UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 26, 2018, at 1:30 p.m.

Dept. C Specially Set Matters

3. **18-20612-C-13** **KEITH STEWART** **MOTION TO VACATE DISMISSAL OF CASE**
Richard Kwun **6-1-18 [82]**

No 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)(3) Motion—Hearing Required. FN.1.

FN.1. Movant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee and Office of the United States Trustee on June 1, 2018. By the court's calculation, 25 days' notice was provided. The court set the hearing for June 26, 2018. Dckt. 92.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 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 to Vacate is xxxxxxxxxxxxxxxxxx.

Keith Stewart ("Debtor") filed his current Chapter 13 Case, 18-20612, on February 3, 2018. Dckt. 1. No plan was confirmed.

Debtor's Spouse, La Keisha Stewart ("Spouse Debtor"), filed her current Chapter 13 Case, 17-27331, on November 5, 2017.

On May 7, 2018, David Cusick ("the Chapter 13 Trustee") filed a Motion to Dismiss Debtor's Case due to delinquency, missing tax returns, and failure to present a plan. Dckt. 66. On May 30, 2018, a hearing on the Motion to Dismiss was held, and the Motion was granted without oral argument. Dckt. 81. Debtor did not file any opposition to the motion to dismiss.

On May 7, 2018, the Chapter 13 Trustee filed a Motion to Dismiss Spouse Debtor's Case due to delinquency, missing tax returns, and failure to present a plan. 17-27331, Dckt. 92. On May 30, 2018, a hearing on the Motion to Dismiss was held, and the Motion was granted without oral argument. *Id.*, Dckt. 116. Spouse Debtor did not file any opposition to the motion to dismiss.

On June 1, 2018, Debtor filed his Motion to Vacate, before the court had entered an order dismissing the case, claiming excusable neglect for Debtor's counsel because he confused the hearing date for motions to dismiss chapter 13 cases.

On June 1, 2018, Spouse Debtor filed her Motion to Vacate, before the court had entered an order dismissing the case, claiming excusable neglect for Spouse Debtor's counsel because he confused the hearing date for motions to dismiss chapter 13 cases.

Debtor and Spouse Debtor seek to have the non-yet entered (the court has held the orders in light of these two Motions) orders dismissing the cases vacated, per Federal Rule of Civil Procedure 60(b).

ORDER SETTING HEARING

On June 7, 2018, the court entered an Order Setting Hearings on the two Motions. The court ordered Debtor and Spouse Debtor to file evidence, if any, in support of the Motion, as well as a supplemental brief addressing the ground in the Motion that:

> Furthermore, the bankruptcy self-set calendar for the Eastern District of California, in counsel's opinion, is akin to a labyrinth where only the most frequent filers can navigate through. Attorneys practicing in other areas, for as many as 10 years or one, can at times get lost.

The court stated that counsel may provide testimony of experienced practitioners who have had difficulty with the court's calendaring system.

DEBTOR'S AND SPOUSE DEBTOR'S SUPPLEMENTAL BRIEFS

Debtor and Spouse Debtor filed Supplemental Briefs on June 14, 2018. Dckt. 98; 17-27331, Dckt. 116. Debtor's and Spouse Debtor's counsel argues that he missed the scheduled 9:00 a.m. dismissal hearing on May 30, 2018, and mistakenly believed that it was at 2:00 p.m. that day.

As to the grounds raised for the motion to dismiss, counsel argues that he was informed on May 23, 2018, that Debtor had filed the missing tax returns. Second, counsel argues that he was proceeding with a consolidated plan for Debtor and Debtor's spouse.

Counsel also argues that he was sick with a cold throughout May 2018, which hindered his performance.

APPLICABLE LAW

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

FED. R. CIV. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199, 1203 (5th Cir. 1993). The court uses equitable principles when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2857 (3d ed. 1998). The so-called catch-all provision, Federal Rule of Civil Procedure 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Uni-Rty Corp. V. Guangdong Bldg., Inc.*, 571 F. App'x 62, 65 (2d Cir. 2014) (citation omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, relief under Rule 60(b)(6) may be granted in extraordinary circumstances. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988).

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts that, if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]–[2] (3d ed. 2010); *see also Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463 (citations omitted).

DISCUSSION

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a Rule 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 F. App'x 194, 196 (9th Cir. 2004) (citations omitted); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 793 (B.A.P. 9th Cir. 2002) (citation omitted).

Debtor's counsel focuses on how he was confused about the correct hearing date, arguing that his confusion is sufficient excusable neglect to allow this case to continue. Debtor's counsel argues that he was working to consolidate this case with Debtor's spouse's case and was late (or near-late) filing pleadings because Debtor was delayed in providing documents to counsel.

As now stated in the Supplemental Pleadings, the grounds being asserted as mistake or excusable neglect are:

A. "On 5/30/2018, Counsel missed the 9 am hearing date and mistakenly and reflexively believed that the hearing time was at 2 pm." Points and Authorities, Dckt. 98 at 1:15.5–18.

B. "Counsel showed up at 2 pm only to realize that it was a dismissal calendar which are normally heard on Wednesdays at either 9 or 10 am." *Id.* at 1:18–20.

C. "On May 1, 2018, the trustee filed a motion to dismiss based on, inter alia, a failure to file 2017 and 2016 tax returns." *Id.* at 1:23–24.

D. "On 5/23/2018 Counsel was notified that the returns were filed." *Id.* at 2:4.4–5.5.

E. "Debtors did not respond to undersigned until after the Memorial Day holiday weekend. Counsel was backed in to a unique corner for two reasons: 1) there was no rule that would allow cessation or work such as the

debt limit being exceeded and 2) debtors' reliance on Ch. 13 as a means financial planning." *Id.* at 2:8.5–14.

F. "Counsel only had two days to file the documents to consolidate and finally did so on the early morning of 5/30/2018." *Id.* at 2:14–15.

G. Counsel personally was beset with a serious of medical issues, which while treatable and would not appear to be long-term medical illnesses or disabilities, can in the short-run be debilitating. *Id.* at 16–22.5.

H. The Supplemental Pleadings conclude that these medical issues, when coupled with the challenges of representing debtors (whether consumer or business) are at the heart of the "mistake" or "excusable neglect."

Counsel for Debtor and Spouse Debtor provides his Supplemental Declarations providing his personal knowledge testimony (Federal Rules of Evidence 601, 602) to establish the evidentiary record for the facts that are stated in the Supplemental Points and Authorities. That testimony could also provide an explanation as to why counsel, when he showed up at 2:00 p.m. the day of the hearing, did not think to address the court that afternoon as to the mistake and request that, if the court had not already entered the orders, the hearing be continued to allow counsel to address these issues in open court with the Chapter 13 Trustee.

Missing from the original Motion and Supplemental Points and Authorities are the legal requirements for what constitutes mistake or excusable neglect for which relief may be granted. Mere "mistake" or "neglect" in acting is not sufficient. In addition to the above, a discussion of this point is found in 12 MOORE'S FEDERAL PRACTICE - CIVIL § 60.41 (emphasis added), stating:

"[1] Mistake, Inadvertence, Surprise, and Excusable Neglect Defined by Example

[a] No Bright Line Test Explains When Relief Will or Will Not Be Granted

Although "mistake, inadvertence, surprise, or excusable neglect" are recognized as grounds for relief from a final judgment by Rule 60(b)(1), the Rule is completely silent on what these terms mean.1 Court language does not precisely define these terms, either. What is or is not sufficient to justify relief under Rule 60(b)(1) is best understood by analyzing the fact patterns, rather than the language, of the cases. However, in the 1993 case of *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, the Supreme Court provided guidance as to the meaning of the term "excusable neglect." As used in Rule 60(b)(1), the word "neglect" encompasses negligence and carelessness. Whether a particular instance of neglect is "excusable" is an equitable determination. In making the determination, a **court must take account of all relevant circumstances, including (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings;2.1Link to the text of the note (3) the**

reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith.3

The factors listed by Pioneer are not exclusive. . . .

The Pioneer decision made it clear that attorney negligence or carelessness can constitute excusable neglect. **The Supreme Court expressly rejected the narrow approach formerly taken by some circuits**, which had held that attorney negligence was *per se* inexcusable neglect, or that neglect would be excusable only if caused by circumstances beyond the movant's control.3.1 Thus, earlier decisions holding that certain types of conduct are never excusable "do not perdure [perdure - : to continue to exist, intrasitive verb,https://www.merriam-webster.com/dictionary/perdure] after Pioneer."3.2 Nevertheless, to the extent that earlier decisions engage in fact-intensive analysis of alleged excusable neglect, they may be helpful in predicting how similar factual situations will be analyzed by courts applying the equitable determination mandated by Pioneer. For example, although ignorance of procedural rules is no longer *per se* inexcusable, and a finding of excusable neglect is now possible under Pioneer, **in most cases such ignorance will continue to be inexcusable under the *Pioneer* standard.**3.3 Some factual patterns in which relief has been granted are examined in subsection [b], below. Some factual patterns in which relief has been denied are examined in subsection [c], below."

It appears that Debtor and Counsel have dropped the assertion that the failure of counsel to appear is the court's fault in creating a byzantine labyrinth of hearing procedures.

Likelihood of Success on the Merits

The Motion and Supplemental Points and authorities make reference to Debtor and Counsel filing a motion to consolidate this case with the one filed by Debtor's spouse, and there being a motion to confirm a plan. No motion to consolidate this case has been filed, nor has a plan and motion to confirm.

In the related case of La Keisha Michelle Stewart, 17-27331, a Plan and Motion to Consolidate that case has been filed. In the Chapter 13 Plan, 17-27331, Dckt. 107, Spouse Debtor promises to have paid $4,260 into her plan through an unspecified date (presumably May 2018, the first six months of the plan) and then $1,800 per month for the remaining fifty-four months of the Plan. *Id.*, Additional Provisions.

For treatment of creditor claims, Spouse Debtor's Plan provides:

A. Class 1 Claims.....None Provided

B. Class 2 Claims

1. Elite Acceptance (2008 Mercedes Benz Collateral)....$181/month dividend

2. Santander (2009 Mercedes Benz Collateral).....$301.37/month dividend

3. IRS.....$21.83/month dividend

C. Class 3 Claims

1. Capital One (2005 Mercedes Benz Collateral)....Surrender

D. Class 4 Claims.....None Provided

E. Class 5 Priority Unsecured

1. Estimated Amount of $63,627.....$1,060.45/monthly dividend

F. Class 6 Special Treatment Unsecured.....None Provided

G. Class 7 General Unsecured

1. $196,432 in Claims.....0.00% dividend

H. Chapter 13 Trustee Fees (est. 8%).....$144/month

I. Chapter 13 Counsel for Spouse Debtor ($2,500).....$ 41.66/month

No provision is made for paying attorney's fees in Debtor's case.

On May 30, 2018, Spouse Debtor filed Amended and Supplemental Schedules I and J (checking the boxes that each document was both a supplemental amendment, effective as of a specified post-petition date, and an amended schedule, which relates all the way back to the filing of the bankruptcy case). *Id.*, Dckt. 108.

On the Amended/Supplemental Schedule I, Spouse Debtor states she has $7,688 in gross monthly income, which after deductions, leaves monthly take-home pay of $6,618.54. Spouse Debtor also states that Debtor has self-employment monthly net income of $2,283.00. *Id.* at 1–2. The required statement of gross income and expenses for Debtor's self-employment business is not included with Amended/Supplemental Schedule I. The court and parties in interest are not provided Debtor's gross income and the expenses he is paying from that gross income.

On Amended/Supplemental Schedule J, Spouse Debtor states having reasonable and necessary monthly expenses of $7,101. *Id.* at 3–4. A line item of $300 per month is provided for income and self-employment taxes for the $2,283 in monthly net self-employment income of Debtor.

The present contention that the court should not dismiss this case is not written on a blank slate, with the mere argument that there will be some motion to consolidate and some plan to be advanced taken as gospel. Debtor and Spouse Debtor have a history of unsuccessful cases in this District. Below is a chart of those cases.

Keith Stewart			**La Keisha Michelle Stewart**
Chapter 13 Case 18-20612	**Counsel: Richard Kwun**		
Filed...February 3, 2018			
Chapter 13 Plan Fled..... 02/03/2018 Confirmation Denied.. Ch. 13 Trustee and Creditor Objections Debtor Failed to provide Documents list assets of Estate on Schedule B, and proposed Plan failed to property provide for curing rent arrearage. Minutes, Dckt. 50, 51			
		Counsel: Richard Kwun	**Chapter 13 Case 17-27331**
		Filed: November 5, 2017	
		Chapter 13 Plan Filed.....November 5, 2017 Confirmation Denied - Ch. 13 Trustee Objection Spouse Debtor's failure to provide tax returns and employer payment advices. Dckt. 37..	
		Counsel: Richard Kwun	**Chapter 13 Case 17-26708**

		Filed.....October 10, 2017 Dismissed.....October 26, 2017 Dismissed Upon Denial of Request For Relief From Stipulated Injunction Barring Filing of Bankruptcy Cases by Spouse Debtor for Two Years. Civil Minutes, Dckt. 17. The court's findings include: "Furthermore, relief under Rule 60(b)(6) is not warranted because the Debtor has not demonstrated any basis for relief from the underlying stipulation on which the judgment barring her from filing a petition for two years is based. . . Here, however, when the Debtor stipulated to entry of the two-year filing bar and the corresponding judgment entered against her, she admitted to being an abusive bankruptcy filer. See Adv. No. 15-02170, Dckts. 1, 7. Given the seriousness of that admission and conduct, the court will not exercise its discretion to relieve the Debtor of her admission and, thus, of the injunctive relief entered against here to which she stipulated." *Id.* Adversary Stipulation, Adv. 15-02170, Dckt. 9.	
		Counsel: Richard Kwun	**Chapter 13 Case 15-28096**
		Filed.....October 10, 2015 Dismissed.....July 14, 2017 Case dismissed due to default in Plan Payments. Notice of Default, Order. Dckts. 89, 92.	
		Pro Se	Chapter 13 Case 15-25312

		Filed.....July 1, 2015 Dismissed.....September 22, 2015 Dismissal based on failure to provide evidence of pre-petition credit counseling, failure to provide tax returns, failure to provide employer payroll advices. Motion and Order, Dckts. 24 and 40.	
		Counsel: Peter Macaluso	**Chapter 13 Case 14-32311**
		Filed.....December 23, 2014 Dismissed.....May 17, 2015 Dismissal based on failure to prosecute confirmation of an amended plan after denial of confirmation of prior plan. Motion and Order, Dckts. 56 and 57.	
		Counsel: Peter Macaluso	**Chapter 13 Case 14-23581**
		Filed.....April 7, 2014 Dismissed.....November 10, 2014 Dismissal based on default in Plan payments. Motion and Order, Dckts. 22 and 27.	
		Pro Se	Chapter 13 Case 13-35889
		Filed.....December 20, 2013 Dismissed.....March 25, 2014 Dismissal based on failure to provide tax returns and default in Plan payments. Civil Minutes, Dckt. 61.	
		Counsel: Peter Macaluso	**Chapter 13 Case 13-25864**

		Filed.....April 29, 2013 Dismissed.....November 15, 2013 Dismissal based on default in Plan payments. Motion and Order, Dckts. 110 and 113.	
		Counsel: C. Anthony Hughes	**Chapter 7 Case 10-38946**
		Filed.....July 19, 2010 Discharge.....October 25, 2010	
Chapter 7 Case 11-43190	**In *Pro Se***		
Filed.....September 27, 2011 Discharge.....February 22, 2012			

In this case, the Motion to vacate does not address why, if the dismissal is vacated, this is the case where there is a reasonable possibility of success. Debtor does not offer his testimony in support of the Motion.

Spouse Debtor does not provide her declaration to provide evidence as to why, especially in light of her repeated filings and failures, there is a reasonable possibility of success in her case if the case is not dismissed.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxx

The Motion is xxxxxxxxxxxxxx.

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 to Vacate filed by Keith Stewart ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxxxxxxxxxxx.

4. **17-27331-C-13** **LA KEISHA STEWART**
Richard Kwun

MOTION TO VACATE DISMISSAL OF CASE
6-1-18 [114]

No 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).

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H. The Supplemental Pleadings conclude that these medical issues, when coupled with the challenges of representing debtors (whether consumer or business) are at the heart of the "mistake" or "excusable neglect."

Counsel for Debtor and Spouse Debtor provides his Supplemental Declarations providing his personal knowledge testimony (Federal Rules of Evidence 601, 602) to establish the evidentiary record for the facts that are stated in the Supplemental Points and Authorities. That testimony could also provide an explanation as to why counsel, when he showed up at 2:00 p.m. the day of the hearing, did not think to address the court that afternoon as to the mistake and request that, if the court had not already entered the order, the hearing be continued to allow counsel to address these issues in open court with the Chapter 13 Trustee.

Missing from the original Motion and Supplemental Points and Authorities are the legal requirements for what constitutes mistake or excusable neglect for which relief may be granted. Mere "mistake" or "neglect" in acting is not sufficient. In addition to the above, a discussion of this point is found in 12 MOORE'S FEDERAL PRACTICE - CIVIL § 60.41 (emphasis added), stating:

> "[1] Mistake, Inadvertence, Surprise, and Excusable Neglect Defined by Example
>
> [a] No Bright Line Test Explains When Relief Will or Will Not Be Granted
>
> Although "mistake, inadvertence, surprise, or excusable neglect" are recognized as grounds for relief from a final judgment by Rule 60(b)(1), the Rule is completely silent on what these terms mean.1 Court language does not precisely define these terms, either. What is or is not sufficient to justify relief under Rule 60(b)(1) is best understood by analyzing the fact patterns, rather than the language, of the cases. However, in the 1993 case of *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, the Supreme Court provided guidance as to the meaning of the term "excusable neglect." As used in Rule 60(b)(1), the word "neglect" encompasses negligence and carelessness. Whether a particular instance of neglect is "excusable" is an equitable determination. In making the determination, a **court must take account of all relevant circumstances, including (1) the danger of prejudice to the adverse party; (2) the length of any delay caused by the neglect and its effect on the proceedings;2.1Link to the text of the note (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party acted in good faith.**3
>
> The factors listed by Pioneer are not exclusive. . . .
>
> The Pioneer decision made it clear that attorney negligence or carelessness can constitute excusable neglect. **The Supreme Court expressly rejected the narrow approach formerly taken by some circuits**, which had held that attorney negligence was *per se* inexcusable neglect, or that neglect would be excusable only if caused by circumstances beyond the movant's control.3.1 Thus, earlier decisions holding that certain types of conduct are never excusable "do not perdure [perdure - : to continue

> to exist, intrasitive verb,https://www.merriam-webster.com/dictionary/perdure] after Pioneer."3.2 Nevertheless, to the extent that earlier decisions engage in fact-intensive analysis of alleged excusable neglect, they may be helpful in predicting how similar factual situations will be analyzed by courts applying the equitable determination mandated by Pioneer. For example, although ignorance of procedural rules is no longer *per se* inexcusable, and a finding of excusable neglect is now possible under Pioneer, **in most cases such ignorance will continue to be inexcusable under the *Pioneer* standard.**3.3 Some factual patterns in which relief has been granted are examined in subsection [b], below. Some factual patterns in which relief has been denied are examined in subsection [c], below."

It appears that Debtor and Counsel have dropped the assertion that the failure of counsel to appear is the court's fault in creating a byzantine labyrinth of hearing procedures.

Likelihood of Success on the Merits

The Motion and Supplemental Points and authorities make reference to Debtor and Counsel filing a motion to consolidate this case with the one filed by Debtor's spouse, and there being a motion to confirm a plan. No motion to consolidate this case has been filed, nor has a plan and motion to confirm.

In the related case of La Keisha Stewart, 17-27331, a Plan and Motion to Consolidate that case has been filed. In the Chapter 13 Plan, 17-27331, Dckt. 107, Spouse Debtor promises to have paid $4,260 into her plan through an unspecified date (presumably May 2018, the first six months of the plan) and then $1,800 per month for the remaining fifty-four months of the Plan. *Id.*, Additional Provisions.

For treatment of creditor claims, Spouse Debtor's Plan provides:

A. Class 1 Claims.....None Provided

B. Class 2 Claims

1. Elite Acceptance (2008 Mercedes Benz Collateral)....$181/month dividend

2. Santander (2009 Mercedes Benz Collateral).....$301.37/month dividend

3. IRS.....$21.83/month dividend

C. Class 3 Claims

1. Capital One (2005 Mercedes Benz Collateral)....Surrender

D. Class 4 Claims.....None Provided

E. Class 5 Priority Unsecured

1. Estimated Amount of $63,627.....$1,060.45/monthly dividend

F. Class 6 Special Treatment Unsecured.....None Provided

G. Class 7 General Unsecured

1. $196,432 in Claims.....0.00% dividend

H. Chapter 13 Trustee Fees (est. 8%).....$144/month

I. Chapter 13 Counsel for Spouse Debtor ($2,500).....$ 41.66/month

No provision is made for paying attorney's fees in Debtor's case.

On May 30, 2018, Spouse Debtor filed Amended and Supplemental Schedules I and J (checking the boxes that each document was both a supplemental amendment, effective as of a specified post-petition date, and an amended schedule, which relates all the way back to the filing of the bankruptcy case). *Id.*, Dckt. 108.

On the Amended/Supplemental Schedule I, Spouse Debtor states she has $7,688 in gross monthly income, with after deductions, leaves monthly take-home pay of $6,618.54. Spouse Debtor also states that Debtor has self-employment monthly net income of $2,283.00. *Id.* at 1–2. The required statement of gross income and expenses for Debtor's self-employment business is not included with Amended/Supplemental Schedule I. The court and parties in interest are not provided Debtor's gross income and the expenses he is paying from that gross income.

On Amended/Supplemental Schedule J, Spouse Debtor states having reasonable and necessary monthly expenses of $7,101. *Id.* at 3–4. A line item of $300 per month is provided for income and self-employment taxes for the $2,283 in monthly net self-employment income of Debtor.

The present contention that the court should not dismiss this case is not written on a blank slate, with the mere argument that there will be some motion to consolidate and some plan to be advanced taken as gospel. Debtor and Spouse Debtor have a history of unsuccessful cases in this District. Below is a chart of those cases.

Keith Stewart			**La Keisha Michelle Stewart**
Chapter 13 Case 18-20612	**Counsel: Richard Kwun**		
Filed...February 3, 2018			

Chapter 13 Plan Fled..... 02/03/2018 Confirmation Denied.. Ch. 13 Trustee and Creditor Objections Debtor Failed to provide Documents list assets of Estate on Schedule B, and proposed Plan failed to property provide for curing rent arrearage. Minutes, Dckt. 50, 51			
		Counsel: Richard Kwun	**Chapter 13 Case 17-27331**
		Filed: November 5, 2017	
		Chapter 13 Plan Filed.....November 5, 2017 Confirmation Denied - Ch. 13 Trustee Objection Spouse Debtor's failure to provide tax returns and employer payment advices. Dckt. 37..	
		Counsel: Richard Kwun	**Chapter 13 Case 17-26708**

		Filed.....October 10, 2017 Dismissed.....October 26, 2017 Dismissed Upon Denial of Request For Relief From Stipulated Injunction Barring Filing of Bankruptcy Cases by Spouse Debtor for Two Years. Civil Minutes, Dckt. 17. The court's findings include: "Furthermore, relief under Rule 60(b)(6) is not warranted because the Debtor has not demonstrated any basis for relief from the underlying stipulation on which the judgment barring her from filing a petition for two years is based. . . Here, however, when the Debtor stipulated to entry of the two-year filing bar and the corresponding judgment entered against her, she admitted to being an abusive bankruptcy filer. See Adv. No. 15-02170, Dckts. 1, 7. Given the seriousness of that admission and conduct, the court will not exercise its discretion to relieve the Debtor of her admission and, thus, of the injunctive relief entered against here to which she stipulated." *Id.* Adversary Stipulation, Adv. 15-02170, Dckt.. 9).	
		Counsel: Richard Kwun	**Chapter 13 Case 15-28096**
		Filed.....October 10, 2015 Dismissed.....July 14, 2017 Case dismissed due to default in Plan Payments. Notice of Default, Order. Dckts. 89, 92.	
		Pro Se	Chapter 13 Case 15-25312

		Filed.....July 1, 2015 Dismissed.....September 22, 2015 Dismissal based on failure to provide evidence of pre-petition credit counseling, failure to provide tax returns, failure to provide employer payroll advices. Motion and Order, Dckts. 24 and 40.	
		Counsel: Peter Macaluso	**Chapter 13 Case 14-32311**
		Filed.....December 23, 2014 Dismissed.....May 17, 2015 Dismissal based on failure to prosecute confirmation of an amended plan after denial of confirmation of prior plan. Motion and Order, Dckts. 56 and 57.	
		Counsel: Peter Macaluso	**Chapter 13 Case 14-23581**
		Filed.....April 7, 2014 Dismissed.....November 10, 2014 Dismissal based on default in Plan payments. Motion and Order, Dckts. 22 and 27.	
		Pro Se	Chapter 13 Case 13-35889
		Filed.....December 20, 2013 Dismissed.....March 25, 2014 Dismissal based on failure to provide tax returns and default in Plan payments. Civil Minutes, Dckt. 61.	
		Counsel: Peter Macaluso	**Chapter 13 Case 13-25864**

		Filed.....April 29, 2013 Dismissed.....November 15, 2013 Dismissal based on default in Plan payments. Motion and Order, Dckts. 110 and 113.	
		Counsel: C. Anthony Hughes	**Chapter 7 Case 10-38946**
		Filed.....July 19, 2010 Discharge.....October 25, 2010	
Chapter 7 Case 11-43190	**In *Pro Se***		
Filed.....September 27, 2011 Discharge.....February 22, 2012			

In this case, the Motion to vacate does not address why, if the dismissal is vacated, this is the case where there is a reasonable possibility of success. Debtor does not offer his testimony in support of the Motion.

Spouse Debtor does not provide her declaration to provide evidence as to why, especially in light of her repeated filings and failures, there is a reasonable possibility of success in her case if the case is not dismissed.

At the hearing, xxxxxxxxxxxxxxxxxxxxxxxxx

The Motion is xxxxxxxxxxxxxx.

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 to Vacate filed by La Keisha Stewart ("Spouse Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxxxxxxxxxxx.

Dept. E Matters

1. **17-25221-E-13** **TOMMIE RICHARDSON**
PGM-3 **Peter Macaluso**

SCHEDULING CONFERENCE RE: OBJECTION TO CLAIM OF SENECA LEANDRO VIEW LLC, CLAIM NUMBER 7
4-13-18 [87]

No 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 3007-1 Objection to Claim—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on April 13, 2018. By the court's calculation, 53 days' notice was provided. 44 days' notice is required. FED. R. BANKR. P. 3007(a) (requiring thirty days' notice); LOCAL BANKR. R. 3007-1(b)(1) (requiring fourteen days' notice for written opposition).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Scheduling Conference on the Objection to Proof of Claim Number 7 is xxxxxxx.

Tommie Richardson, Chapter 13 Debtor, ("Objector") requests that the court disallow the claim of Seneca Leandro View LLC ("Creditor"), Proof of Claim No. 7 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $195,000.00. Objector asserts that there is no evidence to support the claim, especially not for Objector being liable for a property being foreclosed upon while also in escrow. Objector admits to receiving $15,000 from Creditor, but Objector asserts that there is no basis for liability for any higher amount.

The Objection itself states with particularity the following grounds upon which it is based and why the claim should not be allowed:

A. No documentation for a security interest is included with the Proof of Claim.

B. There is no "Declaration" providing testimony to authenticate the exhibits attached to the Proof of Claim. FN.1.

FN. 1. This is a curious "grounds," in that proofs of claim are not pleadings for which declarations, points and authorities, and briefs are filed in support. Everyday documentation underlying the claim, such as notes and deeds of trust, are filed with proofs of claim, without "declarations" or other supporting pleadings. Objector has not provided a points and authorities in support of the Objection for the legal proposition that attachments to proofs of claim must be authenticated as provided in Federal Rule of Evidence 901 et seq.

C. There is no recorded lien attached to the Proof of Claim.

D. There is no "evidence" of the amount asserted to be owed by Debtor. FN.2.

FN. 2. *See* FN.1.

E. There are no equitable liens on the funds held by the foreclosure trustee.

F. The first objection is that "admissible evidence" is not attached to Proof of Claim No. 7.

G. The second objection is that Creditor has not presented admissible evidence to support Proof of Claim No. 7. FN.3.

FN. 3. Debtor directs the court to *Atwood v. Chase Manhattan Mortgage, Co. (In re Atwood)*, 293 B.R. 277, 233 (B.A.P. 9th Cir. 2003), for the proposition that Creditor cannot rely on the prima facie presumption of validity of the claim when the objecting debtor has presented evidence countering the prima facie effect. However, in making this argument, Objector asserts that since evidence is not authenticated with the Proof of Claim, the Proof of Claim must fail. This ignores the well-established law in this case and appears to cut out the burden that "[o]bjector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502–22 (15th ed. 1991)). The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. *Id.* at 623; *In re Allegheny International, Inc.*, 954 F.2d 167, 173–74 (3d Cir. 1992). Here, Objector cannot merely argue "I don't agree so you lose" in countering the *prima facie* presumption.

H. Objector argues that the prima facie presumption is dependent upon Creditor first presenting evidence of reasonableness, without any evidence offered by Objector to rebut the presumption.

Objector has provided his Declaration in Opposition. Dckt. 89. In it, Objector testifies that with respect to the Proof of Claim:

A. In December 2016, Objected entered into the Purchase and Sale Agreement with Creditor.

B. He identifies the "Liaison" between Creditor and Objector, and several people were "responsible" for the escrow. Objector does not provide testimony as to what the "Liaison" and people "responsible" for the escrow were supposed to do in connection with the Purchase and Sale Agreement.

C. Objector testifies that he was told by one of the "responsible" persons that another person "would be handling the paperwork" for the sale. No declaration by such "responsible" person to whom the statement is attributed is provided.

D. Objector testifies that some of the liens being reported on the property were "questionable." He does not state why he believed they were "questionable." Objector further testifies that he investigated and told the person handling the "paperwork" what liens should be paid.

E. On January 26, 2017, escrow was opened. On February 24, 2017, Creditor advanced $15,000 for payment through escrow for the sale of the property.

F. On March 7, 2017, a notice of default and election to sell was filed.

G. Objector concludes that "I did everything said by escrow, and do not owe anything to the creditor as the failure to complete escrow was not my fault, but that of First American Title Company, ..."

The above is the sum total of the evidence presented to rebut the prima facie effect of the Proof of Claim.

CREDITOR'S RESPONSE

Creditor filed a Response on May 22, 2018. Dckt. 103. Creditor argues that it and Objector entered into a purchase agreement for real property on December 27, 2016. Creditor argues that Objector did not disclose being in default on a second deed of trust on the property, leading to a Notice of Default being issued on March 2, 2017, which was also not disclosed to Creditor. Creditor states that it was not informed of a Notice of Trustee's Sale recorded on June 9, 2017, before the property was sold on July 6, 2017.

Creditor argues that escrow had not closed on its purchase agreement because Objector had not required one tenant on the property to vacate the premises. That tenant is identified as Objector's sister.

Creditor argues that it was ready to purchase at any time while the sale was pending and would have waived the requirement for the tenant to be removed if it had known about the pending foreclosure.

With respect to damages, Creditor first asserts that this property was listed on Debtor's Schedule A under penalty of perjury as having a value of $1,000,000 by Objector. Further, the property had been appraised (Creditor's appraiser) to have a value of $940,000 as of July 6, 2017. Using the $940,000 value and the $760,000 contract price, Creditor computes the damages to be $195,000 (which includes the $15,000 advanced by Creditor through escrow). Creditor argues that Objector breached the purchase agreement and now owes Creditor at least $195,000.00, as reflected in Proof of Claim 7-3 filed as an unsecured claim.

As legal grounds, Creditor asserts that its breach of contract claim against Objector is determined by California law, and Creditor points to California Civil Code §§ 3300 and 3306 to determine how contract breach damages are calculated.

JUNE 5, 2018 HEARING

At the hearing, the court announced that it was setting a Scheduling Conference for this matter to be heard at 10:30 a.m. on June 14, 2018. Dckt. 118. The court ordered Objector and Creditor to file and serve on each other's counsel their Scheduling Conference Reports on or before 12:00 p.m. on June 11, 2018. The parties were ordered to identify the applicable California laws upon which they rely and the witnesses and documentary evidence in support of their positions.

JUNE 14, 2018 HEARING

At the hearing, the court noted that on June 11, 2018, the court entered an order resetting the matter for 1:30 p.m. on June 26, 2018. Dckt. 121, 125.

CREDITOR'S SCHEDULING CONFERENCE REPORT

On June 11, 2018, Creditor filed its Scheduling Conference Report. Dckt. 119. In it, Creditor recounts various asserted facts which it intends to present in support of its breach of contract claim.

DEBTOR'S SCHEDULING CONFERENCE REPORT

No Scheduling Conference Report has been filed by Debtor.

DISCUSSION

No further pleadings have been filed since the prior hearing.

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after

a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

Unless otherwise covered by the Bankruptcy Code, state law applies to determine the existence and validity of a claim. *Cossu v. Jefferson Pilot Securities Corp. (In re Cossu)*, 410 F.3d 591, 595 (9th Cir. 2005) ("The validity of a creditor's claim is determined by the rules of state law . . . ."). Furthermore, if all of the events for a breach of contract claim occurred pre-petition, even though liability has not yet been affixed, then the claim is not contingent upon a future determination of liability. *In re Keenan*, 201 B.R. 263 (Bankr. S.D. Cal. 1996).

The court has reviewed the purchase agreement that Creditor attached as Exhibit 1. Dckt. 107. Creditor directs the court to Paragraphs 9(G) & 10. Dckt. 103 at 2. Paragraph 9(G) states in its entirety:

> SELLER REPRESENTATION: Seller represents that Seller has no actual knowledge: (I) of any current pending lawsuit(s), investigation(s), inquiry(ies), action(s), or other proceeding(s) affecting the Property or the right to use and occupy it; (ii) of any unsatisfied mechanic's or materialman lien(s) affecting the Property; and (iii) that any tenant of the Property is the subject of a bankruptcy. If Seller receives any such notice prior to Close Of Escrow, Seller shall immediately notify Buyer.

Exhibit 1, Dckt. 107 at 6.

Paragraph 10 states in its entirety:

> SUBSEQUENT DISCLOSURES: In the event Seller, prior to Close Of Escrow, becomes aware of adverse conditions materially affecting the Property, or any material inaccuracy in disclosures, information or representations previously provided to Buyer, Seller shall promptly Deliver a subsequent or amended disclosure of notice, in writing, covering those items. However, a subsequent or amended disclosure shall not be required for conditions and material inaccuracies of which Buyer is otherwise aware, or which are disclosed in reports provided to or obtained by Buyer or ordered and paid for by Buyer.

Id.

The Purchase Agreement defines "Buyer" as Seneca Leandro View, LLC, and "Seller" as Tommie Richardson. "Close Of Escrow" is stated to mean "2/28/17 or sooner." *Id.* at 3. The original Purchase Agreement was signed by Creditor/Buyer on November 29, 2016, and by Objector/Seller on December 27, 2016. *Id.* at 11.

No declaration is provided by Creditor or Creditor's Managing Member responsible and with personal knowledge of this transaction. No testimony is provided as to Creditor having the money in place to perform the contract, the cost of such money (points, fees), or the ability to complete the purchase.

A declaration is provided by Steven Geller, the appraiser providing his testimony as to value of the Property as of July 6, 2017. Dckt. 104. His appraisal report is stated to be provided as Exhibit 2 to the Declaration. Dckt. 105.

Setting Scheduling Conference

Creditor has provided the court with a brief citation to California Civil Code §§ 3300 and 3306 as the legal authorities for the court to determine what the contract between the parties was, if the contract existed who breached it, and the damages to the breaching party. Creditor asserts that it is per se the aggrieved party and its damages are the difference between the gross value of the property as set by its appraiser and the liens.

Creditor has not provided the court with any evidence of its efforts to perform the contract, that it could perform the contract, or what it did in connection with reviewing the title report and acting with respect to the reported liens against the property. This contract is purported to have arisen in December 2016 when it was signed by Objector. Creditor offers no explanation of what it was doing to perform its part of the contract in:

January 2017,

February 2017,

March 2017,

April 2017,

May 2017,

June 2017, and

July 2017,

to assert its alleged rights under the Purchase and Sale Agreement. The Agreement states that it was to close on or before February 28, 2017. Exhibit 1, Dckt. 107 at 3. Though February 28, 2017, came and went, there is no evidence of Creditor doing anything for the rights it now so stridently demands should be enforced.

Objector's pleading (Dckt. 87) does not provide any California law or treatise materials as to how this court makes a determination as to what the contract was, how to determine if it was breached, and how to correctly compute damages. The "legal basis" for the contention that only $15,000 could be owed as damages is—Objector says so.

Though the court could research the law, develop the arguments that it believes the respective parties could present, organize the legal analysis, and prosecute this Contested Matter for the respective parties, the court declines such assignment of work. It is clear that the court needs to set a scheduling conference and from there a discovery schedule for this Contested Matter. The parties need to assemble their evidence, which supports their state law legal arguments for whether there is an enforceable contract, and if so, what damages may flow therefrom.

Conclusion of Scheduling Conference and Setting of Evidentiary Hearing

The Scheduling Conference having been concluded, the court shall issue its Evidentiary Hearing Scheduling Order.

A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.

B. The Witnesses and Evidence presented for Objector Debtor's Case in Chief for the Objection to Claim are:

1. None - No Witnesses or Evidence identified. No Scheduling Conference Report filed by Debtor.

C. The Witnesses and Evidence presented for Creditor Seneca Leandro View, LLC are:

1. Witnesses

   a. Alvin Cox
   b. Wendy Stewart
   c. Custodian of Records for First American Title Company
   d. Steven Geller
   e. Donna Pekarsky
   f. Tommy Richardson (adverse witness)
   g. "Billie" Robinson (adverse witness)

2. Documentary Evidence

   a. Residential Income Property Purchase Agreement and Joint Escrow Instructions Including Extension Addendums
   b. First American Title Company Preliminary Title Report No. OSA-5380095 (bdaa) Dated January 17, 2017
   c. Check from Seneca Leandro View LLC to First American Title in the amount of $15,000
   d. Check from First American Title to Tommie Richardson in the amount of $15,000
   e. First American Title's Escrow File and Provisions
   f. Second Amended Escrow Instructions
   g. Notice of Default

h. Notice of Trustee's Sale
i. Trustee's Deed Upon Sale
j. Debtor's Schedule "A" Valuing the 1902-1904 Filbert Property in Oakland, California at $1 ,000,000
k. Appraisal Report by Stephen Geller and Curriculum Vitae
l. Pre-Approval Letter and all related documents from Lending One to Seneca Leandro View, LLC as to the loan from Lending One.

D. Discovery, including the hearing of discovery motions, shall close on xxxx, 2018.

E. Objector Debtor, shall lodge with the court and serve their Testimony Statements and Exhibits on or before **xxxxx, 2018**.

F. Respondent Creditor, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before **----------, 2018**.

G. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before **----------, 2018**.

H. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before **----------, 2018**.

I. The Evidentiary Hearing shall be conducted at **-------.m. on ----------, 2018**.

2. **18-22734-E-13 SW-1** | **PATRICK/JILL SUTTLE** **Stephan Brown** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **6-12-18 [14]**

ALLY BANK 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 13 Trustee, and Office of the United States Trustee on June 12, 2018. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 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.

Ally Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2015 Chevrolet Silverado, VIN ending in 0237 ("Vehicle"). The moving party has provided the Declaration of Donna Belliveau to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Patrick Suttle and Jill Suttle ("Debtor").

The Donna Belliveau Declaration provides testimony that Debtor has not made one post-petition payments, with a total of $631.51 petition payments past due.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. Though authenticated, Movant has not provided the court with a basis for determining that this out of court statement is admissible hearsay. FED. R. EVID. 802, 803. The court will not presume to make evidentiary legal assertions for Movant, which may or may not be so intended. Some common hearsay exceptions include:

records of a regularly conducted activity, public records, and market reports and similar commercial publications. FED. R. EVID. 803(6), (8), and (17).

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 $19,199.55, as stated in the Donna Belliveau Declaration. Movant argues that the clean trade-in value of the Vehicle is $17,025.00. The court determines that the value of the Vehicle is determined to be $20,450.00, the clean retail value (replacement value) called for by 11 U.S.C. § 506(a)(2), as stated in the NADA Valuation Report.

DISCUSSION

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.

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

Request for Waiver of Fourteen-Day Stay of Enforcement

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

Movant has not 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 not 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 Ally Bank ("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 2015 Chevrolet Silverado, VIN ending in 0237 ("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 not waived for cause.
>
> No other or additional relief is granted.