UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

April 6, 2023 at 10:00 a.m.

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1. 23-90111-E-11 DB-1 | **MICHAEL HOFMANN** / **Brian Haddix** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **3-23-23 [16]**

SHARON HOFMANN VS.

SUBCHAPTER V

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, Debtor's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 23, 2022. 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 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Relief from the Automatic Stay is ~~granted.~~

Sharon and Gary Hofmann ("Movant") seeks relief from the automatic stay with respect to Michael Erich Hofmann's ("Debtor") 8.33% interest in residential real property located at 13330 Valley Home Road, Valley Home, California ("Property").

Movant argues relief is needed to perform obligations under final state court orders in a partition action of the Property. The State Court Order requires Debtor to sell their 8.33% interest in the Property, as well as requires Movant's to sell their combined 91.66% interests.

Failure to Provide Evidence -
Request for Judicial Notice

Movant requests the court take judicial notice of the following state court opinions and orders:

Exhibit A **Opinion of the Court of Appeal,**

Appellate Case No. F079977, Superior Court No. 2200623, filed July 15, 2021

Exhibit B **Second Amended Interlocutory Judgment,**

Stanislaus County Superior Court Case No. 2200623, filed January 25, 2022

Exhibit C **Order Granting Order to Show Cause to Debtor Regarding Orders Requested by Movants in their Case Management Statement,**

Stanislaus County Superior Court Case No. 2200623, filed October 11, 2022

Exhibit D **Amended Order Granting *Ex Parte* Application for Court Approval for Sale of the Residence,**

Stanislaus County Superior Court Case No. 2200623, filed February 28, 2023

Exhibit E ***Ex Parte* Application For An Order**:

(1) Authorizing an Immediate Writ of Possession;

(2) Prohibiting Removal of Fixtures and Appliances;

(3) Authorizing the Clerk to Sign All Documents Necessary to Close Escrow;

Memorandum of Points and Authorities, and other supporting documents,

Stanislaus County Superior Court Case No. 2200623, filed on March 20, 2023

For legal authority allowing this court to take judicial notice of the above court proceedings, Movant cites Federal Rules of Evidence 201, as well as bankruptcy court decisions out of the Northern District of Indiana and Northern District of Ohio. Motion, Dckt. 16 at 2:15-19 (citing Fed. R. Evid. 201; *In re Snider Farms, Inc.*, 125 B.R. 993, 995 (Bankr. N.D. Ind. 1991); *In re Camp*, 170 B.R. 610, 612 (Bankr. N.D. Ohio 1994)).

When reviewing the plain language of Federal Rules of Evidence 201, a court may judicially notice a **fact** that is not subject to reasonable dispute if it:

> (1) is **generally known** within the trial court's territorial jurisdiction; **or**
>
> (2) can be **accurately and readily determined from sources whose accuracy cannot reasonably be questioned**.

Fed. R. Evid. 201(b). There is nothing within the plain language of 201 that states, as Movant suggests, the court "may take judicial notice of and consider the records and filings in other court proceedings" of documents that just appear and for which no one provides any authentication.

The Federal Rules of Evidence permit courts to take judicial notice of **facts**, not documents. It is not a tool to be used for when counsel wants to shortcut the filing of documents as exhibits along with a declaration authenticating and explaining the documents.

With respect to the case authority cited by Movant, the Northern District of Indiana determined a bankruptcy court may take judicial notice of the record in the main bankruptcy docket, not outside proceedings. *In re Snider Farms, Inc.*, 125 B.R. 993, 995 (Bankr. N.D. Ind. 1991) ("The Court takes **judicial notice of the record in the main case**. . . . In addition, the Court takes **judicial notice** that **pursuant to the above docket entry** the following Order was entered . . . ." (emphasis added)).

The same is true in *In re Camp*, 170, B.R. at 612, stating merely that the court can take judicial notice of that court's own pre-trial.

Neither of the two cases cited support Movant's assertion that this court should merely accept documents that show up with another court's caption at the top of the page. Movant does not provide a clear quote from either case supporting the use of judicial notice.

The court also notes some other irregularities in the legal citations by Movant. Citation is made to *Watson v. Confer (In re Confer)*, 2022 Bankr. LEXIS 631 (B.A.P. 9th Cir. 2022), as the legal authority for asserting that the bankruptcy court abused its discretion in not granting relief from the stay to enforce pre-petition litigation. Motion, p. 4:6-9. However, the Bankruptcy Appellate Panel expressly states with respect to the Decision in *In re Confer*:

> 1 This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, see Fed. R. App. P. 32.1, it has no precedential value, see 9th Cir. BAP Rule 8024-1.

Watson v. Confer (In re Confer), 2022 Bankr. LEXIS 631, FN. 1. Movant does not disclose that it is citing In re Confer merely persuasion, but as a published decision stating the law.

Authentication of Judicial Pleadings From Other Courts

The Supreme Court provides in Federal Rule of Evidence 901 methods of providing evidence sufficient to allow a court to conclude that the item presented is what the proponent claims to be include:

> (b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:
>
> > (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.
> > . . .
> > 7) Evidence About Public Records. Evidence that:
> >
> > > (A) a document was recorded or filed in a public office as authorized by law; or
> > >
> > > (B) a purported public record or statement is from the office where items of this kind are kept.
> >
> > . . .
> > (10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

Fed. R. Evid. 901.

Using the examples above, a simple declaration from an attorney who was personally involved in the proceedings in which the rulings, orders, or judgments were issued to provide personal knowledge (not hearsay) testimony to authenticate the exhibits). Or even if the person testifies that they went to the courthouse/court document web page and personally obtained the document, that may be sufficient for authentication.

The use of Judicial Notice for documents from another court is discussed in 1 Weinstein's Federal Evidence § 901.12, which includes:

> However, records of other courts generally may be noticed only to establish the fact of the litigation and actions of that court. In general, documents may not be judicially noticed for the truth of the matters stated in them. In other words, "a court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation." Although a court may judicially notice that certain facts were found in another proceeding, the court is not usually bound to accept those facts as true.

The Supreme Court further provides in Federal Rule of Evidence 902 that certain written documents are self-authenticating, doing away with the need for even a witness to testify that they obtained a copy of the document. These include:

> The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
>
> (1) Domestic Public Documents That Are Sealed and Signed. A document that bears:
>
> > (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
> >
> > (B) a signature purporting to be an execution or attestation.
>
> (2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:
>
> > (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
> >
> > (B) another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.

Fed. R. Evid. 902

By Movant's asserted application of Judicial Notice, Federal Rule of Evidence 901(b)(1) and 902(1) and (2) are rendered a nullity so long as a document is submitted which would appear to be a court record, or an order or judgment from another court. It does not appear to be proper to interpret the Federal Rules of Evidence to have been written by the Supreme Court where one section renders the other a nullity.

Failure to Provide Evidence -
No Declaration Provided

Movant has not provided a Declaration to introduce evidence or authenticate the exhibits upon which it bases the claim and the obligation secured by the Property. The entire factual basis rests on a series of unauthenticated exhibits - with Movant asking to take judicial notice of all the facts asserted to be told in the unauthenticated exhibits.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding–the court cannot and does not merely take counsel at their word. Federal Rules of Evidence 901 requires a proponent of evidence to support that the item is what the proponent claims it to be. This can be in the form of testimony of a witness with knowledge, in the form of a declaration. Federal Rules of Evidence 901(b)(1).

Here, Movant submits as exhibits various court documents from state court proceedings. The documents have not been authenticated. Additionally, the court does not find these documents as "self-authenticating" under Federal Rules of Evidence 902, as they are not certified copies.

Apart from the practical effect that the court has been given a request for relief without any established factual basis, the Local Rules also affirmatively require that evidence be filed along with every motion and request for relief. LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

At the hearing, XXXXXXXXXX

DISCUSSION

In many respects the matter presented to this court can be viewed as quite "simple." Movant provides the court with a very concise statement of the grounds, which are summarized as:

> (1) Debtor had an 8.33% interest in the residential real property located at 1330 Valley Home Road, Valley Home, California.
>
> (2) There was state court litigation - Presumably a Partition Action brought by the other fractional interest holders – from which the sale of the Property was ordered (it not being practical to physically divide the 8.33% interest in the form of the physical real property).
>
> (3) Debtor refused to participate in a consensual sale of the Property, and the State Court then ordered the sale of the Property to a specific third party.
>
> (4) When Debtor refused to sign the deed to the court ordered sale of the Third-Party and vacate the Property, Movants sought to have the State Court appoint the Clerk of the State Court as an elisor to sign the deed for Debtor, prohibit the removal of the fixtures from the Property, and the issuance of a writ of possession. This Motion was filed on March 20, 2023, with the hearing set for March 21, 2023.
>
> (5) On the evening of March 20, 2023, Debtor commenced this Chapter 11 Bankruptcy Case, resulting in the State Court continuing the March 21, 2023 hearing to April 18, 2023.

Motion, p. 2:21 - 3:11; Dckt. 16. All of the above facts are based upon statements made in the unauthenticated exhibits. As the court quotes from Weinstein on Federal Evidence, " records of other courts generally may be noticed only to establish the fact of the litigation and actions of that court. In general, documents may not be judicially noticed for the truth of the matters stated in them."

Not alleged in the Motion, but from what appears to be "facts" referenced in the unauthenticated exhibits, is that these fractional interests have been obtained through a family inheritance and inter-family transactions. The Debtor is identified as the trustee of the trust holding the interests and as trustee having a fiduciary duty to the beneficiaries of the trust.

The court is also presented with a Second Amended Interlocutory Judgment in the State Court Action. Exhibit B; Dckt. 20. This Motion only seeks relief to enforce the orders entered based on the Second Amended Interlocutory Judgment and not other proceedings in the State Court Action.

This Motion for Relief From the Automatic Stay was filed on March 23, 2023. The Motion does not address the Petition and Schedules so far filed by Debtor in this case. On the Petition, Debtor lists his residence as 13330 Valley Home Rd, Oakdale, California. In the Motion this property is identified as being in Valley Home, California.

Looking at the unauthenticated Second Amended Interlocutory Judgment, one of the facts stated therein is that the Property at issue is located in Oakdale, California, but then also Valley Home, California.

However, the Second Amended Order for the Sale of the Property and the contract attached thereto as being in Valley Home, California.

For the List of Creditors having the 20 Largest Unsecured Claims, the creditors from the State Court Action appear to be a large majority of that debtor. Dckt. 1 at 9-12.

Debtor has timely filed his Schedules and Statement of Financial Affairs. Dckt. 32. This was on March 30, 2023, after the present Motion was filed.

On Schedule A/B Debtor states that he is a joint tenant with other persons for the 13330 Valley Home Property. Schedule A/B, Dckt. 32 at 7-8. He does not list his "ownership interest" other than stating he is joint tenant.

For the 13330 Valley Home Road Property, Debtor lists it three times on Schedule A/B, identifying what appear to be three different parcel numbers. This information is summarized as follows:

A. APN xxx-049, identified as a single family residence.

1. Current Value of the Property.....$545,000

2. Value of Debtor's interest.....$43,600

a. Debtor's stated value is 8% of the total stated value.

B. APN xxx-051, identified as 24 acres of Farm Land

1. Current Value.....$350,000

2. Value of Debtor's interest.....$28,000

a. Debtor's stated value is 8% of the total stated value.

C. APN xxx-050, identified as 17 acres of Farm Land

1. Current Value.....$150,000

2. Value of Debtor's interest.....$12,000

a. Debtor's stated value is 8% of the total stated value.

Dckt. 32 at 7-8.

Unauthenticated Exhibit D, titled Amended Order Granting *Ex Parte* Application for Court Approved Sale of Residence, Dckt. 22, appears to authorize the sale of the Property for $575,000. The Amended Order authorizes the sale of the "residence located at 13330 Valley Home Road, Valley Home, California." Dckt. 22 at 2-3. The contract for sale identifies the property being located in "Valley Home, California." *Id*. at 5.

Partition Action Litigation

Here, at the heart of this Motion is that the Debtor has a fractional interest in the Property to be sold. His co-tenants have tired of being co-owners with him and have prosecuted a partition action in the State Court. The result of that is the order for the residence at 13330 Valley Home Rd, Valley Home, California (Valley Home appearing to be the correct town in which the property is located) to have the residence sold and the sales proceeds to be "partitioned," it not being practical to give Debtor 8.33% of the physical space in the residence.

Response by Debtor at the Hearing

At the hearing, Debtor's counsel addressed the State Court partition action, the 8.33% interest therein of the Bankruptcy Estate, and how that is being addressed, stating **xxxxxxx**

Ruling

~~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).~~

~~The court finds that the nature of the State Court Litigation warrants relief from stay for cause. The issues appear to have been litigated already, and a partition order has already been issued by the state~~

court. Second Amended Interlocutory Judgment, Exhibit B, Dckt. 20. Additionally, Movant's have already been granted an *Ex Parte* Application to approve the sale of the Property to a third party buyer, Michael Hudson. Amended Order Granting *Ex Parte* Application, Exhibit D, Dckt. 22.

Movant is only seeking relief to complete the sale of the Property and otherwise comply with state court orders. Additionally, after the sale of the Property, the proceeds will still remain property of the estate.

Therefore, judicial economy dictates that the state court rulings continue and allow the partition orders to be enforceable, after the considerable time and resources put into the matter already.

The court shall issue an order modifying the automatic stay as it applies to Debtor to allow Movant to continue the State Court Litigation and enforcing the state court orders to sell 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 that the court grant relief from the Rule as adopted by the United States Supreme Court.

The Motion states with particularity grounds upon which the request for waiver of the fourteen day stay is based. These include the delays in sale, Debtor's failure to comply with the orders of the State Court, and a sale of the Property pending.

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 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 Sharon and Gary Hofmann ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are modified as applicable to Michael Erich Hofmann ("Debtor") to allow Movant, its agents, representatives and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors to proceed with enforcing state court orders in *In Re* Estate of Erich Hofmann Testamentary Trust, Case No. 2200623 and proceed with a partition sale of the real property commonly known as 13330 Valley Home Road, Valley Home, California ("Property").

~~**IT IS FURTHER ORDERED** that any proceeds generated from Debtor's interest in the Property shall be disbursed to the Michael Erich Hofmann, the Subchapter V Debtor/Debtor in Possession, as the fiduciary of the Bankruptcy Estate, with such monies to be deposited into a segregated federally insured bank account from which no monies will be disbursed without further order of the court (i.e., a blocked account).~~

~~Upon receipt of the 8.33% of the sales proceeds and deposit in the segregated account, the Debtor/Debtor in Possession shall file with the court documentation of said deposit and the segregated account, and serve such documentation on the Subchapter V Trustee and the U.S. Trustee.~~

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

~~No other or additional relief is granted.~~

2. **18-90029-E-11** **JEFFERY ARAMBEL** **MOTION FOR RELIEF FROM**
JCW-1 **Pro Se** **AUTOMATIC STAY**
6-4-18 [381]

WELLS FARGO BANK, N.A. VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Sufficient Notice Not Provided. The Proof of Service states that the Re-set Motion and supporting pleadings were served on Debtor and Office of the United States Trustee on March 20, 2023. By the court's calculation, 17 days' notice was provided. Although the court's order allowed for a "restored" hearing set on fourteen (14) days notice, Debtor shall still be afforded 28 days notice, as required by 9014-1(f)(1) if Movant requests written opposition prior to the hearing.

The Re-Set Motion for Relief 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 XXXX.

RESTORED MOTION

A notice of "re-set" Motion was filed on March 20, 2023. Dckt. 1845.

Subiya Ali Declaration

On February 3, 2023, Subiya Ali, an Assistant Secretary for Rushmore Loan Management Services, servicer for U.S. Bank ("Movant-Successor"), filed a Declaration indicating Debtor is delinquent in post-petition payments to Movant. Dckt. 1833. Declarant states Debtor has failed to make four (4) post-petition payments, with a total default of $25,341.16.

April Causey Declaration

On March 20, 2023, April Causey, an employee of Movant-Successor, filed an additional declaration in support of the Motion for Relief. Dckt. 1846. Ms. Causey states Movant-Successor is the current beneficiary as the Deed of Trust was assigned to them on May 13, 2021. Dckt. 1846. Ms. Causey states the post-petition default is $39,583.28. This combines monthly payments, bankruptcy attorney's fees, and bankruptcy filing fees.

Exhibits Filed in Support of Re-Set Motion

Movant-Successor filed numerous exhibits in support of their Motion. Dckt. 1847. Movant-Successor failed to provide an "Exhibit Index," as required by Local Bankruptcy Rule 9004-2(d)(2). Without the index, the court has to sift through the forty-five pages of exhibits to determine how many exhibits are attached, what each exhibit is, and the relevance of each document.

Movant-Successor is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

Of relevance, the court does note that Exhibit 3 appears to be a Corporate Assignment Deed of Trust and Assignment Deed of Trust which properly assigns from Wells Fargo Bank, N.A. to U.S. Bank all interest under the original Deed of Trust. Exhibit 3, Dckt. 1847 at 37-41.

RESPONSE OF PLAN ADMINISTRATOR

On March 21, 2023, Focus Management Group USA, Inc. ("Plan Administrator") filed a Response to the Re-Set Motion. Dckt. 1849. The Plan Administrator states the Property Movant-Successor is seeking relief from is a personal asset under the Plan, under the full and sole responsibility of the Reorganizing Debtor. Therefore, the Plan Administrator does not oppose the Motion so long as it does not seek relief to assert or enforce any claims against the Plan Assets.

APRIL 6, 2023 HEARING

At the hearing, XXXXXXXXXX

REVIEW OF ORIGINAL MOTION AND HISTORY OF PROCEEDINGS

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

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

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

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

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

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

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

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

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

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

In Movant's properly pleaded separate Points and Authorities, the legal basis for the relief is stated to arise pursuant to 11 U.S.C. § 362(c)(d)(2)—lack of equity for the Estate and not necessary for an

effective reorganization. As provided in 11 U.S.C. § 362(g), Movant has the burden of proof on the equity issue, and Debtor in Possession has the burden of proof on the necessary for effective reorganization point.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEBTOR IN POSSESSION'S OPPOSITION

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

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

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

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

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

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

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

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

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

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

JULY 12, 2018, HEARING

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

AUGUST 23, 2018 HEARING

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

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

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

SEPTEMBER 24, 2018 STIPULATION

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

1. Commencing August 1, 2018, Debtor shall make regular monthly post-petition payments under the Note and Deed of Trust to Movant to be paid towards contractual arrears on the loan. These payments shall be applied contractually to the loan.

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

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

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

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

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

OCTOBER 9, 2018, STATUS REPORT

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

NOVEMBER 8, 2018 HEARING

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

NOVEMBER 20, 2018 HEARING

At the November 20, 2018 hearing, the court continued the hearing on the Motion to November 20, 2018, at 3:00p.m. Order, Dckt. 724.

DISCUSSION

The Debtor in Possession has been now serving as debtor in possession for twelve months. During that time, he has worked on various ideas for plans of reorganization, while in the interim marketing

and selling several properties in this case and the related Chapter 11 case of Filbin Land & Cattle Co (18-90030). Some of the approved sales have closed, others are still pending. For one, there is required lot-split and related lot line adjustments which require a modicum of cooperation between this Debtor, serving as the responsible representative for the debtor in possession in the Filbin Land & Cattle Co case and creditors who are looking to be paid from the sales proceeds. However, the animosity between the parties and what creditors question as Debtor's acceptance of his financial reality while serving as debtor in possession and the representative in the Filbin case, obtaining the $8,000,000+ in sales proceeds has eluded all of these Parties.

The court has issued orders authorizing the use of cash collateral to pay necessary costs and expenses in this case, as well as provide for the reasonable and necessary expenses of the Debtor while serving as the Debtor in Possession in this case. The debtor in possession in the Filbin Land & Cattle Co case has elected to proceed with that case without the authorization to use cash collateral.

As the court was authorizing the most recent use of cash collateral in this case (Order, Dckt. 384), several of the creditors (including those who have been challenged in addressing the lot split in the Filbin bankruptcy case) pointed out to the court the property securing this Creditor's claim, for which the estate is making a $6,036.87 to preserve this property for the Estate, is "just" the Debtor's residence and does not include any orchard or income producing property.

Creditor asserts a claim of ($784,961) secured by the Property. Motion, p. 2:17; Dckt. 381. As discussed above, the evidence presented by the Parties leads the court to an initial value range of $600,000 (Creditor's low end value) and $800,000 (Debtor's high end value).

There is no evidence that the Property is declining in value, to the extent that the court were to determine the value a Creditor's low end, and that Creditor's interest in the Property is not adequately protected. *United Savings Association of Texas v. Timbers of Inwood Forest*, 484 U.S. 365 (1988).

Creditor's note is provided as Exhibit 2. Dckt. 386 at 32-37. The Note is for a $964,750.00 loan, to be repaid over thirty years, with an adjustable interest rate starting at 6.950%. Note ¶ 3, *Id.* at 32. The initial monthly payment on the notes was $6,386.15.

Creditor's expert states in his Broker's Opinion that the Property was purchased by Debtor for $450,000. Broker's Price Opinion, Sales Comparison Analysis Chart, Sale Price (3rd Line). Exhibit 3, Dckt. 386 at 38. This does not appear to be the actual "sale price," but the Expert's opinion of current value.

In the Listing and Transfer History section of his Broker's Opinion it is stated that the Property was transferred in 2007 for $120,000. *Id.* at 38.

Debtor in Possession's appraiser provides additional information in her Appraisal Report. Exhibit A, Last Market Sale & Sales History Section, Dckt. 449 at 5. Here is it stated that Debtor purchased the Property January 31, 2007 (deed recording date) for $1,201,609. A loan of $964,750 is 80% of the $1,201,609 purchase price. Creditor's Deed of Trust states that it is a purchase money mortgage. Deed of Trust, Exhibit 1; Dckt. 386 at 6.

Adequate Protection Payments

As authorized by the court, Creditor has been receiving monthly payments of $6,036.87 commencing August 1, 2018 ($5,399,45, Creditor's computed principal and interest, plus $637.42 for property taxes). Through December 2018, Creditor has received $30,184.35,which after excluding the $637.42 which is specifically earmarked to pay the property taxes, results in there being $26,997.25 in additional adequate protection cushion already for Creditor.

If Creditor is correct and it's Broker's low end value of $450,000 is correct as the value of the Property, this $26,997.25 represents fourteen months of "adequate protection" once the estate exceeds the "reasonable" period to prosecute a plan as discussed in *Timbers* [($450,000 x .05)/12 = $1,875 per month x 14 months]. If the court uses the higher end value of $800,000, Creditor has an equity cushion in addition to the $26,997.25 in payments to date providing even more protection for its secured claim.

Further Proceedings

The Parties have not provided the court with supplemental pleadings. Debtor in Possession and the Summit Creditors presented the court with Settlement in which the Debtor in Possession sought to fix plan terms in this case. Motion, Dckt. 558. The Settlement provided for a liquidation under a Chapter 11 Plan to be prosecuted by the Debtor in Possession, funding to be provided by Summit, and Summit having the power to control the liquidation of the properties. While the court did not approve the Settlement (concluding that many fo the terms therein had to be confirmed as part of a Chapter 11 plan, not through a settlement), it set forth an intended prosecution of this case by the Debtor in Possession to administer the assets of this bankruptcy estate. The order denying the proposed Settlement was field on October 1, 2018. Dckt. 661.

Debtor in Possession and Summit have not proceeded with a plan on the terms that they sought to bind them (along with the estate and all other parties in interest) they advocated for at the September 27, 2018 hearing on the Motion to Approve Settlement.

When presented with further opposition to the adequate protection payment being made to this Creditor at November 2018 hearing on the Motion to Cash Collateral, the court questioned the Debtor in Possession as to where in the process was the Debtor in Possession-Summit stipulated plan so that creditors could vote on it. The Debtor in Possession advised the court that he had now decided to go another way (disposing of the "plan" he was advocating for at the September 27, 2018 hearing).

At the hearing, the Parties reported that Debtor was current in the adequate protection payments. The Parties requested that the court grant an adequate protection order on the terms set forth in their Stipulation filed on September 24, 2018 (Dckt. 643).

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

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

The Motion for Relief from the Automatic Stay filed by Wells Fargo, N.A. ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Relief from the Automatic Stay filed by Wells Fargo, N.A. is **XXXXXXXXXXXXXXXX**.

FINAL RULINGS

3.	**23-90044-E-7** **ADR-1** **JUAN RAMOS VS.**	**TANYA GUERRERO CARDENAS** **Kevin Tang**	**MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION** **2-27-23 [12]**

COUNSEL FOR MOVANT IS DIRECTED TO REVIEW THE DISCUSSION BELOW CONCERNING THE REQUIRED CERTIFICATE OF SERVICE FORM IN THIS DISTRICT AND POSSIBLE CONSEQUENCES FROM THE FAILURE TO DO SO IN THE FUTURE

Final Ruling: No appearance at the April 6, 2023 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 7 Trustee, and Office of the United States Trustee on February 27, 2023. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

This being what appears to be Counsel for Movant's first filing since the Certificate of Service Requirement went into effect, the court addresses it with Counsel by this writing. In the event of future failures to use the required Certificate of Service and comply with the Local Rules, Counsel may find there being a required hearing on even an unopposed motion or that the motion is denied without prejudice by final 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). 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.

Juan Ramos ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 2701 Hemminger Way, Modesto, California ("Property"). Movant has provided the Declaration of Juan Ramos to introduce evidence as a basis for Movant's contention that Tanya Guerrero Cardenas ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property.

Movant asserts it purchased the Property at a pre-petition foreclosure sale. Declaration, Dckt. 15. Movant rented the Property to Debtor pursuant to an oral rental agreement beginning December 2013. Debtor failed to pay the full amount of rent for the months of November 2022, December 2022, and January 2023. *Id.* There is $4,000.00 in delinquent rent as of January 2, 2023. *Id.*

Juan Ramos, the Movant, provides his Declaration under penalty of perjury, testifying to the facts based on his personal knowledge (Fed. R. Evid. 602), which include:

A. Movant is the owner of the real property and is entitled to possession. (The second, and possibly the first, sound more in the nature of legal conclusions rather than personal knowledge facts.) Dec., p. 2:2-4; Dckt. 15.

B. Movant is the owner and entitled to Possession of the Property. (Again, sounding as legal conclusions and not evidence upon which the court could draw those conclusions.) *Id*., p. 2:23-25.

C. A oral rental agreement with Debtor was terminated pre-petition. *Id*., p. 1:28 - 2:6. (Movant also provides his legal conclusion that "cause exists" for relief pursuant to 11 U.S.C. § 362(d)(1)).

D. Debtor was served with a three-day notice to Pay or Quit on January 23, 2023, and the three day period expired prior to Debtor commencing this Bankruptcy Case. *Id*., p. 3:9-11. Movant authenticates Exhibits 1 and 2, the Three Day Notice and Proof of Service thereof. *Id*., p. 3:11-12.

E. After Movant commenced his Unlawful Detainer Action in State Court, Debtor commenced the current Bankruptcy Case. This has caused the Unlawful Detainer Action to be stayed. *Id*., p. 3:14-19.

F. Debtor has failed to pay Movant the full amount of rent due for the months of November and December 2022, and January 2023. The amount of the default is $4,000 as of January 2, 2023. *Id*., p. 3:8-9.

Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel, relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. Section 362(d). *Hamilton v. Hernandez (In re Hamilton)*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8–9 (B.A.P. 9th Cir. Aug. 1, 2005) (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 part of a motion for relief from the automatic stay in a Contested Matter (Federal Rule of Bankruptcy Procedure 9014).

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the Property, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

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

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 Juan Ramos ("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 Movant and its agents, representatives and successors, to

exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2701 Hemminger Way, Modesto, California, California.

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.

4. 22-90296-E-11 MMJ-1 | **PROVIDENT CARE, INC.** **David Johnston** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **2-10-23 [68]**

ALLY BANK VS.

SUBCHAPTER V

Final Ruling: No appearance at the March 6, 2023 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 11 Trustee, President, creditors holding the twenty largest unsecured claims, parties requesting special notice, and Office of the United States Trustee on February 10, 2023. By the court's calculation, 55 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 hearing on the Motion for Relief from the Automatic Stay has been continued by prior order of the court to 10:00 a.m. on May 4, 2023, as requested by Movant.

Continuance

Movant filed a request for a continuance on April 3, 2023. Dckt. 93. The court grants the request.

REVIEW OF UNOPPOSED MOTION

Ally Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2015 Dodge Grand Caravan Passenger SE Minivan 4D, VIN ending in 7282 ("Vehicle"). The moving party has provided the Declaration of Paul Tangen to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Provident Care, Inc. ("Debtor").

Movant argues Debtor has not made five post-petition payments, with a total of $2,117.65 in post-petition payments past due. Declaration, Dckt. 71.

Movant has also provided a copy of the Kelley Blue Book 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).

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 $3,794.83 (Declaration, Dckt. 68), while the value of the Vehicle is determined to be $6,798.00, as stated on the NADA Valuation Report, which is slightly less than in Schedules A/B and D filed by Debtor. Dckt. 25.

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).

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees "pursuant to the Security Agreement"). No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on

grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

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).