

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Sacramento, California

May 5, 2015 at 1:30 p.m.

1. [13-22028-E-13](#) FAITH EVANS
[14-2105](#)
EVANS V. MOULTON ET AL

CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT
4-16-14 [[1](#)]

Plaintiff's Atty: Patricia Wilson
Defendant's Atty: Pro Se

Adv. Filed: 4/16/14
Answer: 5/14/14

Nature of Action:
Recovery of money/property - turnover of property
Recovery of money/property - other
Notes:

Continued from 4/1/15. Motions, if any, by Defendant for relief from the Scheduling Order in this Adversary Proceeding to be filed and served on or before 4/27/15.

7/25/14 Scheduling Order-
Initial disclosures by 8/4/14
Close of discovery 12/31/14
Dispositive motions heard by 2/27/15

The Pre-Trial Conference is XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

CONTINUED PRE-TRIAL CONFERENCE - MAY 5, 2015

No substitution of attorney has been filed for the Defendant-Debtor. No relief from the Pre-Trial Schedule Order has been sought, notwithstanding the court affording the Defendant-Debtor and Robert McCann, the attorney who advised the court at the April 1, 2015 Pre-Trial Conference that he was substituting in to represent the Defendant-Debtor.

The Plaintiff alleges that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(E). Complaint 19, Dckt. 1. In his answer, Dan Moulton, the Defendant, does not deny the allegations of jurisdiction and core proceedings, but merely states that he is without information and belief, and thereon denies. Federal Rule of Bankruptcy Procedure 7008(a) requires that the defendant affirmatively state whether there it is a core or non-core adversary proceeding. This is a core matter for which the bankruptcy judge enters all final orders and the judgment.

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

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, 201x.
- C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, 201x.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, 201x.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, 201x.
- F. The Trial shall be conducted at ----x.m. on -----, 201x.

APRIL 1, 2015 PRE-TRIAL CONFERENCE

At the Pre-Trial Conference an attorney appeared, advising the court that he had been retained to substitute in to represent Defendant Moulton. He requested on behalf of the Debtor to not have the matter set for trial and to reopen discovery. He represented to the court that Defendant had suffered from some medical issues.

This Adversary Proceeding was commenced on April 16, 2014. Defendant Moulton file his Answer, in pro se, on May 14, 2014. Dckt. 8. The court established the discovery schedule in this case for the parties to properly, and diligently prosecuting their claims and defenses. Defendant has been inactive, to the point where the court issued discovery sanctions against Defendant. Order, Dckt. 45,

The court is concerned that the request to not set the matter for trial, and only after the close of discovery and at trial setting electing to engage counsel, is merely a dilatory tactic.

The court has continued the Status Conference to allow the attorney to substitute in as counsel for Defendant and file any necessary, and properly supported motions, for relief from the scheduling order in this Adversary Proceeding.

The Pre-Trial Conference is continued to 1:30 p.m. on May 5, 2015 (specially set). Motions, if any, by Defendant seeking relief from the Scheduling Order in this case shall be filed and served on or before April 27, 2015.

The Plaintiff alleges that jurisdiction for this Adversary Proceeding

exists pursuant to 28 U.S.C. §§ 1334 and 157(a), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(E). Complaint 19, Dckt. 1. In his answer, Dan Moulton, the Defendant, does not deny the allegations of jurisdiction and core proceedings, but merely states that he is without information and belief, and thereon denies. Federal Rule of Bankruptcy Procedure 7008(a) requires that the defendant affirmatively state whether there it is a core or non-core adversary proceeding. This is a core matter.

The Plaintiff has prepared and filed her Pre-Trial Conference Statement, and Defendant has failed to file a Pre-Trial Conference Statement. The following information is provided in the Pre-Trial Conference Statement:

Plaintiff(s)	Defendant(s)
<p>Jurisdiction and Venue:</p> <p>1. 28 U.S.C. §§ 1334 and 157(a), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(E).</p>	<p>Jurisdiction and Venue:</p> <p>1. Admitted in Answer</p>
<p>Undisputed Facts:</p> <p>a) Faith Evans (Debtor/Plaintiff) and Daniel Moulton (Defendant) were never legally married to each other;</p> <p>b) Title to the Rhodes Lane House was purchased in October 2008 and title was recorded in Faith Evans' name alone;</p> <p>c) The mortgage to the Rhodes Lane house was taken out in the name of Faith Evans alone;</p> <p>d) From the purchase date of the Rhodes Lane house to when the Rhodes Lane house was sold in 2013 title at all times remained in Faith Evans name;</p> <p>e) The Rhodes Lane house was sold on or about February 1, 2013;</p> <p>f) The net proceeds from the sale of the Rhodes Lane house of \$30,178.13 were deposited into the trust account of Harrison L Goodwin;</p> <p>g) Monies from the net sale proceeds were disbursed as follows</p>	<p>Undisputed Facts:</p> <p>1. None, No Pre-Trial Statement Filed.</p>

(Declaration of Harrison L Goodwin, Docket #65 and Declaration of Harrison L Goodwin, Docket #53):

a. To Defendant, Dan Moulton
\$26,889.06

b. For Debtor/Plaintiff (held by Mr. Goodwin at time of filing of Petition and later transferred to Robert McCann) \$3,289.07. (See Declaration of Harrison L Goodwin, Docket #65).

h) In June 2009, the inventory of an existing liquor store located at 1811 Douglas Boulevard, Roseville, CA was transferred through a bulk sale to Faith Evans;

I) From July 2009 until February 2013 Faith Evans operated the business known as Discount Mart Liquor out of the premises at 1811 Douglas Boulevard, Roseville, CA;

j) After February 15, 2013 (the filing date of the bankruptcy petition) Defendant sold the business known as Discount Mart Liquors located at 1811 Douglas Boulevard, Roseville, CA;

k) This court never granted permission for the sale of the business known as Discount Mart Liquors;

l) Defendant has not turned over any of the proceeds of the Sale of Discount Mart Liquor to Faith Evans;

m) Defendant has not turned over any of the proceeds of the Sale of Discount Mart Liquor to Chapter 13 Trustee David Cusick;

n) Funds held by David L Brown of \$2,375.72 on behalf of Faith Evans belong to Faith Evans. (See Declaration of David L Brown, Docket #66). Funds have been transferred to Chapter 13 Trustee David Cusick to

be held until further order from the Court.	
<p>Disputed Facts:</p> <p>a. Whether a marriage exists based on the doctrine of putative spouse under California Law;</p> <p>b. Whether the Liquor License was the sole and separate property of Faith Evans on February 15, 2013, at the time the Bankruptcy Petition was filed;</p> <p>c. Whether the business known as Discount Mart Liquors located at 1811 Douglas Boulevard, Roseville, CA, was the sole and separate property of Faith Evans on February 15, 2013, at the time the Bankruptcy Petition was filed;</p> <p>d. Whether the net proceeds from the sale of the Rhodes Lane house of \$30,178.13, was the sole and separate property of Faith Evans on or about February 1, 2013, when the property was sold and therefore the \$26,889.06 paid to Defendant was in fact Debtor/Plaintiff's property.</p>	<p>Disputed Facts:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None</p>	<p>Disputed Evidentiary Issues:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Relief Sought:</p> <p>a. Finding that a marriage never existed between Plaintiff and Defendant based on the doctrine of putative spouse under California Law;</p> <p>b. Finding that funds held by David Brown on February 15, 2013, were the property of Faith Evans.</p> <p>c. Finding that the Liquor License No. 479183 held in the name of Faith Ann Evans was her sole and separate</p>	<p>Relief Sought:</p> <p>1. No Pre-Trial Statement Filed.</p>

<p>property on February 15, 2013, when her bankruptcy petition was filed and that all sales proceeds are property of her Bankruptcy Estate;</p> <p>d. Finding that the business known as Discount Mart Liquors located at 1811 Douglas Boulevard, Roseville, CA was the sole and separate property of Faith Evans on February 15, 2013 when her bankruptcy petition was filed and that all sales proceeds are property of her Bankruptcy Estate; issuing a Judgment against Defendant in the amount equal to the gross sale amount of Discount Mart Liquor store with interest at the rate of 10% retroactive to the date of the sale; and, all appropriate sanctions against Daniel Moulton for selling Discount Mart Liquor after Faith Evans' bankruptcy Petition was filed and without leave of this court.</p> <p>e. Finding that the net proceeds of \$30,178.13 from the sale of the Rhodes Lane house were the sole and separate property of Faith Evans.</p> <p>f. Finding that proceeds in the amount of \$26,889.06 were improperly disbursed for the benefit of Defendant Daniel Moulton; finding that they should have been disbursed to Faith Evans; and, issuing a Judgment against Defendant in the amount of \$26,889.06 plus interest at the rate of 10% as of the date of this judgment.</p>	
<p>Points of Law:</p> <ol style="list-style-type: none"> 1. California Putative Spouse Doctrine, Family Code 2250-2255 and relevant California case law. 	<p>Points of Law:</p> <ol style="list-style-type: none"> 1. No Pre-Trial Statement Filed.
<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. The issue regarding the 	<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. None, No Pre-Trial Statement Filed.

<p>funds which were held in trust by Mr. Harrison L Goodwin at the time Faith Evans filed her bankruptcy Petition will be decided in a separate adversary case to be filed against Mr. Goodwin and Mr. McCann.</p>	
<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Faith Evans; 2. Amrinder Singh; 3. Most Knowledgeable Person from Shivamabhi, Inc. 4. Lalit Bhatoy; 5. California Department of Alcoholic Beverage Control Custodian of Records. 	<p>Witnesses:</p> <ol style="list-style-type: none"> 1. None, No Pre-Trial Statement Filed.
<p>Exhibits:</p> <ol style="list-style-type: none"> a. Copy of Liquor License held in Faith Evans' name. b. Copies of State of California Department of Alcoholic Beverage Control liquor license ownership records for the 1811 Douglas Boulevard, #A5, Roseville, California, location from February 15, 2006, to the present. c. All documents pertaining to Faith Evans' purchase of Discount Mart in 2009. d. Tax Returns filed by Faith Evans (2010 - 2013) e. Copy of the Deed for Faith Evans' purchase of the residential property located at 2025 Rhodes Lane, Roseville, CA. F. Copy of Closing Statement from sale of house at 2025 Rhodes Lane, 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. None, No Pre-Trial Statement Filed.

<p>Roseville, CA</p> <p>g. Accounting of funds held in trust by David Brown, divorce attorney for Faith Evans, and Harrison Goodwin, divorce attorney for Daniel Moulton.</p>	
<p>Discovery Documents:</p> <p>a. Order on Motion to Compel, Docket #45;</p> <p>b. Request for Admissions filed as Exhibit B, Docket #25;</p> <p>c. Written Interrogatories filed as Exhibit C, Docket #29;</p> <p>d. Request for Production of Documents filed as Exhibit D, Docket #29.</p>	<p>Discovery Documents:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Further Discovery or Motions:</p> <p>1. None</p>	<p>Further Discovery or Motions:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Stipulations:</p> <p>1. None</p>	<p>Stipulations:</p> <p>1. No Pre-Trial Statement Filed.</p>
<p>Amendments:</p> <p>1. None</p>	<p>Amendments:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Dismissals:</p> <p>1. None</p>	<p>Dismissals:</p> <p>1. None, No Pre-Trial Statement Filed.</p>
<p>Agreed Statement of Facts:</p> <p>1. None</p>	<p>Agreed Statement of Facts:</p> <p>1. No Pre-Trial Statement Filed.</p>
<p>Attorneys' Fees Basis:</p> <p>1. Not Requested.</p>	<p>Attorneys' Fees Basis:</p> <p>1. None, No Pre-Trial Statement Filed.</p>

Additional Items	Additional Items
1. Request June 2015 Trial Date.	1. No Pre-Trial Statement Filed.
Trial Time Estimation: One-Half Day in Light of No Pre-Trial Statement From Defendant.	Trial Time Estimation: No Pre-Trial Statement Filed.

2. [12-21733](#)-E-13 SHARAN SINGH
APN-1 Anh V. Nguyen

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR RELIEF FROM CO-DEBTOR STAY
3-31-15 [[69](#)]

SANTANDER CONSUMER USA, INC.
VS.

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct 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 31, 2015. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Court Orders Payment of the Insurance Proceeds to Pay the Remaining Amount of Movant's Secured Claim Under the Chapter 13 Plan, and the Balance to Debtor Which Must be Used to Repair the Damaged Vehicle.

Sharan L. Singh ("Debtor") commenced this bankruptcy case on January 30, 2012. SANTANDER CONSUMER USA INC., successor in interest to Road Loans - A Division of Triad Financial Corporation ("Movant") seeks relief from the

automatic stay with respect to an asset identified as a 2007 Pontiac Grand Prix, VIN ending in 2274 (the "Vehicle"). The moving party has provided the Declaration of Monica Resendez to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Resendez Declaration provides testimony that the Vehicle was involved in an accident and declared a total loss by Debtor "and/or" the nonfiling Co-Debtor's insurance carrier on February 13, 2015. Under the terms of the Contract entered into between the parties, not only did the Debtor "and/or" the nonfiling Co-Debtor agree to insure the Vehicle for fire, theft or collision loss, but the Debtor "and/or" the nonfiling Co-Debtor further agreed to name Movant as the loss payee under the terms of the policy of insurance acceptable to the Movant and the Debtor "and/or" the nonfiling Co-Debtor further agreed to assign the proceeds of any insurance settlement to Movant to the extent of the Debtor "and/or" the nonfiling Co-Debtor's indebtedness to the Movant. It is from these circumstances that Movant files for Relief from the Automatic Stay.

The Resendez Declaration provides testimony that the Movant seeks to apply the insurance proceeds from Debtors' insurance to Debtor's account. The Declaration also provides evidence that there is an outstanding balance on Debtors' account of \$2,702.67.

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 \$2,702.67, as stated in the Monica Resendez Declaration. Movant does not allege the current value of the vehicle, which appears to only be salvage value or the amount of the insurance proceeds it seeks to apply to the secured claim provided for in this plan.

Movant also alleges in the Motion that the Debtor is obligated to make monthly payments to Movant in the amount of \$270.11. Motion, pg. 2:25-26. The Motion fails to state that there is a confirmed Chapter 13 Plan in this case and the Debtor is "obligated" to pay Movant only \$267.00 a month on Movant's secured claim. Modified Chapter 13 Plan, Dckt. 54.

TRUSTEE'S OPPOSITION

David Cusick, Chapter 13 Trustee, has filed a response to the instant Motion on April 14, 2015. Dckt. 75. The Trustee states that the Debtor has paid a total of \$21,850.00 to date in regular plan payments. The Trustee is currently holding in a suspense account two checks from the Debtor's insurance company: (1) \$2,856.40 which was received March 23, 2015 and (2) \$1,476.57 which was received April 6, 2015.

Movant seeks the Liberty Mutual funds received from the auto insurance policy (Dckt. 69. P.4). The Trustee's records indicate \$2,856.40 plus \$14.28 interest remains to be paid on the creditor's secured claim under the Plan, which provides for 6% interest. Dckt. 19. Pg. 3, § 3.11. The Trustee notes however, the creditor asserted an 11% interest rate in their claim. Proof of Claim No. 10.

The Plan has been confirmed, the Debtor is current and the Movant now seeks payment in excess of the amount provided for in the Plan. The Trustee states that while the Movant is bound by the provisions of the plan, arguable

the Movant is also an unsecured creditor in the case based on Proof of Claim No. 9 which was valued at less than the amount of the claim (Dckt. 64) and can seek modification of the plan. The Trustee does not oppose if the Movant seeks to modify the plan to provide for an immediate payment of the balance of their secured claim by insurance proceeds held by the Trustee as no motion to substitute collateral is pending by the Debtor.

DEBTOR'S OPPOSITION

Debtor filed an opposition to the instant Motion on April 15, 2015. Dckt. 78.

The Debtor states that the Movant's secured claim was included in Debtor's bankruptcy plan. Pursuant to the confirmed plan Movant was to receive monthly dividends of \$270.11 a month for a period of sixty months.

After the accident involving the vehicle, on February 13, 2015, Debtor's vehicle was declared a total loss. The vehicle was insured, and the total settlement amount was approximately \$4,832.97. Debtor states that the settlement was made with the understanding that Debtor would keep the vehicle.

The Trustee's office has indicated that he does not have any interest in the proceeds and that he would pay the balance owed to Movant and return the remaining insurance proceeds to the Debtor so that she could repair her vehicle. However, the Debtor states that the Trustee's office did indicate that a stipulation would have to be executed due to the lump sum payment or in the alternative the Debtor would have to modify her plan. Debtor states that Movant's counsel has indicated that it would consider entering into a stipulation.

Debtor asks the court to deny Movant's Motion or continue the matter to give the parties additional time to enter into a stipulation.

RULING

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause does not exist for terminating the automatic stay. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. In this case, the equity cushion in the Vehicle for Movant's claim provides adequate protection such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

The Movant does not articulate to the court whether the insurance proceeds cover the remaining amount owed to Santander Consumer USA Inc. According to the Resendez Declaration, Debtor has an outstanding balance of \$2,702.67 owed to Movant. However, Movant does not describe whether or not they

plan to apply the recovered insurance proceeds to the outstanding balance owed to them, if the proceeds would only apply to the delinquent payments or if there is a different application sought. Without this information, there is potential for a lack of transparency in determining the amount owed to Movant and whether other creditors would be negatively impacted.

Movant does not state the salvage value of the Vehicle. Even if the above issues with the Motion had been resolved, the court might not grant a motion for relief from automatic stay without a description of the recovery value of the Vehicle. Without this information, the court cannot determine the proper amount to be recovered by the Movant. Santander Consumer USA Inc.'s, lien applies to Debtor's Vehicle. In order for the court to make an informed ruling, it is necessary to know the remaining value recoverable from the vehicle and apply only the proceeds tied to the Vehicle to the Movant.

Ms. Resendez further testifies under penalty of perjury that the collateral is "not adequately protected, absent Movant's ability to take immediate receipt of the insurance proceeds that have already been assigned to it by the Debtor and/or the nonfiling Co-Debtor." *Id.* This statement under penalty of perjury is clearly false. Debtor has made the payments due under the confirmed Modified Plan and the Trustee reports that he is making distributions to Movant. Further, no explanation is provided as to how insurance proceeds and a salvage value vehicle are not being "protected."

RESOLUTION OF CONTESTED MATTER

It surprises the court that the professionals involved in this case do not have this matter wrapped up with a simple stipulation. Their separate pleadings state the various elements thereof, and the Chapter 13 Trustee has "connected the dots" for all of the parties and their counsel.

Therefore, pursuant to the requested relief, response by Debtor, and statement of the Chapter 13 Trustee, the court orders:

A. The Chapter 13 Trustee shall disburse to Movant what remains of the \$2,856.40 claim, plus interest, for its secured claim in this case under the Chapter 13 Plan.

B. Upon payment of Movant's secured claim, the Chapter 13 Trustee shall disburse the remaining insurance proceeds to the Debtor, which monies shall be used to repair the vehicle. Debtor shall file a declaration under penalty of perjury and provide receipts for all the repairs which demonstrates that all of the insurance monies were used for the repairs, and if not all was used, then any excess amount was returned to the Trustee to distribute under the plan or that Debtor disbursed the monies as otherwise ordered by the court under a separate order expressly providing for disbursement of the excess insurance proceeds.

C. If Debtor fails to provide such declaration and receipts within 30 days of completion of the repairs, or fails to return any excess insurance proceeds, the Chapter 13 Trustee may seek dismissal of this case for failure to comply with this court's order.

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 Santander Consumer USA Inc. ("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 Chapter 13 Trustee shall, from the insurance proceeds in his possession relating to the 2007 Pontiac Grand Prix, VIN ending in 2274 with is the subject of this Motion,

A. Disburse to Santander Consumer USA, Inc., Movant, whatever amount remains payable under the confirmed Chapter 13 Plan on its secured claim (stated in the Chapter 13 Trustee's response to be \$2,856.40 claim, plus interest); and.

B. Upon payment of Movant's secured claim, disburse the remaining insurance proceeds to Anh Nguyen, the Debtor, which monies shall be used to repair the vehicle. Debtor shall file a declaration under penalty of perjury and provide receipts for all the repairs which demonstrates that all of the insurance monies were used for the repairs, and if not all was used, then any excess amount was returned to the Trustee to distribute under the plan or that Debtor disbursed the monies as otherwise ordered by the court under a separate order expressly providing for disbursement of the excess insurance proceeds.

IT IS FURTHER ORDERED that if Debtor fails to provide such declaration and receipts within 30 days of completion of the repairs, or fails to return any excess insurance proceeds, the Chapter 13 Trustee may seek dismissal of this case for failure to comply with this court's order.

3. [12-34737](#)-E-13 TERESA NABER
PD-1 Mary Ellen Terranella

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-2-15 [[120](#)]

GOLDEN 1 CREDIT UNION VS.

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

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

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on April 2, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

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

**The Motion for Relief From the Automatic Stay is
denied without prejudice.**

Golden 1 Credit Union ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 100 Cobble Ridge Drive, Folsom, California (the "Property"). Movant has provided the Declaration of Wes Motschman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Motschman Declaration states that there are 5 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$4,823.90 in post-petition payments past due. The Declaration also provides evidence that there are 5 pre-petition payments in default, with a pre-petition

arrearage of \$5,588.35.

The confirmed Chapter 13 Plan in this case requires that Golden 1 Credit Union be paid its current payment of \$1,143.00 and an arrearage payment of \$43.52 a month through the Chapter 13 Plan. Plan, Dckt. 5; Order Confirming, Dckt. 40.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on April 20, 2015. Dckt. 128.

The Trustee states that the Debtor is current under the confirmed plan with a plan payment of \$1,401.00 for 60 months. Debtor has paid a total of \$44,430.00 to date with \$43,431.00 having become due. Debtor's confirmed Plan provides for Golden 1 Credit Union, with payments disbursed to Dovenmuehle Mortgage, Inc., per Creditor's Proof of Claim (Court Claim 12), as a Class 1 Claim. Debtor's mortgage payment has adjusted periodically due to mortgage adjustments, with the current payment being \$1,309.73 per creditor's Notice of Mortgage Payment Change filed January 5, 2015 and effective March 2015. Mortgage arrears to be paid through the Plan at \$43.52 per month are \$9,820.12 pursuant to creditor's proof of claim.

To date, the Trustee has disbursed a total of \$38,011.74 to this creditor. The Trustee has disbursed \$32,239.04 in ongoing mortgage payments to the Movant with a principal due of \$3,487.88, while a total of \$5,772.70 has disbursed in mortgage arrears with a principal due of \$43.52.

Debtor's case was dismissed on June 3, 2014 (Dckt.60) for feasibility issues, (the Plan runs 76 months, Dckt. 58), with the dismissal vacated on July 28, 2014 (Dckt. 101.) Debtor filed a modified plan on June 17, 2014 to address the feasibility issue which was subsequently denied December 11, 2014 (Dckt. 114). To date, no modified Plan has been approved and the feasibility issue remains unresolved.

The court notes there is a pending Motion to Dismiss, filed by David Cusick, Chapter 13 Trustee (Dckt. 116), which specifically addresses the failure of the Plan to complete in 60 months. Trustee states the Plan as is, will complete in 77 months, rendering the Plan noncompliant with 11 U.S.C. § 1322(d).

The Trustee further notes that the Trustee made an error that allowed the Trustee's system to overpay the mortgage arrears after the Debtor's proposed modified plan was denied. The Trustee place a disbursement limit on the mortgage payment so no more than one payment would disburse monthly in order to avoid disabusing the mortgage payment Debtor paid outside and was now proposing to add to Class 4 under the proposed plan. The confirmed plan calls for monthly minimum payments of \$43.52 to mortgage arrears, which would indicate through March 2015 the amount required toward the arrears by the plan is \$1,349.12. The Trustee has actually disbursed \$5,772.70, which is an overpayment in the amount of \$4,423.58, which more than offsets the mortgage delinquency.

The Trustee ends by stating that the Movant is aware of the Trustee's error in over-disbursing funds based on a conversation he had via email on

March 19, 2015. While the Trustee could seek to retrieve the over-disbursed funds from the creditor for the mortgage arrears so as to then pay those funds on the mortgage payment, commencing an adversary proceeding if necessary, the Trustee prefers to reach a mutually agreed solution.

DEBTOR'S OPPOSITION

The Debtor filed an opposition to the instant Motion on April 21, 2015. Dckt. 133. The Debtor states that the plan provides for Movant as a Class 1 creditor, with on-going payments being made through the plan, as well as an amount to pay the pre-petition arrears. Debtor argues that she is current with the plan payments.

DISCUSSION

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Here, both the Trustee and Debtor show that the Debtor is current under the confirmed Chapter 13 plan which provides for payments to the Movant as a Class 1 creditor. There is no evidence that, post-petition and post-confirmation, that the Debtor has failed to make the necessary payments to the Movant under the terms of the confirmed plan. Therefore, the Movant's request for relief under 11 U.S.C. § 362(d)(1) is denied.

Movant's contention that the mere lack of equity is "cause," as set forth in 11 U.S.C. § 362(d)(2) is without merit. Lack of equity is one of the two necessary elements for relief from the automatic stay under 11 U.S.C. § 362(d)(2). The fact that the debtor has no equity in the estate is not sufficient, standing alone, to grant relief from the automatic stay, especially in light of the fact that the Debtor is current under the terms of the modified plan. While the burden to show it is necessary for an effective reorganization shifts to the Debtor or trustee after a lack of equity is shown, the Movant merely stating that the Property is not necessary is insufficient when the Movant is properly provided for in a confirmed plan when the Debtor is current in plan payments,

Therefore, the Motion is denied without prejudice.

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 Golden 1 Credit Union ("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 Motion is denied without prejudice.

4. [10-25551](#)-E-13 CHRISTOPHER BOLTON
PPR-1 Mary Ellen Terranella

MOTION FOR RELIEF FROM
AUTOMATIC STAY, MOTION FOR
RELIEF FROM CO-DEBTOR STAY,
AND/OR MOTION FOR ADEQUATE
PROTECTION
4-2-15 [[88](#)]

THE BANK OF NEW YORK MELLON
VS.

Final Ruling: No appearance at the May 5, 2015 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 2, 2015. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief From the Automatic Stay is
granted.**

The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMS 2007-FA1, by First Horizon Home Loans, a Division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement, a holder in due course, its assignees and/or successors, ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 501 Falcon Drive, Vallejo, California (the "Property"). Movant has provided the Declaration of Raquel Bryan to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Bryan Declaration states that there are 44 post-petition defaults in the payments on the obligation secured by the Property, with a total of \$69,527.92 in post-petition payments past due.

Movant is seeking relief from the automatic stay under 11 U.S.C. § 362(d)(1) and to terminate the co-debtor stay of 11 U.S.C. § 1301(a).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response to the instant Motion on April 21, 2015. Dckt. 100. The Trustee states that according to the Debtor's Statement of Financial Affairs (Dckt. 1, pg. 32, No. 10), the Property was transferred to Rebecca Baca Bolton as part of a marital property settlement agreement. The Chapter 13 case was completed on February 21, 2015. The Trustee does not oppose the requested relief.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$305,201.89 secured by Movant's first deed of trust, as stated in the Bryan Declaration and Schedule D filed by Debtor.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Section 1301 provides that a creditor may not act or commence or continue any civil action to collect 11 or any party of a consumer debt of the debtor from any individual that is liable on such debt with the debtor or that secured such debt. 11 U.S.C. § 1301(a). However, pursuant to 11 U.S.C. § 1301(c),

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that-

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

As part of the settlement agreement from the dissolution of marriage between Christopher Bolton and Rebecca Bolton, the non-filing co-debtor, the Property was transferred to Rebecca Bolton in September of 2009. The court finds that, in light of the delinquency and the plan being complete, that the Movant would be irreparably harmed with the continuation of the co-debtor stay. Therefore, the court grants relief from the automatic stay as to co-debtor Rebecca Bolton.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

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

No other or additional relief is granted by the court.

The court shall issue 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 The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMS 2007-FA1, by First Horizon Home Loans, a Division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement, a holder in due course, its assignees and/or successors, ("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 immediately vacated to allow The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMS 2007-FA1, by First Horizon Home Loans, a Division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement, a holder in due course, its assignees and/or successors, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 501 Falcon Drive, Vallejo, California.

IT IS FURTHER ORDERED that the automatic stay provisions of 11 U.S.C. § 1301(a) are immediately vacated as to Rebecca Bolton to allow The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Mortgage Pass-Through Certificates Series FHAMS 2007-FA1, by First Horizon Home Loans, a Division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the Trustee under the

Pooling and Servicing Agreement, a holder in due course, its assignees and/or successors, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial or judicial foreclosure sale, or other rights pursuant thereto, and for the purchaser at any such sale obtain possession of the real property commonly known as 501 Falcon Drive, Vallejo, California.

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

No other or additional relief is granted.