

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 June 1, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.**

April 28, 2020 at 1:30 p.m.

1.	<u>20-20920-E-13</u> <u>JCC-1</u>	MICHAEL MORRIS Peter Macaluso	CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 3-2-20 <u>[15]</u>
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LAGUNA PAVILION S.C., LLC

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.

The Motion for Relief from the Automatic Stay is granted.
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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. Michael 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 an 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 TO APRIL 28, 2020 FOR FURTHER SUPPLEMENTAL BRIEFING
AND
PROVIDING 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.

Further, 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.

Supplemental Pleadings

Movant Laguna Pavilion's
Supplemental Points and Authorities

On April 10, 2020, Movant filed a Supplemental Points and Authorities and four (4) declarations in support with exhibits attached to each declaration as follows:

1. Declaration of Madison A. Jobe (Ex. 1- Termination Agreement and Mutual Release),
2. Declaration of Steve Hussey (Ex. 2- Lease, Ex. 7- Series of text communications

from Michael Ex. 8- photo(?) of a Wingstop Storefront),

3. Declaration of David B. Durrett (Ex. 2- Lease; Ex. 7- Series of text communication from Michael, and Ex. 8- photo(?) of a Wingstop Storefront), and
4. Declaration of Jeffrey Chiao (Ex. 9- unlawful detainer complaint). Dckts. 56, 57, 58, 59.

Debtor's Opposition to
Movant's Supplemental Points and Authorities

On April 21, 2020, Debtor filed an Opposition to the Supplemental Points and Authorities and the Declaration of Debtor Michael L. Morris in support. Dckt. 69, 70.

In his Opposition Debtor argues that Movant has failed to show that cause exist to grant relief from the automatic stay because the lease has not expired and is in active litigation; all pre-petition arrears have been paid; and the proposed Plan addresses any post-petition arrearage. Opposition, Dckt. 69.

The following are undisputed facts according to Debtor:

1. The validity of the Franchise Agreement is currently being litigated in Federal Court. See Debtor's Declaration and the Exhibits in support of the Opposition, Dckt. 32). *Id.* ¶ 1.
2. The amount sought under the Unlawful Detainer was \$12,862.08. (See Declaration of Jeffrey Chiao, Exhibit 9, p. 5, Dckt. 60). *Id.* ¶ 2.
3. Debtor has paid the amount due under the least prior to the Unlawful Detainer. *Id.*
4. According to the Declaration of Steve Hussey: "on January 16, 2020 a cashier's check ("Check")...in the amount of \$12,862.08 was delivered to my office at about 4:00 p.m., and that the check was not deposited until "on or about March 31, 2020", and that it has been credited towards pre-petition arrears for the months of December 2019 and January 2020." (See Declaration of Steve Hussey, p. 2, 4, Dckt. 58). *Id.*
5. Debtor's lease does not expire until October 31, 2020. (See Declaration of Steve Hussey, pp. 2-3, Dckt. 58). *Id.* ¶ 3.
6. Debtor's chapter 13 assumes the Lease at issue and cures the arrears through the plan. *Id.* ¶ 4.

Debtor argues that the following are disputed facts:

1. Whether Debtor will be successful in the pending federal litigation related to the rights to the Franchise agreement between the Debtor and

Wingstop. *Id.* p.2, 23-25.

2. Whether caused exists for the relief requested. *Id.* 26.

Debtor asserts that in this case cause has not been shown to grant the motion as the lease has not expired, litigation is pending as to the franchise agreement which the Movant is party to, the pre-petition arrearage was cured, Debtor's Plan proposes to cure the arrearage alleged in Movant's motion. *Id.* p. 3, 2-6. Thus, the Motion should be denied.

DISCUSSION

Movant opens arguing that Debtor's lease was terminated pursuant to the Fifteen Day Notice to Perform Covenant (Cure) or Quit. Motion, p. 1. Movant directs the court's attention to *In re Windmill Farms, Inc.*, 841 F.2d 1467 (1988), where the Ninth Circuit held that a lease of real property is terminated under California law when the lessor affirms his election to terminate the lease as expressed in a Ten Day Notice to Pay or Quit which was served upon the lessee. Arguing that the affirmation of such termination is usually accomplished by filing an unlawful detainer. *Id.* p. 2, 1-3.

Movant asserts that the Notice to Quit was drafted, signed, and delivered on December 26, 2019. *Id.* p. 3, 1-7. The Notice informed the Debtor that he had fifteen days to obtain permission from Wingstop to sell their products on the Premises, and that if Debtor failed to perform and cure, Movant would declare a "forfeiture of your lease or rental agreement." *Id.* 2-3. Movant adds that Debtor has not provided any response indicating that he has permission from Wingstop to continue to sell under Wingstop's name. *Id.* 7-8. Adding that Debtor is not able to obtain permission from Wingstop in the future. With this knowledge, on January 22, 2020, Movant filed the Unlawful Detainer against Debtor.

Movant also argues that Debtor breached the lease, Movant gave proper notice to Debtor of its intention to terminate the lease if Debtor failed to cure, Debtor failed to cure, and Movant affirmed its intention by filing the Unlawful Detainer. Therefore, following *In re Windmills Farms*, the lease being terminated, Debtor has no property interest in the lease, or the tenancy it created, which was terminated prior to the commencement of his bankruptcy case; and Debtor's recent retention of the premises is not a property interest recognized by law.

Finally, Movant contends that since the filing of Debtor's bankruptcy petition, Debtor has not made or offered to make any pre-petition or post-petition payments.

Per the court's Order instruction, Movant was to file supplemental exhibits, which addressed the items expressly stated in the Order as stated above.

While ordered to provide the evidence, Movant failed to comply and provide the supplemental pleadings relating to the Three day Notice to Pay Rent or Quit nor the Fifteen Day Notice to Cure or Quit were addressed.

Movant argues that the lease was terminated in January when Debtor failed to cure the issue at hand according to the December 26, 2019 Fifteen (15) Notice to Quit, which was that Debtor could only operate on the premises as a Wingstop as long as it had permission from Wingstop to operate under their name. According to Movant, Debtor did not respond to this Notice.

Movant further argues that the Fifteen Day Notice to Cure or Quit and Debtor's failure to cure the issues regarding the use of Wingstop's name to operate constitute a breach that terminates the lease. Thus, Debtor has no interest in the property and the tenancy was terminated prior to the filing of the bankruptcy case which took place.

The Declaration of Steve Hussey is most illuminating as to the Three Day Notice to Pay Rent or Quit. Dckt. 58.

He testifies as follows:

1. Mr. Hussey is employed as the Property Manager by Sierra Asset Management Inc. which manages the commercial real property subject of this Motion on behalf of Movant Laguna Pavilion S.C., LLC. *Id.* ¶ 1.
2. According to his testimony, there are two Three (3) Day Notices to Quit. *Id.* ¶ 5, 7.
3. There is a December 16, 2019 Three (3) Day Notice to Pay Rent or Quit stating that \$6,431.04 was due. *Id.* ¶ 5.
4. On January 14, 2020, a second one was requested by Mr. Hussey to be served upon Debtor in the amount of \$12,862.08 for the months of December 2019 and January 2020. *Id.* ¶ 7.
5. Mr. Hussey further declares that on January 16, 2020, a cashier's check in the amount of \$12,862.08 was delivered to his office but that Debtor did not respond to the Fifteen (15) Day Notice. *Id.* ¶ 8.
6. He further testifies that on January 24, 2020, he informed Debtor to pick up the cashier's check and to sign a document acknowledging the pick up but Debtor refused. *Id.* ¶ 9.
7. He denies receiving the cashier's check in the amount of \$17,071.36 attached by Debtor in support of the his original Opposition to the instant Motion. *Id.* ¶ 11.
8. On March 31, 2020, he deposited the \$12,862.08 check which was credited towards pre-petition arrearage for the months of December 2019 and January 2020. Further testifying that neither Debtor nor Debtor's Counsel have contacted him to arrange for payment of pre-petition or post-petition arrearage from February 2020 to the present. *Id.* ¶ 17.

Decision

Debtor asserts that the lease has not expired and is in active litigation, that he has cured the monetary defaults in the three-day notice. Debtor states that he has commenced and is pursuing litigation concerning the franchise agreement.

In his Declaration, Debtor testifies that he is in litigation with Wingstop Franchising, LLC that if successful, “my” license would remain valid. Declaration, ¶ 3; Dckt. 31. He directs the court to Exhibit A as “his” federal lawsuit against Wingstop Franchising, LLC.

Exhibit A is a complaint by Morris CM Enterprises, LLC against Wingstop Franchising, LLC. Dckt. 32. It states that Morris CM Enterprises, LLC entered into the franchise agreement, not the Debtor. Complaint ¶ 6; Exhibit A, Dckt. 32. All of the relief sought in the Complaint are for Morris CM Enterprises, LLC, not the Debtor.

Debtor argues that the court should not grant relief because he intends to cure the post-petition defaults and continue to pay on the lease until it terminates in October 2020. Response, ¶ B. 3, 4. Dckt. 69.

The proposed Chapter 13 Plan in this case was filed on February 28, 2020. Dckt. 13. The terms of the proposed plan are summarized as follows:

- A. Debtor will make monthly plan payments of \$6,200.00 for 60 months. Plan ¶¶ 2.01, 2.02. Dckt. 13.
- B. From this the following disbursements will be made by the Chapter 13 Trustee
 - 1. Wells Fargo Bank, Mortgage Claim - Monthly
 - a. Current Payment.....\$2,639.00
 - b. Arrearage Cure (\$46,118.39).....\$ 770.00
 - 2. Honda Finance - Monthly.....\$ 591.00
- C. Debtor’s Counsel’s \$4,000 fee (amortized).....\$ 66.66
- D. Chapter 13 Trustee Fees (estimated).....\$ 480.00

No provision is made for any payments to Movant.

On Schedule I, Debtor states that he is employed as a “Franchise Owner” and he is employed by “Wingstop.” Schedule I, Dckt. 12 at 21. He states that he is paid a salary by “Wingstop” of \$6,000.00 a month. *Id.* Debtor states that he has other monthly income consisting of “drawer” of \$6,200.00 a month. While Debtor lists withholding for state and federal taxes and Social Security by “Wingstop” from his salary, there is no indication of any taxes to be paid for the \$74,000 in “drawer” income - other than line 16 of Schedule J in the amount of \$210.00 for “Increase in Tax deduction.” See Schedule I, *Id.* at 21-22, and Schedule J, *Id.* at 23-24. It is unclear how an “increase” in a tax deduction is a \$210.00 a month expense.

There is no expense for Debtor paying Movant’s lease for the remaining five months that Debtor states remains on the lease.

On Schedule A/B Debtor states that he does not have any claims against any person

(Question 33, 34); that he does not have any licenses or franchises (Question 27); that he does not have any interests in any non-publically traded stock or interests in any incorporated or unincorporated businesses, including an LLC, partnership, and joint venture (Question 19); and that he does not have any business related property (Question 37). Dckt. 12 at 6, 7. These statements are made under penalty of perjury. This conflict with Debtor's Declaration under penalty of perjury that he is prosecuting a federal court lawsuit enforcing his rights in a franchise.

However, though stating under penalty of perjury on Schedule A/B that he does not have any business interests or business assets, on the Statement of Financial Affairs, Debtor states under penalty of perjury that within four years of filing bankruptcy Debtor has operated a sole proprietorship for the periods from July 2010 to December 2018, and then from December 2019 to "current." Statement of Financial Affairs Question 27; *Id.* at 31. Debtor states that his sole proprietorship is "Wingstop," with the nature of the business being "Wingstop Franchise." *Id.* However, Debtor states under penalty of perjury on Schedule A/B that he has no franchises.

Granting Relief

Movant has an active dispute with Debtor whether or not the lease has been terminated prior to the upcoming October 2020 termination testified to by Debtor. The court cannot determine that in a Motion for Relief. See, *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.

What Debtor argues in substance is for this court to allow the automatic stay to enjoin the adjudication of Movant's asserted rights, and effectively "give" the Debtor the lease for the remaining term, depriving Movant of adjudication of its rights.

Debtor's statements under penalty of perjury are grossly conflicting. Debtor's statement that he is pursuing the enforcement of his franchise rights in the federal court litigation is conflicted by the copy of the complaint he provides as an exhibit.

Debtor also states under penalty of perjury on Schedules A/B that he has no claims or rights against any person, such as a claim that a franchise was improperly alleged to have been terminated.

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.

The court also waives the fourteen-day stay of enforcement arising pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3). This Motion has been pending and required two months of adjudication. The Motion states grounds of this relief, this bankruptcy case having been filed on the eve of the trial on the unlawful detainer action commence on February 20, 2020. (The court notes that waiving the fourteen-day stay may not be of significance in light of the state courthouses being shut down due to the COVID-19 access restrictions.)

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 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 7440 Laguna Boulevard, Ste 116, Elk Grove, 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.

FINAL RULINGS

2. 19-28015-E-13 ALIAKSEI FLIAHA MOTION FOR RELIEF FROM
[KMM-1](#) Mark Shmorgon AUTOMATIC STAY
3-6-20 [\[58\]](#)
VW CREDIT LEASING, LTD. VS.

Final Ruling: No appearance at the April 28, 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 March 6, 2020. By the court’s calculation, 53 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.

VW Credit Leasing, LTD (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2017 Audi Q7, VIN ending in 4512 (“Vehicle”). The moving party has provided the Declaration of Jennifer Clothier to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Aliaksei Fliaha (“Debtor”).

Movant argues Debtor has not made two (2) post-petition payment, with a total of \$1,731.68 in post-petition payments past due. Declaration, Dckt. 60.

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 \$41,685.74 (Declaration, Dckt. 60), while the value of the Vehicle is determined to be \$34,745.00, as stated in Schedules B and D filed by Debtor.

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick, filed a Response on March 30, 2020 stating non-opposition to the Motion. Dckt. 67.

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.

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 VW Credit Leasing, LTD (“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 2017 Audi Q7, VIN ending in 4512 (“Vehicle”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle

to the obligation secured thereby.

No other or additional relief is granted.

3. [20-20656-E-13](#) **MICHAEL KENNEDY** **MOTION FOR RELIEF FROM**
[CAS-1](#) **Julius Cherry** **AUTOMATIC STAY**
3-11-20 [14]

BMW BANK OF NORTH AMERICA
VS.

Final Ruling: No appearance at the April 28, 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, parties requesting special notice, and Office of the United States Trustee on March 11, 2020. By the court's calculation, 48 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.

BMW Bank of North America ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 BMW G 310GS, VIN ending in 3655 ("Vehicle"). The moving party has provided the Declaration of Pamela Weems to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Michael Edward Nelson Kennedy ("Debtor").

Movant argues Debtor has 2,990 pre-petition payments in default, with a total of \$445.58 in pre-petition payments past due. Declaration, Dckt. 16.

NADA Valuation Report Provided

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication

generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick, filed a Response on April 4, 2020 stating non-opposition to the Motion. Dckt. 20.

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 \$5,823.33 (Declaration, Dckt. 16), while the value of the Vehicle is determined to be \$5,755.00, as stated in Schedules B and D filed by Debtor.

The Debtor's Chapter 13 Plan provides for the surrender of the Vehicle. Dckt. 2. According to Movant, they already have possession of the Vehicle.

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.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Cusick ("the Chapter 13 Trustee"), the court determines that there is no equity in the Vehicle for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant,

and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

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 BMW Bank of North America (“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 BMW G 310GS, VIN ending in 3655 (“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.