

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein  
Bankruptcy Judge  
Sacramento, California

July 30, 2019 at 1:30 p.m.

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1.	<a href="#"><u>18-25212</u></a> -C-13	EDDY AGUILAR	CONTINUED MOTION FOR RELIEF
	<a href="#"><u>JCW-1</u></a>	Peter G. Macaluso	FROM AUTOMATIC STAY
			5-13-19 <a href="#"><u>[47]</u></a>

WELLS FARGO BANK, N.A. VS.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 13, 2013. 28 days' notice is required. That requirement was met.

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

<b>The Motion for Relief from the Automatic Stay is <span style="color: red;">XXXXX</span>.</b>
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Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to Eddy Aguilar's ("Debtor") real property commonly known as 4460 Lineras Way, Sacramento, California ("Property"). Movant has provided the Declaration of Charice Gladden to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Charice Gladden Declaration states that there are four post-petition defaults in the payments on the obligation secured by the Property, with a total of \$4,344.80 in post-petition payments past due. The Declaration also provides evidence that there are forty-one pre-petition payments in default, with a pre-petition arrearage of \$36,912.91.

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Movant states that the Debtor's confirmed Plan provides for adequate protection payments while Debtor attempted to modify the loan. The Plan also provides for the Plan to be modified within 14 days of a denial of the requested loan modification. Movant states that formal denial letters were sent to both Debtor and Debtor's Attorney on August 12, 2019 and February 21, 2019. The Debtor has not proposed a modified plan in compliance with requirements set forth in the confirmed plan.

#### **CHAPTER 13 TRUSTEE'S RESPONSE:**

David Cusick ("the Chapter 13 Trustee") filed a Response on May 28, 2019. Dckt. 53. The Trustee asserts that the confirmed plan provides for adequate protections to Movant, a Class 1 creditor, which Debtor is current. The adequate protection payments are \$1,060.00 against principal and interest. The confirmed plan also references a pending HAMP Application requiring the Debtor to file a motion to modify the plan within 14 days of a denial of the loan modification. The Trustee also notes that Movant's Motion includes letters that suggest that Debtor has had more than 14 days notice of the denial of the loan modification request and no motion to modify that plan has been filed.

#### **DEBTOR'S RESPONSE:**

Debtor's counsel responds that Debtor is current on plan payments under the confirmed Plan and appears to acknowledge that Debtor was required to file and serve a motion to confirm a modified plan within 14 days of the denial of the loan modification request. Debtor's counsel claims that a modified plan and accompanying motion to confirm will be filed prior to the hearing date.

#### **DISCUSSION:**

Debtor's confirmed Chapter 13 Plan affords Debtor extraordinary relief in being able to make adequate protection payments while diligently prosecuting a loan modification. If that modification is denied,

"6.10 Events of Default, Failure to Modify Plan Upon Rejection of Modification,  
Failure to Prosecution Loan Modification

The Debtor shall be in default under the terms of this Plan, and Wells Fargo Home Mortgage entitled to exercise its rights to conduct a nonjudicial foreclosure sale, as described in the modification of the automatic stay of the Property in the event of any of the following defaults.

1. Default in timely adequate protection payment.
2. Default in the payment terms in a court approved loan modification agreement (if not a Class 4 claim for which the Plan terminates the automatic stay).
3. Failure to file and serve a modified plan and motion to confirm modified plan within fourteen (14) [the text in the Plan term appears to cut off the end of the sentence]

The Motion is supported by evidence that the Movant communicated the denial of the requested loan modification by letter dated February 21, 2019. Exhibit 6, Dckt. 51. The Chapter 13 Plan in this case confirmed on February 7, 2019. Order, Dckt. 39. Well more than fourteen days have expired since the February 21, 2019 denial of the loan modification.

Debtor's response to the failure to having filed and be diligently prosecuting a modified plan to properly provide for Movant's secured claim is limited to:

The Ensminger provisions included in Section 7 of Debtor's confirmed plan allows for modification of the Chapter 13 plan upon rejection of a loan modification. As such, Debtor will file, set, serve and be current under a modified Chapter 13 Plan before the hearing on this matter.

Response ¶ 1, Dckt. 58.

The "Ensminger Provision" is the common name given for the loan modification/adequate protection that was worked out some nine years ago to accommodate the realities of debtors who could afford to retain their homes if the loan was modified under applicable law, the crushing weight of loan modification applications on creditors, the financial benefit to creditors in modifying loans, protecting the rights of creditors to not have loan improperly modified through a Chapter 13 plan, and some less than scrupulous debtors who had no ability to pay even a modified loan but asserted that no payments were due until modified and that the court could not confirm a plan, leaving the parties in a "live in the house for free" limbo.

The Ensminger Provision is the collaborative work of consumer and creditor attorneys, giving the good faith debtors the ability to move forward and protect the legitimate rights of creditors. In addition to requiring an adequate protection payment in the approximate amount of the realistic potential loan modification, if the modification was denied, the creditor could promptly move to foreclose. The Ensminger Provision's legal foundation is built on a foundation of there either being a loan modification or, if denied, the debtor immediate files and seeks confirmation of a plan that provides for the creditor's claim as permitted under the Bankruptcy Code (which would be a plan payment to cure the default over the remaining plan term).

Creditor filed Proof of Claim No. 2-1, stating its secured claim in this case. The amount of the pre-petition arrearage that would have to be cured by Debtor through a plan is stated to be \$40,666.58. There remain approximately fifty-one (51) monthly payments to cure the \$40,666.58, which would be \$797.39 a month, plus any short-falls in the post-petition adequate protection payment and the contract amount.

At the June 1, 2019 hearing Debtor asserted that notwithstanding the failure to timely file a proposed modified plan (which Debtor would be performing pending confirmation) and motion to confirm, there has not been a denial of the requested loan modification. The "denial documents" state that the Movant has determined that the Debtor does not "qualify" to have a loan modification request reviewed. Debtor argues that this is not a denial, but a failure to review and make a decision.

Since Debtor identified a question of whether a denial has occurred. The court continued the hearing to allow this issue to be addressed. Additionally, it allowed the parties additional time to determine whether such review is warranted and a modification in the best interests of the Parties.

## MOVANT'S SUPPLEMENTAL PLEADINGS

Movant provides the Supplemental Declaration of Charice Gladden. Dckt. 65. The Charice Gladden Supplemental Declaration states that Movant reviewed and denied Debtor's request for a loan modification on 6/14/17. Movant claims Debtor did not meet the requirements for any of the modification programs. Movant attaches two letters dated 8/21/18 and 2/21/19 indicating Debtor was not eligible to be re-reviewed due to the prior denial. In order to be re-reviewed, Debtor would need to show a valid change in financial circumstances and Movant claims Debtor has not done so.

## DEBTOR'S SUPPLEMENTAL RESPONSE:

Debtor's counsel responds that a review of the two letters attached as exhibits are not necessarily a "denial of the requested loan modification" but, is a "ineligibility to be reviewed for assistance." Further, Debtor's counsel responds that they have obtained the required documents to be "eligible" and has sent such documents to Movant as requested.

## DISCUSSION

### **At the hearing -----**

~~From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$198,705.97, as stated in the Charice Gladden Declaration and Schedule D. The value of the Property is determined to be \$355,560.00, as stated in Schedules A and D.~~

~~Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. See *J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470-WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. See *In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.~~

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

~~and its agents, representatives and successors, and all other creditors having lien rights against the 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.~~

~~————— 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 Wells Fargo Bank, N.A. (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~————— **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., 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 4460 Lineras Way, Sacramento, 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.~~

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

CAB WEST, LLC VS.

**Final Ruling:** No appearance at the July 30, 2019 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on June 21, 2019. By the court's calculation, 39 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.**

CAB West, LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Ford Fusion, VIN ending in 7240 ("Vehicle"). The moving party has provided the Declaration of Jacklyn Larson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Martin Rios Ceballos ("Debtor").

Movant argues Debtor has completed the lease payments pursuant to the terms of the lease. However, the lease terminated on May 30, 2019 and the Vehicle has not been returned, nor has Debtor exercised his option to purchase the vehicle. Declaration, Dckt. 53. As of June 20, 2019, the payoff on the Vehicle, including the residual, is \$18,871.50.

Movant requests a waiver Federal Rule of Bankruptcy Procedure 4001(a)(3) because as stated above the lease term expired on May 30, 2019 and the Vehicle has not been returned.

The Chapter 13 Trustee filed a response on July 12, 2019 stating he does not oppose the requested relief. Dckt. 58.

## 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.

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 CAB West, LLC (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** 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 Ford Fusion (“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.