UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 27, 2019 at 1:30 p.m.

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1. 19-24607-E-7 **DIMETRIY TUPCHIY** **STATUS CONFERENCE RE: STIPULATION FOR RELIEF FROM AUTOMATIC STAY WITH ETHAN CONRAD**
7-31-19 [9]

Debtor's Atty: Mark Shmorgon

Notes:
Set by order of the court dated 8/7/19 [Dckt 10]. Mark Shmorgon, counsel for the Debtor, and Shawn S. Dhillon, counsel for Ethan Conrad, order to appear. No Telephonic Appearances Permitted

The Status Conference is xxxxxxxxxx

AUGUST 27, 2019 STATUS CONFERENCE

At the Status Conference xxxxxxxxxx

REVIEW OF STIPULATION
AND
PROPOSED ORDER

On July 31, 2019, Shawn S. Dhillon, Esq. lodged with the court a proposed order titled:

[PROPOSED] ORDER APPROVING STIPULATION PURSUANT TO 11 U.S.C. § 362 CONSENTING TO RELIEF FROM STAY WITH RESPECT TO STATE LEGAL ACTION FOR POSSESSION OF THE LEASED

PREMISES

A copy of the Proposed Order is attached hereto as Addendum A.

The specific language in the above proposed order for the relief granted by the court was stated to be:

> 1. The Stipulation attached hereto is approved.
>
> 2. The terms of the Stipulation are incorporated into this Order as if they were set forth herein.

Thus, the court's "order" is little more than a recitation that, "whatever these parties state is the order and everyone else can be held in contempt for violating what these parties state."

The Stipulation was filed on July 31, 2019. Dckt. 9. The various "terms" which the parties have written which they are now having the court say they have ordered against other persons include:

> 1. To the extent applicable and subject to the reservations set forth in this Stipulation, the parties hereto agree that the automatic stay under section 362 of the Bankruptcy Code with respect to Legal Actions for possession of the Premises is hereby vacated.

Stipulation ¶ 1, Dckt. 9 at 2.

It appears from this language, the parties doubt that the automatic stay applies, do not understand how it applies, and are uncertain as to the scope by which the automatic stay is to be vacated.

> 2. The parties have an understanding that Debtor shall completely vacate and voluntarily turn over possession of the Premises no later than August 26, 2019. Therefore, the parties have agreed that Ethan Conrad shall not commence any legal action for possession of the Premises (including an unlawful detainer action) until after August 26, 2019.

Stipulation ¶ 2, *Id.*

The court is unsure how the parties' order that there is an "understanding" and how the parties will then have someone held in contempt based upon such mere "understanding." As discussed below, it appears that the parties are trying to create an order by which Dimetriy Tupchiy, the Debtor, has an order to shove in the face of the Chapter 7 Trustee in this case and seize property of the bankruptcy estate to an individual, living person named Ethan Conrad.

> 3. Except as expressly set forth in this Stipulation, nothing else with respect to the automatic stay shall be modified at this time.

Stipulation ¶ 3, *Id.*

In light of the automatic stay being vacated by the order of the parties, this appears to be an

illusory provision, with the potential to mislead creditors and court into believing that the order of the parties is limited.

Parties to the Stipulation

The Stipulation identifies the parties thereto, who are issuing the order that the court will merely republish, are identified as:

> Ethan Conrad (Creditor)
> and
> Dimetriy Tupchiy (Debtor)

Id., p. 1:19.5-20.5.

There is no indication in the Stipulation that either of these persons are anything other than living, breathing human beings. In the upper left hand corner of the Stipulation is the header information for the attorney for Ethan Conrad, which states:

> SHAWN S. DHILLON, ESQ. (SBN: 291527)
> 1300 National Drive, Suite 100
> Sacramento, CA 95834
> Telephone: (916)779-1000
> Facsimile: (916)779-1200
> Email: shawn@ethanconradprop.com
>
> Attorneys for ETHAN CONRAD

Id., p. 1:1-5. Again, Shawn Dhillon identifies his client as an individual named Ethan Conrad.

However, at the bottom of the second page of the proposed order submitted to the court, Mr. Dhillon identifies himself as,

> Corporate Counsel, Ethan Conrad Properties, Inc.
> Counsel for Ethan Conrad (Creditor).

Proposed Order, p. 2:11-19. It is unclear whether the words "Ethan Conrad" are a shorthand term used for Ethan Conrad Properties, Inc., or the corporate counsel for Ethan Conrad Properties, Inc. is appearing as the attorney for an individual named Ethan Conrad and not his corporate employer.

On Schedule E/F, Debtor lists an individual named Ethan Conrad as having a claim of ($10,828.61) for a lease deficiency. Dckt. 1 at 32.

On Schedule G, Debtor states that as of the filing of the bankruptcy case there was in existence, which would then become property of the bankruptcy estate pursuant to 11 U.S.C. § 541(a), a five-year lease of property in Folsom, California, for which Ethan Conrad is the lessor. *Id.* at 35.

On the Statement of Financial Affairs, the Debtor states under penalty of perjury that there were no legal proceedings pending within one year of the commencement of this bankruptcy case -

which proceeding could have included an unlawful detainer action if the lease stated on Schedule G, which became property of the bankruptcy estate, had been terminated and did not exist. Statement of Financial Affairs Question 9, *Id.* at 47.

Failure to Comply With Federal Rule of Bankruptcy Procedure 4001(d), Failure to Include Indispensable Party, and Failure to Provide Notices to Parties in Interest Whose Rights Were Purported to Be Terminated

The United States Supreme Court provides in Federal Rule of Bankruptcy Procedure 9013 that when relief is sought in the form of an order from the court in a bankruptcy case, then such relief shall be requested by motion or, if provided for in the Rules, by application. There is not a provision for the court to issue an order based on two persons in a bankruptcy case filing a stipulation. Additionally, Rule 9013 requires that such motions must be served on the bankruptcy trustee, other persons specified in the Rules of Bankruptcy Procedure, and as further ordered by the court. The "Stipulation" was not served on anyone and any order that the court would have entered would not only have been in violation of Rule 9013, but would not have been effective as against all of the other persons, including the Chapter 7 Trustee, for basic Due Process principles. Thus, this would also have lead to the Trustee seeking damages, including punitive damages, for violation of the stay (as well as other possible relief for obtaining and then acting on an ineffective order in violation of the rights of the Trustee and bankruptcy estate).

The United States Supreme Court further provides in Federal Rule of Bankruptcy Procedure 4001(d) the procedure for obtaining an order based on an agreement or stipulation to vacate or modify the automatic stay. The requirements for seeking an order pursuant to an agreement or stipulation include the following:

> (d) Agreement relating to relief from the automatic stay, prohibiting or conditioning the use, sale, or lease of property, providing adequate protection, use of cash collateral, and obtaining credit.
>
> **(1) Motion; service**.
>
> (A) Motion. **A motion for approval of any of the following shall be accompanied by** a copy of the agreement and a proposed form of order:
>
> > (i) an agreement to provide adequate protection;
> >
> > (ii) an agreement to prohibit or condition the use, sale, or lease of property;
> >
> > (iii) **an agreement to modify or terminate the stay provided for in § 362**;
> >
> > (iv) an agreement to use cash collateral; or
> >
> > (v) an agreement between the debtor and an entity that has a lien or

> interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property.
>
> (B) Contents. **The motion shall consist of** or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the agreement. In addition, the concise statement shall briefly list or summarize, and identify the specific location of, each provision in the proposed form of order, agreement, or other document of the type listed in subdivision (c)(1)(B). The motion shall also describe the nature and extent of each such provision.
>
> (C) Service. **The motion shall be served** on: (1) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, on the creditors included on the list filed under Rule 1007(d); and (2) on any other entity the court directs.

Fed. R. Bankr. P.m 4001(d). While the parties may argue that paragraph C above does not state that the trustee needs to be served, it is the Chapter 7 Trustee in this case who is the real party in interest with respect to the automatic stay as it applies to property of the bankruptcy estate - both the leased property and all of the personal property of the estate located on the leased property. The requirements in Federal Rule of Bankruptcy Procedure 4001(a) relating to all motions seeking relief from the stay, which Rule 4001(d) supplements, requires that the motion shall be made in accordance with Federal Rule of Bankruptcy Procedure 9014, the general Rule governing law and motion practice. Rule 9014(b) requires that the motion and supporting pleadings be served on all of the parties whose rights are being effected in the same manner as a summons and complaint.

Here, not only is the Chapter 7 Trustee not a party, there is no noticed motion seeking the relief as stipulated between the Debtor and Mr. Conrad.

2. **17-27297-E-13 RAS-1** **ARLEANER COLLINS** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
7-23-19 [74]

REVERSE MORTGAGE SOLUTIONS, INC. 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 23, 2019. By the court's calculation, 35 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.

Creditor Reverse Mortgage Solutions, Inc. holding a secured claim ("Movant") seeks relief from the automatic stay with respect to Arleaner Collins' ("Debtor") real property commonly known as 1828 Jamestown Drive, Sacramento, California ("Property"). Movant has provided the Declaration of Deneen Sowell to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Dckt. 77.

Movant argues the loan is in default because Debtor has not made tax payments, $2,306.39 having been advanced by Movant to cover taxes. Declaration, Dckt. 77 at ¶ 7.

Movant also argues that its claim is $281,587.19 while the value of the Property is only $260,000.00, meaning Debtor has no equity in the Property. *Id.*, ¶ 8.

Movant also seeks $1,081 in attorney's fees for bringing this Motion and waiver of the 14-day stay.

CHAPTER 13 TRUSTEE'S RESPONSE

David P. Cusick, the Chapter 13 Trustee ("Trustee"), filed a Response on August 9, 2019. Dckt. 80. Trustee notes that the Movant's claim was provided for in the Confirmed plan as a Class2A, and Debtor is current in plan payments.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on August 13, 2019. Dckt. 83.

Debtor's counsel asserts that the Property has a fair market value of $297,632.00, and therefore there is an equity cushion in the Property. In support of this assertion, Debtor's counsel relies on his own testimony(Declaration, Dckt. 84), as well as a Redfin.com price estimate (for which no exception or exemption to the rule against hearsay was established (FED. R. EVID. 801, et seq.)). Exhibit A, Dckt. 85.

The Opposition also indicates the advance for taxes not paid by Debtor is disputed. However, no evidence is provided in support of Debtor's contention.

DISCUSSION

From the evidence of the court, and only for the purpose of this Motion for Relief, Movant's claim is in the amount of $281,587.19 . Declaration, Dckt. 77.

Additionally, the Property has a value of $265,642.14 at the time of filing–the amount of Creditor's secured claim at the time of filing as indicated by Creditor's Proof of Claim, No. 2. This value is significantly higher than the $200,000.00 valuation listed on Debtor's Schedule A/B. Dckt. 1.

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). Cause exists for relief here, including Debtor's failure to maintain property taxes.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76

(1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). Further, Debtor (whom has the burden of proof) has not argued that the Property is necessary for an effective rehabilitation.

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 Attorneys' Fees

Movant argues it is owed attorneys fees, but does not direct the court to any legal authority showing such a right.

Moreover, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court. Movant argues this relief is warranted because if the Motion is granted, Debtor will not have an incentive to preserve the Property.

This argument is not persuasive. Debtor continues to have liability on the agreement between Movant and Debtor. Debtor's intentional failure to preserve the Property would not be without recourse.

This part of the requested relief is not granted.

Request for Prospective Injunctive Relief

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.
>
> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

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 Secured Creditor, Reverse Mortgage Solutions, Inc.("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 1828 Jamestown Drive, Sacramento, California, 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.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.

3. **18-27897-E-13 BTH-1** **CLINTON MOTTA**

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-18-19 [23]

M&T BANK VS.

Final Ruling: No appearance at the August 27, 2019 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on July 18, 2019. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is granted.

M&T Bank ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 Forest River Sandstorm 283SLR, VIN ending in 9039 ("Vehicle"). The moving party has provided the Declaration of Carolee Gould to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the debtor, Clinton Clifford Motta ("Debtor").

Movant argues Debtor has not made 6 post-petition payments, with a total of $2549.10 in post-petition payments past due. Declaration, Dckt. 26.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $48,753.87 (Declaration ¶ 10, Dckt. 26), while the value of the Vehicle is determined to be $40,000, as stated in Schedules B and D filed by Debtor (which is slightly higher than the value asserted by Movant).

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

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

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

Request for Waiver of Fourteen-Day Stay of Enforcement

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

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by M&T Bank("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2018 Forest River Sandstorm 283SLR, VIN ending in 9039 ("Vehicle"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.
>
> No other or additional relief is granted.

4. **19-21298-E-13 JERRI LOWDEN**
JCW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
7-29-19 [26]

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION VS.

Final Ruling: No appearance at the August 27, 2019 hearing is required.

The Motion For Relief is dismissed without prejudice.

Creditor JP Morgan Chase Bank, N.A. ("Movant"), having filed an Ex Parte Motion to Dismiss the pending Motion on August 22, 2019, Dckt. 55; no prejudice to the responding party appearing by the dismissal of the Motion; movant having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by the debtor, Jerri Serina Lowden ("Debtor"); the Ex Parte Motion is granted, Movant's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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 filed by JP Morgan Chase Bank, N.A. ("Movant]") having been presented to the court, Movant having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 55, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion For Relief is dismissed without prejudice.

5. **17-22347-E-11 MET-2** **UNITED CHARTER LLC**

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
5-16-19 [391]

EAST WEST BANK VS.

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 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, creditors, parties requesting special notice, and Office of the United States Trustee on May 16, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The Motion for Relief from the Automatic Stay is XXXXXXXXX.

Creditor East West Bank ("EWB" or "Movant") seeks relief from the automatic stay with respect to Debtor in Possession, United Charter LLC's (" ΔIP") real property located in Stockton, California, and identified as (1) 1904, 1908, 1912, 1916, 1920, 1928, 1936 Weber Avenue ("Parcel 1 Through 7"); 1881 E. Market Street (Parcel 11, B1 thru B15); 1617 (Parcel 12, A thru D), 1555 (Parcel 14 thru 16); 1531 (Parcel 17), 1523 E. Main Street (Parcel 18) (collectively, the "Property").

Movant has provided the Declaration of L. Kurth Demoss to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property. Dckt. 393. The Demoss Declaration presents testimony that there is a $783,312.79 arrearage on Movant's claim, with $338,655.87 as an advance for taxes. *Id.*, ¶ 7.

At filing Movant's claim was $4,522,031.36, which claim has grown to $5,214,465.67 as of April 30, 2019 due to interest and fees. *Id.,* ¶ 9. The total post-petition payments received from ΔIP in this case have been $262,035.66. *Id.,* ¶ 16.

The Demoss Declaration testifies that ΔIP's monthly expenses are $9,678.00, and monthly payments owing on the two claims secured by the Property would be $39,406.91 and $7,772.81 at 7.5 percent interest (the prime rate plus a 2 percent adjustment). *Id.*, ¶ 32.

Demoss testifies further that in his experience, banks typically lend at maximum 65 percent of the "as-is" value of the property securing such a loan. *Id.,* ¶ 35. Thus, assuming a value of $7.2 million, Demoss states the maximum loan would be near $4,680,000.00. *Id*., ¶ 35.

ΔIP recently informed Movant it seeks to sell the Property by the end of the summer. *Id.*, ¶ 46.

In the Motion, Movant states with particularity (FED. R. BANKR. P. 9013) the legal contention that there is cause for relief from stay pursuant to 11 U.S.C. § 362(d)(1) because of its legal conclusion that the claim is not adequately protected. Dckt. 391. Movant also argues relief should be granted pursuant to 11 U.S.C. § 362(d)(2) because there is no equity in the Property and the Property is not necessary for an effective reorganization. Movant also states it is seeking relief from the 14 day stay pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3).

The Motion fails to state grounds upon which relief may be granted, but instead instructs the attorney to read, analyze, and assemble for Movant the grounds from the "Notice of Hearing, this Motion, the Memorandum of Points and Authorities, the Declaration of L. Kurth DeMoss, the Exhibits to the Motion, and the pleadings on file herein, the records and files in this action, and upon such further oral and documentary evidence as may be presented." Though not permitted, Movant appeals to have issued itself authorization to slip in more evidence at the hearing.

In addition to exempting itself from Federal Rule of Bankruptcy Procedure that requires the grounds to be stated with particularity, Movant also exempts itself from Federal Rule of Bankruptcy Procedure 9013 and the pleading requirements of Local Bankruptcy Rules 9004-1, 9004-2, and 9014-1. These require that the motion, notice, points and authorities, each declaration and the exhibits (which may be combined into one exhibit document) be filed as separate pleadings (except in limited circumstances in which the motion and points and authorities may be combined into one document).

In its Memorandum of Points and Authorities lies the actual grounds forming the basis for relief. Those grounds are as follows:

1. ΔIP's equity position is eroding and has nearly disappeared, and EWB is not receiving adequate protection payments. Memorandum of Points and Authorities, Dckt. 395. at p. 6:22-25.

2. ΔIP has paid only $262,035.66 post-petition, with EWB's claim increasing significantly since the filing of this case on April 7, 2017. *Id*. at p. 7:1-18.

3. The Property is encumbered by liens totaling $6,256,704.72. *Id*. at p. 8:3. ΔIP asserted the Property's value was only $5,330,000.00; while creditor Wayne Bier asserts the value is $7.2 million, the ΔIP's valuation is likely the correct value. *Id*. at p. 8:4-9.

4. In the event the Property is valued at $7.2 million, ΔIP will not be able to confirm a Plan as the DIP simply cannot afford to pay the all of the secured claims and its regular operating expenses. *Id*. at p. 8:18-19.

5. The Property is not necessary for an effective reorganization because the timing and facts of the case are such that a successful reorganization of the DIP within a reasonable time is impossible. Doubts as to reorganization include the following:

   i. This case has been pending for more than 2 years without a confirmed plan.

   ii. A confirmable plan is likely months off as the Property would need to be valued first.

   iii. ΔIP has inadequate capital to continue operations, demonstrated by ΔIP's failure to make regular post-petition and adequate protection payments, as well as ΔIP's history of not paying taxes.

   iv. ΔIP's sole source of income is rents. While projected rents for March 2019 were $58,922.00, the actual rents were only $35,000.00–ΔIP has not explained this discrepancy. Additionally, there have been issues with pending leases, uncollected rent, and expiring leases.

   v. A recent fire at the Property may have affected the Property value.

   vi. Errors and misinformation in monthly operating reports and elsewhere indicate mismanagement, and there are no funds to pay a new property manager.

   vii. Due to deferred maintenance and tenant turnover, it is likely that even if a plan is confirmed it will not be successful. *Id.*, at p. 8:21-13:27.

6. Waiver of the 14 day stay is warranted because ΔIP has no equity, is not reorganizing (as evident by the lack of plan), and is not paying any Cash Collateral payments. A new Notice of sale would allow 20 to 30 days before foreclosure for an appeal to be filed. *Id.*, at p. 14:2-5.

The relief requested in the Memorandum mirrors that in the Motion, except an additional request for attorney's fees and costs is dropped in to the Memorandum. *Id.,* at p. 14:18-20.

DEFAULT BY DEBTOR IN POSSESSION

The ΔIP has not filed any opposition to the Motion. The Declaration of Jeffrey Goodrich was filed "in support of opposition." Dckt. 412.

While filed in "support" of an opposition, there is no position asserted. There is no request that the Motion be denied asserted by ΔIP.

Furthermore, the Local Bankruptcy Rules do not permit a Declaration to filed as an opposition. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." LOCAL BANKR. R. 9004-2(c)(1). Failure to comply is cause for an appropriate sanction. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

The Goodrich Declaration provides an overview of the case history and attempts to explain the delay in getting a plan confirmed. The Goodrich Declaration also admits no adequate protection payments have been made, but argues this is because ΔIP instead paid $45,000 for roofing repairs to EWB's collateral, over $80,000 of leasing commissions to increase EWB's cash collateral, over $87,000 in senior lien property taxes, and over $11,000 of storm drain fees that would have become a lien senior to EWB.

OPPOSITION OF CREDITOR
WAYNE BIER

Creditor Wayne Bier holding a secured claim ("Bier") filed an Opposition on May 30, 2019. Dckt. 406. Bier asserts the Property has a value range of $7,230,000.00 - $7,730,000.00 as of an October 2018 appraisal. Bier argues the appraisal obtained by ΔIP valuing the Property at $5,330,000.00 was based on the value as of July 27, 2018, notwithstanding ΔIP's scheduled value of $7,855,018.99.

Bier does not explain how or why the court should find an appraisal, which is relied upon by Movant, obtained by the ΔIP and used in a motion to value the secured claim of Bier is not more credible and realistic than the value stuck in the schedules by the principal of the Debtor. $5,330.000.00 Appraisal Declaration, Dckt. 285.

Bier argues further a plan which re-writes the East West Bank obligation to term it out over time at an appropriate interest rate, amortized at an affordable monthly payment, and provide monthly payments to Bier could be confirmed in this case.

RAYMOND ZHANG EQUITY INTEREST HOLDER
OPPOSITION

Raymond Zhang ("Zhang") has filed his personal Opposition, as an equity interest holder in the Debtor, on May 30, 2019. Dckt. 408. Mr. Zhang is also the responsible representative of the ΔIP, with the responsibilities of acting to make sure that the ΔIP fulfill its fiduciary duties in this Chapter 11 case (there having been no trustee appointed or requested to be appointed in this case).

Zhang eschews the $5,330,000 value that he, as the responsible representative of the ΔIP, has advanced (for which the Federal Rule of Bankruptcy Procedure 9011 certificates are made, for the ΔIP as the accurate value of the Property in seeking to set the value of Bier's secured claim at less than the full amount of the obligation. The Motion to Value, Dckt. 283, was filed on September 27, 2018, a mere eight months before the filing of the present Motion for Relief From the Stay. The ΔIP has not wavered from opposing Bier's $7,000,000.00 valuation of the Property.

Zhang, but not the ΔIP, argues further there is equity in the Property, which Property is necessary for this Chapter 11. Zhang, but not the ΔIP, argues that at the current rental rates, the ΔIP should be able to propose a plan that re-amortizes the EWB and Bier obligations at an appropriate

interest rate with repayment in a reasonable period of time, and provide regular monthly payments on the claims while the property is marketed and sold to provide for the full payment of the claims in a relatively short period of time.

Conflicting Statements and Positions Asserted in Court

As noted above, the ΔIP has steered clear of asserting opposition to the Motion. It may well be that the ΔIP and Zhang have concocted a scheme for the ΔIP to continue to assert a value of $5,330,000 for the ΔIP's battles with Bier, but have Zhang "personally" state, while wearing his equity holder hat, that the property is worth substantially more than Zhang, when wearing his hat as the responsible representative of the ΔIP, certifies to the court is the actual value of the Property.

Or, it may be that Zhang is admitting that he knowingly provided an inaccurate value in seeking to value the Bier claim at a lower amount than the full amount of the claim. Or it may be for Zhang that the more "convenient truth" when opposing the motion for relief is to, "personally, not as a representative of the ΔIP as the fiduciary of the bankruptcy estate," adopt the higher value asserted by Bier and disputed by the ΔIP.

JUNE 13, 2019 HEARING

At the June 13, 2019 hearing, the court continued the hearing on the Motion for Relief from the Stay to afford Mr. Bier, the Debtor in Possession, and Mr. Zhang to get a plan and disclosure statement on file and this case moving forward, or in the alternative to market the Property before the Plan is confirmed. Civil Minutes, Dckt. 422.

The court addressed at the hearing the prosecution of this bankruptcy case over the past two and almost one-half years, and the lack of any Chapter 11 Plan. Given that this is really a three party dispute, with East West Bank having the senior lien on the Property at issue and Mr. Bier and Mr. Zhang being embroiled in a multi-year financial donnybrook, the only persons financially hurt by the delay have been Mr. Bier and Mr. Zhang. Neither Mr. Bier nor East West Bank sought the appointment of a trustee in this case.

The court has addressed in other ruling the failings of Mr. Zhang as the responsible representative of the Debtor in Possession (including making unauthorized payments of estate property to Mr. Bier and making additionally payments from purportedly non-bankruptcy estate monies, which may well have included monies paid from the Debtor to Mr. Zhang within the preference period) in this case. As came out in the four day evidentiary hearing on the Objection filed by the Debtor in Possession to Mr. Bier's claim, both sides have a view of the "truth" that is not consistent with federal law. As the court's findings showed, Mr. Bier's belief is that one can say whatever they want, with the federal court proceedings being merely an extensive of aggressive, no holds barred, over the top, business "negotiations." Mr. Zhang and the prebankruptcy counsel for the Debtor and Mr. Zhang demonstrated that they would say whatever they thought was in their favor, without regard to the truth, including counsel preparing a document containing knowingly false information for Mr. Bier that he knew Mr. Bier would use to obtain benefits and advantage from a foreign government.

Though having the advantage of hearing the court's findings more than a month ago and reading the tentative ruling below, Mr. Bier's counsel and the Debtor in Possession's counsel showed up

with little more than "hope" that a plan would be prosecuted in this case. Though having more than a month since the court's ruling that the Debtor in Possession asserts "clarified" the claim so a plan could be proposed, nothing has been prepared. The court did not find persuasive Debtor in Possession's counsel's arguments that a plan could not be proposed providing for a sale of the property because the property was not quite ready to sell because there was fire damage and repairs would have to be made. Such provisions for reorganizing the Debtor's business through the making of the repairs, addressing any insurance claims, providing for interim payments on the East West Bank claim, the marketing of the property, and sale within a commercially reasonable time could all be part of a bankruptcy plan of reorganization. That is where the reorganization is to occur, not in the twilight of post-filing and preconfirmation, with the plan only being the capstone for the reorganization that has occurred during the bankruptcy case.

Both Mr. Bier and the Debtor in Possession requested that in lieu of granting relief the court set deadlines for them to act in prosecuting a plan. Clearly, it is not a positive sign in a Chapter 11 case whether the court has to set deadlines for parties to act reasonably to comply with federal law and protect their financial interests.

Notwithstanding Mr. Bier, the Debtor in Possession and Mr. Zhang having had more than two years to get their finances together, East West Bank agreed (in light of the phrasing of the issues by the court) to a continuance for a reasonable time for Mr. Bier, the Debtor in Possession, and Mr. Zhang to "put up or shut up" (as the court phrased it, not counsel for East West Bank).

EWB'S SUPPLEMENTAL PLEADINGS

On August 6, 2019, EWB filed the Declaration of Mary Ellmang Tang and Exhibits thereto in support of the Motion. Dckts. 426, 427. The Tang Declaration provides testimony to authenticate correspondence between EWB and counsel for ΔIP.

Exhibit A (Dckt. 427) filed by EWB is a letter from EWB to ΔIP's counsel dated June 19, 2019. The letter makes numerous requests for information, broken up into the following categories:

1. Insurance Claim

This category requests information and evidence regarding the fire at the Property, including copies of insurance claims, estimates of repairs, and correspondence with the insurance company.

2. Tenant/Lease Issues

This category requests information and evidence regarding several new tenants at the Property, including LGN, Hotel Furniture Liquidators, White Glove, and Inland Express.

3. Financial Reporting Issues

This category requests information and clarification regarding financials provided, including Operating Reports and proposed cash collateral budgets.

4. Sale Issues

Id. This category requests information and evidence regarding the proposed sale of the Property, including a timeline, broker, prerequisites to marketing the Property, estimates of repair costs from fire damage, and estimated sale price.

Exhibit B is a response letter from ΔIP's counsel dated July 1, 2019. The response provides answers to several of EWB's questions and references various exhibits.

Exhibit C is a follow up letter from EWB dated July 17, 2019. The follow-up letter reasserts questions posed in the June 19 letter which EWB believed need a response or supplemental information.

JOINT STATUS REPORT

The parties to this Matter filed a Joint Status Report on August 14, 2019. Dckt. 430. The parties report that Farmers' Insurance has paid the ΔIP $3,688,659.73 in insurance proceeds, and that the parties are working on an agreement to resolve this Matter.

AUGUST 15, 2019

At the August 15, 2019 hearing the court continued the hearing to allow the parties time to reach an agreement resolving the Matter.

APPLICABLE LAW

Standing

In adjudicating issues in federal court a party must have standing. As stated in the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti* (*In re Johnson*), 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

A basic principal of American Jurisprudence is that the law does not condone the "officious intermeddler." One is not allowed to assert claims or rights in which he or she has no interest. In the federal courts, this is the Constitutional requirement of "standing."

> Article III of the Constitution confines federal courts to decisions of "Cases" or "Controversies." Standing to sue or defend is an aspect of the case-or-controversy requirement. (Citations omitted.) To qualify as a party with standing to litigate, a person must show, first and foremost, "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent.' (Citations omitted.)...Standing to defend on appeal in the place of an original defendant, no less than standing to sue, demands that the litigant possess 'a direct state in the outcome.' (Citations omitted.)

Arizonans for Official English v. Arizona, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997).

Though neither party has identified the issue of standing, the court may raise it *sua sponte*,

Rule 12(h)(3), Federal Rules of Civil Procedure. A person must have a legally protected interest, for which there is a direct stake in the outcome. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055 (1997). The Supreme Court provided a detailed explanation of the Constitutional case in controversy requirement in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville Florida*, 508 U.S. 656, 663, 113 S.Ct. 2297 (1993). The party seeking to invoke federal court jurisdiction must demonstrate (1) injury in fact, not merely conjectural or hypothetical injury, (2) a causal relationship between the injury and the challenged conduct, and (3) the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative, *Id*. In determining whether the plaintiff has the requisite standing and the court has jurisdiction, the court may consider extrinsic evidence. *Roverts v. Corrothers*, 812 F.2d, 1173, 1177 9th Cir. 1987).

The Ninth Circuit Court of Appeals addressed the issue of Constitutional standing and the self-imposed judicial restrain of prudential standing (whether the person asserting standing was within the "zone of interests") in *Motor Vehicle Casualty Co. V. Thorpe Insulation Company* (*In re Thorpe Insulation Company*), 671 F.3d 980 (9th Cir. 2012).

This followed the United States Supreme Court discussing the judicial restrain concept in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12 (2004). "Prudential standing" is an additional judicial "self-restraint" by which a court, which otherwise has standing, chooses to not hear the matter because of the generalized interests which do not directly relate to the person seeking to utilize the federal courts to address his or her grievance. By its very nature, a request for the court to exercise "self restraint" and not hear a matter based on prudential standing admits that Article III case in controversy Constitutional standing and federal court jurisdiction exists. One of the principal areas in which federal courts have determined it prudent to not exercise jurisdiction has been in the realm of domestic relations, giving strong deference to state law. *Id.*, p. 12. In an earlier decision, *Warth v. Seldin*, 422 U.S. 490, 501 (1975), discussed the concept of prudential standing to be one in which the claims being asserted as personal to the plaintiff rests on legal rights of others.

Parties to the Contested Matter

The Motion for Relief From the Automatic Stay seeks relief of the automatic stay as it applies to property of the bankruptcy estate to allow Movant to foreclose on its collateral, which collateral is property of the bankruptcy estate. Motion, Dckt 391. In a Chapter 11 case when a trustee has not been appointed, it is the debtor in possession that shall have the powers of and perform all functions and duties of a bankruptcy trustee. 11 U.S.C. § 1107(a). Here, it is the ΔIP who is responsible for, and the obligation to, exercise the powers of a trustee to defend, to the extent a *bona fide* opposition exists, challenges to the rights and interests of the bankruptcy estate, which includes a creditor seeking relief from the stay to foreclose.

Neither Bier nor Zhang have sought to intervene in this contested matter as required by Federal Rule of Civil Procedure 24 and Federal Rule of Bankruptcy Procedure 7024 (which Federal Rule of Bankruptcy Procedure 9014 does not make automatically applicable in contested matters and for which relief must be requested).

While it is questionable whether Bier and Zhang are mere officious intermeddlers in the affairs of the ΔIP or would be allowed to intervene if they sought such relief, the court has considered their arguments notwithstanding the ΔIP having defaulted in this contested matter.

Cause Grounds for Relief From the Stay

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 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.*

As to 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).

DISCUSSION

Current Case Status

At the prior hearing the court granted a continuance to allow the parties to work out an agreement to resolve this Matter in light of the insurance proceeds received by ΔIP.

At the hearing, xxxxxxxxxxxxxx.

Disputed Value of the Property

EWB argues the Property is encumbered by liens totaling $6,256,704.72 which exceed the $5,330,000.00 value of the Property. Bier and Zhang (now individually as the equity interest holder, conflicting what he asserts as the responsible representative of the ΔIP) assert the Property has a value range of $7,230,000.00 - $7,730,000.00.

	EWB Value Analysis (based on value asserted by the ΔIP)	Bier and Zhang (individually) Analysis
Asserted Value	$5,330,000.00	$7,230,000.00
EWB Secured Claim	($5,214,465.67)	($5,214,465.67)
Bier Claim ,for which Bier has received payments of $185,843.92 which must be applied to this obligation. (The issue of post-petition interest has not been determined due to the ΔIP asserting that the value of the Property is only $5,330,000 and that Bier is not entitled to any interest because his claim is undersecured.)	($1,042,239.05)	($1,042,239.05)
Asserted Value in Excess of Liens	($926,704.72)	$973,295.28

Based on the ΔIP's appraisal information, EWB's secured claim all but exhausts the value of the property, there is no equity for the bankruptcy estate, and Bier is left out in the economic cold.

Bier and Zhang, who switches to Bier's value for this Motion, assert that not only is Bier fully secured, but there is almost another million dollars in equity for the bankruptcy estate (not taking into costs of sale). This is a $2,000,000 swing in value from that asserted by the ΔIP, and Zhang as the responsible representative just eight months ago - a 35.6% increase in value from that previously asserted (subject to the Fed. R. Bankr. P. 9011 certifications) by the ΔIP and Zhang as the responsible representative.

Bier then continues to argue that because there is a $2,000,000 equity cushion for EWB, it should not worry and Bier "believes" that the ΔIP can advance a Chapter 11 plan within a "reasonable period of time." Opposition, Dckt. 406.

The court has conducted a long, protracted evidentiary hearing on the ΔIP's Objection to Bier's claim in this case. The ΔIP asserted that Bier's claim should have been only ($580,000) or less. Bier asserted that it should be ($2,148,541.75) or more. The court determined the claim to be ($1,042.239.05), for which there are $185,843.92 in post-petition payments that must be applied to said obligation.

Clearly, both Bier and Zhang, as the responsible representative of the ΔIP, have been challenged when it has come to economic calculations.

For the Evidentiary Hearing, the court made very pointed comments about the credibility of

both Bier and Zhang based upon the evidence presented - concluding that both where challenged when it came to giving credible, accurate testimony under penalty of perjury. Additionally, evidence was presented concerning Bier and the ΔIP's pre-petition counsel, Mr. Hu, intentionally creating a document they knew contained false information so Bier could use it to obtain a visa, based on the false information, from a foreign government.

Zhang, as the equity interest holder, contends that this Property is necessary for an "effective" reorganization. Opposition, Dckt. 408. Without it, Zhang, as the equity interest holder, states that "without [the property] there is no hope of reorganization." *Id.* at p. 3:8-9.

Zhang, as the equity interest holder, argues that the ΔIP should be able to confirm a plan of reorganization within a "reasonable time." But no "reasonable time" period is stated.

With respect to Bier, he repeatedly testified as to his disdain for Zhang and Zhang's inability to properly run the property of the Estate prior to the bankruptcy case being filed. Further, though presented with multiple opportunities to foreclose, he never did, instead electing to let Zhang run the show.

If Bier is correct and the Property is worth more than $7,230,000.00, then he could foreclose (obtaining relief from the stay at the same time as EWB), pay off EWB from a quick sale, and then pocket all of the remaining proceeds from a sale, which amount would be well in excess of his claim as determined by the court. Assuming Bier is correct and he actually believes that the property is worth more, say $7,500,000.00, then his upside to brining this multi-year, no Chapter 11 plan case to a conclusion would be computed as follows:

Bier Asserted Value	$7,500,000.00
Estimated Costs of Sale at 5%	($375,000.00)
EWB Secured Claim (estimated higher due to delay in foreclosing and Bier selling the property)	($5,500,000.00)
Net Sales Proceeds for Bier	$1,625,000.00
Post-Petition Payments Received by Bier to be Applied to his Claim	$185,843.92
Economic Recovery for Bier Based on His ($1,042,239.05) Secured Claim	$1,810,843.92

If truly confident that the Property is worth more than $7,230,000.00, then Bier could foreclose and turn a quick $768,604.87 profit (an additional 74% more than he is actually owed). This 74% additional profit over his claim is without taking into account all of the rent revenues collected during the period in which the foreclosure is completed and the Property quickly sold.

The fact that Bier chooses not to foreclose but just delay EWB further puts into question whether he truly believes that such higher value exists. Given his clear disdain for Zhang and his repeated testimony in the evidentiary hearing that Zhang could not properly manage the Property, it would make little sense to leave such a "valuable" asset for Bier in the hands of someone Bier is convinced cannot manage it.

When Bier and Zhang, individually as an equity interest holder, assert that the ΔIP can quickly and reasonably confirm a Chapter 11 Plan, they ignore the history in this case. The Debtor commenced this case on April 7, 2017. From that day through the June 13, 2019 hearing on this Motion, Zhang has been in control as the responsible representative of the ΔIP. Zhang, as the responsible representative, and the ΔIP have had two years, two months, and thirteen days to confirm a plan in this case. No plan has been confirmed.

The ΔIP filed a Chapter 11 Plan on February 22, 2018. Dckt. 166. Then on May 3, 2018, ΔIP filed the First Amended Plan and the Amended Disclosure Statement. Dckts. 232, 234. The court's order approving the Disclosure Statement was filed on May 10, 2018, Dckt. 237, and the confirmation hearing was set for July 19, 2019. *Id.*

The Confirmation Hearing was continued to August 30, 2018, with Bier opposing confirmation. Order, Dckt. 254. As noted in the Civil Minutes for the July 19, 2018 hearing, the ΔIP failed to file a declaration providing evidentiary support for confirmation of the First Amended Plan. Civil Minutes, Dckt. 255 at 2.

In a ΔIP Status Report filed on August 27, 2018, the ΔIP stated that the dispute with Bier continued and "regardless of the outcome of those negotiations, the ΔIP is not currently prepared to present evidence in support of confirmation." Status Report, p. 1:21-24; Dckt. 269.

The confirmation of the proposed First Amended Plan was denied. Civil Minutes, Dckt. 273. In the Civil Minutes, the court's finding include:

> DENIAL OF CONFIRMATION
>
> At the hearing, Debtor in Possession advised the court that it was not prepared to proceed with confirmation of this plan. As noted by the court, two weeks earlier Debtor in Possession represented that it anticipated confirmation and that the denial of appointment of special counsel was not of significant concern because the "plan administrator" could just hire counsel to assert the rights and interests of the estate. See Civil Minutes, Dckt. 267. Confirmation having been denied, the Debtor in Possession will need to proceed with promptly obtaining authorization of special counsel to protect the rights and interests of the bankruptcy estate.

Id. at 5. Though professing to be diligently prosecuting a plan in this case, when the day of the confirmation hearing came, the ΔIP folded its tent and walked away from its Chapter 11 plan.

In the ten months that have passed since the ΔIP walked away from its Chapter 11 plan, no new plan has been presented. There is no evidence presented that the ΔIP can, and would, diligently prosecute a plan in this case.

Failure of Bier to Propose a Plan

With no confidence in Zhang as the responsible representative of the ΔIP, Bier had a very cost effective option to foreclosing if he questioned the asserted $2,000,000.00+ in value asserted to exists above the EWB secured claim. He could have proposed a Chapter 11 plan, garnered the support of EWB, had a plan administrator appointed, the Property sold by the plan administrator, and EWB paid, Bier paid in full, and the excess money to go to the other creditors.

But Bier has chosen to do nothing. No creditor's plan has been advanced by him.

Default of ΔIP

It is significant that the fiduciary responsible for the bankruptcy estate, the ΔIP who stands in the shoes of and exercises the powers of a trustee, offers no opposition to the Motion for Relief From the Stay (choosing merely to file a declaration of ΔIP's counsel, without any actual position asserted as to the Motion outside of the caption). The ΔIP indicates that it cannot proceed with a Chapter 11 plan. It also appears that the ΔIP has concluded that there is no value for the bankruptcy estate after paying EWB and Bier and has chosen to cut off further efforts by the ΔIP, as the fiduciary to the bankruptcy estate, to prolong the bankruptcy suffering.

Cause for Relief From the Stay

EWB has established that cause exists for relief from the stay. The ΔIP has provided the evidence that EWB is under secured and the continued delays while Zhang and Bier want to continue to gamble are at EWB's risk, not Zhang or Bier's. Even if some value exists in excess of Bier's secured claim, the ΔIP and Zhang, as the responsible representative of the ΔIP, have demonstrated that after more than two years in bankruptcy they are incapable of obtaining confirmation of, or even trying to prosecute, a Chapter 11 plan.

This bankruptcy case has aged out from a good faith attempt to reorganize the business affairs of the Debtor that are now assets of the bankruptcy estate, and has become a vehicle to hinder and delay, for no bankruptcy purpose, EWB from foreclosing on an obligation that the ΔIP and Debtor cannot pay and one that Bier appears to be unwilling to pay, even if to do so would (if his asserted value of the Property were to be believed) yield him almost double of what he is owed.

As discussed in Collier on Bankruptcy, "cause" for relief from the stay is broader than merely arguing over whether there is adequate protection for the delay.

> [a] General Examples of Cause
>
> Use of the word "cause" suggests an intention that the bases for relief from the stay should be broader than merely lack of adequate protection. Thus, relief might be granted when the court finds that the debtor commenced the case in bad faith. And relief also may be granted when necessary to permit litigation to be concluded in another forum, particularly if the nonbankruptcy suit involves multiple parties or is ready for trial. Relief may also be granted to permit an embezzlement victim to pursue the embezzled property in the debtor's hands. Actions that are only remotely related to the case under title 11 or which involve

the rights of third parties often will be permitted to proceed in another forum.

3 Collier on Bankruptcy P 362.07 (16th 2019).

To the extent that the ΔIP was attempting in good faith to prosecute this case and a Chapter 11 plan, it and its responsible representative, Zhang, would have done so. To the extent that Bier believes that the property has significant value, he could have diligently prosecuted a creditor's plan, had the property sold, with both EWB and Bier paid in full (if the Property is actually worth what Bier asserts). No creditor's plan was advanced by Bier.

One could speculate that if the Property is really worth as much as Bier asserts, then he might make the financial decision to sit pat, let EWB get relief from the stay (which is then granted as to all creditors having a lien on the property so they can act to protect their interests), make a deal with EWB to get the property sold, foreclose and then recover almost double of what he is owed. Bier does not attempt to do that, but instead merely argue that EWB should be delayed further, now more than two years into this case, premised upon some unexplained, inchoate plan concept, that may be proposed by the ΔIP, who does not oppose this Motion, sometime in the future (the two-plus years of this case not being enough for the diligent prosecution of a plan).

There is no good faith prosecution of this case by the ΔIP. There is no attempt by any creditors to prosecute a plan in this case. The case appears to continue to exist to further the wheeling and dealing of Bier and Zhang, personally as an equity holder, and not for any proper purpose under the Bankruptcy Code.

To the extent that value exists in excess of the two secured claims, it does not overcome the cause by the lack of good faith prosecution of a plan in this case. It does not overcome the ΔIP electing to not oppose the Motion, which indicates that the ΔIP knows there is no good faith prosecution of this case. It does not overcome the lack of good faith of a response that merely says, there will be some plan, at some time, with some terms, that may be filed in the case. It does not overcome the Zhang flipping on the value of the Property, when eight months ago he, subject to the Federal Rule of Bankruptcy Procedure 9011 certifications, as the responsible represented/asserted/admitted for the ΔIP that the Property has a value of only $5,330,000.00, but now as an equity holder contracts that by stating that he personally believes that the value is in excess of $7,000,000.00.

The ΔIP has had every opportunity to prosecute this case. No creditor sought the appointment of a trustee. No creditor filed a competing plan. No creditor has hounded the ΔIP and presented the ΔIP and ΔIP's experienced bankruptcy counsel from filing, prosecuting, and confirming a plan.

Cause exists to terminate the automatic stay. The court shall issue its order vacating the automatic stay to allow East West Bank , 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 (1) 1904, 1908, 1912, 1916, 1920, 1928, 1936 Weber Avenue ("Parcel 1 Through 7"); 1881 E. Market Street (Parcel 11, B1 thru B15); 1617 (Parcel 12, A thru D), 1555 (Parcel 14 thru 16); 1531 (Parcel 17), 1523 E. Main Street (Parcel 18) (collectively, 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 to obtain possession of the Property.

The court does not rule on the lack of equity grounds, that being at issue with conflicting evidence.

Request for Attorneys' Fees

In the Memorandum of Points and Authorities, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

The Supreme Court has amended Federal Rule of Bankruptcy Procedure 7008 deleting the requirement that a request for attorney's fees be pleaded as a claim in the complaint/motion. Now, attorney's fees and costs are requested by a post-judgment/order motion and costs bill as provided in Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054, 9014.

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 in the **Motion**, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

~~No other or additional relief is granted by the court.~~

~~The court shall issue 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 Creditor East West Bank ("EWB" or "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 East West Bank , 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 (1) 1904, 1908, 1912, 1916, 1920,~~

1928, 1936 Weber Avenue ("Parcel 1 Through 7"); 1881 E. Market Street (Parcel 11, B1 thru B15); 1617 (Parcel 12, A thru D), 1555 (Parcel 14 thru 16); 1531 (Parcel 17), 1523 E. Main Street (Parcel 18) (collectively, 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 to obtain possession of the Property.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

Attorney's fees and costs, if any, shall be requested as provided by Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054 and 9014.

No other or additional relief is granted.

6. 17-22347-E-11 JJG-15 UNITED CHARTER LLC CONTINUED MOTION TO USE CASH COLLATERAL 3-12-19 [340]

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, creditors, parties requesting special notice, and Office of the United States Trustee on March 12, 2019. Dckt. 347. The court set the hearing for March 21, 2019, requiring 9 days' notice. Order, Dckt. 338. 9 days' notice was provided.

The Motion For Authority To Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Motion for Authority to Use Cash Collateral is XXXXXXXXX.

The Debtor in Possession, United Charter, LLC ("ΔIP"), moves for an order approving the use of cash collateral from ΔIP's real property identified as an industrial warehouse property located in Stockton, California ("Property"). Debtor in Possession requests the use of cash collateral to pay an average of $7,785 per month of budgeted property-related expenses such as property taxes, insurance, utilities and maintenance that EWB had approved for payment.

Stipulation

Along with the Motion, ΔIP filed a Stipulation between ΔIP, and creditors East West Bank ("EWB") and Wayne Bier ("Bier"). Dckt. 339. The Stipulation consents to the aforementioned expenses sought to be paid by ΔIP, as well as a variance of 10 percent in any individual line item expense as long as the total amount used does not exceed five percent of the monthly budget.

Pursuant to the Stipulation and as a adequate protection for the use of cash collateral, the ΔIP has offered, and EWB and Bier have agreed to accept:

(a) Replacement liens in post-petition rents to the same extent, and with the same validity and priority, as such lenders held in the cash collateral expended, to the extent the DIP's use of such cash collateral resulted in a reduction of such lender's secured claim; and

(b) Turnover to EWB of all net rents received between August 1, 2018 and May 31, 2019 after payment of the previously approved or to be authorized monthly and one-time expenses described in the Stipulation and this Motion.

Supplemental to Motion

ΔIP filed a Supplement to the motion on May 17, 2019. Dckt. 400. The Supplement requests the following:

1. Authorization to use cash collateral for the monthly budgeted expenses of $5,878 for the period of June 1, 2019 through August 31, 2019.

2. Upon the ΔIP's filing of an amendment to the Supplement, determine the amounts necessary for tenant improvements to the remaining leased space.

3. Grant EWB and Bier the requested replacement liens.

The Supplement also provides a detailed overview of efforts to obtain contractor bids for the requested tenant improvements, that electrical plans may need to be acquired to solicit future bids, and notes there was a fire on one of the leased properties which losses will be entirely covered by insurance.

Because of the fire, ΔIP's counsel states that the Supplement is incomplete and requests a continuance of the hearing in the event no amendment is filed prior to the hearing.

Limited Objection of EWB

EWB filed a Limited Objection to the use of cash collateral on May 22, 2019. Dckt 402. EWB consents to ΔIP's use of the cash collateral in the amounts necessary for maintenance, subject to EWB's review of the budgeted amount to be specified in further detail by ΔIP. EWB notes no other amounts have been requested in the Supplement.

EWB notes further it has filed a motion for relief from the automatic stay set for hearing June 12, 2019 on the grounds there is no adequate protection.

EWB requests that if this Motion is granted, the order granting the Motion provide as follows:

1. EWB shall be granted a valid, duly perfected, enforceable and non-avoidable replacement lien and security interest of the same priority as EWB's prepetition lien, in all post-petition cash collateral, and

2. Entry of the court's order approving use of cash collateral shall constitute a validly perfected first lien and security interest upon the post-petition collateral and no filing, recordation or other act in accordance with any applicable local, state or federal law shall be necessary to create or perfect such lien and security interest.

Response of Bier

Bier filed a Response consenting to the use of cash collateral for the monthly budgeted expenses of $5,878 for the period of June 1, 2019 through August 31, 2019. Dckt. 404. Bier's consent is given on the condition the grant of a replacement lien in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended.

Bier notes he believes the Property is valued at $7,230,000.00, and states he will be opposing the motion for relief filed by EWB.

MAY 30, 2019 HEARING

At the May 30, 2019 hearing the court granted the motion in light of EWB consenting to the use of cash collateral for the monthly budgeted expenses through August 31, 2019. Civil Minutes, Dckt. 416.

AUGUST 15, 2019 CONTINUED HEARING

The court continued the hearing on the Motion to Use Cash Collateral to August 15, 2019. No further pleadings have been filed or request made for the further use of cash collateral after the August 31, 2019 termination under the prior order. Dckt. 438.

SECOND SUPPLEMENT TO MOTION

ΔIP filed a Second Supplement to the Motion on August 22, 2019. Dckt. 440. The Supplement lists the following proposed expenses:

1. Tenant Improvements for Remaining Leaseable Space ($28,985)

2. Refinance Costs ($41,200)

3. Lot Line Adjustment Costs ($27,642.82)

4. Monthly Operating Expenses for the period September 1, 2019 through November 30, 2019, as follows:

Expense	**Amount**
Cal Water	$250
PGE	$3800

Insurance	N/A
Maintenance	$1,000
Bay Alarm	$105
Contingency	$1,000
FTB	$75
Accounting	$500
Storm Drain	$450
Backflow Test	$7
TOTAL	**$7,187**

An explanation for the necessity of each of the one-time expenses is provided in the Motion (Dckt. 440 at p. 3:5-4:13), and further explained in the Declaration of Raymond Zhang. Dckt. 441.

Applicable Law

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless–
>
> > (A) such sale or such lease is consistent with such policy; or
> >
> > (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease–
> >
> > > (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and
> > >
> > > (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part,

Federal Rule of Bankruptcy Procedure 4001(b) states:

> (b)(2) Hearing
>
> The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Discussion

ΔIP has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for various expenses to maintain the collateral, including payment of taxes, utilities, and repair costs, as well as various one-time expenses necessary for the ΔIP's successful reorganization. The Motion is granted, and ΔIP is authorized to use the cash collateral for the period September 1, 2019 through November 30, 2019, including the one-time expenses stated in the Motion.

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 Authority to Use Cash Collateral filed by Debtor in Possession, United Charter, LLC ("ΔIP") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, pursuant to this order, for the period September 1, 2019 through November 30, 2019, and the cash collateral may be used to pay the following monthly expenses, granting ΔIP a variance of 10% in any individual line item expense as long as the total amount used does not exceed five percent of the monthly total budget:

Expense	**Amount**
Cal Water	$250
PGE	$3800
Insurance	N/A
Maintenance	$1,000
Bay Alarm	$105
Contingency	$1,000
FTB	$75

Accounting	$500
Storm Drain	$450
Backflow Test	$7
TOTAL	**$7,187**

IT IS FURTHER ORDERED that ΔIP cash collateral may be used to pay the following one-time expenses:

Expense	**Amount**
Tenant Improvements for Remaining Leaseable Space	$28,985
Refinance Costs	$41,200
Lot Line Adjustment Costs	$27,642.82
TOTAL	**$97,827.82**

IT IS FURTHER ORDERED that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

IT IS FURTHER ORDERED that the hearing on the Motion is continued to **xxxx a.m. on May XX , 2019**, to consider a Supplement to the Motion to extend the authorization to use cash collateral. On or before **xxxx, 2019**, Debtor in Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the **xxxx, 2019** hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

7. 17-22347-E-11 UNITED CHARTER LLC CONTINUED STATUS CONFERENCE

RE: VOLUNTARY PETITION

4-7-17 [1]

Debtor's Atty: Jeffrey J. Goodrich

Notes:
Continued from 8/21/19 to be conducted in conjunction with the continued hearing on the Motion to Use Cash Collateral and Motion for Relief from the Automatic Stay to allow the Parties the opportunity to appear at one hearing to completely address the issues in this case.

The Status Conference is continued to 2:00 p.m. on xxxxxxx, 2019.