UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

August 22, 2013 at 10:00 a.m.

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1. 13-91106-E-7 ERIC ANTHONY — **MOTION FOR RELIEF FROM AUTOMATIC STAY**
JAB-1 Pro Se — **7-23-13 [34]**

BAYVIEW LOAN SERVICING, LLC.
VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee and Office of the United States Trustee on July 23, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. No appearance at the August 22, 2013 hearing is required.

Bayview Loan Servicing, LLC seeks relief from the automatic stay with respect to the real property commonly known as 2404 Naas Court, Modesto, California. The moving party has provided the Declaration of Janine Gonzalez to introduce evidence which establishes that the Debtor is no longer the owner of the property, movant having purchased the property by way of a Grant Deed in Lieu of Foreclosure recorded on October 29, 2012. Debtors are tenants at sufferance, and movant commenced an unlawful detainer action in and received a Writ of Possession on June 21, 2013.

Movant has provided a certified copy of the recorded Grant Deed in Lieu of Foreclosure to substantiate its claim of ownership and a copy of the Writ of Possession. Based upon the evidence submitted, the court determines that there is no equity in the property for either the 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 In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Bayview Loan Servicing, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 2404 Naas Court, Modesto, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The moving party has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3).

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor 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 Bayview Loan Servicing, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2404 Naas Court, Modesto, California.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.
>
> No other or additional relief is granted.

2. 13-91209-E-7 THOMAS LITTLE
SSA-1 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
7-25-13 [22]

DORAN MAXWELL AND PAULINE A. MAXWELL VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted. No appearance required.

Doran J. Maxwell and Pauline A. Maxwell seek relief from the automatic stay with respect to the real property commonly known as 18669 Pine Street, Tuolumne, California. The moving party has provided the Declaration of Doran Maxwell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be $248,239.95 (including $229,239.95 secured by movant's first trust deed), as stated in the Maxwell Declaration, while the value of the property is determined to be $100,000.00, as stated in Schedules A and D filed by Debtor.

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

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the 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 In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Doran J. Maxwell and Pauline A. Maxwell, 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.

Because the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party is not awarded attorneys' fees for all matters relating to this Motion.

Movant states that Debtor does not currently have insurance on the subject real property. The moving party has pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor 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 Doran J. Maxwell and Pauline A. Maxwell, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 18669 Pine Street, Tuolumne, California.

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

3. 13-91212-E-7 BETY REA **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION**
VVF-1 Scott D. Mitchell **7-22-13 [9]**

AMERICAN HONDA FINANCE CORPORATION VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee and Office of the United States Trustee on July 22 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted. No appearance required.

American Honda Finance Corporation seeks relief from the automatic stay with respect to an asset identified as a 2013 Honda CRV, VIN ending in 3337. The moving party has provided the Declaration of Amber Rocha to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Rocha Declaration states that the Debtor has not made one post-petition payment, with a total of $487.18 in post-petition payments past due. 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 $30,388.51, as

stated in the Rocha Declaration, while the value of the asset is determined to be $25,000.00, as stated in Schedules B and D filed by Debtor.

The movant also seeks to introduce evidence establishing the value of the asset. The authenticated *Kelley Blue Book* valuation is attached as an Exhibit, valuing the vehicle at $19,700.00. However, either using the Debtor or the Movant's valuation, the vehicle does not have equity.

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

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow American Honda Finance Corporation, and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

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

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow American Honda Finance

Corporation, its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2013 Honda CRV, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

No other or additional relief is granted.

4. 13-91315-E-7 SK-2 — APPLEGATE JOHNSTON, INC. — George C. Hollister — MOTION FOR RELIEF FROM AUTOMATIC STAY — 8-7-13 [57]

AFCO ACCEPTANCE CORPORATION
VS.

Local Rule 9014-1(f)(2) Motion.

Correct 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, parties requesting special notice and Office of the United States Trustee on August 7, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the 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 offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Relief from the Automatic Stay. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

AFCO Acceptance Corporation seeks relief from the automatic stay with respect to an asset identified as financing agreement with Debtor to cancel insurance policies and realize on the value of its collateral.

However, the pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the

challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

The court also notes that what could be construed as the "motion" portion of the pleading fails to comply with Federal Rule of Bankruptcy Procedure 9013 which requires the motion (which is separate from the points and authorities) state with particularity the grounds upon which the relief is based. Rather, the "motion" just states a conclusion and directs the court write the motion for Movant.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the Motion is denied without prejudice.

5. 13-90816-E-7 JUSTIN/JULIE WHITNEY
MBB-1 Patrick B. Greenwell

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-10-13 [14]

BANK OF AMERICA, N.A. VS.

DISCHARGED 8-9-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee and Office of the United States Trustee on July 10, 2013. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted. No appearance required.

Bank of America, N.A. seeks relief from the automatic stay with respect to an asset identified as a 2006 Extreme Mega Lite, VIN ending in 0208. The moving party has provided the Declaration of Teresa Haith to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Haith Declaration states that the Debtor has not made two (2) post-petition payments, with a total of $514.14 in post-petition payments past due. 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 $18,553.79, as stated in the Haith Declaration, while the value of the asset is determined to be $14,000.00, as stated in Schedules B and D filed by Debtor. The Debtor' statement of intention indicates that the subject property is to be surrendered.

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

Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The Debtor was granted a discharge on August 9, 2013. Granting of a discharge to an individual under Chapter 7 lifts the automatic stay by operation of law. *See* 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is denied as moot as to the Debtor. The Motion is granted as to the Estate.

The court shall issue a minute order terminating and vacating the automatic stay to allow Bank of America, N.A., and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Bank of America, N.A., its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2006 Extreme Mega Lite, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to the debtor, who was granted a discharge in this case, it is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).

IT IS FURTHER ORDERED that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

6. 11-94146-E-11 DOMINIC/MARIA DEPALMA — **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY**
TJS-1 David Johnston — **7-1-13 [340]**

JPMORGAN CHASE BANK, N.A.
VS.

CONT. FROM 8-1-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors' committee or creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on July 1, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to deny the Motion for Relief from the Automatic Stay. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

JPMorgan Chase Bank, N.A. seeks relief from the automatic stay with respect to an asset identified as a 2011 Lexus ES 350, VIN ending in 17504. The moving party has provided the Declaration of Charlene Hartman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Hartman Declaration states that the Debtor has not made 1 post-petition payments, with a total of $607.99 in post-petition payments past due. 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 $18,219.15, as stated in the Hartman Declaration, while the value of the asset is determined to be $31,000.00, as stated in Schedules B and D filed by Debtor.

However, Movant values the vehicle at $28,717.00, according to *Kelley Blue Book*. The Hartman Declaration seeks to introduce evidence establishing the value of the asset. Though the *Kelley Blue Book* valuation is attached as an Exhibit, it is not properly authenticated.

The court will *sua sponte* take notice that the *Kelley Blue Book* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, the court will presume the Declaration of Hartman to be that she obtained the *Kelley Blue Book* valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

Trustee's Opposition

Michael D. McGranahan, the Trustee, opposes this motion. The Trustee acknowledges that the Debtors are delinquent on their payments, but suggests instead of relief from the stay, that the Trustee pays the secured creditor through insurance proceeds from a recent accident caused by a third party. The Trustee states that he is working diligently with the insurance company to explore different options. The Trustee states the cost of repairs to the Lexus total $20,000 and in light of the high monthly debt services, the Trustee is not inclined to repair the vehicle. Rather, the Trustee is attempting to get the monies for the costs of the repairs, pay Movant a portion of the proceeds, pay Debtors the remainder of the proceeds and abandon the vehicle. If the insurance company is unwilling to give the Trustee, the Trustee would repair and sell the vehicle.

Discussion

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

However, the existence of missed payments by itself does not guarantee relief from stay. Based on either the Debtor's valuation of $31,000.00 or the Movant's valuation of $28,717.00 and the outstanding obligation being $18,219.15, there is sufficient equity to protect the Movant. Since the equity cushion provides enough protection to the creditor, moving party's motion for relief from stay is premature. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor 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 is denied without prejudice.

7. 12-92570-E-12 COELHO DAIRY
KFV-1 Thomas O. Gillis

MOTION TO PROHIBIT THE CONTINUED USE OF CASH COLLATERAL AND/OR MOTION FOR RELIEF FROM AUTOMATIC STAY
7-24-13 [177]

BANK OF THE WEST VS.

HEARING ON THIS MOTION WILL BE CONDUCTED ON THE COURT'S 10:30 CALENDAR WITH THE OTHER COELHO DAIRY MATTERS

Local Rule 9014-1(f)(1) Motion - Opposition Filed

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, parties requesting special notice, and Office of the United States Trustee on July 24, 2013. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to set the Motion for an evidentiary hearing. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Bank of the West seeks to prohibit Coelho Diary from the continued use of cash collateral and for relief from the automatic stay with respect to assets identified as Coelho Diary's milk, milk products, milk base, growing crops, livestock, feed inventory and equipment not owned or hereafter acquired, all accounts and general intangibles now outstanding or hereafter arising, and all cash and noncash proceeds of the foregoing, as well as a security interest in a parcel of real property. The moving party has provided the Declaration of Walter C. De Bruyn to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

Movant argues that "cause" exists under 11 U.S.C. § 362(d)(1) because of the following:

(1) Debtor has breached every cash collateral order in this case by failing to produce timely and complete financial reports, and only complied with 9 of 58 deadlines from November 2012-June 2013;

(2) Debtor has breached the courts most recent cash collateral order (June 26, 2013) at least four times;

(3) Debtor has used Creditor's cash collateral to make unauthorized payments to itself, unsecured non-priority creditors, and third-parties in an amount exceeding $40,000 in 8 months;

(4) Debtor's accountant refuses to perform accounting services because he is owed $8,000 for work compiling Debtor's 2012 finances;

(5) Debtor has incurred a past due bill for silage chopping in the amount of $11,000;

(6) Debtor breached a settlement agreement it entered into with its largest unsecured creditor, Black Rock Milling, by failing to make a $50,000 payment in May 2013;

(7) Though Debtor promised to amend its schedules to include all of Debtor's assets, it has failed to do so;

(8) Debtor no longer has equity in its herd or feed;

(9) Debtor's proposed Amended Plan contains the same problems as its original proposed plan and cannot be confirmed.

Movant also argues that cause exists under 11 U.S.C. § 362(d)(2) because Debtor no longer has equity in the herd and feed and the property is not necessary to an effective reorganization.

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 $655,993 on the herd loan and $230,657 on the feed loan, as stated in the De Bruyn Declaration. The De Bruyn Declaration states that Bank of the West initiated an appraisal of the Debtor's herd and concluded that the herd was valued at $582,517 and the feed is $98,645. Declaration, Dckt. 181.

Movant states that if this motion is granted, Debtor's cows will be treated with all due care until they can be sold at auction; this will include the cows being fed a proper diet of organic feed to maintain their organic certification and insure that the highest price per head is achieved.

DEBTOR'S OBJECTION

Debtor argues that relief under 11 U.S.C. § 362(d)(2) is improper because the cows, milk, feed and equipment are all property that is necessary for the plan to repay 100% of the debt owed to the creditors. Debtor states that the diary is now doing very well and will be able to fund the plan that pays all secured creditors. Debtor asserts that milk production has increased and the dairy profit has increased since the case was filed. Debtor maintains that Bank of the West is provided for in the plan and has been paying adequate protection payment of $7,212 since the case started.

Debtor also argues that there is substantial equity in the property because the cow's feed and other personal property are worth $821,710.00 and the there is additional security on the loan of $1,200,000.00 (the real property being 44 acres of pasture with a 553 cow diary facility). Debtor argues that the 11 U.S.C. § 362(d)(2) relief fails because the property is necessary for an effective reorganization and there is substantial equity.

Debtor also argues that cause does not exist under 11 U.S.C. § 362(d)(1). Debtor states that Movant did not make written demand for any of the allegedly missing documents. Debtor states he met with the Bank at least four times and there was no mention of late or missing reports. Debtor argues that the Bank is being adequately protected and addresses the following by the Bank:

> (1) The missing three monthly creamery checks were sent and are included as attachments;
>
> (2) Aguiar testing reports were sent regularly and contain the livestock count; the feed inventory is done regularly by Bank of the West inspections; there are no accounts receivable, the client in on C.O.D., so there are no accounts payable.
>
> (3) Every two weeks, Debtor sent the milk statements which include the production records.
>
> (4) Debtor believes the bi-weekly cash collateral comparison were sent twice a month.
>
> (5) There are no milk checks as the funds are electronically deposited. Debtor was sent copies of the check registrar which shows all deposits.
>
> (6) The copies of the Aguiar Milk Testing were sent on time.
>
> (7) Debtor sent Quarterly P&L reports performed by his accountant.

(8) The pay checks and living expenses of Debtor were reasonable and necessary.

MOVANT'S RESPONSE

Movant states that Debtor vastly overstates its operating profits. Movant states in July 2013, Debtor's check register started with a balance of a negative $916.61 and ended with a positive balance of $4,9803.08, representing a monthly profit of only $5,896.69. Movant states that this is illusory at best since the Debtor's accounting is cash based and fails to disclose accrued but unpaid liabilities.

Movant also alleges that Debtor has failed to build up its administrative reserve. The most recent entry on Debtor's check registrar dated August 13, 2013 shows a final balance of $2,801.39.

Additionally, Movant argues that Debtor continues to "hide the ball" with respect to Debtor's assets, including multiple parcels of real property owned by Debtor with substantial equity.

Movant also argues that it has provided substantial evidence showing that Debtor had made unauthorized payments to Frank Coelho for living expenses and had used cash collateral to also pay unsecured credit card bills, satellite TV bills and other unapproved expenses without explanation.

Movant also argues that Debtor's equity calculation is not correct because the referenced real property is not part of the Debtor's bankruptcy estate. The subject real property is owned by Mary Coelho and is not listed in Debtor's bankruptcy schedules. Further, Movant argues that a creditor's equity cushion stemming from other collateral or liens on property not owned by the Debtor is not relevant under § 362(d)(2).

Furthermore, Movant argues that Debtor's amended plan indicates that Debtor has no reasonable possibility of reorganization, as Debtor's financial reports from July 2013 show dishonesty and inability to reorganize.

Movant also asserts that Debtor's failure to address the issues regarding accounting services, past due bill for silage chopping, breach of settlement agreement with Black Rock Milling, promise to amend schedules to include all of Debtor's assets and failure to address late reports, shows continued bad faith.

Movant also states that Debtor's response to producing a report regarding production and herd status, the bi-weekly cash collateral comparisons, and use of cash collateral is further evidence of its bad faith.

DISCUSSION

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

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Here, Movant has shown sufficient evidence to warrant relief from the automatic stay. Debtor and Creditor appear to agree that the herd and the feed do not generate an equity cushion for Movant. However, Debtor contends that there is equity in that there is additional security on the loan of $1,200,000.00 from the real property 44 acres of pasture with a 553 cow diary facility. The subject real property is owned by Mary Coelho and is not listed in Debtor's bankruptcy schedules. Declaration, Dckt. 150. Further, Movant argues that a creditor's equity cushion stemming from other collateral or liens on property not owned by the Debtor is not relevant under § 362(d)(2). The court disagrees. Movant has all its collateral securing its claim. Movant may choose not to consent to the of the collateral that is owned by the estate, but that does not mean the court ignores the collateral. The estate, as well as this Movant, have the benefit of such collateral being provide to secure the claim.

The court does not have sufficient evidence to make a determination as to the total value of the collateral, and as such, an evidentiary hearing is required.

If the Movant establishes that there is no equity, after all of the collateral it is holding to secure its claim is accounted for by Movant, the Debtor will have to show, that the property is necessary for **an effective reorganization**. There must be a "reasonable possibility of a successful reorganization with a reasonable time." *United Sav. Ass'n of Tex. V. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 375 (1988). The debtor fails to show necessity of the property for an effective reorganization if the debtor's plan is unsupported by credible assumptions and projections that offer some basis for confidence that the plan could succeed. *In re Pegasus Agency, Inc.*, 101 F. 3d 882 (2d Cir. 1996). Courts usually require the debtor to do more than manifest unsubstantiated hopes for a successful reorganization. A debtor must do more than merely assert that it can reorganize if only given the opportunity to do so. *Sun Valley Newspapers v. Sun World Corp. (In re Sun Valley Newspapers)*, 171 B.R. 71 (B.A.P. 9th Cir. Ariz. 1994).

It appears that the Chapter 12 plan now before the court will not be confirmed. First, Debtor's plan is depended on a Motion for Approval of Compromise and a Motion for Approval of Post-Petition Financing. The court has denied both of these motions. As the plan is based on these motions being granted, it is currently not feasible.

Second, Debtor is proposing to pay a lump sum into the plan on or before month 60 in the amount of $89,370.00, from a refinance of his real

property. Debtor does not provide evidence as to what real property will be refinanced in order to obtain the funds, when such loan will be taken out, or for how much the Debtor will be able to qualify. The court is not satisfied that this treatment is feasible. Debtor has not shown sufficient evidence to the court regarding the refinance. Therefore, the plan is not presently feasible.

The evidence provided in support of confirmation is insufficient. Debtor has provided the court with yearly financial statements 2009-2012, which is illegible. The Debtor provides the court with a Typical Annual Profit and Loss Projection intended to show that the plan is feasible. Exhibit C, Dckt. 149. The court is unable to determine even if the one month "projection" is at all plausible. Mr. Coelho does not provide any information on how he determined these projections. Declaration, Dckt. 148. The lack of providing even minimal competent evidence is an indication that the plan has been proposed and prosecuted in bad faith.

Motion to Terminate Use of Cash Collateral

The law and motion practice in bankruptcy court is fast and substantive. The motion now before the court will make or break the case, with the parties being afforded only 28 days notice. In an adversary proceeding multiple claims against one or multiple persons may be loaded into one pleading. Fed. R. Civ. P. 18 and Fed. R. Bank. P. 7018. However, Federal Rule of Bankruptcy Procedure 7018 is not incorporated in to the contested matter practice (motion and non-adversary proceedings) in bankruptcy court. Fed. R. Bankr. P. 9014. This avoids the confusion, and inherent unfairness, of a party loading multiple claims into one pleading and then rushing to a final nearing on 28 days notice for a mishmash of claims. While the Movant may say that "we only stuck two claims together and they kind-of relate to the Debtor in Possession's bad conduct," sticking them together has only made the motion more difficult to address and possibly lead the court to apply the wrong standards to the consideration of each motion.

The request to terminate the use of cash collateral is denied without prejudice. The court shall issue a separate order denying this portion of the relief.

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

> A. Evidence shall be presented according to Local Bankruptcy Rule 9017-1.
>
> B. Bank of the West, the Movant, shall lodge with the court and serve their Testimony Statements and Exhibits on or before ----------, 2013.
>
> C. Coelho Dairy, the Debtor in Possession, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before ----------, 2013.
>
> D. Evidentiary Objections and Hearing Briefs shall be lodged with the court and served on or before ----------, 2013.

E. Oppositions to Evidentiary Objections shall be lodged with the court and served on or before ----------, 2013

F. The Evidentiary Hearing shall be conducted at -------.m. on ----------, 2013.

8. 12-92570-E-12 TOG-15 COELHO DAIRY Thomas O. Gillis

OBJECTION TO CLAIM OF BLACK ROCK MILLING, CLAIM NUMBER 24 8-8-13 [191]

HEARING ON THIS MOTION WILL BE CONDUCTED ON THE COURT'S 10:30 CALENDAR WITH THE OTHER COELHO DAIRY MATTERS

Local Rule 3007-1(b)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 12 Trustee, respondent creditor, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 14 days' notice was provided. 30 days' notice is required.

Tentative Ruling: This Objection to a Proof of Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(2). Consequently, the Debtor, Creditors, the 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 offers 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. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to overrule the Objection to Proof of Claim number 24 of Black Rock Milling. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

SERVICE

Debtor objects to the claim of Black Rock Milling. However, Local Bankruptcy Rule 3007-1(b)(2) requires that the objecting party file and serve the objection at lest thirty (30) days prior to the hearing date. Here, only

14 days notice was provided. Therefore, the proper notice was not provided and the objection is overruled.

PLEADINGS

An objection to claim must be in writing and filed with the court. Fed. R. Bank. P. 3007(a). The objection must be sufficient to overcome the prima facie evidence of the claim. Here, the grounds for the objection are stated to be,

> Debtor her objects to the allowance of Claim #24 held by Block Rock Milling on the grounds that the amount claimed is not owed because the interest was over charged and some charges not occurred.

Objection, Dckt. 191. The court cannot tell if the objection is to $1.00 of the claim or the entire claim. The court and creditor are left to guess as to the extent of the relief requested. The "testimony" provided by Frank Coelho, one of the partners of the Debtor, is merely a recitation of the "grounds" alleged in the motion. This demonstrates that he has no actual knowledge of this claim or what the Debtor in Possession asserts is the correct amount of the claim.

Based on the foregoing deficiencies, the Objection is overruled without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Claim of Black Rock Milling filed in this case by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the objection to Proof of Claim is overruled without prejudice..