UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 26, 2023 at 1:30 p.m.

FINAL RULINGS

1. 23-20016-E-13 KMM-1 **DAVID STEELE** **Mo Mokarram** **MOTION FOR RELIEF FROM AUTOMATIC STAY** **8-28-23 [20]**

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the September 26, 2023 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 13 Trustee, and Office of the United States Trustee on August 28, 2023. By the court's calculation, 29 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.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion for Relief from the Automatic Stay is granted.

Wells Fargo Bank, N.A., dba Wells Fargo Auto ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2021 Dodge Charger, VIN ending in 6071 ("Vehicle"). The moving party has provided the Declaration of Robert Keith to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by David Jeremy Steele ("Debtor").

Movant argues Debtor has not made at least 3 post-petition payments, with a total of $1,928.44 in post-petition payments past due. Declaration, Dckt. 22.

Movant has also provided a copy of the J.D. Power Guide Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

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 $36,810.76 (Declaration, Dckt. 22), while the value of the Vehicle is determined to be $32,900.00, as stated on the J.D. Power Guide Valuation Report, which is less than the retail value as stated in Schedules A/B and D filed by Debtor.

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

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset. [Fn.1.]

FN. 1. The court notes that in the confirmed Chapter 13 Plan (Dckt. 3), Movant's secured claim is provided for as a Class 4 claim. Order Confirming; Dckt. 13. As a Class 4 Claim, the automatic stay has been modified to allow it to proceed against its collateral. In such cases, it is not uncommon for a creditor to seek relief from the stay in the case to protect against a subsequent conversion or to clearly document by separate order (rather than having to read the plan) that the relief from the stay has been 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 Wells Fargo Bank, N.A., dba Wells Fargo Auto ("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 2021 Dodge Charger, VIN ending in 6071 ("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.
>
> No other or additional relief is granted.

2. **23-21822-E-12 BSH-2** | **RUSSELL LESTER** **Brian Haddix** | **CONTINUED MOTION TO USE CASH COLLATERAL** **6-7-23 [18]**

Final Ruling: No appearance at the September 26, 2023 Hearing is required.

The Bankruptcy Case having been dismissed (Order; Dckt. 186), the Motion to Use Collateral is dismissed without prejudice.

On June 6, 2023, the court issued an order modifying Local Bankruptcy Rule 9014(d) to allow omnibus pleadings respecting first day motions. Order, Dckt. 16. The order authorized Debtor in Possession to file First Day Motions and related documents for the following requests for relief:

1. **BSH-2** - Debtor in Possession's Emergency Motion for an Order (A) Authorizing Interim and Final Use of Cash Collateral; (B) Granting Replacement Liens; and (C) Scheduling Final Hearing Pursuant to Bankruptcy Rule 4001;

2. **BSH-3** - Debtor in Possession's Emergency Motion for Authority to Pay Prepetition Wages, Compensation and Employee Benefits, and for Related Relief;

3. **BSH-4** - Motion for Order to approve the Turnover of Funds Held by Receiver Subject to a Reasonable Reserve for Future Fee Applications.

The following deadlines were imposed:

1. Notice of the June 8, 2023 hearing shall be given by 5:00 p.m. on June 6, 2023; and

2. The pleadings and supporting documents for the Omnibus Motions will be filed and served by 4:00 p.m. on June 7, 2023, and a chambers electronic set of the pleadings filed on June 7, 2023 delivered by 4:00 p.m. on June 7, 2023 to the Judge assigned to the case.

Motion to Use Cash Collateral,
Granting Replacement Lien, and
Setting Final Hearing on Motion

Russell Lester, as the Debtor, commenced this bankruptcy case on June 2, 2023. Now, as Debtor in Possession seeks the interim and final authorization for use of cash collateral, and the granting of a replacement lien. Debtor is currently the post-confirmation, Plan Administrator in his prior case, 20-24123, which was recently reopened, the Reorganized Debtor seeking to have disagreements concerning the performance of the Confirmed Plan resolved.

The Creditor whose cash collateral is sought to be used in First Northern Bank ("FNB"). Currently the Estate has 1,257,197 pounds of walnuts (included in FNB collateral), valued at a bulk sale price of $5,333,161.70. The Debtor in Possession seeks to use some of the proceeds from the sale to continue in the farming, marketing, and sale of the walnuts at a higher value than a bulk sale.

The Motion recounts the challenges faced by the Reorganized Debtor in performing the confirmed Chapter 11 Plan and the default in making payments to FNB on its secured claim as required under the Confirmed Chapter 11 Plan.

Debtor in Possession states that on February 1, 2023, FNB obtained *ex parte* the appointment of a receiver in State Court, with the receiver taking possession and control of the personal property collateral securing FNB's claim. The appointment of the receiver was confirmed by the State Court on February 21, 2023, and a preliminary injunction was issued enjoining the Debtor from retaining possession of the personal property collateral.

With the receiver in possession of the personal property collateral, the Debtor in Possession cannot harvest the 2023 crop, which must be harvested "soon."

The obligation owed to FNB is stated to be approximately $7,800,000.00 for an asset based line of credit. In addition, there is $1,400,000.00 owed by Debtor to FNB on a Real Estate Loan.

For the emergency use of cash collateral pending a final hearing, the Debtor in Possession seeks authorization to use $205,000, plus a 10% variance, to pay the necessary expenses during the pre-harvest period pending final authorization.

The Debtor in Possession asserts that the real property securing the obligations owed to FNB have a value of $18,000,000.00.

Interim Use of Cash Collateral

The requested $205,000 of cash collateral to be used is stated to be for the following expenses and costs of operation:

> 28. As such, Dixon Ridge Farms needs to use cash collateral immediately to be able to pay critical and necessary expenses of its operations, including harvesting the 2023 walnut crop which will cost approximately $205,000.00, issuing payroll and related benefits in the approximate amount of $14,328 and paying for utilities. Payment of these expenses is critical for Dixon Ridge Farms to continue farming operations, to avoid incurring costs to destroy crops that have perished as a result of the failure to complete the 2023 harvest, and to avoid immediate and irreparable harm to the bankruptcy estate.

Motion, ¶ 28; Dckt. 18. In reviewing the Motion and the Exhibits, the court could not identify the expenses for which the monies would be spent (itemized categories), other than the $14,328 for payroll.

In the Motion it is stated that a proposed "interim budget" will be filed on or before June 22, 2023, which is two weeks after the current hearing.

June 8, 2023 Interim Use Hearing

At the hearing, the Parties reached a Stipulation to authorize the use of cash collateral in the amount of $113,000.00 through June 30, 2023, for the payment of the regular and ordinary operating expenses of the business of the Bankruptcy Estate, including prepetition payroll as authorized by the separate order of the court.

The continued hearing on the Motion to Use Cash Collateral shall be conducted at 10:30 a.m. on June 29, 2023.

Creditor's Opposition

Creditor First Northern Bank of Dixon ("Creditor"), holding a secured claim, filed an opposition to the Motion on June 15, 2023. Dckt. 49. Creditor states the following:

1. Debtor in Possession has failed to provide a cash collateral budget to show whether the use of cash collateral is necessary.

2. There are $93,555.53 of unexplained funds in an account held by Debtor in Possession at Bank of America. Debtor in Possession has not provided an explanation as to the source of the funds. Creditor believes the funds

constitute proceeds of Creditor's Collateral that have been diverted from the receiver's estate.

3. Debtor in Possession states they are unaware of the exact amount of accounts receivable, however, they continue to process and sell inventory, issue invoices, and collect payments.

Creditor requests that if Debtor in Possession is allowed to use cash collateral, the following conditions should be imposed:

1. Replacement Lien - The Replacement Lien should include a lien on all post-petition assets in which Creditor was provided a pre-petition security interest. Creditor asserts it has a valid and perfected security interest on all crops growing.

The court's order granting the use of cash collateral on an interim basis granted Creditor a Replacement Lien on "post-petition revenues, accounts receivable, and other proceeds generated by the business to the extent that Creditor's cash collateral is diminished by this authorized use of cash collateral." Order, Dckt. 48.

2. Adequate Protection Payments - Creditor requests approximately $29,000 per month in adequate protection payments to cover all inters as it accrues.

3. Monthly Cash Collateral Reports - Debtor in Possession should provide monthly cash collateral reports to show the actual income and expenses as shown in the cash collateral budget.

June 29, 2023 Hearing

At the hearing, the Parties agreed to the authorization for the Interim Use of Cash Collateral as set forth in the proposed Budget; Exhibit F, Dckt. 73, for July 2023 and for August 1 through August 12, 2023 as specified in the court's order. The Parties will lodge with the court a proposed order consistent with this Ruling and specifying the expenses for which the use of cash collateral is authorized for the August period (it being impractical for the parties to identify those amounts from the proposed Budget at the hearing).

The court further grants Creditor a replacement lien in all of the post-petition assets as the collateral described in its security instruments for any diminution in value of its collateral caused by the use of the cash collateral.

July 25, 2023 Supplemental Opposition of First Northern Bank of Dixon

First Northern Bank of Dixon ("Creditor") filed a Supplemental Opposition to the Motion to Use Cash Collateral July 25, 2023. Dckt. 117. Creditor states the following:

1. July 13, 2023 Proposed Second Interim Order - Creditor sent a revised second interim order for use of cash collateral to counsel for Debtor with Creditor's comments and revisions. Debtor has not responded.

2. **Unexplained Funds** - There are $93,555.53 worth of funds that Debtor has not provided an explanation for their location and use. Debtor has not been able to adequately explain the source of the funds, even though the receiver has asked for information regarding payments received and deposited into any account from February 1, 2023 through June 1, 2023. There are also further discrepancies with Debtor's cash balances.

3. **Compensation of Counsel** - The Compensation Disclosure, Dckt. 7, states counsel for Debtor received $20,000 from Debtor prior to filing. Debtor's Statement of Financial Affairs, Dckt. 76, states Debtor paid Debtor's counsel $20,000 on June 2, 2023. Debtor's Monthly Operating Report, Dckt. 98, shows Debtor paying $20,000 to Debtor's counsel on June 14, 2023. The Cash Collateral budget does not provide for payment of compensation for Debtor's counsel.

This Bankruptcy Case was commenced on June 2, 2023 by the Debtor. The court is directed to page 20 of the June 2023 Monthly Operating Report, with the attachments on that page being images of two checks written on the Bank of America Account -8828. Check No. 101 is dated June 14, 2023, is made for Pay to the Order of Haddix Law, and is in the amount of $20,000.00. Dckt. 98, p. 20.

The Bank of America June 2023 Statement for Account -8828 states that Check 101 for $20,000.00 was negotiated and paid by Bank of America on June 20, 2023. *Id*., p. 10.

As noted by Creditor, on June 2, 2023 the Disclosure of Compensation of Attorney for Debtor(s), Dckt. 7, states that $20,000.00 was paid to counsel for the Debtor for representation in connection with this Bankruptcy Case. It is not clear whether there was $20.000 paid pre-petition and the Debtor in Possession (the fiduciary of the Bankruptcy Estate) transferred $20.000 of cash collateral to Counsel, or there was no such reported $20,000.00 pre-petition payment to Counsel.

At the hearing, the parties had a long discussion of this issue, Debtor in Possession's counsel stating how it would be documented in a monthly operating report, and Creditor's counsel stating his concern of the failure of the Debtor and Debtor in Possession to document the source of the money.

4. **Carrion Ranch** - There are misrepresentations regarding ownership of Carrion Ranch and whether it belongs to Russ Lester, LLC or Debtor in their individual capacity.

5. **Super-Priority Administrative Claim** - Creditor argues they should be granted a super-priority administrative claim in addition to a replacement lien.

Creditor appears to be asking for the court to determine the amount of a priority claim. Pursuant to Federal Rules of Bankruptcy Procedure 3012(b), determinations of priority claims may be made by motion, in a claim objection, or in a plan filed in a chapter 12 case. This is discussed below.

6. **Clarification of Reinstatement Dispute** - Creditor seeks to clarify that loans Creditor made to Debtor have not be reinstated and, as such, remain in default for failure to pay.

This is addressed below.

August 8, 2023 Hearing

In reviewing the Supplemental Opposition, the basis for the request for a Superpriority Administrative Expense, in addition to the replacement lien is stated by Creditor is:

> D. In Addition to a Replacement Lien, FNB Should Be Granted a Super-Priority Administrative Claim.
>
> In addition to the Replacement Liens granted to FNB pursuant to the Interim Order, FNB should be granted a super-priority administrative claim under Sections 503(b)(1), 507(a), and 507(b) of the Bankruptcy Code (the "507(b) Claims") for the amount of the diminution in Secured Creditors' pre-petition cash collateral after all Replacement Liens have been exhausted. Such 507(b) Claims shall have priority over all other costs and expenses of the kind specified in or ordered pursuant to Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 of the Bankruptcy Code, except for the Office of the United States Trustee Fees.

Supp. Opp, p. 7:13-20; Dckt. 117. The above states that Creditor wants a Superpriority Administrative Expense and directs the court to several Bankruptcy Code sections, but does not state how such law is applicable to the present situation, or why.

This Creditor first directs the court to 11 U.S.C. § 503(b)(1) as the statutory basis for a Superpriority administrative expense or claim, which provides:

> (b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including—
>
> (1)
>
> (A) the actual, necessary costs and expenses of preserving the estate including—
>
> (I) wages, salaries, and commissions for services rendered after the commencement of the case; and
>
> (ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of

> the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;
>
> . . . .

Next, the court is directed to the provisions of 11 U.S.C. § 507(a) as the legal basis for allowing a Superpriority administrative case. The specific provision at issue is 11 U.S.C. § 507(a)(2), which provides:

> § 507. Priorities
>
> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (2) Second, administrative expenses allowed under section 503(b) of this title, . . .
>
> . . . .

This provides that administrative expenses allowed under 11 U.S.C. § 503(b) to be second in priority.

Moving to 11 U.S.C. § 507(b), Congress provides for the superpriority for the § 507(a)(2) priority claims that arise due to the lack of the "adequate protection" provided for a creditor having a secured claim whose collateral is being used failing to be "adequate." 11 U.S.C. § 507(b) provides (emphasis added):

> (b) **If the trustee**, under section 362, 363, or 364 of this title, **provides adequate protection** of the interest of a **holder of a claim secured by a lien on property** of the debtor and **if, notwithstanding such protection**, such **creditor has a claim allowable under subsection (a)(2)** of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, **then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection**.

Going to Collier on Bankruptcy, with respect to a creditor being able to assert a Superpriority administrative expense or claim, the discussion begins with:

> [1] Establishing the Right to a Superpriority Claim under Section 507(b)
>
> A creditor seeking to assert a claim under section 507(b) must meet three criteria.

> First, the trustee must have, under section 362, 363 or 364(d), provided adequate protection of the interest of the holder of a claim secured by a lien on property.
>
> Second, such creditor must have a claim allowable under section 507(a)(1).
>
> Third, the claim must have arisen from either the stay of action against property under section 362, from the use, sale or lease of property under section 363, or from the granting of a lien under section 364(d).

4 Collier on Bankruptcy P 507.14 (the court reorganizing the paragraph for clarity). 11 U.S.C. § 507(a)(1) provides a huge list of type of priorities for various claims and administrative expenses. As to the second requirement for the § 507(a)(1) allowable claim, Collier further discusses:

> [b] Establishing an Administrative Claim
>
> The second element of establishing priority under section 507(b) is that the creditor must have a claim allowable under section 507(a)(2). Section 507(a)(2) grants priority to administrative expenses allowed under section 503(b). **Section 503(b)(1) provides that the actual, necessary costs and expenses of preserving the estate are entitled to be allowed as administrative expenses.** Proving that the cost incurred by the creditor was an actual and necessary **expense should not be difficult for a creditor to establish if the trustee has affirmatively provided adequate protection to the secured creditor.** Under section 362, if the trustee resisted the creditor's attempt to terminate the stay, the trustee obviously desired continued use of the property. Under section 363, if the trustee used the secured creditor's collateral during the case, the trustee believed that the use was of necessary benefit to the estate. The same rationale applies when the trustee has granted an equal or priming lien under section 364(d).

4 Collier on Bankruptcy P 507.14[1][b]. The discussion in Collier continues, with the third element for having a Superpriority administrative expense or claim, stating:

> [c] The Amount of a Superpriority Claim
>
> The third element of establishing priority under section 507(b) is usually the most difficult to establish. A creditor is not entitled to priority under section 507(b) merely because the creditor holds an administrative expense claim in the case. **A creditor is entitled to section 507(b) priority only to the extent that the claim arose from the stay of action against property under section 362, from the use, sale or lease of property pursuant to section 363, or from the granting of a lien under section 364(d).** Determining the extent to which the claim is attributable to one of those items will vary from case to case.
>
> [I] Claims Arising with Respect to Section 363
>
> With respect to the use of property under section 363, **the logical measure of the claim is the loss in value attributable to the trustee's use of the property**. Assume that a piece of equipment subject to a creditor's lien is worth $10,000 at the time the creditor seeks relief from

> stay or adequate protection and that the creditor's claim exceeds that amount. The trustee desires to use the equipment and agrees with the creditor to make adequate protection payments of $200 per month to compensate the creditor for the anticipated decline in value due to the trustee's continued use of the equipment. After five months, the trustee finishes using the equipment and returns it to the creditor, having made $1,000 in adequate protection payments. If the equipment has a value of $8,500 because the equipment deteriorated to a greater extent than envisioned, the creditor would be entitled to a section 507(b) claim of $500. If the equipment was worth $1,000 in scrap value because it had been the subject of an uninsured catastrophe, the creditor would be entitled to a section 507(b) claim of $8,000.7 In each case, the claim would be measured by the decrease in value attributable to the trustee's use of the equipment, less the amount of payments actually made by the trustee.
>
> It should be noted that the extent of the creditor's loss cannot always be measured by the decrease in the value of the collateral. Rather, it is the extent of the loss caused by the trustee's use of the collateral.8a If the collateral were of a type less easily liquidated than an item of equipment, it would be necessary to analyze whether the creditor would have incurred some or all of the loss even if the asset was returned to the creditor at the time adequate protection was granted. If the security interest covered inventory that could be liquidated only over a considerable period of time at a considerable cost, the extent to which the creditor would have incurred liquidation costs ought to be considered. A section 507(b) priority should not be available for the full amount of any loss, but only for the loss that resulted from use of the property by the trustee.

4 Collier on Bankruptcy P 507.14[1][c].

In requesting the court preemptively allowed a Superpriority claim, Creditor does not provide a basis for showing that it has a claim due to the lack of adequate protection.

At the hearing, counsel for Creditor stated that this was an agreed to term in the prior Chapter 11 case, but would accept the court denying it for this Order. Counsel for the Debtor in Possession stated that he would not consent to inclusion in this order.

California Commercial Code Alleged Default

Creditor clarifies it assertion that notwithstanding have cured the default for which the Notice of Default was issued, there remains a default which can be enforced against the personal property of the Bankruptcy Estate. Creditor states this clarification as:

E. Clarification of Reinstatement Dispute.

> As set forth in the Kraft Declaration, a dispute arose regarding the effect of a reinstatement of the FNB Loans pursuant to Cal. Civ. Code § 2924c (the "Reinstatement Dispute"). Cal. Civ. Code § 2924c ("Section 2924c") gives the Debtor the right to reinstate the FNB Loans and stop the pending Nonjudicial Foreclosure Proceedings. The Debtor believed that reinstatement of the FNB Loans pursuant to Section 2924c, would also stop the receiver from liquidating the FNB Collateral under the Stipulated Receiver Order.

> However, prior to filing the Pending State Court Action, FNB exercised its right under the FNB Loan documents to accelerate the FNB Loans making the FNB Loans immediately due and payable in full and made demand on the Debtor for immediate payment in full. Kraft Decl. ¶20.
>
> Cal. Comm. Code § 9604 provides that Section 2924c, and the right to reinstatement provided therein, has no application to the enforcement of the Bank's rights and remedies with respect to its personal property collateral.
>
> Since the right to reinstatement under Section 2924c does not apply to reinstate the FNB Loans for purposes of enforcing the Bank's rights and remedies against its personal collateral, the FNB Loans were not reinstated for purposes of enforcing the Bank's rights and remedies against its personal property collateral.
>
> As such, the FNB Loans remain in default for failure to pay the FNB Loans in full pursuant to the Bank's demand. Kraft Decl. ¶¶70-82.

Supp. Opp., p. 7:21 - 8:11 (the court breaking up the single paragraph clarification into subparagraphs for clarity). From this dense paragraph the court distills the follow legal asserting being made by Creditor:

1. Debtor is in default on his obligations to Creditor.

2. Creditor declared the obligations to be in default and commenced a nonjudicial foreclosure sale on its real property collateral.

3. Creditor also commenced the enforcement of the defaulted obligation against its non real property collateral.

4. Debtor cured the default and the nonjudicial foreclosure was terminated.

5. However, the default in the obligations cannot be cured with respect to the personal property collateral and Creditor wants to pursue the personal property collateral.

The basis for asserting that the defaults are not curable with respect to the personal property collateral, the legal authority cited is California Commercial Code § 9604 (Creditor not directing the court to any specific provision thereof), which provides:

> § 9604. Procedure if obligation secured by security interest in personal property or fixtures is also secured by interest in real property
>
> (a) If an obligation secured by a security interest in personal property or fixtures is also secured by an interest in real property or an estate therein:
>
> (1) The secured party may do any of the following:
>
> > (A) Proceed, in any sequence, (I) in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and (ii) in accordance with this chapter as to the personal property or fixtures.

(B) Proceed in any sequence, as to both, some, or all of the real property and some or all of the personal property or fixtures in accordance with the secured party's rights and remedies in respect of the real property, by including the portion of the personal property or fixtures selected by the secured party in the judicial or nonjudicial foreclosure of the real property in accordance with the procedures applicable to real property. In proceeding under this subparagraph, (I) no provision of this chapter other than this subparagraph, subparagraph (C) of paragraph (4), and paragraphs (7) and (8) shall apply to any aspect of the foreclosure; (ii) a power of sale under the deed of trust or mortgage shall be exercisable with respect to both the real property and the personal property or fixtures being sold; and (iii) the sale may be conducted by the mortgagee under the mortgage or by the trustee under the deed of trust. The secured party shall not be deemed to have elected irrevocably to proceed as to both real property and personal property or fixtures as provided in this subparagraph with respect to any particular property, unless and until that particular property actually has been disposed of pursuant to a unified sale (judicial or nonjudicial) conducted in accordance with the procedures applicable to real property, and then only as to the property so sold.

(C) Proceed, in any sequence, as to part of the personal property or fixtures as provided in subparagraph (A), and as to other of the personal property or fixtures as provided in subparagraph (B).

(2)

(A) Except as otherwise provided in paragraph (3), provisions and limitations of any law respecting real property and obligations secured by an interest in real property or an estate therein, including, but not limited to, **Section 726 of the Code of Civil Procedure, provisions regarding acceleration or reinstatement of obligations secured by an interest in real property or an estate therein, prohibitions against deficiency judgments**, limitations on deficiency judgments based on the value of the collateral, limitations on the right to proceed as to collateral, and requirements that a creditor resort either first or at all to its security, **do not in any way apply to either (I) any personal property or fixtures other than personal property or fixtures as to which the secured party has proceeded or is proceeding under subparagraph (B) of paragraph (1), or (ii) the obligation.**

(B) Pursuant to, but without limiting subparagraph (A), in the event that an obligation secured by personal property or fixtures would otherwise become unenforceable by reason of Section 726 of the Code of Civil Procedure or any requirement that a creditor resort first to its security, then, notwithstanding that section or any similar requirement, **the obligation shall nevertheless remain enforceable to the full extent necessary to permit a secured party to proceed against personal property or fixtures securing the obligation in accordance with the secured party's rights and remedies as permitted** under this chapter.

(3)

(A) Paragraph (2) does not limit the application of Section 580b of the Code of Civil Procedure.

(B) If the secured party commences an action, as defined in Section 22 of the Code of Civil Procedure, and the action seeks a monetary judgment on the debt, paragraph (2) does not prevent the assertion by the debtor or an obligor of any right to require the inclusion in the action of any interest in real property or an estate therein securing the debt. If a monetary judgment on the debt is entered in the action, paragraph (2) does not prevent the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the debt and not included in the action.

(C) Nothing in paragraph (2) shall be construed to excuse compliance with Section 2924c of the Civil Code as a prerequisite to the sale of real property, but that section has no application to the right of a secured party to proceed as to personal property or fixtures except, and then only to the extent that, the secured party is proceeding as to personal property or fixtures in a unified sale as provided in subparagraph (B) of paragraph (1).

(D) Paragraph (2) does not deprive the debtor of the protection of Section 580d of the Code of Civil Procedure against a deficiency judgment following a sale of the real property collateral pursuant to a power of sale in a deed of trust or mortgage.

(E) Paragraph (2) shall not affect, nor shall it determine the applicability or inapplicability of, any law respecting real property or obligations secured in whole or in part by real property with respect to a loan or a credit sale made to any individual primarily for personal, family, or household purposes.

(F) Paragraph (2) does not deprive the debtor or an obligor of the protection of Section 580a of the Code of Civil Procedure following a sale of real property collateral.

(G) If the secured party violates any statute or rule of law that requires a creditor who holds an obligation secured by an interest in real property or an estate therein to resort first to its security before resorting to any property of the debtor that does not secure the obligation, paragraph (2) does not prevent the assertion by the debtor or an obligor of any right to require correction of the violation, any right of the secured party to correct the violation, or the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the obligation, or the assertion by the debtor or an obligor of the subsequent unenforceability of the obligation except to the extent that the obligation is preserved by subparagraph (B) of paragraph (2).

(4) If the secured party realizes proceeds from the disposition of collateral that is personal property or fixtures, the following provisions shall apply:

(A) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any nonmonetary default.

(B) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any

monetary default (although the application of the proceeds shall, to the extent of those proceeds, satisfy the secured obligation) so as to affect in any way the secured party's rights and remedies under this chapter with respect to any remaining personal property or fixtures collateral.

(C) All proceeds so realized shall be applied by the secured party to the secured obligation in accordance with the agreement of the parties and applicable law.

(5) An action by the secured party utilizing any available judicial procedure shall in no way be affected by omission of a prayer for a monetary judgment on the debt. Notwithstanding Section 726 of the Code of Civil Procedure, any prohibition against splitting causes of action or any other statute or rule of law, a judicial action which neither seeks nor results in a monetary judgment on the debt shall not preclude a subsequent action seeking a monetary judgment on the debt or any other relief.

(6) As used in this subdivision, "monetary judgment on the debt" means a judgment for the recovery from the debtor of all or part of the principal amount of the secured obligation, including, for purposes of this subdivision, contractual interest thereon. "Monetary judgment on the debt" does not include a judgment which provides only for other relief (whether or not that other relief is secured by the collateral), such as one or more forms of nonmonetary relief, and monetary relief ancillary to any of the foregoing, such as attorneys' fees and costs incurred in seeking the relief.

(7) If a secured party fails to comply with the procedures applicable to real property in proceeding as to both real and personal property under subparagraph (B) of paragraph (1), a purchaser for value of any interest in the real property at judicial or nonjudicial foreclosure proceedings conducted pursuant to subparagraph (B) of paragraph (1) takes that interest free from any claim or interest of another person, or any defect in title, based upon that noncompliance, unless:

(A) The purchaser is the secured party and the failure to comply with this chapter occurred other than in good faith; or

(B) The purchaser is other than the secured party and at the time of sale of the real property at that foreclosure the purchaser had knowledge of the failure to comply with this chapter and that the noncompliance occurred other than in good faith.

Even if the purchaser at the foreclosure sale does not take his or her interest free of claims, interests, or title defects based upon that noncompliance with this chapter, a subsequent purchaser for value who acquires an interest in that real property from the purchaser at that foreclosure takes that interest free from any claim or interest of another person, or any defect in title, based upon that noncompliance, unless at the time of acquiring the interest the subsequent purchaser has knowledge of the failure to comply with this chapter and that the noncompliance occurred other than in good faith.

(8) If a secured party proceeds by way of a unified sale under subparagraph (B) of paragraph (1), then, for purposes of applying Section 580a or subdivision (b) of Section 726 of the Code of Civil Procedure to any such unified sale, the personal property or fixtures included in the

unified sale shall be deemed to be included in the "real property or other interest sold," as that term is used in Section 580a or subdivision (b) of Section 726 of the Code of Civil Procedure.

Cal Com Code § 9604 (emphasis added).

Since Creditor states that the basis for this contention is the reference to California Civil Code § 2924c, in the above section, the court conducted a word search of this voluminous statute and found this one reference:

> (C) Nothing in paragraph (2) shall be construed to excuse compliance with Section 2924c of the Civil Code as a prerequisite to the sale of real property, **but that section has no application to the right of a secured party to proceed as to personal property or fixtures** except, and then only to the extent that, the secured party is proceeding as to personal property or fixtures in a unified sale as provided in subparagraph (B) of paragraph (1).

Cal Com § 9604(a)(3)(C) [emphasis added]. This section does not appear to dictate that a debt secured by personal property is not curable, but "merely" states that the nonjudicial foreclosure rights provided in California Civil Code § 2924(c) does not preclude a creditor from electing to separately enforce its rights against the personal property collateral and is not required to do a combined real and personal property nonjudicial foreclosure sale.

While making general reference to California Commercial Code § 9604, Creditor does not clearly and simply state what default exists. Further, that if such default exists, how is Creditor's status as a creditor having a secured claim for which there is a pre-petition default is any different than the thousands and thousands of similar creditor have secured claims for which the collateral is personal property.

In attempting to try and find an answer to this issue, the court reviewed the Claims Registry to review Creditors proof of claim filed in this Bankruptcy Case. Though this case is now two months old, no proof of claim has been filed by Creditor.

Creditor has, in its prior Opposition and in the related Motion to Excuse the State Court Receiver from turning over personal property to the Debtor in Possession, has identified the default as being the default under Debtor's prior Chapter 11 Plan, with that default not being cured within the time period provided in the Plan.

Debtor responds that the default in the Chapter 11 Plan was subsequently cured.

It appears that the question of whether there is a default will not turn on interpretation of the prior Confirmed Chapter 11 Plan. The eighty (80) page confirmed Plan (20-24123; Order with Plan Attached, Dckt. 724), provides in § 6.13 for Plan defaults:

> 6.13. **Plan Default**
>
> Except as otherwise set forth in Section 4.1(vii) and (viii), if the Reorganized Debtor or the SPE or the Lester Family **Trust fails to make any payment or to perform any other material obligation required under the Plan, for more than fifteen (15) days after the time specified in the Plan** for such payment or other performance, any member of a Class

affected by the default may serve written notice of the default upon (I) the Reorganized Debtor, (ii) counsel for the Reorganized Debtor, and (iii) the SPE Independent Manager. If the Reorganized Debtor or the SPE or the Lester Family Trust **fails within fifteen (15) days after the date of service of the notice of default** either: (I) to **cure the default**; (ii) to obtain from the Court an extension of time to cure the default; or (iii) to obtain from the Court a determination that no default occurred, **then the Reorganized Debtor is in material default under the Plan to all the members of the affected Class (also defined above as a "Plan Default").**

Upon a Plan Default arising from an unpaid payment to any affected Class in which the SPE, the Lester Family Trust, or the Reorganized Debtor is the obligor on a Plan payment obligation, the creditors in such Class with an uncured default shall **immediately have relief from the Plan Injunction to pursue all available remedies against the Reorganized Debtor** and/or the Lester Family Trust or to file a motion to convert the case to a case under Chapter 7 of the Bankruptcy Code.

Upon a Plan Default arising from an asserted "non-payment" obligation of the Reorganized Debtor under this Plan, the affected creditors in such Class must first obtain a Court determination that the "non-payment" defaulted obligation is material with respect to the treatment of that Class before pursuing any available remedies against the Reorganized Debtor and/or the Lester Family Trust or filing a motion to convert the case to a case under Chapter 7 of the Bankruptcy Code.

20-24123; Confirmed CH 13 Plan, ¶ 6.13, Dckt. 724 (emphasis added). The above appears to "merely" provide for relief from the stay and does not otherwise address the ability, or inability of the Plan Administrator Debtor to cure a default in a payment due under the Plan.

At the hearing, counsel for the Debtor in Possession and counsel for Creditor stated that they reached an agreement on the use of cash collateral. The Debtor in Possession has not yet received, and doesn't know when it will be received, the employee retention credits not yet received. That item is being removed from this Cash Collateral Budget.

Counsel for Creditor and Counsel for Debtor shall lodge with the court their proposed order granting the motion. This order is consistent with prior orders entered by the court for the use of Creditor's cash collateral (except for not including the superpriority administrative claim).

The continued hearing on the Motion will be conducted at 1:30 p.m. on September 26, 2023 (specially set day and time). Supplemental pleadings for the further use of cash collateral shall be filed and served on or before September 12, 2023, and Opposition pleadings, if any, will be filed and served on or before September 19, 2023.

Counsel for the Debtor in Possession shall lodge with the court a proposed order, with the cash collateral budget attached, authorizing the use of the cash collateral for the period through September 30, 2023.

September 26,2023 Hearing

The court has dismissed this Bankruptcy Case, with the parties looking to address their issues in the Debtor's Chapter 11 case in which there is a confirmed Plan.

This Bankruptcy Case having been dismissed, this Motion is dismissed without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Use of Cash Collateral having been heard on August 8, 2023, the court having granted the Motion authorizing the use through September 30, 2023, this Bankruptcy Case having been dismissed, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Use Cash Collateral is dismissed without prejudice.

3. 23-20038-E-13 KMM-2 | **JOANNE DAVIS** Peter Cianchetta | **MOTION FOR RELIEF FROM AUTOMATIC STAY** 8-16-23 [105]

GLOBAL LENDING SERVICES LLC
VS.

Final Ruling: No appearance at the September 26, 2023 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 13 Trustee, and Office of the United States Trustee on August 16, 2023. By the court's calculation, 41 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.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion for Relief from the Automatic Stay is granted.

Global Lending Services LLC ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2018 Nissan Rogue, VIN ending in 4150 ("Vehicle"). The moving party has provided the Declaration of Paul Peay to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Joanne Davis ("Debtor").

Movant argues Debtor has not made 7 post-petition payments, with a total of $4,218.48 in post-petition payments past due. Declaration, Dckt. 109.

Movant has also provided a copy of the J.D. Power Report Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

David P. Cusick, the Chapter 13 Trustee ("Trustee"), submitted a non-opposition requesting this court grant Movant's motion. Dckt. 115. Trustee states that Debtor is delinquent $1,323.74 in her plan

payments, and a payment in the amount of $15,066.00 would be necessary to cure Debtor's default with Movant. *Id.*

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the remaining debt secured by this asset is determined to be $29,745.10 (Declaration, Dckt. 109), while the value of the Vehicle is determined to be $18,250.00, as stated on the J.D. Power Report, which is slightly less than the retail value as stated in Schedules A/B and D filed by Debtor. *Id.*

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

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

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 Global Lending Services LLC ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2018 Nissan Rogue, VIN ending in 4150 ("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.

No other or additional relief is granted.

4. 20-21558-E-13 KMM-1 | **DANIEL CRAIN** | **Mark Briden** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** | **8-16-23 [102]**

HARLEY-DAVIDSON CREDIT CORP
VS.

Final Ruling: No appearance at the September 26, 2023 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 13 Trustee, and Office of the United States Trustee on August 16, 2023. By the court's calculation, 41 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.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion for Relief from the Automatic Stay is granted.

Harley-Davidson Credit Corp ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2020 Harley-Davidson FLHXS Street Glide S, VIN ending in 3641 ("Vehicle"). The moving party has provided the Declaration of Hemlata Mistry to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Daniel Crain ("Debtor").

At the time of filing this Motion, Movant argues Debtor has not made 5 post-petition payments, with a total of $2,819.80 in post-petition payments past due. Declaration, Dckt. 105.

Movant has also provided a copy of the J.D. Power Guide Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the remaining debt secured by this asset is determined to be $21,338.36 (Declaration, Dckt. 105), while the value of the Vehicle is determined to be $29,999.00, as stated in Schedules A/B and D filed by Debtor.

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.

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 Harley-Davidson Credit Corp ("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 2020 Harley-Davidson FLHXS Street Glide S, VIN ending in 3641 ("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.
>
> No other or additional relief is granted.

5. **23-22089-E-13** **PHILIP LA TONA** **MOTION FOR RELIEF FROM**
SCF-1 **Peter Macaluso** **AUTOMATIC STAY**
8-17-23 [27]

THE BANK OF NEW YORK MELLON
VS.

Final Ruling: No appearance at the September 26, 2023 Hearing is required.

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 August 17, 2023. 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). The defaults of the non-responding parties and other parties in interest are entered.

The court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion for Relief from the Automatic Stay is granted.

The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH3, Mortgage Pass-Through Certificates, Series 2007-OH3, its successors and/or assignees ("Movant") seek relief from the automatic stay with respect to Philip John La Tona's ("Debtor") real property commonly known as 1724 Chesapeake, Arroyo Grande, California ("Property"). Movant has provided the Declaration of Trisha Jamjuntr to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

DEBTOR'S REPLY

Philip John La Tona filed an Opposition on September 8, 2023. Dckt. 36. Debtor's attorney asserts that Debtor is a victim of fraud, and that the two prior cases filed under his name were not his. Further, Debtor asserts that he has no interest in the Property, nor has he met any of the people listed in the motion as separate debtors filing bankruptcy petitions. Given that Debtor has no interest in the Property, Debtor is not opposed to relief. Opposition, Dckt. 36.

TRUSTEE'S NONOPPOSITION

David P. Cusick, Chapter 13 Trustee ("Trustee), filed a nonopposition to Movant's motion on September 12, 2023. As with the Debtor, Trustee does not oppose Movant's motion because Debtor has not listed the Property in his estate, and Debtor is otherwise completely current on plan payments. Dckt. 39.

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 $545,000 (Declaration, Dckt. 32). The Property is not listed or stated in Schedules A/B and D filed by Debtor because Debtor claims he has no interest in the Property whatsoever.

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.

The court provides this order to avoid any confusion that could exist with respect to title appearing to be in Debtor's name, but Debtor confirming that Debtor has no interest in the Property.

Prospective Relief from Future Stays

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

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Movant asserts that the bankruptcy filing was in bad faith and was part of a scheme to delay, hinder, or defraud creditors. Movant points to a series of 38 other bankruptcy cases having been filed and dismissed in which an interest in the property was asserted. However, the Debtor asserts that the previous bankruptcy filings have no relationship to him and indeed, he has no interest in this property. Dckt. 36.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was not part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases because Debtor was not involved in the previous filings.

However, the court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4) of granting relief from. Movant has provided sufficient evidence concerning bankruptcy cases

being filed to prevent actions against the Property. Debtor asserts no rights in the Property and does not contest a nonjudicial foreclosure sale of the Property.

No other or additional relief is granted by the court.

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

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by The Bank of New York fka The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-OH3, Mortgage Pass-Through Certificates, Series 2007-OH3, its sucessors and/or assignees ("Movant") having been presented to the court, Debtor confirming with the court that Debtor has no interest in this property and believes that Debtor's name is fraudulently being put on title by unknown third-parties, 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 1724 Chesapeake, Arroyo Grande, California 93420 ("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 waived.

No other or additional relief is granted.

6. **23-22693-E-13 KGR-1** | **RUDOLF/JULIANA VOGT** | **Mikalah Liviakis** | **MOTION FOR RELIEF FROM AUTOMATIC STAY** **8-31-23 [17]**

THE GOLDEN 1 CREDIT UNION
VS.

Final Ruling: No appearance at the September 26, 2023 Hearing is required.

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 August 31, 2023. By the court's calculation, 26 days' notice was provided. 28 days' notice is required.

Though two days short of the required 28 days notice, the court notes that in the proposed Chapter 13 Plan Debtor intends to surrender the collateral to the Movant and modify the stay so Movant can proceed to liquidate its collateral. Proposed Plan, Class 3 Claims, § 3.09; Dckt. 3. In light of Debtor's stated intention to surrender the collateral, the court shortens the notice period to the 26 days given.

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 court has determined that oral argument will not be of assistance in rendering a decision in this matter.

The Motion for Relief from the Automatic Stay is granted.

Golden 1 Credit Union ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2022 Ford Truck Super Duty F-35, VIN ending in 2053 ("Vehicle"). The moving party has provided the Declaration of Sofia Ali to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Rudolf Vogt and Juliana Vogt ("Debtors").

Movant argues Debtors has not made 1 post-petition payment, with a total of $1,447.52 in post-petition payments past due. Declaration, Dckt. 20.

Movant has also provided a copy of the Kelley Blue Book Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

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 $93,585.11 (Declaration, Dckt. 20), while the value of the Vehicle is determined to be $83,430.00, as stated on the Kelley Blue Book Valuation Report, which is slightly less than the retail value as stated in Schedules A/B and D filed by Debtor.

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.

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, arguing that relief is appropriate because Debtor is unlikely to object to relief. Dckt. 27. The court does not find this reason sufficient to lift the fourteen-day stay. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Therefore, 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.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees "pursuant to the Security Agreement"). 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.

Furthermore, 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.

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 The Golden 1 Credit Union ("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 2022 Ford Truck Super Duty F-35, VIN ending in 2053 ("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.