**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

**Honorable Ronald H. Sargis**
Bankruptcy Judge
Sacramento, California

**August 1, 2024 at 10:00 a.m.**

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**1. 18-25114-E-7 DWE-1** | **DAVID HOWERTON** | **Peter Macaluso** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **6-14-24 [167]**

**FREEDOM MORTGAGE 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.

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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 7 Trustee, and Office of the United States Trustee on June 14, 2024. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

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

Freedom Mortgage Corporation ("Movant") seeks relief from the automatic stay with respect to David De Vaughn Howerton's ("Debtor") real property commonly known as 6521 24th Street, Rio Linda, California 95673("Property"). Movant has provided the Declaration of Nitzan Shazar to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Decl., Docket 170.

Movant argues Debtor has not made 11 post-petition payments for months July 2023 through May 2024, with a total of $17,929.01in post-petition payments past due. Decl. ¶ 5, Dckt. 170. The total outstanding amount of the Claim as of May 20, 2024, is $231,948.60.

**DEBTOR'S OPPOSITION**

Debtor filed an Opposition on July 8, 2024. Dckt. 184. Debtor does not dispute the amount of missed payments, but asserts the postpetition delinquency will be cured by August 25, 2024, and that Debtor has already been making payments to Movant to achieve this end. Debtor also states that the Property has dramatically increased in value to $460,000, well over the previously asserted amount of $270,000. *Compare* Schedule A/B 3, Docket 10, *with* Amended Schedule A/B 4, Docket 186.

**DISCUSSION**

The court begins with the asserted value of the Property. In the Motion Movant asserts that the Property has a value of $270,000. Motion ¶ 1; Dckt. 167. Based upon that valuation, Movant asserts that it is not adequately protected and that cause exists to terminate the Automatic Stay. *Id*.

The Motion does not reference the basis for alleging that the Property has a value of $270,000.

The Declaration of Nitzan Shazar has been filed in support of the Motion. Dec.; Dckt. 170. Nitzan Shazar is identified as an employee of Movant. Testimony is provided as to the default in the post-petition payments.

In the Declaration, Nitzan Shazar testifies that the $270,000 value is based on the value stated on Schedule A/B filed by the Debtor in this Bankruptcy Case. Dec., ¶ 6; *Id*. Copies of Schedule A/B is provided as Exhibit D in support of the Motion. Dckt. 171. That Schedule A/B has an original filing date for the Schedule of August 29, 2018 – five years prior to the hearing on this Motion.

Movant's evidence of value of the Property is a well aged, five year old statement of value by the Debtor in this Bankruptcy Case. Thus, Movant asserts that the value of the Property is the same as it was five years prior to the hearing on the Motion.

Debtor's Amended Schedule A/B stating a value of $460,000 was not filed until July 8, 2024, after the June 14, 2024 filing of the Motion for Relief From the Automatic Stay.

Movant carries the burden of proof with respect to the value of the Property as of the time of the current Motion. 11 U.S.C. § 362(g)(1). Movant provides evidence of what the Debtor thought the Property was worth five years ago – not the current value of the Property.

As has been demonstrated in the thousands, and tens of thousands, of bankruptcy cases filed in the past five years and as is commonly known throughout the State of California, real estate prices for residential properties have dramatically increased in the past five years. This is a fact that is generally known within this court's territorial jurisdiction and one which the court can and does take judicial notice of. Fed. R. Evid. 201.

While Debtor has filed an Opposition in which his attorney argues (which is not evidence) that "The Value of the Real Property has increased since 2018;" Opposition, ¶ A.1., Dckt. 184; the court notes

that the Debtor, who is now deceased, cannot provide his testimony as the owner of the property as to his opinion of value in 2024.

Though Debtor, who is deceased, cannot provide his owner opinion as to the current value of the Property, that does not excuse the stale, five year old evidence of value or preclude the court taking judicial notice of a generally well know face as to the significant increase of the value of residential property within the jurisdiction of this court.

The court also wonders what reasonable, good faith investigation was done by Movant (as required by Federal Rule of Bankruptcy Procedure 9011) as to the value of the Property, which is its basis for asserting that there is no adequate equity cushion to protect it. As a very simple first step, Movant could have checked with some of the online real property valuation services (which, in and of themselves would not be evidence of value but which could be part of an initial investigation before making factual allegations) like Zillow.com or Redfin.com.

If such initial, no cost, check would indicate an increase in value, then further investigation by Movant would be warranted as part of its obligation under Federal Rule of Bankruptcy Procedure 9011 if it is alleging that there is not an adequate protection equity cushion protecting its secured claim.

**11 U.S.C. § 362(d)(1): 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).

That said, the existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay. A senior lienor is entitled to full satisfaction of its claim before any subordinate lienor may receive payment on its claim. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][d][i] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Therefore, a senior lienor may have an adequate equity cushion in the property for its claim, even though the total amount of liens may exceed a property's equity. *Id.* In this case, the equity cushion of over $200,000 in the Property for Movant's claim potentially provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). However, such equity cushion does not give Debtor the right to avoid making payments while the arrearage grows indefinitely.

This Bankruptcy Case was converted to one under Chapter 7 on March 22, 2024. Order; Dckt. 148. The Debtor has not yet received his discharge and the deadlines for filing nondischargeability complaints and objections to discharge have been extended through and including August 23, 2024. Order; Dckt. 189.

Shaun Howerton has been appointed as the successor representative of the deceased Debtor in this Case. Order; Dckt. 78.

The extension of these deadlines was necessary given a clerical error in the Clerk's Office and the Notice of such deadlines was not served on the creditors in this case. Civ. Min.; Dckt. 183. The deadlines were extended to insure that there would be no post-discharge arguments, and litigation, over the effect of the discharge as to creditors of Debtor.

**Denial of Relief**

With respect to the present Motion, Movant fails to carry its initial burden of proof of establishing the current value of the Property. Rather, Movant tries to use a five year old Schedule A/B filed by the Debtor in 2018 to be evidence of the value of the Property in 2024. That is clearly insufficient and not credible value of the Property in 2024.

Reviewing the court's files in this District, Movant appears as a creditor in 310 bankruptcy cases filed in this District since January 1, 2019. On Movant's website, www.freedommortgage.com/about, Movant provides the following information about its business:

> The power of home
>
> Family-founded, and operating since 1990, Freedom Mortgage helps millions of Americans buy and refinance their homes—a key step toward achieving financial stability and success. We're one of the nation's top mortgage lenders, because we are dedicated to expanding homeownership, including first-time homebuyers, as well as U.S Veterans and service members.

This does not appear to be a less sophisticate investor who was talked into making a loan to Debtor by some loan broker.

Given that Movant is a sophisticated business enterprise, the court wonders why credible evidence of the current value of the Property was not presented by Movant and Movant's experienced counsel. [Fn.1.]

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FN. 1. Movant's counsel of record in this case has appeared in 437 cases in this District since January 1, 2019.

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While the court does not excuse the successor representative of Debtor or the Trustee for payments not being made post-petition to Movant, such default does not release Movant of its burden of proof.

Based upon the evidence presented, the court cannot determine that there is no equity cushion for Movant, and to the contrary, based on having taken judicial notice of the substantial increase in values of residential property within the jurisdiction of the court during these past five years, there appears to be a substantial equity cushion as shown by Movant.

While Movant may have some consternation about being delayed another month or two before getting statutory relief from the Automatic Stay, 11 U.S.C. § 362(c)(1), due to the clerical error in the Clerk's Office, Movant will receive such relief after the August 23, 2024 extended deadlines for nondischargeability complaints and objections to discharge. Movant will have its relief from stay shortly, presuming that no party in interest files an objection to discharge, without further cost or expense. Given the apparent increase in the equity cushion given the rise in residential real estate in this District in the past five years, it appears that Movant is even more adequately protected then it was five years ago.

At the hearing, **xxxxxxx**

The Motion is denied without prejudice.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Freedom Mortgage 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** that the Motion for Relief from the automatic stay provisions of 11 U.S.C. § 362(a) is denied without prejudice.

**2. 24-22538-E-11 BAL-1** | **PLAZA ESTATES LLC** **Lewis Phon** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **6-24-24 [15]**

**ARIXA INSTITUTIONAL LENDING PARTNERS, LLC VS.**

**THE COURT WILL CALL THE RELATED STATUS CONFERENCE IN THIS CASE AT 10:00 A.M. TO BE HEARD IN CONJUNCTION WITH THIS MOTION FOR RELIEF.**

**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 not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession's Attorney, creditors, and Office of the United States Trustee on June 24, 2024. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

**INSUFFICIENT NOTICE**

Though notice was provided, Movant has not complied with Local Bankruptcy Rule 7005-1 which requires the use of a specific Eastern District of California Certificate of Service Form (Form EDC 007-005). This required Certificate of Service form is required not merely to provide for a clearer identification of the service provided, but to ensure that the party providing the service has complied with the requirements of Federal Rule of Civil Procedure 5, 7, as incorporated into Federal Rule of Bankruptcy Procedure 7005, 7007, and 9014(c).

Furthermore, Federal Rules of Bankruptcy Procedure 7004(b)(9) and 9014(b) require service on the Debtor in Possession and its attorney; service on the Debtor in Possession's attorney alone is insufficient to require the Debtor in Possession to answer and defend. *In re Cossio*, 163 B.R. 150, 154 (B.A.P. 9th Cir. 1994)), aff'd, 56 F.3d 70 (9th Cir. 1995); *In re Bloomingdale,* 137 B.R. 351, 354 (Bankr.C.D.Cal.1991); *In re Cole*, 142 B.R. 140, 143 (Bankr. N.D. Tex. 1992); *In re Love*, 242 B.R. 169, 171 (E.D. Tenn. 1999), aff'd, 3 F. App'x 497 (6th Cir. 2001); *In re Hall*, 222 B.R. 275, 277 (Bankr. E.D. Va. 1998).

**The Motion for Relief from the Automatic Stay is xxxxxxx .**

Arixa Institutional Lending Partners, LLC ("Movant") seeks relief from the automatic stay with respect to Plaza Estates LLC's ("Debtor in Possession") real property commonly known as 695 Plaza Avenue, Sacramento, CA 95815 ("Property"). Movant has provided the Declaration of Seth Davis to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

**Basic Information Regarding the Motion From Various Pleadings (not grounds stated in the Motion as required by Fed. R. Bankr. P. 9013)**

Movant argues relief from the automatic stay should be granted pursuant to 11 U.S.C. § 362(d)(1) and (2) because Movant is not adequately protected, Debtor in Possession lacks equity in the Property, and there is no plausible chance of reorganization. Mem. 2:3-5, Docket 18. Debtor in Possession failed to make regular payments in accordance with the note secured by the Property, and so Movant set a non-judicial foreclosure sale of the Property for June 11, 2024. Decl. 4:20-5:3, Docket 17. Debtor in Possession filed bankruptcy on the same day. Debtor in Possession's case is a single asset real estate case.

Movant also provides testimony that Debtor in Possession has not paid property taxes or maintained hazard and liability insurance on the Property, further giving rise to cause for relief. *Id.* at 5:4-16. Movant finally explains that Debtor in Possession has allowed the Property to fall into disrepair by not properly maintaining the premises, and so Movant's collateral is quickly depreciating in value. *Id.* at 5:17. The original loan amount was for $7,300,000, while Debtor in Possession apparently received an offer to purchase the Property for only $6,500,000 on June 5, 2024. *Id.* at 3:19, 5:21.

**Review of Motion for Relief From Stay**

In Federal Rule of Bankruptcy Procedure 9013 the United States Supreme Court sets the requirements for a motion in the bankruptcy court.

> Rule 9013. Motions: Form and Service
>
> A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The **motion shall state with particularity the grounds therefor**, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:
>
> (a) the trustee or debtor in possession and on those entities specified by these rules; or
>
> (b) the entities the court directs if these rules do not require service or specify the entities to be served.

Fed. R. Bankr. P. 9013 (emphasis added).

This Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See In re Weatherford*, 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

*In re Weatherford*, 434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

*Martinez v. Trainor*, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

The 2024 discussion of Federal Rule of Civil Procedure 7(b) in 2 Moore's Federal Practice - Civil § 7.03[4][a] includes:

> Motions Must Be Stated With Particularity
> [a] Particularity Requirement Is Flexible
>
> A motion must "state with particularity the grounds for seeking the order; and … state the relief sought." This particularity requirement gives notice to the court and the opposing party, providing the opposing party with a meaningful opportunity to respond to the movant's arguments, and providing the court with enough information to process the motion correctly. The particularity requirement is flexible and has been interpreted liberally by the courts. The liberal construction of Rule 7(b)(1) is consistent with the admonition that the civil procedure rules "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding" (see Ch. 1, Scope and Purpose).
>
> In the absence of a showing of prejudice, the substance of a motion rather than its form will usually be considered. Motions worded very generally have been found sufficiently particular when the opposing party had notice of the specific basis for the motion. When a motion does not give adequate notice of the grounds relied on, summary denial of the motion will usually follow.

Under the Local Bankruptcy Rules for the Eastern District of California, several provisions are made for law and motion practice in this District. Local Bankruptcy Rule 9004-2 provides the general requirements for the form of pleadings. These include requiring that motions, notices, objections, oppositions, replies, responses, exhibits (which may be combined into one exhibit documents), points and authorities, declarations, and proof of service be filed as separate documents. L.B.R. 9004-2 (c)(1), (d). These requirements are also stated in Local Bankruptcy Rule 9014-1 for Motion and Other Contested Matter Practice. See, L.B.R. 9014-1(d)(1), (d)(3)(A), (d)(C) (providing that "[t]he memorandum of points and authorities shall be a succinct and reasoned explanation of the moving party's entitlement to relief."), and (d)(4).

Grounds Stated With Particularity
In The Motion (Dckt. 15)

The Motion filed by Movant seeking relief from the Automatic Stay sets forth the following grounds with particularity:

A. Movant seeks an order granting relief from the automatic stay pursuant to 11 U.S.C. § 362(d). Motion, p. 1:19-21; Dckt. 15.

B. Relief is sought with respect to the Property know as 695 Plaza Avenue, Sacramento, California. *Id*.; p. 1:21-22.

C. Movant had initiated a nonjudicial foreclosure based on Debtor's defaults on the loan obligation. *Id*.; p. 1:23-24.

D. Debtor filed bankruptcy to circumvent the nonjudicial foreclosure sale. *Id.*; p. 1:24-25.

E. Relief from the stay is appropriate under 11 U.S.C. § 362(d)(1) and (2). *Id.*; p. 1:26.

No other grounds are stated, with the Motion being little more than a generic statement that would be applicable to thousands of other motions for relief from the automatic stay.

While the grounds are skinny, some would say non-existent, in the Motion, Movant found it necessary to file a ten-page Points and Authorities in support of the Motion. On first blush, the legal "points and authorities" and arguments (to the extent necessary) would be quite simple for a motion such as this. Points and Authorities; Dckt. 18.

However, the Motion begins with a half-page Introduction and then two and one-half "Statement of Fact" which appear to be the grounds upon which the relief is based. The balance of the Points and Authorities is a detailed application of law to the grounds being asserted in the first two and one-half pages of the Points and Authorities (with Movant providing a well drafted Points and Authorities).

**DEBTOR IN POSSESSION'S OPPOSITION**

Debtor in Possession filed an Opposition and supporting Declaration on July 18, 2024. Dckts. 51, 52. Debtor in Possession asserts:

1. A property's lack of equity does not automatically entitle the undersecured lender to relief from stay nor to adequate protection payments. Opp'n 2:6-8, Docket 51.

2. Debtor in Possession submits that normally an undersecured creditor would not be entitled to any adequate protection payments because it has not provided any evidence that the Property is declining in value post petition. In order for the lender to receive adequate protection payments, it must be shown that the property has been declining in value post petition. *Id.* at 3:18-22.

3. In the case at bar, the Property is the sole main asset of the Debtor in Possession who is in the business of apartment rentals and, if it is gone, there would no prospect of reorganizing. *Id.* at 6:1-3.

4. This case is still in its early stages and there is no evidence that the property is declining in value. Debtor in Possession will shortly file an application to approve the employment of a real estate broker and to list the property. *Id.* at 6:17-20.

5. Debtor in Possession is in the process of obtaining insurance to cover the bankruptcy estate. *Id.* at 7:11-13.

The Declaration of Waqar Khan has been filed in support of the Opposition. Dec.; Dckt. 52. His testimony includes:

1. The Debtor in Possession intends to file a Motion to Value the Property (presumably a motion to value Movant's secured claim) at $8,500,000. Dec., ¶ 4; Dckt. 52.

As of the court's July 30, 2024 review of the Docket, the Motion to Value was filed on July 30, 2024. Dckt. 63. The court provides a review of it below.

2. Mr. Khan provides his opinion that the Property has a value of $8,500,000. *Id.*; ¶ 5. He first offers this as the manager and member of the Debtor. However, Mr. Khan is not the owner of the Property and cannot provide his "owner opinion" as to value. Second, Mr. Khan states that he has been buying and selling apartment buildings for years, and thus is qualified to provide his opinion (as an expert) as to value. No basis has been shown for Mr. Khan to so qualify as an expert and he provides no testimony to assist the court in making such factual determination. See, Fed. R. Evid. 702.

3. Mr. Kahn notes that Movant has not provided evidence of the value of the Property, but references some "bottom feeder" offers that were made in light of the Debtor's pre-bankruptcy financial distress and imminent nonjudicial foreclosure sale. *Id.*; ¶ 6.

4. Mr. Kahn states that his son is a guarantor for the debt owed Movant, but no financial information about the son is provided. *Id.*; ¶ 11.

**MOVANT'S REPLY**

On July 25, 2024, Movant filed a Reply to Debtor in Possession's Opposition. Movant states:

A. Debtor in Possession has failed to meet its burden in showing that relief from stay is unwarranted, Movant having made its *prima facie* case for relief. Reply 2:17-21, Docket 56.

B. Movant is not protected by an equity cushion, even considering Debtor in Possession's unsupported valuation of $8,500,000. *Id.* at 2:22-28. The highest offer Debtor in Possession has received for the Property was $7,700,000, well short of Movant's claim. *Id.* at 5:9-10.

C. Contrary to Debtor in Possession's assertions, Movant has submitted evidence that the Property is depreciating in value. *Id.* at 3:10-21.

D. Debtor in Possession has admitted the Property is not insured, which is further case for granting relief. *Id.* at 3:22-4:8.

E. Debtor in Possession posits that the guaranty from Asad Khan constitutes adequate protection, but Debtor in Possession fails to offer any legal support for such a position. In fact, courts have held that guaranties do not provide adequate protection. *Id.* at 4:9-11.

F. Debtor in Possession has no reasonable possibility of a successful reorganization, so 11 U.S.C. § 362(d)(2) relief should also be granted. *Id.* at 5:19-26.

**Initial Review of Motion to Value Movant's Secured Claim**

On July 30, 2024, the Debtor in Possession filed a Motion to Value Collateral of Movant. 11 U.S.C. § 506(a) provides that the court may determine the value of a creditor's secured claim, which necessarily requires the court to make a finding as to the value of the collateral. The grounds stated with particularity in the Motion (Fed. R. Bankr. P. 9013) include (emphasis added):

A. The collateral to be valued is that which secured Movant's secured claim. Debtor in Possession states that the value of the collateral is $8,500,000 and Movant's secured claim is $8,300,000. Motion, ¶ 1; Dckt. 63.

On its face, this allegation appears to state that Movant's secured claim is oversecured by $200,000.

B. The Debtor in Possession bases the value of the Property based on its own investigation and the Limited Liability Company seeks to provide it's opinion as to value pursuant to Federal Rule of Evidence 701. *Id.*; ¶ 3.

Federal Rule of Evidence 701 allows for a non-expert witness to provide opinion testimony which Rule states:

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

4 Weinstein's Federal Evidence § 701.03 discusses this opinion testimony stating that it must be made based on the witnesses personal knowledge and based on information from others or other specialized knowledge. Additionally, that the lay person opinion testimony cannot be "disguised" expert witness testimony.

The Declaration of Waqar Khan, the Managing Member of Debtor, has been filed in support of the Motion to Value. Dckt. 65. He testifies that he has reviewed values of comparable properties by inquiring into internet websites, newspapers ads, and neighborhood listings. *Id.*; ¶ 3. Further, that Mr. Khan has been a real estate investor for more than twenty years and is familiar with investment properties similar to the Property at issue. *Id.*; ¶ 4. Mr. Khan then states his opinion that the Property is worth $8,500,000. No other information is provided.

In the legal Points and Authorities (in the argument portion) filed by Movant for the Motion for Relief, it is asserted that the Property has only a value of $6,500,000 (Motion, ¶ 1; Dckt. 18), thus Movant appears to admit that it is undersecured by more than ($150,000).

**DISCUSSION**

The court begins with the evidence of value of the Property which has been provided by Movant. The only testimony in support of the Motion is the Declaration of Seth Davis, a Managing Director of Arixa Capital Advisors, LLC, "the ultimate parent of Arixa Institutional Lending Parties, LLC [the Movant]." Dec., ¶ 1; Dckt. 17. Mr. Davis provides testimony as to the documentation supporting he claim and defaults.

Mr. Davis further testifies that the Debtor failed to pay property taxes for the 2022/2023 and 2023/2024 tax years, with total unpaid taxes in the amount of ($188,686.75) outstanding. Dec., ¶ 17; *Id*. Mr. Davis directs the court to Exhibits 7 and 8 (Dckt. 19), which is a Sacramento County Online Property Tax Bill Information statement and a Fidelity National Title report showing the defaults. Neither of the Exhibits have been authenticated by the persons making the Statement or as otherwise permitted by the Federal Rules of Evidence.

With respect to the condition of the Property, Exhibit 9 (Dckt. 19), Movant provides a copy of a budget prepared by Debtor which Movant asserts shows that there are ($360,000) in repairs that need to be made to the Property. The work to be done is identified as: (1) Painting the Building, ($60,000); (2) Replace Roofing on Backside, ($150,000); and Replace AC Units throughout the building, ($120,000). There is also a ($30,000) expense for landscaping.

Movant offers no credible evidence as to value. There are no appraisal reports, no expert opinions as to value, or other evidence as to the current value of the Property. Movant makes general, vagues references to some offers that were made on the eve of the pending nonjudicial foreclosure sale, but does not provide th e court with a basis for finding that they represent the fair market value of the Property.

On Schedule A/B (Dckt. 32 at 6) Debtor listed the Property as having a value of $8,500,000.

However, as of the filing of the Motion and filing of the Opposition, it is undisputed that the insurance on the Property has lapsed. This does put Movant at financial peril and is a failure of the Debtor and now the Debtor in Possession of doing one of the most basic things in owning real property.

Seeing this undisputed default and the Debtor in Possession stating that it is seeking to get insurance, the court has further reviewed the Schedules and Statement of Financial Affairs.

The court begins with Schedule A/B which states all of the real and personal property assets of the Debtor as of the commencement of this Bankruptcy Case on June 11, 2024. The assets identified on Schedule A/B are:

| | | |
|---|---|---|
| 1. | Cash | $ 100.00 |
| 2. | Checking Account | $ 1,000.00 |
| 3. | Accounts Receivable | $ 6,000.00 |
| 4. | Office Equipment | $ 500.00 |
| 5. | Real Property | $8,500,000.00 |

Dckt. 32 at 1-8.

The court notes that the Debtor had no: (1) inventory or supplies, (2) no office furniture, (3) minimal office equipment, and (4) no machinery or equipment. *Id.*

On the Statement of Financial Affairs Debtor reports having gross rental income of $930,000 in 2023 and $780,000 in 2022. Dckt. 38 at 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).

As an initial matter, Debtor in Possession notes that Movant asserts that it is grossly undersecured (based on Movant 's asserted value of $6,600,000), which the Debtor in Possession argues that Movant is oversecured based on the $8,500,000 valuation. Debtor in Possession argues that if Movant is undersecured, then Movant is not entitled to adequate protection payments. Status Conference Statement 2:22-24, Docket 54. Debtor in Possession then goes on to explain the Property is actually worth $8,500,000, which would mean Movant's claim of $8,259,878.16 would be slightly oversecured.

Debtor in Possession also asserts that an undersecured creditor is not entitled to adequate protection payments when the creditor has not shown its collateral is depreciating in value. Debtor in Possession appears to believe that it is entitled to sit in bankruptcy, for free, and wait on a sale that may or may not occur within four months.

On Schedule D the Debtor did not list there being any secured property tax obligation. Dckt. 33 at 1. Debtor only listed Movant. Movant has provided the court with documents stating that here is a substantial outstanding property tax obligation in the amount of approximately ($188,686.75). While the court has not been presented with properly authenticated or certified documentation of such tax obligations, it appears that if such exists then the Debtor, now serving as the fiduciary Debtor in Possession and the Debtor in Possession counsel should know and can clearly report whether there is such a tax obligation.

In his Declaration, Waqar Khan did not rebut the assertion of their being a tax obligation. Given that property taxes have a senior lien priority to subsequently recorded consensual liens, and for which there is a substantial interest rate on the taxes, if such exist then there will be eating into the value of Movant's collateral - the Property.

At the hearing, **XXXXXXX**

Debtor in Possession cites to the case *In re Weinstein* to support its argument. *In re Weinstein*, 227 B.R. 284 (B.A.P. 9th Cir. 1998). That case has dissimilarities from the case here because the main secured creditor there made an election under 11 U.S.C. § 1111(b)(2), so its entire claim had to be treated as an allowed secured claim. That election rendered that creditor's claim as wholly secured, no longer being an undersecured creditor. *Id.* at 294. Therefore, *Weinstein* does not support the proposition that an undersecured creditor is not entitled to adequate protection payment unless its collateral is depreciating. Rather, *Weinstein* supports the proposition that a secured creditor who makes an election under 11 U.S.C. § 1111(b)(2) is not entitled to adequate protection payments because it is entitled to retain a lien for the full amount of its claim as well as receive "a stream of payments equal[ing] the present value of the collateral. . . but the sum of the payments must be in an amount equal at least the creditor's total claim." *Id.*

Collier on the issue of adequate protection payments states:

> An entity is entitled to adequate protection as a matter of right, not merely as a matter of discretion, when the entity is stayed from enforcing its interest, when the estate proposes to use, sell or lease property in which the entity has an interest, and when property on which the entity has a lien is to be used as collateral for a loan. This protection is provided both as a matter of policy and, arguably, as a matter of constitutional law.

3 COLLIER ON BANKRUPTCY ¶ 361.02.

At this juncture Movant has not shown that the Property is depreciating in value. While it may have declined in value due to pre-petition lack of maintenance and repairs, that is the condition that it was in as of the filing of this Bankruptcy Case and now is in while property of the Bankruptcy Estate.

However, if there are senior lien priority taxes that are owed and accruing interest, such would be eating away from the current value of the Property as Movant's collateral.

At the hearing, **XXXXXXX**

**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); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 Debtor in Possessions are rehabilitated, not reorganized).

Here, Movant has not provided the court with evidence of the value of the Property. Rather, the only "evidence" provided is the value of $8,500,000 stated on Schedule A/B. The"Offer Matrix" (Exhibit 1; Dckt. 58), for which there is testimony that it was provided to Movant by the Managing Member of the Debtor in Possession Waqar Khan, show offers being made on the eve of the nonjudicial foreclosure sale, not offers showing the fair market value of the Property.

At the hearing, **XXXXXXX**

~~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, 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.

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 Arixa Institutional Lending Partners, LLC("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> ~~**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, 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 695 Plaza Avenue, Sacramento, CA 95815 ("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.

**3.** **23-23242-E-7** **BRYAN GALLINGER** **MOTION FOR RELIEF FROM**
**JTK-2** **Peter Macaluso** **AUTOMATIC STAY**
**7-1-24 [156]**

**DOUGLAS LEVICK 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 7 Trustee, all creditors and parties in interest, and Office of the United States Trustee on July 1, 2024. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

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

Douglas F. Levick and Melba J. Levick, as Trustees of the Levick Family Trust, and Ron Levick ("Movant") seek relief from the automatic stay with respect to Bryan Gary Gallinger's ("Debtor") real property commonly known as 9421 Fair Oaks Blvd., Fair Oaks, California ("Property"). Movant has provided the Declarations of Terrance Kilpatrick and Doug Levick to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Decl., Dockets 158, 159.

Movant also argues that it seeks relief *in rem* as to the Property so it may pursue its rights in the Property during any potential future bankruptcy cases, but cites no code sections or applicable law in support of that request. The court therefore could construe this as a request to seek relief under 11 U.S.C. § 362(d)(4). However, Movant has not stated a legal basis for such "*in rem*" relief.

Movant filed this Motion based on Debtor's previously confirmed Chapter 13 Plan, which stated:

> 7.10 If Debtor is unable to sell the property by 05/31/2024, then the Debtor or Secured Creditors or the Trustee may request that the Court appoint a third

party to act in the nature of a receiver for the purpose of selling the Property.

7.11 If Debtor or any third party appointed by the Court is unable to sell the Property by not later than 06/30/2024, then Secured Creditors shall have relief from the Automatic Stay in Bankruptcy, 11 U.S.C. § 362, in order to complete nonjudicial foreclosure.

Plan 8, Docket 118.

Movant argues Debtor has not complied with these provisions as the Debtor did not sell the Property by the deadline, and so relief should be granted. Movant argues demands against the Property in the context of a sale, including closing costs and the Chapter 13 Trustee's demand, total $621,708.63. Mot. 3:5-6, Docket 156. Movant provides evidence it has not received its adequate protection payments for the months of May and June of 2024. Decl. 2:1-5, Docket 158.

However, of note, the same day Movant filed this Motion, Debtor converted the case to one under Chapter 7. Docket 155. Geoffrey Richards was appointed as the Chapter 7 Trustee, but the meeting of creditors has not yet been held.

**DEBTOR'S OPPOSITION**

Debtor filed an Opposition and Statement of Disputed Facts on July 17, 2024. Dockets 178, 179. Debtor asserts:

1. Are these "Assets" (Subject Property & Related Law Suit) inter-related? Opp'n. 3:8-9, Docket 179.

2. Are there any "Assets" Non-Exempt & Viable for the Trustee to liquidate for the benefit of creditors? *Id.* at 3:10-11.

3. Does the Debtor &/or Trustee have Equity in these inter-related Assets? *Id.* at 3:12-13.

4. Can these "Assets" be liquidated for the benefit of creditors? *Id.* at 3:14-15.

5. There is equity in the Property. *Id.* at 4:1.

6. The Chapter 7 Trustee should be allowed an opportunity to sell the Property or prosecute the related adversary proceeding against Movant. *Id.* at 4:2-4.

7. As this case has recently been converted, and has yet to have a meeting of creditors, this motion should be continued between 30 to 60 days to allow the Trustee to review these claims. *Id.* at 4:5-8.

**MOVANT'S REPLY**

On July 25, 2024, Movant filed a Reply to Debtor's Opposition. Docket 181. Movant states:

1. As the case is now in Chapter 7, it being established there is no equity and the Property is not necessary for a reorganization, relief under 11 U.S.C. § 362(d)(2) should be granted. *Id.* at 2:1-16.

2. Relief is also warranted under 11 U.S.C. § 362(d)(1) as Debtor has defaulted in making the adequate protection payments. Movant has not received a payment since April 30, 2024. *Id.* at 2:20-24.

3. Debtor also defaulted in performance of his confirmed Corrected First Amended Plan of Reorganization by failing to sell the Property by the deadline of June 30, 2024. *Id.* at 2:25-28.

4. There is no evidence in support of Debtor's Opposition. *Id.* at 3:7-8.

5. The related adversary proceeding is subject of an Order to Show Cause re: Dismissal dated July 15, 2024, for several deviations from Federal court adversary proceeding litigation, including failure to name correct defendants and failure to correctly serve process. *Id.* at 3:15-18.

6. There is no evidence of property insurance. *Id.* at 3:28.

7. Debtor has presented no evidence of any "fair market analysis" of the Property at a value of $550,000.00. *Id.* at 4:3-4.

8. Movant answers "no" to Debtor's questions in the Disputed Material Facts. *Id.* at 4:5-6.

9. There are no non-exempt and viable assets for the Chapter 7 Trustee to liquidate in this case. *Id.* at 4:9-13.

**DISCUSSION**

This Motion and the underlying Bankruptcy Case present the court and Parties with some interesting and out of the ordinary facts. The existence of the Secured Claim and Movant seeking relief from the Stay to foreclose is fairly standard.

However, this Bankruptcy Case was filed on September 18, 2023, as a Chapter 13 Case in which the Debtor pursued (and was given time by the court) an arms length, properly marketed sale of the Property to achieve its fair market value. Which Debtor and Movant disagreed over the value of the Property, the bankruptcy system worked in Chapter 13 to allow the Debtor the ability to market and sell the Property.

The court issued its Order granting the Motion to Sell the Property on June 6, 2024. Order; Dckt. 147. The sale price for the Property was $515,000. *Id.*

The court's Civil Minutes for June 4, 2024 hearing on the Motion to Sell the Property provides the background and back story relating to the Parties and Debtor's efforts to sell the Property. Civ. Min.; Dckt. 150. Movant raised several grounds opposing the Motion to Sell.

In the Civil Minutes the court discusses the Economic Realities for both the Debtor and Movant. *Id*., at 5-6.

At the end of the day the court granted the Motion to Sell as a final "put up or shut up" resolution point for both Movant and Debtor.

The Sale having not been completed, on July 1, 2024, the Debtor voluntarily converted this Case to one under Chapter 7. Ntc. of Conversion; Dckt. 155. This is the same day Movant filed this Motion for Relief From the Stay.

Terence Kilpatrick, Esq., counsel for Movant, provides his Declaration stating his efforts with the Trustee to determine why adequate protection payments had not been made to Movant. Dckt. 158. Exhibit B attached to the Declaration is a copy of the Chapter 13 Trustee's Demand into the sale escrow, with the Demand totaling ($563,443.71), well in excess of the $515,000.00 sales price authorized by the court. *Id*. at 7-8.

Though served with this Motion on July 2, 2024 (Amd. Cert. of Serv.; Dckt. 165), no opposition has been filed by Geoffrey Richards, the Chapter 7 Trustee.

Amended Schedule C filed on July 15, 2024, by Debtor lists his interest in the Property as having a value of $525,000.00, with Debtor claiming a $30,431 exemption in the Property. With the Debtor's exemption and the ($477,395.17) for Movant's Claim and ($30,106.70) for the County Tax Collector's Claim shown on the Trustee's July 7, 2024 demand in Escrow, the value of the collateral is exhausted.

Here, Debtor's Opposition is that by Debtor's calculations there should be $171,132 in equity in the property for Debtor and the Bankruptcy Estate. Opp.; Dckt. 179. However, this is based on Debtor asserting the right to recover $100,000 from Movant based on the Complaint Debtor filed April 19, 2024. Adv. 24-02038. That Adversary Proceeding was not actively prosecuted by the Debtor while this case was under Chapter 13 , and with the conversion to Chapter 7, such action is under the control of the Chapter 7 Trustee.

Debtor also asserts that the Property taxes being asserted by Sacramento County are not the ($26,621.15) as set forth in Proof of Claim 3-1, but only ($16,836.46). No evidence is presented in support of this contention and the Debtor did not file an objection to Proof of Claim 3-1.

**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).

While Debtor asserts that he has various disputes he may want to litigate, to the extent that they are his disputes, and not those of the Trustee, he may do so. If they are property of the Bankruptcy Estate, then the Debtor has had a month to meet with the Trustee and either obtain an abandonment of such rights or coordinate with the Trustee for the Trustee to prosecute them.

In the Opposition, Debtor argues that the Property is worth more than Movant's claim, so the Trustee should be given the opportunity to try and sell the Property – notwithstanding the Debtor, as the fiduciary Chapter 13 Debtor, having attempted to but unable to sell the Property prior to conversion.

While the Debtor would like to continue in "control" of this case as if he were the Chapter 13 Debtor, his assertions are what he wants the Chapter 7 Trustee to do. The Chapter 7 Trustee has not opposed the Motion.

If Debtor wants to litigate with Movant over disputed rights or interests, he must actively do so, and not merely re-raise them as a basis for further delay.

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); 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, 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).

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 ($477,395.71), which is based on the ($453,675.57) set forth by Movant in Proof of Claim 1-1 filed on October 4, 2023 (there being at least nine months of interest accrual since filing).

To view this in the more favorable light to the Debtor, the court considers the value of the Property for this Motion to be $525,000, as stated in Amended Schedules A/B filed by Debtor, slightly higher than the $515,000.00 contract price that the Debtor obtained from his active marketing of the Property with a Real Estate Broker. Am. Schedule A/B 4:1.1, Docket 93.

If the Property is worth $525,000, after deducting 8% for real estate commission and costs of sale, there would be $483,000 in net proceeds. After deducting ($26,621.15) for property taxes as set forth in Proof of Claim 3-1, that leaves only $456,378.85. Thus, there is no equity for the Bankruptcy Estate based on the evidence presented.

This being a Chapter 7 case, there is no reorganization to be undertaken.

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.

**11 U.S.C. § 362(d)(4)**
**Prospective Relief from Future Stays**

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.*

Here, Movant has not set forth grounds for 11 U.S.C. § 362(d)(4) relief. While making a general reference in "i*n rem*" relief, that does not constitute as stating grounds for 11 U.S.C. § 362(d)(4) relief.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. In this case, Movant has not made a showing that Debtor has engaged in a scheme to delay, hinder, or defraud creditors. Movant has not offered any facts or evidence justifying the court in granting relief under this section of the Code. The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation.

**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, as Debtor has had no less than 18 months to act and sell the Property, that the court grant relief from the Rule as adopted by the United States Supreme Court. Mot. 4:18-24, Docket 156.

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 Douglas F. Levick and Melba J. Levick, as Trustees of the Levick Family Trust, and Ron Levick ("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 9421 Fair Oaks Blvd., Fair Oaks, 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 relief pursuant to 11 U.S.C. § 362(d)(4) is denied.

**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.

**4. 24-20145-E-7 DONALD DUPONT**
**VR-1 Eric Schwab**

**CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY**
**6-13-24 [98]**

**CONFIDANT BOARD, LLC 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 not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on June 13, 2024. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

**SUFFICIENT NOTICE**

Federal Rules of Bankruptcy Procedure 7004(b)(9) requires service on the Debtor and his attorney; service on the Debtor's attorney alone is insufficient to require the Debtor to answer and defend. *In re Cossio*, 163 B.R. 150, 154 (B.A.P. 9th Cir. 1994)), aff'd, 56 F.3d 70 (9th Cir. 1995)*; In re Bloomingdale,* 137 B.R. 351, 354 (Bankr.C.D.Cal.1991)*; In re Cole*, 142 B.R. 140, 143 (Bankr. N.D. Tex. 1992); *In re Love*, 242 B.R. 169, 171 (E.D. Tenn. 1999), aff'd, 3 F. App'x 497 (6th Cir. 2001); *In re Hall*, 222 B.R. 275, 277 (Bankr. E.D. Va. 1998). Service here was made solely on Debtor's counsel, Eric Schwab.

Sufficiency of Service was addressed at the initial hearing on this Motion and it was continued pursuant to the stipulation of the Parties.

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

**The Motion for Relief from the Automatic Stay is xxxxxxx.**

Confidant Board LLC ("Movant") seeks relief from the automatic stay with respect to Donald Fred DuPont, Jr.'s ("Debtor") real property commonly known as 2840-2970 Delmar Ave., Penryn, Ca ("Property"). Movant has provided the Declaration of Arik Levy to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Decl., Docket 100.

The hearing on this Motion was originally scheduled for July 11, 2024, but this court granted the *ex parte* Stipulation to continue the hearing to July 25, 2024. Docket 142. However, due to a scheduling conflict of the court, the court had to reschedule the hearing for August 1, 2024. Am. Order, Docket 145.

Movant argues Debtor is in default for multiple pre and postpetition monthly payments of $10,166.67 each, with the last payment having been received on February 6, 2023. Decl. 3:4-8, Docket 100. Movant argues Debtor was delinquent in the amount of $230,942.19 as of the filing of this Motion. *Id.* Movant's claim is in the amount of $1,350,574.19, but Movant is in second position. Decl. 3:3, Docket 100. Creditor Even Daily holds a first position deed of trust in the Property in the approximate amount of $715,000. Mot. 2:27-3:1, Docket 98.

**CHAPTER 7 TRUSTEE'S RESPONSE**

Geoffrey Richards ("the Chapter 7 Trustee") filed a Response on July 18, 2024. Dckt. 161. The Chapter 7 Trustee asserts that Debtor's counsel, the Chapter 7 Trustee, and Movant are attempting to work out a deal to sell the Property and resolve Debtor's homestead exemption. Resp. 1:21-25, Docket 161. However, no such agreement has yet been reached, and if the parties cannot reach an agreement, the Chapter 7 Trustee likely has no opposition to this Motion. *Id.* at 1:26-2:3.

**DEBTOR'S DECLARATION**

Debtor filed a Declaration in response on July 17, 2024. Docket 159. Debtor states:

1. Debtor is a licensed real estate agent and broker with two offices and 24 agents in Sonoma, in total for more than 35 years. Decl. 1:16-17, Docket 159.

2. Debtor is also licensed for 43 years as a (B) General Building Contractor as well as a (C-10) General Electrical Contractor building and developing real estate throughout Sonoma County. *Id.* at 1:17-19.

3. In 1996 Debtor received an Award of Merit from the Sonoma League for Historical Preservation. *Id.* at 1:19-20.

4. Debtor was raised in Sonoma Valley on a 33-acre vineyard in Glen Ellen, and his mother retired from Buena Vista Winery Sonoma. *Id.* at 1:20-22.

5. As such, Debtor has direct extensive experience in viticulture and construction, and the current market value of the subject real Property based on replacement value exceeds $3,500,000.00. *Id.* at 1:22-23.

6. Debtor also includes his cost basis appraisal. *Id.* at 3.

7. Debtor requests 90 days for a broker, Craig Beechum, to market and sell the Property at a price higher than the secured debt. *Id.* at 2:5-7.

**MOVANT'S REPLY**

On July 23, 2024, Movant filed a Reply to Debtor's Declaration. Docket 172. Movant states:

1. Debtor has not offered any adequate protection of Movant's collateral. Speculative future sale proceeds do not constitute adequate protection. *Id.* at 1:12-13.

2. Even if Debtor's valuation of the Property is accepted, the equity in the property does not constitute adequate protection. As this Court held, an equity cushion that is rapidly eroding does not provide adequate protection. *In re Billman*, Case No. 19-90989-E-7 (Bankr. E.D. Cal. Jun. 12, 2020). The equity cushion is eroding here as Debtor is not paying property taxes and interest and unpaid postpetition payments continue to accrue. *Id.* at 1:20-26.

3. The potential for a surplus resulting from the sale of the Property does not justify denying relief from stay. The Bankruptcy Code prioritizes the protection of secured interests over the interests of unsecured creditors, and the creditor's secured interest must be adequately protected. *Id.* at 2:8-17.

**DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt owed to Movant secured by this asset is determined to be $1,350,574 (Decl. 3:3, Docket 100), while the value of the Property is determined to be $3,050,000, as stated in Schedules A/B filed by Debtor. Schedule A/B 1:1.1, Docket 95. Creditor Even Daily also holds a first position deed of trust in the Property in the approximate amount of $715,000. Mot. 2:27-3:1, Docket 98.

**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.

However, the Chapter 7 Trustee stated a deal is in the works but has not yet been reached. Resp., Docket 161. If a deal cannot be reached, that Chapter 7 Trustee has indicated he will likely not oppose the Motion. Meanwhile, Debtor requests a 90 day extension to have his broker market and sell the Property for at least what has been invested into it. Debtor has not offered any form of adequate protection payments

during this 90 day period. Movant has provided evidence that its equity cushion is disappearing as the case draws on, suggesting the equity cushion alone may not serve as sufficient reasonable adequate protection.

At the hearing, **xxxxxxx**

~~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 Confidant Board LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, 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 2840-2970 Delmar Ave., Penryn, Ca ("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.

# FINAL RULINGS

**5. 24-21363-E-12 KMT-1** | **JEDIAH HOFFMAN** | **Noel Knight** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **6-6-24 [35]**

**COMMERCIAL CREDIT GROUP INC.**
**VS.**

**Final Ruling: No appearance at the August 1, 2024 Hearing is required.**
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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, Chapter 12 Trustee, creditors and parties in interest, parties requesting special notice, and Office of the United States Trustee on June 6, 2024. 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 in Possession, creditors, the Chapter 12 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.

**The Hearing on the Motion for Relief from the Automatic Stay has been continued to 10:00 a.m. on August 22, 2024,** by prior order of this court (Dckt. 74), pursuant to the Joint *Ex Parte* Motion and Stipulation of the Parties.

**REVIEW OF THE MOTION**

Commercial Credit Group Inc. ("Movant") seeks relief from the automatic stay with respect to the following two assets:

1. A 2007 Caterpillar D10T Crawler Dozer, Serial No. RJG01025 ("2007 Crawler")

2. A 1997 Caterpillar D10R Crawler Dozer, Serial No. 3KR00943 ("1997 Crawler") (collectively, "Crawlers").

The Crawlers are a type of bulldozer with a heavy plate used to load and push heavy objects, ideal for maneuvering over uneven surfaces and hauling heavy materials.

The moving party has provided the Declarations of Michael Mikulan and Gabriel Herrera to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Jediah Hoffman, the Debtor and Debtor in Possession. Decls., Dockets 37, 38. According to Movant, Mr. Hoffman testified at the 341 Meeting that the Crawlers were not necessary to reorganize in his Chapter 12 case. Mot. 3:1-3, Docket 35. However, Debtor in Possession's counsel explained at a subsequent status conference that the Crawlers may be needed by Debtor in Possession to reorganize. *Id.* at 3:4-5.

Debtor executed a promissory note to Creditor in the amount of $517,770, secured by the Crawlers, containing the following terms:

> (a) repayment was to be in consecutive monthly installments of 22 installments in the amount of $21,690.00 and 1 installment in the amount of $40,590.00; (b) payments were to begin on January 15, 2023; (c) upon default, including by failing to make payment, default interest would accrue at 18% per annum, plus collection and other charges, and reasonable attorneys' fees; (d) the proceeds of the loan were to refinance other loans issued by the Creditor to the Debtor in Possession; and (e) the Debtor in Possession provided a blanket lien against his assets, including against the 2007 Crawler and the 1997 Crawler.

*Id.* at 3:12-18. Debtor immediately defaulted under these terms, failing to make a single installment. Creditor repossessed various items of collateral, including the Crawlers, prepetition. *Id.* at 23-27.

The Creditor does not significantly dispute the Debtor in Possession's Schedule D valuation of the collateral identified. Post-petition, the Creditor has received and forwarded to the Debtor in Possession offers for the purchase of the 2007 Crawler at $243,000, and the 1997 Crawler at $42,000. *Id.* at 4:6-8. Creditor continues to accumulate storage fees and interest while in possession of the Crawlers.

The 2007 Crawler has a value of $243,000, with liens encumbering it in the amount of $776,008.73. *Id.* at 5:15-19. The 1997 Crawler has a value of $42,000 with liens encumbering it also in the amount of $776,008.73. *Id.* As such, there is no equity in the Crawlers. Creditor requests relief pursuant to 11 U.S.C. § 362(d)(2) as the Crawlers are not effective for a reorganization and there is no equity in the Crawlers. In the alternative, if the court finds that the Crawlers are necessary for an effective reorganization, Creditor requests the Motion be denied without prejudice.

**OPPOSITION FILED BY DEBTOR IN POSSESSION**

On June 14, 2024, the Debtor in Possession filed Opposition Pleadings. Dckts. 43-45. In the Opposition it is asserted that the Crawlers are necessary "for the success of the Debtor's business endeavors and the success and feasibility of the Debtor." Opposition, p. 2:11-13; Dckt. 43. The court is directed to the Declaration of the Debtor in Possession is support of this statement.

In looking at the above stated ground of opposition, it is not stated that the equipment is necessary for an effective reorganization.

The Debtor in Possession then states that "the Debtor" has obtained Liability Insurance for all the heavy equipment being used in 'his' ranch and farm operations." *Id*.; p. 2:15-17.

The Debtor in Possession then requests an Evidentiary Hearing,

> so that it can evaluate the live testimony of agricultural experts in order to make its determination on the condition of the Property and its trees for purposes of ruling upon Movant's request for relief from the stay under Section 362(d)(1).

*Id*., p. 2:18-22.

In his Declaration, the Debtor in Possession provides testimony, as summarized by the court, including the following (identified by paragraph number in the Declaration):

> 1. I am a resident of the State of California and am over eighteen years of age. The following facts is within my personal knowledge, except as to those matters, if any, which are stated on information and belief and as to those matters I believe to be true; accordingly, if called as witness I could and would, competently testify thereto

It appears that the Debtor in Possession is stating that he does not have personal knowledge of all of what he is testifying to, as required by Federal Rule of Evidence 602, [Fn.1.] but merely has been informed from some source or believes it to be true because it supports his Opposition.

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FN. Fed. R. Evid. 602.Need for Personal Knowledge (emphasis added)

> A witness may testify to a matter **only if** evidence is introduced sufficient to support a finding that the **witness has personal knowledge of the matter**. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Additionally 28 U.S.C. § 1746 set forth the requirements for declarations and the affirmation that must be provided by the declarant (emphasis added):

> § 1746. Unsworn declarations under penalty of perjury
>
> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or **proved by the unsworn declaration**, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

> (1) If executed without the United States: "**I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date)**.
>
> (Signature)".
>
> (2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).
>
> (Signature)".

The Debtor in Possession has not provided a declaration that complies with 28 U.S.C. § 1746.

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In the Declaration, the Debtor in Possession state that the court:

> 2 . BE ADVISED, that ALL of my heavy equipment, particularly my Caterpillar D10T and my Caterpillar D10R and necessary for my income streams and for a feasible Chapter 12 Plan.

With this statement, the Debtor in Possession dictates to the court a finding of fact and does not provide the court with any evidence of how and why the two Crawlers are necessary for generating monies to fund a Chapter 12 Plan.

The Debtor in Possession continues, telling the court to "BE FURTHER ADVISED" that he has sent to Movant a Certificate of Liability Insurance covering all of "his" equipment, and directs the court to see the Certificate of Insurance as an exhibit. *Id*., ¶¶ 4, 5.

The Exhibit is filed at Dckt. 45, without a cover page identifying this Bankruptcy Case and the contested matter to which it relates. The Certificate of Liability Insurance is dated June 7, 2024, and states that the Insured is "Westside Production Solutions." Dckt. 45, p. 1. It is not clear from the Schedules and Statement of Financial Affairs who "Westside Production Solutions," the insured, is.

On page 2 of the Exhibit is a document titled "Inland Marine Coverage Part Contractors Equipment Coverage Form Supplemental Declarations" which is dated June 7, 2024. The insured person named is "Westside Production Solutions, Inc." Neither the Debtor in Possession nor the Bankruptcy Estate are named as insureds. *Id*.

On all of the other pages of the Exhibit, the identified insured is "Westside Production Solutions, Inc."

The Debtor in Possession has also filed a Statement of Disputed Facts, Dckt. 46, stating the disputed fact as to whether or not the Crawlers are necessary for Debtor's effective reorganization.

While stating this opposition, the Debtor in Possession offers no evidence of what possible reorganization will be sought, what business operations are ongoing in the Bankruptcy Estate, and how such will be funded.

**DISCUSSION**

**11 U.S.C. § 362(d)(2)**

A Debtor in Possession 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 in Possession or estate has no equity in property, it is the burden of the Debtor in Possession 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); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor in Possession or the Estate. 11 U.S.C. § 362(d)(2).

However, importantly, the Motion includes some indication that Debtor in Possession may argue the Crawlers are necessary for an effective reorganization. Debtor has filed an Opposition making such a conclusory statement, but offering no evidence of how or why such may be necessary for an effective reorganization.

**June 20, 2024 Hearing**

At the hearing, the court addressed the evidentiary shortfalls with respect to the Opposition. This being a Motion filed with notice provided pursuant to Local Bankruptcy Rule 9014-1(f)(2), the written Opposition was treated by the court as the oral opposition and has set the briefing schedule based on that.

The hearing on the Motion for Relief from the Automatic Stay is continued to 10:00 a.m. on August 1, 2024. On or before July 12, 2024, Amended Opposition to the Motion shall be filed and served by the Debtor in Possession. Reply pleadings, if any, shall be filed and served on or before July 19, 2024.

**August 1, 2024 Hearing**

The court continued this hearing as counsel for Debtor in Possession reported that he would likely argue the Crawlers, the collateral that is subject to the Motion, are necessary for an effective reorganization. The court set the following deadlines in continuing this hearing: "On or before July 12, 2024, Amended Opposition to the Motion shall be filed and served by the Debtor in Possession. Reply pleadings, if any, shall be filed and served on or before July 19, 2024." Order, Docket 51. The parties complied with their respective time lines.

On July 11, 2024, Debtor in Possession filed a Declaration in support of the proposition that the Crawlers are going to be necessary for an effective organization. Docket 61. Debtor in Possession states:

1. The Crawlers have proved integral to Debtor in Possession's profitability over the course of many years and will in turn will be critical to his effective organization in that the income to be derived from the Crawlers will assist in supporting Plan payments. Decl. 2:9-12, Docket 61.

2. Debtor in Possession provides an income history for each Crawler, reporting that since 2016 the 1997 Crawler has cumulatively earned

$2,456,200, and since 2018 the 2007 Crawler has cumulatively earned $1,834,000. *Id.* at 3:15, 3:25.

3. Debtor in Possession provides the following tables of income projections for each Crawler:

| **1997 Crawler** | **2025** | **2026** | **2027** | **2028** | **2029** |
|---|---|---|---|---|---|
| Deep Ripping | $300,000 | $300,000 | $300,000 | $300,000 | $300,000 |
| Pushing Dirt/ Leveling | $250,000 | $250,000 | $250,000 | $250,000 | $250,000 |
| Rental | $360,000 | $360,000 | $360,000 | $360,000 | $360,000 |

| **2007 Crawler** | **2025** | **2026** | **2027** | **2028** | **2029** |
|---|---|---|---|---|---|
| Deep Ripping | $500,000 | $500,000 | $500,000 | $500,000 | $500,000 |
| Pushing Dirt/ Leveling | $400,000 | $400,000 | $400,000 | $400,000 | $400,000 |
| Rental | $600,000 | $600,000 | $600,000 | $600,000 | $600,000 |

*Id.* at 4:2-9.

4. Debtor in Possession states Movant is adequately protected in the Crawlers possessing a total market value of $700,000, while Movant's claim is in the amount of $331,000. *Id.* at 4:20-23.

5. Movant is in possession of all of Debtor in Possession's farm equipment, including the Crawlers, in the total market value of approximately $1,000,000. *Id.*

**Movant's Sur Reply**

In Movant's reply pleading filed on July 19, 2024, Movant states:

1. One concern raised at the hearing held on June 20, 2024, was the issue of insurance policies on the Crawlers. On or about July 2, 2024, an updated declaration page was received from Debtor in Possession for the insurance. The declaration page continues to identify the insured as Westside Production Solutions, Inc. and that "loss payables" were added, and states that only "Inland Marine Coverage" is provided. The full policy, however, has not been produced. Reply 2:11-14, Docket 69.

2. The court entered an Order on May 24, 2024, requiring Debtor in Possession to file monthly operating reports ("MOR"). Debtor in Possession has not filed any MORs. *Id.* at 2:21-24.

3. In Debtor in Possession's Motion to Confirm the Plan, an unsubstantiated projection is attached which identifies the anticipated revenue from "custom farming" as $1,250,000 for 2025, which is over $1 million less than the projections for the use of the Crawlers. *Id.* at 3:3-4.

4. Debtor in Possession fails to provide any evidence or testimony establishing that the 2007 Crawler and the 1997 Crawler are necessary to an effective reorganization. No explanation is provided as to how the profitability from several years ago is relevant to a successful reorganization now or within a reasonable time. *Id.* at 3:23-28.

5. Debtor in Possession does not provide any term sheets, agreements, or other documentation that would demonstrate that income will be generated in the future by the use of the Crawlers. Debtor in Possession already admitted that his custom farming operation is not doing well and he only has one farmer client, who pays $350 per acre for 20 acres. *Id.* at 4:4-7.

6. Despite this relatively minimal income, Debtor in Possession somehow speculates that he will earn $2.41 million per year from the use of the Crawlers. *Id.* at 4:7-9.

7. Notably, $960,000 per year of the combined projections come from the "Rental" of the Crawlers. Yet, the rental of the Crawlers is expressly prohibited by the terms of the loan documents with the Movant. *Id.* at 4:14-16.

8. Debtor in Possession has not yet even attempted to recover the Crawlers from Movant's possession. *Id.* at 4:20-21.

9. Debtor in Possession has not received the court's permission through a noticed hearing or Movant's permission to use the cash collateral. *Id.* at 4:26-5:1.

**Proof of Claim 13-1**
**Filed by Movant**

Movant filed Proof of Claim 13-1 on June 11, 2024. Movant asserts a secured claim in the amount of ($311,249.29), and states that the property securing the claim has a value of $400,000. POC 13-1, Part 2 ¶ 9. Movant also states in Proof of Claim 13-1 that the annual interest rate of the Claim is 18%. *Id*.

Based on Movant's Proof of Claim 13-1, there is an equity cushion of approximately 30%.

The UCC-1 Financing Statement attached to Proof of Claim 13-1, p. 15, lists the following items as collateral securing the ($311,249.29) Claim:

Description:
(1) 2000 Murray 16 Wheel Lowboy Trailer 1M9G45208YA056042
(1) 2011 Caterpillar 430E Backhoe Loader CAT0430ECSWC00383
(1) 2007 Caterpillar D6T XW Crawler Dozer with EROPS, Enclosed Cab, Heat, Air Condition, 6-Way Blade, Multi Shank Ripper, Laser DJG00316
(1) 2006 Peterbilt 367 Day Cab Tractor with a 550 Horse Power Cat Engine, 18 Speed Transmission, 22K lb Front Axle, 46K Rear Axles 1XPFDB0X16D889446
(1) 2002 John Deere 544H Wheel Loader DW544HX583752
(1) 1997 Caterpillar 623F Elevating Scraper 6BK00396
(1) 2007 Caterpillar 330DL Excavator with Hydraulic Thumb, Hydraulic Quick Coupler MWP01950
(1) 2015 John Deere 9520R Scraper Tractor with 115GPM Hydraulic System, Drawbar Support, Hydaulic Trailer Brakes 1RW9520RCFE016196
(1) 2007 Caterpillar D10T Crawler Dozer RJG01025
(1) 1997 Caterpillar D10R Crawler Dozer 3KR00943
(1) 2013 Komatsu WA320-7 Wheel Loader with Tier 4 Interim, Bucket & A/C Cab KMTWA121C01080219
and all attachments, accessions, improvements, tooling, replacements, replacement parts, software and software upgrades and all cash and non-cash proceeds (including rental proceeds, insurance proceeds, accounts and chattel paper arising out of or related to the sale, use, rental or other
disposition thereof) of and to all of the foregoing. In addition to the foregoing collateral, all assets now owned or hereafter acquired. Secured Party includes Commercial Credit Group Inc. on behalf of itself and on behalf of all Affiliates of Commercial Credit, Inc.

**Prosecution of Chapter 11**
**Case by Debtor in Possession**

As Movant notes, the Debtor in Possession has not filed any monthly operating reports, notwithstanding the required to so do. See Order Setting Chapter 12 Status Conference, stating:

> **IT IS FURTHER ORDERED**, the debtor-in-possession shall prepare, file, and serve Monthly Operating Reports as required by LBR 2015-1 using the form found on the court's website

Order, p. 2; Dckt. 10.

Since the April 3, 2024 filing of this Bankruptcy Case, there are three Monthly Operating Reports that are required to be filed and have not been by the Debtor in Possession.

**DISCUSSION**

Debtor in Possession makes the case that the Crawlers are going to be essential to an effective reorganization, even earning millions of dollars in revenue per year. However, Debtor in Possession does little to describe how he will achieve such a high income after seemingly winding up his business over the recent years. The record indicates Debtor in Possession only has one farmer client for his custom farming operation, earning a meager $350 per acre for 20 acres.

Debtor in Possession has not filed any monthly operating reports despite this court order Debtor to do so on May 24, 2024. Docket 31. Of additional concern to the court is a lack of a Motion for Authorization to Use Cash Collateral on the Docket. If the Crawlers truly can generate such a large income, the court would expect to see not only efforts to quickly recover the Crawlers from Movant's possession, but also a Motion on the Docket seeking immediate authorization to use the cash collateral and start generating income.

11 U.S.C. § 363(c) provides:

(c)

> (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1183, 1184, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.
>
> (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—
>
> > (A) each entity that has an interest in such cash collateral consents; or
> >
> > (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

Movant has not consented to using the cash collateral, and this court has not granted authorization to use the cash collateral.

Furthermore, Movant states Debtor is yet to fully resolve the issue whether insurance has been properly provided.

**Continuance of Hearing**

Pursuant to the Joint *Ex Parte* Motion and Stipulation of Movant and the Debtor in Possession, the court has continued the hearing to 10:00 a.m. on August 22, 2024. Order; Dckt. 74.