B and D filed by Debtor.

According to Debtor's Plan, Debtor intends to surrender the Vehicle. Dckt. 4.

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

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Mercedes-Benz Financial Services USA LLC DBA Daimler Truck Financial (“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 2018 Freightliner PT126SLP, VIN ending in 0377 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

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

No other or additional relief is granted.