

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

MODESTO DIVISION CALENDAR

Pursuant to District Court General Order 617, 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.**

May 14, 2020 at 10:00 a.m.

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|---|----------------|------------------------------------|
| 1. <u>20-90049-E-11</u> | SUN-ONE LLC | CONTINUED MOTION FOR RELIEF |
| <u>EJR-1</u> | David Johnston | FROM AUTOMATIC STAY |
| | | 4-6-20 <u>[40]</u> |
| ADOLFO CABELLO, ET AL. VS. | | |

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, Lien Holder, parties requesting special notice, and Office of the United States Trustee on April 6, 2020. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The court continued the hearing for briefing by the Parties.

May 14, 2020 at 10:00 a.m.

Pursuant to the Motion for Relief from the Automatic Stay, the court imposes an adequate protection order requiring the monthly payment of \$6,250.00 to Movant and the hearing is continued to 10:00 a.m. on August 6, 2020.

Adolfo and Antoinette Cabello, Jerry and Soo Jung Hong, George and Lynn Gallegos, and Glenn Thompson (“Movants”) seek relief from the automatic stay with respect to Sun-One LLC’s (“Debtor in Possession”) real property commonly known as Sims Road, Chinese Camp, Tuolumne County, California APN 064-081-038-000 (“Property”). Movant has provided the Declarations of Roxana L. Stobaugh and Adolfo Cabello to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor in Possession has not made two (2) post-petition payments, with a total of \$12,500.00 in post-petition payments past due. Declaration, Dckt. 45. Movant also provides evidence that there are ten (10) pre-petition payments in default, with a pre-petition arrearage of \$62,500.00. *Id.*

DISCUSSION

On Schedule A/B Debtor states that Property has a value of \$4,390,000.00.

Movant provides a properly authenticated Land Appraisal Report prepared by Roxana L. Stobaugh. Exhibit 1. Dckt. 44. Based on the evaluation and analysis she conducted, the appraiser values the Property as of March 1, 2020 at \$290,000.00. Dckt. 43. This is significantly less than Debtor’s valuation.

May 5, 2020 Opposition Filed by the DIP

In its Opposition DIP points out that this Chapter 11 case is a single asset real estate case, consisting of the Property at issue in this motion. Opposition at ¶ 1. Further, DIP argues that a \$6,250.00 payment was made to the secured loan at the contract rate of interest within 90 days after the order for relief, and thus satisfying 11 U.S.C. § 362(d)(3). *Id.* at ¶¶ 2-3. DIP states that the 90th day after the order for relief was April 20, 2020 with the payment being made on April 9, 2020. *Id.* at ¶ 2.

An additional payment of \$6,250.00 was made 19 days later on April 28, 2020. *Id.* at ¶ 3. DIP provides the Declaration of Joe Machado, husband of Kathryn Machado, Debtor’s Managing Member. Dckt. 53. Mr. Machado testifies that he personally handled and mailed the payments to Superior Loan Servicing, who is in charge of the loan. *Id.* at ¶ 1. He further testifies that he will continue to make such payments until the plan of reorganization is finalized. *Id.* at ¶ 6.

DIP asserts that it had expected to file a plan of reorganization within the 90 days. Opposition at ¶ 4. However, due to current COVID-19 crisis, the joint venture project, which is the key to the plan, has not been finalized. *Id.* Mr. Machado asserts that details related to the joint venture are close to completion and a plan of reorganization will be filed which will fully pay the Moving Parties. Declaration at ¶ 2.

DIP adds that if the Property is in fact worth only \$290,000 then the monthly interest of \$6,250.090 is actually generating a return of 25.8% for Movant. Thus, the payments are more than adequate protection. *Id.* at ¶ 6.

Further, that the DIP making monthly payments of \$6,250.00 provide more than sufficient adequate protection payments to protect Movant's interests, especially if the Property has a value of only \$290,000.00.

The Property being the only asset of the estate, DIP requests the Motion be denied as the Property is necessary to an effective organization. *Id.* at ¶¶ 7-8.

Decision

The Movant has filed a Reply, stridently arguing for relief from the automatic stay so that it can foreclose on the Property worth only \$290,000.00, forgoing monthly payments of \$6,250.00 so that it can take a (\$400,000) loss (66.6% loss) on its claim. Movant demands that since it is "clear" the DIP cannot have a successful reorganization, it is Movant's right to take a 66.6% loss.

Thus, relief is requested pursuant to 11 U.S.C. § 362(d)(1) [lack of adequate protection] and § 362(d)(2) [no equity and not necessary for an effective reorganization].

The Debtor in Possession is and will continue, as part of an adequate protection order, to make \$6,250.00 a month adequate protection payments to Movant that shall be applied to its secured claim. (See 11 U.S.C. § 506(a) for Bankruptcy Code definition of secured claim.)

With respect to whether or not there is an equity, the court begins with Movant's expert witness, Roxana Stobaugh. Declaration, Dckt. 43; Appraisal Report, Dckt. 44. Ms. Stobaugh has identified the sales of four properties of 46 acres to 215 acres in 2019 and two properties of 20 and 120 acres in contract in 2020 as comparables. The sales prices range from \$190,000 to \$280,000, and the two contract prices are \$179,000 and \$299,000. All significantly less than the \$4,390,000.00 stated by Debtor. Ms. Stobaugh values the Property at the upper end of her comparables.

In considering the value of the Property, the court considers the loan made by Movant. A copy of the Note attached is dated February 26, 2018. Exhibit 2, Dckt. 46. The loan is for \$600,000, with interest at the rate of 12.5% per annum, payable in monthly installments of \$6,250.00 - interest only monthly payments.

The interest rate of 12.5% is striking - much higher than interest rates, at least for loans on which the lender expected to be paid by the borrower, as opposed to a "loan" that the lender plans as a delayed sale by which the "lender" will acquire the property through foreclosure from the desperate borrower when the loan comes due. Here, Movant was to receive two years of interest only payments (which would equal 25% of the original principal amount "loaned"), and then the \$600,000 principle balance would become due.

In apparent anticipation of defaults in the interest only payments, the Note includes a compounding of interest provisions, by which the 12.5% interest itself would accrue 12.5% interest if not paid, in addition to late charges of 10% and other amounts due.

The evidence presented, as we now go into the fourth month of this new born bankruptcy case, indicates that Movant believes that Property has a value greater than the \$299,000 opined by their expert.

Further, the DIP providing a \$6,250.00 a month in adequate protection payment, funded by the principals of the Debtor, indicate that they believe in the nascent stage of this case that the Property has significantly greater value than the \$299,000.

The court notes that with respect to an effective reorganization, reference is made to managing member Kathryn Machado having a “serious medical condition” and her husband, Joe Machado had been responsible for getting the \$6,250 a month post-petition checks to Movant. Declaration, Dckt. 53.

Mr. Machado provides additional testimony, including his legal opinion about this being a “single asset” bankruptcy case and the legal effects thereof. Such “legal opinions” cause the court to question the credibility of any of Mr. Machado’s testimony and wonder whether he merely provides his signature to whatever document the DIP’s attorney puts in front of him.

Mr. Machado provides testimony about a “joint venture project” being completed by the DIP. It is unclear how Mr. Machado, who is not a managing member, is involved in the structuring of a joint venture for the Debtor. Additionally, if Kathryn Machado is suffering from a serious medical condition, who is representing the Debtor in fulfilling its fiduciary duties as the debtor in possession?

While questionable, Kathryn and Joe Machado are providing the contributions of \$6,250.00 a month for adequate protection payments while the DIP diligently prosecutes this case. They are going to suffer a very substantial loss if there is not an effective reorganization that can be reasonably completed.

The court grants relief in the form of required monthly adequate protection payments to be paid by the **XXXXXXXXXX** day of each month, with payments having been made for the months of **XXXXXXXXXX** and **XXXXXXXXXX** 2020 as of the date of this hearing.

The court continues this hearing, the motion for which has been filed pursuant to Local Bankruptcy Rule 9014-1(f)(2) and waving the provisions of 11 U.S.C. § 362(e). The court continues the hearing to allow Movant to keep the issue before the court, rather than denying the motion without prejudice and then requiring Movant to file a new motion (incurring further costs and filing fees) in the event that there is a default in adequate protection payments or the other grounds upon which relief is requested may be established with the passage of time.

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 Adolfo and Antoinette Cabello, Jerry and Soo Jung Hong, George and Lynn Gallegos, and Glenn Thompson 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 Debtor in Possession shall make monthly adequate protection payments in the amount of \$6,250.00, which shall be in the form of a cashier’s check, money order, or other certified funds, on or before the **XXXXXXXXXX** day of the month, and continuing monthly thereafter, with the first

adequate protection payment pursuant to this order to be made by **XXXXXXXXXX** , 2020.

IT IS FURTHER ORDERED that the hearing on this Motion is continued to 10:00 a.m. on August 6, 2020. Supplemental Pleadings, if any, shall be filed and served by Movant on or before July 23, 2020, and Replies, if any, by July 30, 2020. As provided in L.B.R. 9014-1(f)(2)(B), the provisions of 11 U.S.C. § 362(e) have been waived.

The continuance of this hearing is without prejudice to Movant filing an *ex parte* motion and lodging with the court a proposed order thereon for the court to advance the hearing date on this Motion to the next available regularly scheduled law and motion hearing date for the Modesto Division in the event of a default in the adequate protection payments, with no notice of default on the Debtor in Possession required before Movant requesting the court to advance the continued hearing date.

AMERICAN HONDA FINANCE
CORPORATION VS.

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

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 22, 2020. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----

The Motion for Relief from the Automatic Stay is granted.

American Honda Finance Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Honda Goldwing F6B DE, VIN ending in 0553 ("Vehicle"). The moving party has provided the Declaration of Crystal Estrada to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by David Dennes Bacon ("Debtor").

Movant argues Debtor has not made two (2) post-petition payments, with a total of \$835.08 in post-petition payments past due. Declaration, Dckt. 14.

DEBTOR'S NON-OPPOSITION

Debtor filed a Non-Opposition on April 27, 2020. Dckt. 18. Debtor states that in order to avoid unnecessary delay and consumption of judicial time and resources, he does not oppose Movant's motion.

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 \$9,425.38 (Declaration, Dckt. 14), while the value of the Vehicle is determined to be \$10,00.00, as stated in Schedules B and D filed by Debtor.

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 reorganization. 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).

While some possible equity could exist, it is of such a small amount there is no realizable equity for the bankruptcy estate or the debtor. Relief is also granted pursuant to 11 U.S.C. § 362(d)(2).

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 American Honda Finance Corporation (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Honda Goldwing F6B DE, VIN ending in 0553 (“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.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant Smith, Chapter 7 Trustee, and Office of the United States Trustee on December 26, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

~~The hearing is continued to May 14, 2020 at 10:00 a.m., to afford Plaintiff's counsel the opportunity to file a proposed form of a specific performance and alternative full monetary damages relief if specific performance is not given, which terms shall be included as part of the order granting this motion for the entry of such judgment.~~

~~—The proposed form of the Judgment shall be filed on or before May 7, 2020.~~

REVIEW OF MOTION

Tina Alvarez ("Plaintiff") filed the instant Motion for Default Judgment on December 26, 2019. Dckt. 22. Plaintiff seeks an entry of default judgment against Tracy Emery Smith ("Defendant Smith") and his wholly owned corporation, Sharp Investor Inc. ("Defendant Sharp Corp."), who are collectively referred to as "Defendants," in the instant Adversary Proceeding No. 19-09012.

The instant Adversary Proceeding was commenced on July 26, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 26, 2019. Dckt. 3. The complaint and summons were properly served on Defendant Smith. Dckt. 6, 7.

Defendant Smith failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant Smith pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on October 16, 2019. Dckt. 13, 15.

April 5, 2020 Supplemental Brief

Plaintiff's Counsel filed a Supplemental Brief on February 5, 2020. Dckt. 28. Amongst other things, Plaintiff's Counsel requested additional time for further briefing and reported that due to illness he was unable to complete the briefing. The Second Supplemental Brief filed on April 5, 2020, Dckt. 33, is considered in the Ruling below.

REVIEW OF COMPLAINT

The Complaint seeks three forms of relief. The claims arise out of a contract for the purchase of property described as a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 (the "Mobile Home").

In the Fourth Claim of the Complaint, Plaintiff seeks specific performance and damages for lost use of the Mobile Home. Second, in the First, Second, and Third Claims, the Complaint asserts three different legal theories for tort claims against the Defendant Smith and Defendant Sharp Corp.. For the tort claims, Plaintiff seeks the award of punitive damages. Third, for any judgment on the tort claims and for lost use damages awarded with specific performance, Plaintiff seeks to have the monetary judgment amounts determined to be nondischargeable. Plaintiff had combined these together in collective requests for relief in each cause of action. In this decision the court will address the state law claims and the nondischargeability grounds in the same sections as appropriate.

The court summarizes the allegations stated in the Complaint (Dckt. 1) for the various Claims by Plaintiff as follows:

- A. On or about November 30, 2018, Defendant Tracy Emery Smith ("Defendant Smith"), on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 and located at 4837 Faith Home Rd, #58, Ceres, CA.
- B. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor, Inc.
- C. He also represented that Defendant Sharp Investor Inc. had clear and valid title to the Mobile Home, with no encumbrances.
- D. Additionally, that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Mobile Home upon payment of the agreed amount of \$40,000.
- E. Defendant Smith further represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the

mobile home park. Plaintiff agreed to buy the Mobile Home on those terms.

- F. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract.
- G. While Defendants did provide a Bill of Sale purporting to transfer the Mobile Home, Defendants have failed and refused to convey title or possession of the Mobile Home.
- H. Plaintiff is now informed and believes that Defendants do not have title to the Mobile Home and that Plaintiff has not yet been approved as a resident of the mobile home park.
- I. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants \$40,000.00, the agreed upon purchase price for the Mobile Home.
- J. Since February 2019, Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but have continuously refused to do so.
- K. Plaintiff demands that Defendants honor the agreement and transfer clear and valid title to the Mobile Home, free of all liens and encumbrances, and pay damages associated with the delay and other failures to meet their obligations, and that Defendants honor their promises as alleged above.
- L. In the alternative, Plaintiff seeks damages according to proof against both Defendants in excess of \$40,000.00. Plaintiff also seeks a determination that Defendant Tracy Emery Smith's obligations are nondischargeable in bankruptcy.
- M. Plaintiff alleges that Defendants defrauded her out of \$40,000.00, and caused additional damages according to proof at trial, plus interest according to proof at trial.
- N. In addition, Plaintiff has been damaged in an amount according to proof for the lost use of the Mobile Home and for any excess value in the Mobile Home over the contract amount if the Mobile Home cannot be conveyed.
- O. Defendants' actions as specified herein were outrageous and despicable, malicious, fraudulent and oppressive, and Plaintiff is entitled to punitive damages in an amount to be determined by the court as a result.

First Claim for Relief—Obtaining Money By False Pretenses, False Representations And/Or Fraud - 11 U.S.C. §523(a)(2)

Plaintiff-Debtor alleges the following for the First Cause of Action:

- A. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Mobile Home, and had no intention or the ability to transfer said title and possession of the Mobile Home upon payment of the agreed amount.
- B. Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park.
- C. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely on Defendants' misrepresentations, all to Plaintiff's damage as specified herein.
- D. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations.
- E. As a result, if clear title to the Mobile Home is not conveyed without encumbrances, Plaintiff has been damaged by at least \$40,000.00 plus the lost use of the Mobile Home and other damages including but not limited to damages for inconvenience according to proof.
- F. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein.
- G. Plaintiffs' claims against Defendants are for money and Mobile Home obtained by false pretenses, based on one or more false representations and/or actual fraud, and, as a result, Defendants' obligations are nondischargeable in bankruptcy.
- H. As such, Plaintiff is entitled to a determination that her claim for the transfer of the Mobile Home and damages are non-dischargeable under 11 U.S.C. §523(a)(2) and Plaintiff requests that the Court find that to be the case.
- I. Plaintiff seeks the conveyance of the Mobile Home, without encumbrances and with good and clear title, plus damages according to proof in excess of \$10,000 for the lost use of the Mobile Home and the inconvenience associated therewith.
- J. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of \$40,000.00.

Second Claim for Relief—Intentional Injury Under 11 U.S.C. §523(a)(6)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants' actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff.
- B. Plaintiff suffered damages of \$40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions.
- C. In light of the foregoing, Defendant Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6).

Third Claim for Relief—Larceny Under 11 U.S.C. §523(a)(4)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants wrongfully and with fraudulent intent converted money for their own use and totaling \$40,000.00.
- B. Defendants actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable.

Fourth Claim for Relief—For Conveyance of the Property and Damages Against Defendants

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants breached their contract with Plaintiff, and obtained money by false pretenses, false representations and/or fraud.
- B. As a result of Defendants' actions, Plaintiff is entitled to the conveyance of the Mobile Home, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse claims, plus damages according to proof in excess of \$10,000 for the lost use of the Mobile Home and the inconvenience associated therewith.
- C. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of \$40,000.00.

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

- A. For a determination that the debts owed to Plaintiff and Plaintiff's claims

against Defendant Smith are non-dischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);

- B. For an order that Defendants Sharp Investor Inc. and Tracy Emery Smith convey the Mobile Home, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse claims, plus damages for the lost use of the Mobile Home in an amount according to proof in excess of \$10,000.00, or, in the alternative, that they pay damages in an amount according to proof totaling \$40,000.00, or more, and other damages, in a sum according to proof in excess of \$10,000.00, and said judgment be determined to be nondischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);
- C. For interest on those damages, according to proof;
- D. For punitive damages according to proof;
- E. For costs of suit herein, including reasonable attorney's fees; and
- F. For such other relief as the court deems just and proper.

RELIEF SOUGHT IN MOTION FOR ENTRY OF DEFAULT JUDGMENT

On December 26, 2019, Plaintiff filed the Motion for Entry of Default Judgment, accompanied by a Declaration and two (2) exhibits: Declaration of Tina Alvarez; Exhibit A to the Declaration– Original Written Agreement; and Exhibit B to the Declaration– Bill of Sale. Dckt. 24.

In the Motion, Plaintiff requests the following relief:

- 1. For a determination that the debts and obligations owed to Plaintiff and Plaintiff's claims against Defendant Smith are nondischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6),
- 2. For an order that Defendants convey the Mobile Home, with clear and valid title, free of all liens and encumbrances, and pay damages associated with the delay and other failures to meet their obligations in an amount to be determined after final transfer of the Mobile Home, and that Defendants be ordered to pay the fair rental value of the Mobile Home of \$1,000.00 per month since the breach of contract (which will total \$11,000.00 as of the hearing date). Further, if that cannot be finally accomplished, for Plaintiff to be granted nondischargeable damages either in the amount of the contract, \$40,000.00, plus the fair rental value of the Mobile Home of 1,000.00 per month, or, such lesser amount as is necessary to remove any potential encumbrances on the Mobile Home plus the fair rental value of the Mobile Home which is \$1,000.00 per month since February 21, 2019 (which will total \$11,000.00 as of the hearing date),

3. For interest on those damages, at the legal rate,
4. For costs of suit herein, and
5. For such other and further relief as the court determines just and proper.

MOTION'S ARGUMENT

The Motion states with particularity grounds for relief, with citations to the evidence presented, which are outlined by the court below.

Under Plaintiff's Motion for Default Judgment ("Motion"), Plaintiff alleges the following:

- A. Smith previously provided a bill of sale to Plaintiff for the Mobile Home, after Plaintiff fully performed all of her obligations under the contract, but Defendants have failed and refused to deliver possession. Motion at 1.
- B. Further, contrary to his repeated representations, neither Defendant Smith nor his co-defendant corporation held title clear title to the Mobile Home. *Id.* at 2.
- C. In reliance on his representations to the contrary, Plaintiff gave him \$40,000.00, which she would not have done had she known he did not have clear title and he did not intend to deliver title to her. *Id.*
- D. Default was entered against Defendants on 10/16/2019 as neither defendant filed any responsive pleading. *Id.*
- E. Defendants were validly served at their respective addresses as shown on the proof of service filed in this action and in the supplemental Declaration of Shane Reich regarding service. *Id.*
- F. Plaintiff Tina Alvarez is an individual and creditor of Defendants. *Id.*
- G. Defendant Smith is the sole owner of Sharp Investor Inc. which he claims has no assets. Defendant Sharp Investor Inc. is a corporation, wholly owned by Defendant Smith, that does business in Stanislaus County. Defendant Smith is an officer of Defendant Sharp Investor Inc. *Id.* at 2, 3.
- H. Prior to the filing of the Chapter 7 petition that initiated the above-referenced bankruptcy case, on or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 and located at 4837 Faith Home Rd, #58, Ceres, CA. *Id.* at 3.
- I. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor Inc., that

Defendant Sharp Investor Inc. had clear and valid title to the Mobile Home, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Mobile Home upon payment of the agreed amount, which was initially \$43,000 but was later reduced by agreement between Plaintiff and Defendants to \$40,000. *Id.*

- J. Defendants further represented and agreed that Defendant Smith had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*
- K. Plaintiff agreed to buy the Mobile Home on those terms. (Exhibit 1, Declaration of Plaintiff, ¶3 and Exhibit 2).
- L. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract. While Defendants did provide a Bill of Sale purporting to transfer the Mobile Home, Defendants have failed and refused to convey title or possession of the Mobile Home. (Exhibit 1, Declaration of Plaintiff, ¶4, and Exhibit 3).
- M. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants \$40,000.00 which was the agreed upon purchase price for the Mobile Home. (Exhibit 1, Declaration of Plaintiff, ¶5).
- O. Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. (Exhibit 1, Declaration of Plaintiff, ¶7).
- P. After paying the full amount due under the contract, Plaintiff is now informed and believes that Defendants do not have clear and valid title to the Mobile Home. *Id.* at 4.
- Q. Plaintiff, as the owner of the Mobile Home, is entitled to testify about its rental value. Her declaration established that she has been damaged in an amount of \$1,000.00 per month for the lost use of the Mobile Home, which will total \$11,000.00 as of the hearing date. *Id.*
- R. Based on the foregoing, and based on Defendant's admissions due to his failure to answer the complaint, it has been established that Defendant Smith's obligations and debt to Plaintiff are nondischargeable due to his obtaining money by false pretenses, false representations and/or fraud - 11 U.S.C. §523(a)(2)). *Id.*
- S. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Mobile Home, and Defendants did not intend or have the ability to transfer said title and possession of the Mobile Home upon payment of the agreed amount. Defendant Smith, on his own behalf

and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*

- T. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely on Defendants' misrepresentations, all to Plaintiff's damage as specified herein. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations. As a result, if clear title to the Mobile Home is not conveyed without encumbrances, Plaintiff has been damaged by at least \$40,000.00 plus the lost use of the Mobile Home and other damages including but not limited to damages for inconvenience according to proof. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein. *Id.* at 5.
- U. The elements of deceit are: (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in justifiable reliance on the representation, (5) to that person's damage. *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal. App. 3d 750, 765. Fraud may be proved by inference and circumstantial evidence because it is often impossible to prove directly. The circumstances surrounding the transaction and the relationship of the parties will often be facts from which fraud may be inferred. *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 192. *Id.*
- V. Defendants' actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff. Plaintiff suffered damages of \$40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions. In light of the foregoing, Defendant Tracy Emery Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6). *Id.*
- W. As it is clear from the foregoing that Defendants wrongfully and with fraudulent intent converted money for their own use and totaling \$40,000.00. Defendants' actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable under that subsection as well. *Id.* at 6.
- X. Finally, Defendants should convey the Mobile Home immediately as the contract was fully performed and a bill of sale delivered long before the bankruptcy was initiated. *Id.*

EVIDENCE IN SUPPORT OF THE MOTION

On December 26, 2019, Plaintiff filed three (3) exhibits. Dckt. 24. The first, filed by Exhibit A, is the Declaration of Plaintiff Tina Alvarez. The two authenticated exhibits are:

Exhibit A: Original Written Agreement; and

Exhibit B: Bill of Sale

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

First Claim for Relief Obtaining Money By False Pretenses, False Representations And/Or Fraud and Nondischargeability Pursuant to 11 U.S.C. §523(a)(2)(A)

For this first cause of action, Plaintiff asserts a claim for fraud under California law. The requirement elements for fraud are stated by the California Supreme Court in *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996), as:

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778; see also Civ. Code, § 1709; Hunter, supra, 6 Cal. 4th 1174, 1184; *Molko v. Holy Spirit Assn.* (1988) 46 Cal. 3d 1092, 1108.)

As discussed below, these match up with the general requirements for determining that an obligation is nondischargeable for fraud pursuant to 11 U.S.C. § 523(a)(2)(A).

Plaintiff provides her Declaration as the evidence in support of the Motion and to provide clear and convincing evidence of the alleged fraud. The Declaration of Tina Alvarez provides testimony under penalty of perjury that:

- A. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented to me and agreed, both orally and in writing that Defendant Sharp Investor Inc. had clear and valid title to the Mobile Home, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Mobile Home upon payment of the agreed amount, which was initially \$43,000 but was later reduced by agreement between me and Defendants to \$40,000. Mr. Smith agreed to reduce the amount because we prepaid an additional amount. (Exhibit A) Declaration at ¶3.
- B. Mr. Smith further told me that he was an officer of Defendant Sharp Investor Inc. and that he was the owner of that business. *Id.*
- C. Defendant Smith, further represented and agreed that he had already arranged for me and my spouse to be approved as renters of the mobile home park. *Id.*
- D. Mr. Smith further represented and agreed that the mobile home would be improved according to specifications we both agreed upon. *Id.*
- E. I agreed to buy the Mobile Home on those terms. Pursuant to the agreement, Mr. Smith was to transfer the Mobile Home on or before January 5th, 2019. *Id.*

- F. I paid the agreed upon amounts. In reliance on Defendants' representations and agreements, I paid Mr. Smith \$40,000.00 which was the agreed upon purchase price for the Mobile Home. While Defendants did provide a bill of Sale purporting to transfer the Mobile Home, Defendants have failed and refused to convey title or possession of the Mobile Home. (Exhibit B) *Id.* at ¶¶ 4, 5.
- G. When I made the last payment on the Mobile Home, Mr. Smith promised he would give the keys to the Mobile Home. After that he made repeated and changing excuses as to why he could not give me the keys to the Mobile Home. Thereafter, my husband and I both told Mr. Smith that we would take the Mobile Home as is, but he still failed and refused to give possession of the Mobile Home. *Id.* at ¶6.
- H. Since February 2019, I have repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. *Id.* at ¶7.
- I. I estimate that the fair rental value of the Mobile Home was at least \$1,000 per month since January 5, 2019. *Id.* at ¶8.

Based upon the testimony and Exhibits presented by Plaintiff, the court finds:

- a. Defendant Smith, on his own behalf and on behalf of Defendant Sharp Corp., represented both orally and in writing that Defendant Sharp Corp. had clear and valid title to the Mobile Home.
- b. Defendant Smith further represented that he and Defendant Sharp Corp. would transfer said title and possession of the Mobile Home to Plaintiff upon payment of the agreed amount, which was initially \$43,000 but was later reduced by agreement between Plaintiff and Defendants to \$40,000.
- c. Defendant Smith represented to Plaintiff that he was an officer of Defendant Sharp Investor Inc. and that he was the owner of that business.
- d. Plaintiff reasonably relied upon each of the above representations, there being nothing presented to the court that indicates that such was not reasonable or justified.
- e. Defendant Smith further represented and agreed that he had already arranged for Plaintiff and Plaintiff's Spouse that they were approved as renters of the mobile home park.
- f. Defendant Smith further agreed for himself and Defendant Sharp Corp. that the Mobile Home would be improved according to specifications agreed upon by the parties as part of the \$40,000.00 purchase price.

- g. Based on the promises and representations made by Defendant Smith, Plaintiff reasonably and justifiably relied on those representations in entering into the Contract to purchase the Mobile Home for \$40,000.00.
- h. Pursuant to the terms of the Contract and as expressly represented by Defendant Smith, for himself and the Defendant Sharp Corp., the Mobile Home was to be delivered to Plaintiff on or before January 5, 2019.
- i. The Contract entered into by Plaintiff for the purchase of the Mobile Home for \$40,000.00 is filed as Exhibit 2, Dckt. 24.
- j. In reliance upon the representations made by Defendant Smith above, both for himself and Defendant Sharp Corp., Plaintiff paid \$40,000.00 pursuant to the Contract, which monies were delivered to Defendant Smith.
- k. Defendant Smith, on behalf of himself and Defendant Sharp Corp., delivered to Plaintiff a Bill of Sale for the Mobile Home. A copy of the Bill of Sale is filed as Exhibit 3, Dckt. 24.
- l. Though having a bill of sale, Plaintiff has not been able to obtain possession of the Mobile Home or obtain title thereto.
- m. Defendant Smith and Defendant Sharp Corp., and neither of them have title to the Mobile Home and neither have delivered possession of the Mobile Home to Plaintiff.
- n. Defendant Smith, on behalf of himself and Defendant Sharp Corp., upon receipt of payment of the \$40,000.00, represented to and promised Plaintiff that he would deliver the keys to the Mobile Home to Plaintiff.
- o. When Defendant Smith failed to deliver the keys and possession of the Mobile Home to Plaintiff and Plaintiff questioned him on it, Defendant Smith provided what is characterized as repeated and changing excuses as to why he could not give Plaintiff the keys to and deliver possession of the Mobile Home.
- p. Since February 2019, Plaintiff has repeatedly requested that Defendant Smith and Defendant Sharp Corp. deliver possession of and title to the Mobile Home, but Defendant Smith and Defendant Sharp Corp., and each of them, have failed or refused to so perform as promised.

From those findings, the court draws the following conclusions of law in granting judgment for Plaintiff and against Defendant Smith and Defendant Sharp Corp. on this claim in the Complaint:

- (1) Defendant Smith and Defendant Sharp Corp. misrepresented that Defendant Sharp Corp. owned the Mobile Home, that Defendant Smith and Defendant Sharp Corp. could deliver title to and possession of the Mobile Home to Plaintiff, and that Defendant Smith and Defendant

Sharp Corp. had the intention to deliver title and possession of the Mobile Home to Plaintiff when such misrepresentations were made;

(2) Defendant Smith and Defendant Sharp Corp. necessarily knew that their misrepresentations of being able to transfer title to the Mobile Home and possession of the Mobile Home were false when they were made;

(3) Defendant Smith and Defendant Sharp Corp., and each of them, intentionally made the misrepresentations with the intent to defraud Plaintiff into paying \$40,000.00 to them;

(4) Plaintiff's reliance on the misrepresentations were justified under these facts and circumstance. Nothing has been presented to the court that Plaintiff has any knowledge, experience, or ability with respect to purchasing the Mobile Home, and that Plaintiff is an "average consumer" who justifiably relied upon the misrepresentations; and

(5) Defendant Smith's and Defendant Sharp Corp.'s misrepresentations above that were justifiably relied upon by Plaintiff has damaged Plaintiff in the amount of \$40,000.00.

(6) Defendant Smith and Defendant Sharp Corp. breached the contract for the sale of the Mobile Home and has caused damages of \$40,000.00 from the breach thereof.

Plaintiff testifies that Defendant Smith made false representation about his representation that Defendant Sharp Corp. had clear and valid title to the Mobile Home, with no encumbrances, and that they would transfer said title and possession of the Mobile Home upon payments of the \$40,000.00. Additionally, Defendant Smith represented that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. Plaintiff relied on Defendant Smith's misrepresentation, on behalf of himself and Defendant Sharp Corp. that after she made the last payment, that he would give her keys to the Mobile Home. A misrepresentation because after repeated and changing excuses as to why he could not give her the keys, he failed to give Plaintiff possession of the Mobile Home. Defendant Smith and Defendant Sharp Corp. could not give what they did not have, as it seems Defendants did not and do not have title to the Mobile Home.

Defendant Smith knew that the representations he made were false and purposely concealed important information. Defendant Smith, for himself and for Defendant Sharp Corp., intended to deceive Plaintiff in order to obtain Plaintiff's money. Plaintiff justifiably relied on all the information and documents provided by Defendant Smith.

Plaintiff sustained the loss of \$40,000.00 as a proximate result of the misrepresentations made by the Defendants.

Judgment is granted Plaintiff and against Defendant Smith and Defendant Sharp Corp., jointly and severally, in the amount of \$40,000.00.

Nondischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A)
Fraud Committed by Defendant Smith

With respect for the additional relief here, Plaintiff has established that the obligation owed by Defendant Smith based on fraud is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

As a matter of federal law, 11 U.S.C. § 523(a)(2)(A) provides that a debt arising out of fraud will be nondischargeable upon the Plaintiff establishing the following five elements:

- (1) the debtor made ... representations;
- (2) that at the time he knew they were false;
- (3) that he made them with the intention and purpose of deceiving the creditor;
- (4) that the creditor relied on such representations; [and]
- (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz*, 523 U.S. 213, 215 (1998).

Additionally, in 2016 the United States Supreme Court in *Husky International Electronics, Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581 (2016) held that “the phrase [. . .] “actual fraud” to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation.” *Husky International Electronics, Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581 (2016).

The burden of proof for a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the “ordinary preponderance-of-the-evidence standard.” *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Plaintiff has established that Defendant Smith has satisfied each of the five grounds above, which are the same as under the State law.

The judgment for \$40,000.00 is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

**Second Claim for Relief—
Intentional Injury/Conversion
Nondischargeable Pursuant to 11 U.S.C. §523(a)(6)**

For the second claim for relief, it is asserted that \$40,000.00 was obtained through “intentional acts,” converting property of the Plaintiff. The court does not see any legal grounds upon which an “intentional act” claim was based. Since this is commonly a “conversion” claim, the court considers what constitutes conversion under State law.

In *Lockerby v. Sierra*, 535 F.3d 1038, 1041-1042 (9th Cir. 2008), the Ninth Circuit Court of Appeals stated that the court looks to applicable state law in defining what is a “conversion.” The elements for a conversion under California law are stated as:

- (2) Elements. The basic elements of the tort of conversion are (a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting

damages. (*Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 C.A.4th 97, 119, 55 C.R.3d 621, *infra*, § 814.) The property need not be appropriated to the use of the defendant; it may be destroyed, or merely damaged. (*Staley v. McClurken* (1939) 35 C.A.2d 622, 628, 96 P.2d 805; *see Hernandez v. Lopez* (2009) 180 C.A.4th 932, 939, 103 C.R.3d 376 [cause of action labeled “intentional tort” stated claim for conversion; business owners alleged that prospective buyers sold business that did not belong to them to third party]; Rest.2d, Torts §§ 223, 226; on destruction or alteration, *see infra*, § 823.)

5 WITKIN SUMMARY OF CALIFORNIA LAW, TORTS § 810(a)(2). Money may be the subject of conversion, so long as an identifiable sum is involved. Here, there is the specific, identified, \$40,000.00 that were taken from Plaintiff.

From the above findings, the court draws the following conclusions of law in granting judgment for Plaintiff and against Defendant Smith and Defendant Sharp Corp. on this claim in the Complaint:

- (1) Plaintiff owned and had possession of the \$40,000.00.
- (2) Defendant Smith and Defendant Sharp Corp., and each of them obtained the \$40,000.00 from Plaintiff and it was not used for Plaintiff’s purchase of the Mobile Home and the agreed improvements thereto.
- (3) The conduct of Defendant Smith and Defendant Sharp Corp. resulted in \$40,000.00 of damages to Plaintiff.

Judgement is also granted for Plaintiff and against Defendant Smith and Defendant Sharp Corp., jointly and severally for the \$40,000.00 on the additional legal grounds of conversion.

Nondischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(6)
Willful and Malicious Injury Caused
by Defendant Smith

With respect for the additional relief here, Plaintiff has established that the obligation owed by Defendant Smith based on the willful and malicious injury to the property of Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit is met “only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct.” *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury “involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.” *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted).

Here, the evidence presented is sufficient for the court to find that:

- (1) Defendant Smith and Defendant Sharp Corp., and each of them, engaged in the wrongful act of inducing Plaintiff to pay \$40,000.00 for the Mobile Home that neither intended to transfer to Plaintiff;
- (2) Defendant Smith and Defendant Sharp Corp., and each of them did so intentionally, and on multiple occasions;
- (3) the conduct and acts of the Defendant Smith and Defendant Sharp Corp., and each of them, necessarily caused Plaintiff to suffer \$40,000.00 in damages; and
- (4) Defendant Smith and Defendant Sharp Corp., and each of them, had no just cause or excuse for their misrepresentations and inducements to obtain the \$40,000.00 from Plaintiff.

The \$40,000.00 obligation is of Defendant Smith for the willful and malicious injury to Plaintiff is nondischargeable as provided in 11 U.S.C. § 523(a)(6).

Third Claim for Relief
Larceny
Nondischargeable Pursuant to 11 U.S.C. §523(a)(4)

For the Third Claim the Plaintiff identifies the federal nondischargeability statute, and states that Defendant Smith and Defendant Sharp Corp. are obligated to Plaintiff for “Larceny.”

Under California Law, the crime of theft (larceny renamed theft in 1927; RUTTER GROUP-CALIFORNIA CRIMINAL LAW, § 8:1.LARCENY) occurs as defined in California Penal Code § 484 (emphasis added) when a person:

[w]ho shall feloniously **steal, take, carry, lead, or drive away** the personal property of another, or who shall **fraudulently appropriate property which has been entrusted** to him or her, or who shall **knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property**, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, **is guilty of theft.**

The elements of theft (larceny) are stated in the RUTTER GROUP-CALIFORNIA CRIMINAL LAW treatise as follows:

§ 8:2. Larceny—Essential elements of larceny

There are four essential elements of the crime of larceny:

1. A taking;
2. Of the personal property of another;

3. Asportation of the property taken; and

4. The taking was done, without claim of right, to deprive the owner of his or her property permanently.¹

The offense of theft by larceny is committed by a person who: (1) takes possession; (2) of personal property; (3) owned or possessed by another; (4) by means of trespass; (5) with intent to steal the property; and (6) carries the property away.² A leasehold interest is property subject to the theft statute.³ The act of taking personal property from another's possession is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property.⁴

Consent procured by fraud is invalid, and the resulting offense is commonly called larceny by trick and device.⁵ The intent to steal is the intent, without a good faith claim of right, to permanently deprive the owner of possession. If the taking has begun, the slightest movement of the property constitutes a carrying away or asportation.⁶

The jury instruction for theft by larceny lists three elements: (1) a person took personal property of some value belonging to another; (2) when the person took the property he or she had the specific intent to deprive the other person permanently of the property; (3) the person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property.⁷ These elements are further discussed in §§ 8:3 to 8:11, below.

RUTTER GROUP-CALIFORNIA CRIMINAL LAW § 8.2 (footnote citations to California case law omitted).

Only personal property can be the subject of theft (larceny). *Id.*, § 8:5. The mere fact that someone is a co-owner or partner with the victim does not mean that the improper taking is not a theft (larceny). *Id.*, § 8:8.

Based on the facts above, Defendant Smith and Defendant Sharp Corp., and each of them, through their fraud committed “larceny by trick and device.” They:

- (1) took \$40,000.00 from Plaintiff by trick and device;
- (2) when they took the \$40,000.00 they each intended to deprive Plaintiff permanently of the \$40,000.00, knowing that they could not deliver possession of and title to the Mobile Home; and
- (3) Defendant Smith and Defendant Sharp Corp., and each of them, obtained physical possession of the \$40,000.00 and took it away from Plaintiff.

Judgement is also granted for Plaintiff and against Defendant Smith and Defendant Sharp Corp., jointly and severally, for the \$40,000.00 on the additional legal grounds of larceny.

Nondischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(4)
Larceny Committed by Defendant Smith

With respect for the additional relief here, Plaintiff has established that the obligation owed by Defendant Smith based on Larceny is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

For Section 523(a)(4), the term “while acting in a fiduciary capacity” does not qualify the words “embezzlement” or “larceny.” Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

The Ninth Circuit Court of Appeals laid out the elements for nondischargeability based on embezzlement in *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551 (9th Cir. 1991).

Under federal law, embezzlement in the context of nondischargeability has often been defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Moore v. United States*, 160 U.S. 268, 269, 40 L. Ed. 422, 16 S. Ct. 294 (1885). Embezzlement, thus, requires three elements: "(1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." *In re Hoffman*, 70 Bankr. 155, 162 (Bankr. W.D. Ark. 1986); *In re Schultz*, 46 Bankr. 880, 889 (Bankr. D. Nev. 1985).

Littleton v. Transamerica Com. Fin, 942 F.2d at 555.

As discussed in COLLIER ON BANKRUPTCY, a nondischargeable larceny is the wrongful taking of the property of another with the intent to convert the property to the taker's use without the consent of the owner of the property. 4 COLLIER ON BANKRUPTCY (SIXTEENTH EDITION) P 523.10[2]. The main difference between a larceny and an embezzlement is that the initial taking is wrongful for the larceny, while with the embezzlement the taker does not improperly obtain possession, but the wrongful act subsequently occurs. *Id.* As stated by the Ninth Circuit Court of Appeals in *Ormsby v. First America Title Company (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010), a court is not bound by state law on what constitutes larceny, but *may* follow state law.

Section 523(a)(4) prevents discharge "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). "For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a 'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.'" 4 Collier on Bankruptcy P 523.10[2] (15th ed. rev. 2008).

Id. at 1205. The Ninth Circuit then stated that it was not determining that there is a “fraudulent intent” requirement for a larceny to be nondischargeable, which is what the debtor in that case was arguing. The Ninth Circuit concluded:

We make no determination concerning whether federal law requires a finding of fraudulent intent for larceny as Ormsby contends. Were we to find that larceny

required fraudulent intent, the state court judgment would provide enough information to determine that the court found that his actions amounted to fraud, because "[i]ntent may properly be inferred from the totality of the circumstances and the conduct of the person accused." *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 904 (7th Cir. 1991). The totality of the circumstances as described in the state court's findings of fact make clear that Ormsby acted with fraudulent intent. . . .

Id.

From the above stated factual findings, the court makes the following conclusions of law concerning Defendant Smith's conduct:

- (1) Plaintiff delivered \$40,000.00 to Defendant Smith for the improvements to and purchase of the Mobile Home.
- (2) Defendant Smith took the property, the \$40,000.00 and did not use it for the improvement and purchase of the Mobile Home by Plaintiff.
- (3) The conduct of Defendant Smith was fraudulent, the court having determined that Defendant Smith did not intend to deliver the Mobile Home to Plaintiff when he obtained the \$40,000.00 for that purpose. The court's detailed findings and conclusions are stated above under the First Claim based on fraud.

The judgment for \$40,000.00 for Plaintiff and against Defendant Smith is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Prejudgment Interest

Plaintiff seeks an award of interest on the compensatory damages on the basis for lost use of the Mobile Home and the inconvenience associated therewith. However, Plaintiff fails to give a calculation for awarding such interest and does not identify the legal basis for such damages.

Plaintiff's Supplemental Brief identifies Cal. Civ. Code § 3289(a) as the legal basis for awarding interest, stating that the section provides for interest at ten percent per annum after a breach contract. Plaintiff provides no analysis of how this provision applies to the contract at issue.

California Civil Code § 3289 provides for prejudgment interest for any "contract entered into after January 1, 1986, [that] does not stipulate a legal rate of interest, the obligation shall bear interest at a rate of 10 percent per annum after a breach."

The Contract at issue, a copy of which is provided as Exhibit 2 (Dckt. 24 at 6) has the following terms relevant to the question of interest:

- A. The Agreement is signed November 30, 2018.
- B. The price to be paid is stated to be \$43,000, with Plaintiff testifying it was reduced to \$40,000, which amount was paid by Plaintiff.

- C. Seller, identified as Sharp Investor, Inc., was selling a “Mobile Home Located @ 4837 Faith Home Road # 58.
- D. Title to the Mobile was to be transferred on January 5th, 2019.
- E. \$20,000.00 of the purchase price was received on November 30, 2018. (This is handwritten at the bottom of the contract.)

On its face, this Contract does not set any legal rate of interest in the event of a breach of the contract. The Contract was entered into after January 1, 1986. Thus, for a breach of contract claim (which is not asserted in the First, Second, or Third Claims, but may be included in the Fourth Claim) the court concludes that the prejudgment rate of interest is 10% per annum.

The court further concludes that the breach occurred on January 5, 2018, the date that Defendant Sharp Investor, Inc. was to deliver title to Plaintiff. The failure to so deliver title is the date of breach, after which the pre-judgment interest begins to accrue.

For tort judgments, a review of 6 Witkin Summary of California Law, Torts § 1819 provides the following:

[§ 1819] Obligation Not Arising From Contract.

"In an action for the breach of an obligation not arising from contract," interest may be given in the jury's discretion. (C.C. 3288; *see Redke v. Silvertrust* (1971) 6 C.3d 94, 106, 98 C.R. 293, 490 P.2d 805 [breach of agreement to make will, by violation of confidential relationship, constituting constructive fraud and unjust enrichment]; *Bullis v. Security Pac. Nat. Bank* (1978) 21 C.3d 801, 814, 148 C.R. 22, 582 P.2d 109, *supra*, § 1818, citing the text [bank breached duty of due care by allowing one coexecutor to withdraw funds from estate's account without other coexecutor's signature] .)

Under California Law, except when otherwise provided by Statute, the maximum prejudgment interest that may be awarded is 7% per annum. Cal. Civ. § 3287(a).

For the tort claims the court computes the prejudgment interest at 7% per annum, for the same time period as above for the tort claims is \$3,643.84, which is computed as follows: \$40,000.00 x 7%/365 x 475 days (January 5, 2019 - April 23, 2020).

For the Tort claims, the prejudgment interest awarded is \$3,643.84. The court addresses contract prejudgment interest in the second below addressing Defendant Smith having been denied his discharge, the court awards \$5,205.60 in pre-judgment interest.

Award of Punitive Damages

The prayer in Plaintiff's Complaint requests that "punitive damages according to proof." Complaint, p. 6:28; Dckt. 1. In Plaintiff's Supplemental Brief, Plaintiff is entitled to punitive damages on the basis that a default judgment may include an award of punitive damages, directing the court to *Cutcliff v. Renter*, 791 F.3d 875, 883-884 (8th Cir. 2015). Further adding that "Defendant's" conduct clearly

satisfies California Civil Code § 3294, which allows for punitive damages where the defendant has been guilty of “oppression, fraud, or malice” Thereon, Plaintiff requests \$50,000 in punitive/exemplary damages.

The evidence provided to show the oppression, fraud, or malice required for punitive damages pursuant to California Civil Code § 3294 is provided in Plaintiff’s Declaration filed as Exhibit 1, Dckt. 24. While repeating the words of California Civil Code § 3294, the Supplemental Brief does not provide an analysis of the necessary findings that the court must make to establish fraud or malice (there not appearing to be any assertion of “oppression”) for the award of punitive damages.

As discussed in 6 Witkin Summary of California Law, Torts § 1727, the basic purpose of punitive damages is to punish and deter such improper conduct in the future, not only by this Defendant Smith, but others who would be inclined to engage in such conduct.

The court begins with the statute relied upon by Plaintiff. The Plaintiff must establish that the Defendant Smith and Defendant Sharp Corp. have committed the fraud, or malice by clear and convincing evidence. Cal. Civ. § 3294(a). While fraud has been addressed above, the “malice” grounds has been stated as, “The statute further defines “malice” in part as “conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.” (Civ. Code, § 3294, subd. (c)(1).)” *SKF Farms v. Superior Court*, 153 Cal. App. 3d 902, 907 (1984).

The United States Supreme Court has weighed in on federal courts and the parameters of such awards, stating:

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981); *Haslip*, 499 U.S. at 22. . . . Most States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence. *See TXO*, 509 U.S. at 456; *Haslip*, 499 U.S. at 21, 22. Only when an award can fairly be categorized as "grossly excessive" in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment. *Cf. TXO*, 509 U.S. at 456. For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. We therefore focus our attention first on the scope of Alabama's legitimate interests in punishing BMW and deterring it from future misconduct.

. . .

The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. *See TXO*, 509 U.S. at 459; *Haslip*, 499 U.S. at 23. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs.

. . .

In *Haslip* we concluded that even though a punitive damages award of "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety." 499 U.S. at 23-24. *TXO*, following *dicta* in *Haslip*, refined this analysis by confirming that the proper inquiry is "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred." *TXO*, 509 U.S. at 460 (emphasis in original), quoting *Haslip*, 499 U.S. at 21. Thus, in upholding the \$ 10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded. That difference suggested that the relevant ratio was not more than 10 to 1.

BMW of North America v. Gore, 517 U.S. 559, 579-581 (1996).

Here, Plaintiff requests \$50,000.00 in punitive damages. Such amount is equal to the principal amount of the damages, not including prejudgment interest. While not insignificant, \$50,000.00 is not an amount that shocks one and is an amount that is reasonably necessary to deter each of the Defendants, as well as others who seek to engage in such improper tortious conduct. It is 1.25 times the actual damages, well under the multiplies and amounts which cause consternation of the U.S. Supreme Court.

The court awards \$50,000.00 in punitive damages against Defendant Smith and Defendant Sharp Corp., jointly and severally.

As addressed by the Ninth Circuit Court Appeals in *Britton v. Price*, 950 F.2d 602, 606 (9th Cir. 1991), the punitive damages, as well as other incidental obligations such as interest, fees, and costs, relating to the nondischargeable compensatory damages are also nondischargeable.

Computation of Nondischargeable Monetary Judgment For Fraud, Conversion, and Larceny

The monetary judgment awarded to Plaintiff for the First Claim (Fraud), Second Claim (Conversion) and Third Claim (Larceny), prejudgment interest, and punitive damages is granted as follows:

\$40,000.00 Compensatory Damages:	for which Defendant Smith and Defendant Sharp are jointly and severally liable
\$3,643.84 Prejudgement Interest:	for which Defendant Smith and Defendant Sharp are jointly and severally liable
\$50,000.00 Punitive Damages:	for which Defendant Smith and Defendant Sharp are jointly and severally liable

Attorney's fees and costs, as joint and several liability shall be determined as addressed below by post-judgment motion and Bill of Costs.

Attorney's Fees and Costs

Moving to costs, Plaintiff requests costs of suit herein. (Under Plaintiff's Complaint, the prayer for relief included reasonable attorney's fees as part of the costs.). However, no amounts or evidence of billing records in provided. No basis for the attorneys' fees is stated in the Motion.

Federal Rule of Bankruptcy Procedure 7054(b) specifies that attorneys' fees shall be requested pursuant to Federal Rule of Civil Procedure 54(d)(2)(A)-(C) and (E). Such request shall be made by post-judgment motion. Plaintiff shall request attorneys' fees, and identify the contractual or statutory basis, in a post-judgment motion, if Plaintiff chooses to seek such attorneys' fees.

For the costs in this Adversary Proceeding, Plaintiff may file a costs bill as provided in Federal Rule of Bankruptcy Procedure 7054.

Assertion that Sharp Investors, Inc. Is Property of the Bankruptcy Estate

Plaintiff also asserts that it is appropriate for Plaintiff to seek relief against Defendant corporation, Sharp Investor Inc., because the corporation is wholly owned by Defendant Smith and as such is an asset of the estate. In support, Plaintiff discusses *In re Moses*, 225 B.R. 360, 364 (E.D. Mich. 1998), where the court found that the corporation in question (IRM), was wholly owned by the debtor, and thus it was properly considered part of the estate upon the filing of the bankruptcy petition. *In re Moses*, 225 B.R. 360, 364 (E.D. Mich. 1998). It is unclear how this contention, if an accurate statement of law, would be relevant to the present Motion and Adversary Proceeding.

The Complaint filed by Plaintiff seeks damages and specific performance, but does not seek a determination that the corporation Sharp Investors, Inc. is the alter ego of Defendant Smith. The Debtor's citation to *In re Moses* for the proposition that the corporation is property of the estate is misplaced. The authority cited in *Moses* for the proposition expressly states that the court concluded in the *Crabtree* case cited in *Moses* that the corporation was the alter ego of the individual bankruptcy debtor.

In Shepardizing the *Moses* decision, one sees that it has been cited twice. In *Moyer v. Kooistra* (*In re Przybysz*), 2012 Bankr. LEXIS 6333 *17-*18 (Bankr. W. Mich. 2012), that bankruptcy court stated:

The cases the Trustee cites for the notion that the corporate property of a debtor's wholly-owned corporation is included within the debtor's bankruptcy estate are not persuasive either. For example, *In re Moses*, 225 B.R. 360, 364 (E.D. Mich. 1998), has been criticized as a remarkable departure from settled corporate law in *In re Bruce*, 2002 Bankr. LEXIS 2075, 2002 WL 34705759 (Bankr. S.D. Ga. July 29, 2002). The court agrees with the criticism and regards *Moses* as neither binding nor persuasive.

As provided in 11 U.S.C. § 541(a) in pertinent part to what becomes property of the bankruptcy estate upon the commencement of the case:

- a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, **all legal or equitable interests of the debtor in property** as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse **in community property** as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable. . . .

The Defendant Smith's stock is property of the bankruptcy estate, but not Sharp Investors, Inc.

Plaintiff has obtained judgment against Defendant Sharp Corp. because of its improper conduct, by its representative (Defendant Smith), not merely because its stock is included in the Defendant Smith's bankruptcy estate.

REQUEST FOR SPECIFIC PERFORMANCE

In the Fourth Claim for Relief, titled Claim For Conveyance of the Mobile Home and Damages Against Defendants, Plaintiff requests that the court first grant a judgment for specific performance, the delivery of the Mobile Home, and title thereto, free and clear of liens and encumbrances, and loss of use damages cause by Defendant Smith and Defendant Sharp failing to timely deliver the Mobile Home and title on January 5, 2019.

Further, Plaintiff computes the lost use value to be \$1,000.00 a month in lost rental value damages. The evidence of such loss is the Plaintiff's testimony that "I estimate that the fair rental value of the property was at least \$1,000.00 a month since January 5, 2019." Declaration, Dckt. 24. It is not clear if this represents a gross rental value, net rental monthly profit, or Plaintiff's rental damages by being deprived the use of the Mobile Home for which she has paid \$40,000.00.

Then, only if the Mobile Home and title are not so delivered, that a judgement for fraud, conversion, and larceny damages and punitive damages be entered. Plaintiff cannot be given a \$40,000.00 judgment for the Mobile Home not being transferred and then also have a judgment requiring the Mobile Home to be transferred.

At the February 19, 2020 hearing, counsel for Plaintiff addressed this additional relief, requesting a continuance to provide supplemental points and authorities. Plaintiff addresses their specific performance argument in the Supplemental Brief discussed below.

Appropriateness of a Conditional, Alternative Judgment Based on the Evidence Provided

With respect to the request for possession, the requested relief appears similar when a trustee or debtor in possession requests the turnover of a fraudulent conveyance and then a monetary judgment if not turned over within the reasonable time specified in the judgment. 11 U.S.C. § 550. In such judgments, the court issues a judgment ordering the turnover of the property, and any fees, costs, and expenses, which judgment may then be enforced in the same manner as a mandatory injunction (i.e. contempt). The trustee/debtor in possession is not also given a monetary judgment for the amount of the property to be turned over. However, the judgment provides that the trustee/debtor in possession may request to have the judgment amended, within a specified period of time, to be a monetary judgment for the value of the property, and no longer provide for the turnover of the property.

In the Supplemental Brief, Plaintiff clarifies that they are seeking an order (which would be the judgment for specific performance) that Defendants be required to convey title to the property in question and, if that cannot be accomplished, that Plaintiff be awarded damages. Plaintiff argues that under state law they are entitled to an order of conveyance, and damages if that cannot be accomplished. Plaintiff cites to *McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072 (9th Cir. 2000), where the circuit court noted that:

[B]ankruptcy courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the commencement of the case. See *Butner v. United States*, 440 U.S. 48, 54-55, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979).

McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit), 217 F.3d 1072, 1078 (9th Cir. 2000). Plaintiff asserts that Defendants agreed to convey the Mobile Home and purported to do so by giving Plaintiff a bill of sale. Thus, Plaintiff contends they are entitled to whatever interest Defendants have.

Plaintiff further argues that under UCC, specifically Cal. Com. Code § 2716 Plaintiff may obtain specific performance as an explicit remedy for breach and special terms for payment may be specifically fashioned.

Section 2716 of the California Commercial Code provides:

- (1) Specific performance may be decreed where the goods are unique or in other proper circumstances.
- (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
- (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he or she is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal,

family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

Plaintiff also argues that the order requested from this court is in the nature of a constructive trust remedy, which the court has discretion in creating and determined based on state law. Plaintiff asserts that constructive trusts are a remedy to prevent unjust enrichment and would adequately protect Plaintiff's interest. Plaintiff turns to *Higgins v. Higgins* and lists the three conditions to impose a constructive trust:

- (1) a specific, identifiable property interest,
- (2) the plaintiff's right to the property interest, and
- (3) the defendant's acquisition or detention of the property interest by some wrongful act.

Higgins v. Higgins, 11 Cal. App. 5th 648, 659, 217 Cal. Rptr. 3d 691, 700 (2017).

Plaintiff argues all three conditions are met on the basis that (1) the identifiable property interest is the mobile home; (2) the Plaintiff is entitled to the Mobile Home because she completed performance of the contracts; and (3) Defendants have wrongfully detained the Mobile Home, both in terms of ownership and possession.

Plaintiff further adds that a bankruptcy court, being a court of equity, has the latitude to impose such remedy in order to prevent unjust enrichment. (Taking Plaintiff's statement at face value, corresponding, the court, in exercise of equity jurisdiction has equal latitude to not impose such remedy.) Moreover, imposing a constructive trust on funds held by debtor has been determined to be a core proceeding akin to matters concerning administration of the estate under 28 U.S.C. § 157.

The court begins with the California case law cited by Plaintiff. In *Miller* the court begins with the basic premise that under California law if a person contracting to sell property to another does not have title to the property, they cannot be compelled to transfer the property. *Id.* at 528-529; citing *Co. v. Henry*, 208 Cal. 185 (1929). However, if the seller has some interest, though incomplete, the buyer can seek to have that incomplete interest transferred. *Id.*

Plaintiff also cites to California Commercial Code § 2716, asserting that it allows for specific performance and damages. Again, these provisions state that "Specific performance may be decreed where the goods are unique or under other proper circumstance" and that a "decree for specific performance may include terms and conditions as to the payment of the price."

A review of 7 Witkin California Procedure, CH IX § 25, directs one to *Goldsworth v. Dobbins*, 110, Cal.App. 2d 802 (1952) as a California appellate decision stating conditional judgments in the specific performance setting. In *Goldsworth*, it was the buyer who breached the purchase contract, refusing to perform.

A decree for specific performance, in addition to ordering a conveyance, **may make such delivery conditional upon payment by the purchaser of the amount due on the purchase price**, together with interest from the date it fell due. Such a condition protects the rights of the purchaser. *Clyne v. Benicia Water Co.*, 100 Cal. 310, 315, 34 P. 714; *Bird v. Potter*, 146 Cal. 286, 289, 79 P. 970. If the parties

have agreed that a policy of title insurance shall be furnished, the judgment, in an action by a vendor, may require payment to be made by the purchaser only upon the tender to him of a policy of title insurance showing title to the property to be in the vendor, free and clear of all encumbrances, except those agreed upon. *Jackson v. Snow*, 62 Cal.App. 56, 62, 216 P. 60. The court in an action for specific performance may direct that the amount of an encumbrance be paid directly to the holder instead of to the vendor even though such holder is not before the court. *Grant v. Beronio*, 97 Cal. 496, 498–499, 32 P. 556; *Whittier v. Gormley*, 3 Cal.App. 489, 492, 86 P. 726. **When the judgment includes an order that plaintiff convey the realty involved to the defendant it effects a transfer of title as effectually as a voluntary conveyance.** *Scott v. Warden*, 111 Cal.App. 587, 593, 296 P. 95.

...

Should plaintiffs, after receipt of the purchase price, in anywise disobey the command to convey, or prevent delivery of the deed, the judgment can be enforced against them by contempt proceedings. Code Civ.Proc., §§ 684, 1209(5), 1219; '76 *Land & Water Co. v. Superior Court*, 93 Cal. 139, 143, 28 P. 813; 58 C.J. 1277, §§ 633–5; 49 Am.Jur. 202, § 179. Cf. *Ex parte Joutsen*, 154 Cal. 540, 545, 98 P. 391; *Scadden Flat Gold-Min. Co. v. Scadden*, 121 Cal. 33, 41, 53 P. 440.

Goldsworth v. Dobbins, 110, Cal.App. 2d at 809-810.

The Plaintiff has demonstrated that a jilted buyer can be granted a judgment for specific performance (which requires Plaintiff to have paid the purchase price) and damages for the lost use of such property, or Plaintiff can have damages for the fraud/misrepresentation/larceny, including pre-judgment interest. .

At this juncture Plaintiff offers the court no evidence of the Defendants actually having any interest in the Mobile Home. Plaintiff provides testimony that Defendant Smith represented that Defendant Sharp Investor, Inc. had title to the Mobile Home. Declaration ¶ 3, filed as Exhibit 1; Dckt. 24. Plaintiff offers no evidence from the State of California concerning the registration of the mobile home to be sold, whether Defendants, or either of them were owners, and who is stated to be the owner now.

Plaintiff cites back to the Motion and prior pleadings for the statement that Defendant Smith and Defendant Sharp Corp. represented on multiple occasions that they had title to and would convey the Mobile Home. Supplemental Pleading, p. 1:24-26; Dckt. 33. Plaintiff's testimony (as summarized by the court) on this point includes:

3. On or about November 30, 2018, Defendant Smith, individually and on behalf of Defendant Sharp Corp., represented that Defendant Sharp Corp. has "clear and valid title to the Mobile Home, without encumbrances, . . ."

Defendant Smith represented that the Mobile Home would be improved according to specifications they agreed to and that it would be transferred to Plaintiff on or before January 9, 2020.

4. Defendant Smith and Defendant Sharp Corp. delivered to Plaintiff a Bill of Sale purporting to transfer title of the Mobile Home to Plaintiff.

6. When Plaintiff delivered the last payment to Defendant Smith and Defendant Sharp Corp., Defendant Smith promised that the keys would be delivered to Plaintiff.

Declaration, identified by paragraph number used in the Declaration; Dckt. 24.

In the Agreement to Sell, it is expressly stated that Defendant Sharp Corp. warrants that it “has good and legal title to said property [the Mobile Home], and that said property shall be sold by warranty bill of sale free and clear of all liens, encumbrances, liabilities and adverse claims of every nature and description.” Exhibit A, Dckt. 24.

The Bill of Sale (California Department of Housing and Community Development Form HCD RT 475.1 (Rev. 06/16)) further expressly states that Defendant Smith and Defendant Sharp Corp.:

[c]ertify under penalty of perjury under the laws of the State of California that the following is true and correct: (1) I/we **are the lawful owner(s) of the unit**, and (2) I/we **have the right to sell it**, and (3) I/we **guarantee and will defend the title to the unit** against the claims and demands of any and all persons arising prior to this date and (4) the **unit is free of all liens and encumbrances**, except for the lienholder shown below*, whose lien presently exists and has not been paid.

Exhibit B, Dckt. 24.

The Plaintiff has not presented the court with evidence from the California Department of Housing of who is the owner of record and how a judgment for specific performance will be enforceable.

If Plaintiff believes that specific performance can be obtained, whether by the Defendant Smith and Defendant Sharp Corp. “voluntarily” (under the threat of being held in contempt for failure to comply) and transfer possession of and title to the Mobile Home in a reasonable time; or that Plaintiff believes such can be accomplished by post-judgment orders of the court in enforcing the judgment as to third-parties; the court will enter a judgment for specific performance and loss of use damages as follows:

- A. Judgment determining Plaintiff’s right to and ownership of the Mobile Home, and that Defendant Smith and Defendant Sharp Corp. shall deliver clear title to and possession of the Mobile Home to Plaintiff on or before November 15, 2020;
- B. Judgment for \$18,000.00 (\$15,000.00 as of the date of the Judgment and \$3,000.00 for the continuing post-judgment loss of use) for the lost use of the Mobile Home caused by Defendant Smith and Defendant Sharp Corp. failing to deliver the Mobile Home to Plaintiff as promised, which is nondischargeable due to fraud and conversion;
- C. Prejudgment interest for the \$15,000.00 in damages for the lost use of the Mobile Home in the amount of \$1,000.00. (The court computed the prejudgment interest at the 10% breach of contract rate, beginning with \$1,000 of damages for the lost use in January 2019, then \$2,000 of aggregate damages in February 2020, and continuing thereafter, each month computing the pre-

judgment interest as of that month by multiplying the aggregate loss of use damages for the month by $10\% \div 12$.)

- D. Costs and attorney's fees as permitted by law;
- E. That Plaintiff is entitled to the nondischargeable monetary judgment for fraud, conversion, and larceny, which is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6), if the Mobile Home is not transferred to Plaintiff on or before November 15, 2020; and
- F. That if the Mobile Home is not timely delivered, Plaintiff may obtain an amended judgment for the monetary judgment only, with credit given against it for any of the loss of use damages actually paid, with the motion for an amended judgment to be filed on or before December 31, 2020, after which time the option for an amended judgment expires.

PROPOSED JUDGMENT FORM LODGED WITH THE COURT

On May 7, 2020, a proposed judgment form was lodged with the court. The terms of the proposed judgment form are summarized by the court as follows:

- A. Defendants Tracy Smith and Sharp Corporation are jointly and severally liable.
- B. Plaintiff is awarded the following monetary damages:
 - 1. \$18,000.00 for the Loss of Use of the Mobile Home and Improvements;
 - 2. \$1,000.00 in Prejudgment Interest For the Loss of Use Damages
- C. Injunctive Relief
 - 1. Ordering Tracy Smith and Sharp Corporation to transfer clear title, free and clear of liens and encumbrances of the Mobile Home, together with Improvements, to Plaintiff, as well as delivering physical possession thereof.
- D. If Title and Possession Not Timely Delivered
 - 1. If title and possession are not "Timely delivered as specified above"^{FN. 1} then Plaintiff shall be entitled to an amended judgment for the following damages in lieu of specific performance]
 - a. \$40,000.00 in Compensatory Damages;
 - b. \$3,643.84 in Pre-Judgment Interest; and

c. \$50,000.00 in Punitive Damages

FN. 1 It does not appear what is “timely” is stated in the judgment form. It appears that timely is reference in conjunction with the court’s continued status conference to consider whether specific performance is a proper, achievable remedy, or whether a monetary judgment is required.

- E. The court will schedule a Post-Judgment Status Conference to consider the prosecution of the specific performance relief and whether the court should impose a deadline when the court determines that specific performance is not a proper remedy and that an amended judgment for monetary damages will be entered.
- F. Plaintiff will seek the recovery of costs and attorneys’ fees as provided in the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure.

FINAL RULINGS

4. [20-90216-E-7](#)
[MET-1](#)

KIM/PATSY SHEHAN
Seth Hanson

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-16-20 [\[10\]](#)

BANK OF THE WEST VS.

Final Ruling: No appearance at the May 14, 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's, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on April 16, 2020. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

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

Bank of the West ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 Durango Travel Trailer, VIN ending in 9083 ("Vehicle"). The moving party has provided the Declaration of Aimee Nanon to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Kim Shehan and Patsy Lee Shehan ("Debtors").

Movant argues Debtor has not made one (1) post-petition payment, with a total of \$390.08 in post-petition payments past due. Declaration, Dckt. 13. Movant also provides evidence that there are two (2) pre-petition payments in default, with a pre-petition arrearage of \$780.16. *Id.*

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).

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 \$33,131.50 (Declaration, Dckt. 13), while the value of the Vehicle is determined to be \$30,000.00, as stated in Schedules B and D filed by Debtor.

The Debtor's Statement of Intention provides for the surrender of the Vehicle. Dckt. 1.

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

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 Bank of the West (“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 2014 Durango Travel Trailer, VIN ending in 9083 (“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.

**SELECT PORTFOLIO SERVICING
INC. VS.**

Final Ruling: No appearance at the May 14, 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 Debtors, Debtor's Attorney, and Chapter 7 Trustee on April 10, 2020. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted.

Select Portfolio Servicing Inc. as servicing agent for U.S. Bank NA, successor trustee to Bank of America, NA, successor in interest to LaSalle Bank NA, as trustee, on behalf of the holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2006-AR2 ("Movant") seeks relief from the automatic stay with respect to Michael Joseph Chavez and Kimberly Dawn Wright-Chavez's ("Debtors") real property commonly known as 3021 Farris Avenue, Ceres, California ("Property"). Movant has provided the Declaration of Stephanie Runyan to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant's records reflects that U.S. Bank NA, successor trustee to Bank of America, NA, successor in interest to LaSalle Bank NA, as trustee, on behalf of the holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2006-AR2 holds possession and/or is in control of the original Note. The Note is endorsed and payable in blank. The Deed of Trust was assigned to Movant.

Movant argues Debtor has not made nine (9) post-petition payments, with a total of \$7,688.88 in post-petition payments past due. Declaration, Dckt. 46. Movant also provides evidence that there are four (4) pre-petition payments in default, with a pre-petition arrearage of \$3,571.76. *Id.*

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 \$257,519.50 (Declaration, Dckt. 46), while the value of the Property is determined to be \$262,145.00, as stated in Schedules B and D filed by Debtor.

The Debtor's Statement of Intention provides for the surrender of the Property. Dckt. 32.

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

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

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests 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 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 U.S. Bank NA, successor trustee to Bank of America, NA, successor in interest to LaSalle Bank NA, as trustee, on behalf of the holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2006-AR2 (“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, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 3021 Farris Avenue, Ceres, California (“Property”) to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the 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.