

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

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

1. [19-22078-E-13](#) **EDUARDO/MARIE ORTEGA** **CONTINUED MOTION FOR RELIEF**
[EAT-1](#) **Peter Macaluso** **FROM AUTOMATIC STAY**
6-10-19 [37]

WILMINGTON TRUST, NATIONAL
ASSOCIATION, VS.
ITEM 1-4

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, Chapter 13 Trustee, creditors, and Office of the United States Trustee on June 10, 2019. By the court's calculation, 36 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 xxxxxxx.

Wilmington Trust, National Association as Trustee for MFRA Trust 2016-1 ("Movant") seeks relief from the automatic stay with respect to the debtors, Eduardo Ortega and Marie Ortega's ("Debtor") real property commonly known as 2481 Bent Tree Dr., Roseville, California ("Property"). Movant has provided the Declaration of James M. Stefani to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The James M. Stefani Declaration provides the following testimony:

1. Notices of Trustee's Sale were filed on March 1, 2012; September 16, 2013; June 27, 2014; February 11, 2016; and April 7, 2017. All sales were cancelled due to bankruptcy filings. Declaration ¶ 8, Dckt. 39.
2. A new Notice of Default was recorded April 1, 2019 but rescinded due to this bankruptcy filing. *Id.*, ¶ 9.
3. The Property was involved in several bankruptcy cases. *Id.*, ¶ 10.
4. As of May 2019, no payments have been received by Debtor since November 2018. *Id.*, ¶ 12.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("the Chapter 13 Trustee") filed a Response on July 1, 2019. Dckt. 55. The Chapter 13 Trustee notes Debtor is \$8,062.38 delinquent under the plan, and that Movant is included as a Class 1 claim with a monthly payment of \$2,277.55.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on July 2, 2019. Dckt. 62. Debtor asserts an amended plan will be filed to cure Movant's arrearage claim by the 26th month of the plan term. Debtor requests the court deny the Motion on the basis that the amended plan will provide adequate protection.

JULY 16, 2019 HEARING

At the July 16, 2019 hearing, the court continued hearing and ordered the Chapter 13 Trustee to make a distribution of \$6,500.00 to Movant as an adequate protection payment. Civil Minutes, Dckt. 80.

AUGUST 13, 2019 HEARING

At the August 13, 2019, hearing the court further continued the hearing to allow Debtor to get the case on track. Civil Minutes, Dckt. 98.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$668,011.63 (including \$532,858.08 in consensual liens, and \$121,268.16 in tax liens). *See* Schedule D, Dckt. 1 *and* Proof of Claim, Nos. 1-3, 5, 10. The value of the Property is determined to be \$575,000.00, as stated in Schedules A and D. 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). ~~The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.~~

~~————— The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.~~

Prospective Relief from Future Stays

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

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor’s inability to reorganize, and unnecessary delays by serial filings. *Id.* Here, Debtor has filed now three cases and as of May 10, 2019 the total indebtedness owed to Movant is \$471,943.21.

- A. Case No. 17-22226
 - 1. Filed: April 3, 2017
 - 2. Chapter 13
 - 3. Dismissal Date: January 16, 2019
 - 4. Reason for Dismissal: Delinquency in plan payments.
- B. Case No. 16-21304
 - 1. Filed: March 2, 2016
 - 2. Chapter 13
 - 3. Dismissal Date: January 22, 2017
 - 4. Reason for Dismissal: Delinquency in plan payments.
- C. Case No. 14-27476
 - 1. Filed: July 22, 2014
 - 2. Chapter 13
 - 3. Dismissal Date: September 24, 2015
 - 4. Reason for Dismissal: Delinquency in plan payments.

- D. Case No. 12-38100
1. Filed: October 10, 2012
 2. Chapter 7
 3. Result: Discharge received June 25, 2013

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 part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation.

~~The filing of the current Chapter 13 case cannot have been for any bona fide, good faith reason in light of Movant not receiving regular monthly payments and suffering from undue delay from the foreclosure proceeding on the subject Property. In effect, this is a series of bankruptcy attempts by Debtor. Movant argues that Debtor's repeated bankruptcy filing is being used as part of a scheme to delay or hinder or otherwise interfere with Movant's ability to enforce its state law remedies. The scheme includes multiple bankruptcy filings affecting the Property, which further hurts Movant.~~

~~—————The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Debtor has been in and out of bankruptcy for nearly a decade. In 2013, Debtor received a discharge in Debtor's Chapter 7 case. Notwithstanding being afforded that relief, Debtor proceeded to file 4 Chapter 13 bankruptcy cases. Omitting the present case, all of Debtor's Chapter 13 cases have been dismissed for delinquency in plan payments.~~

~~—————Debtor does not appear to be capable (or willing) of prosecuting a Chapter 13 case in good faith. Rather, it appears Debtor is merely using bankruptcy protections to stop foreclosure on the Property, and live in the Property while paying only what Debtor wants to pay.~~

~~—————Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases, and relief is granted pursuant to 11 U.S.C. § 362(d)(4).~~

~~—————In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.~~

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 Wilmington Trust, National Association as Trustee for MFRA Trust 2016-1 ("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 2481 Bent Tree Dr., Roseville, California ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.~~

~~**IT IS FURTHER ORDERED** that the above relief is also granted pursuant to 11 U.S.C. § 362(d)(4), which further provides:~~

~~"If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording."~~

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

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)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on May 9, 2019. By the court's calculation, 33 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----

The Motion to Dismiss is denied
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Creditor, Robert Guerra ("Creditor"), filed this Motion seeking dismissal of this case filed by debtors, Eduardo M Ortega and Marie E Ortega ("Debtor"), pursuant to 11 U.S.C. §1307.

The Motion states the following with particularity (Fed. R. Bankr. P. 9013) :

1. Debtor is incapable of keeping their promises, whether paying creditors or complying with the terms of their own Chapter 13 plans. This case was filed in bad faith.
2. Debtor has filed the following prior cases:

Filing Date	Case No.	Result
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10/10/2012	12-38100	Discharge entered June 25, 2013
07/22/14	14-27476	Dismissed September 25, 2015
03/02/16	16-21304	Dismissed January 23, 2017
04/03/17	17-22226	Dismissed January 16, 2019

3. The Debtors have been in and out of Chapter 13 for the last 6 years. Where a plan has been confirmed, the cases were dismissed for defaults in payments.
4. Debtor currently owes Creditor slightly less than \$8,000 under the 1999 non-discharge and forbearance agreement.
5. Debtor defaulted on the balloon payment on April 1, 2019 under the recent forbearance agreement.
6. This is the fifth filing by Debtor in the past five or six years. Debtor is a high wage earner but has failed to complete a Chapter 13 file in recent years.
7. Debtor lists \$100,000.00 in arrearages in this case, indicating their financial situation has gotten worse since prior filings.
8. The instant case was filed not listing Creditor's secured claim, and appears to have been filed for the sole purpose of thwarting Creditor's enforcement of judgment.
9. Debtor's serial filings and inaccurate schedules demonstrate bad faith and warrant dismissal with prejudice to refiling for at least one year.

Motion, Dckt. 23.

JUNE 11, 2019 HEARING

At the June 11, 2019 hearing Debtor's counsel asserted a defect in service - the Motion not having been served by personal service or U.S. Mail. counsel not having consented to service by email, the specter of a deficiency in service exists.

Additionally, Debtor's counsel stated that Debtor believed that Creditor had been paid in full through the prior four Chapter 13 cases. The balance of Creditor's claim (not including any additional attorney's fees) has been reduced to less than \$8,000.

The court continued the hearing and ordered an opposition be filed by June 24, 2019, and

AUGUST 13, 2019 HEARING

At the August 13, 2019, hearing the court further continued the hearing to allow Debtor to get the case on track. Civil Minutes, Dckt. 97.

DEBTOR'S OPPOSITION

Debtor's counsel filed an Opposition on June 24, 2019. Dckt. 51. Debtor's counsel argues the current case was not filed in bad faith and should not be dismissed. Debtor's counsel argues further:

1. Debtors have paid the Creditor a total of \$134,528.00 at the demise of the mortgage payments.
2. There has been no misrepresentation; while Debtor was unable to complete payments due, the balance was \$795.84 according to the Trustee's accounting and down from a initial balance of \$122,952.47.
3. The Debtor's first case lasted 14 months, the second case lasted 10 months, and the third case 9 months.
4. Debtor filed this case to pay the creditors and Creditor has been front loaded with the intention to complete that debt first.
5. Debtor appears to have paid Creditor's claim given the lack of a new proof of claim accounting for payments via the Trustee to a remaining balance of \$795.84, and is a little bewildered that the claim is asserted to be in excess of \$7,000.00.

While a throng of factual allegation are made in the Opposition, no evidence such as a declaration of Debtor was filed. Despite the allegations of bad faith in this case and in the face of the court's comments at the prior hearing, there is no testimony of the Debtor's explaining how this case can be filed in good faith.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding—the court cannot and does not merely take counsel at their word. Furthermore, the Local Rules affirmatively require that evidence be filed along with every motion and request for relief (including a request that this Motion be denied). LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

CREDITOR'S REPLY TO DEBTOR'S OPPOSITION

Creditor filed a Response on July 1, 2019. Dckt. 58. Creditor argues that Debtor's Opposition only explains some payments on Creditor's claim have been made, and does not actually refute the allegations of bad faith stated in the Motion. Creditor further notes that no admissible evidence was filed in support of the Opposition.

Creditor filed the Declaration of Mark Serlin, Creditor's counsel, in support of its Opposition. Dckt. 59. Therein, Serlin explains Creditor's claim has continued to grow due to attorney's fees and costs necessarily incurred through collection.

DISCUSSION

Creditor's claim has now been paid and Creditor does not have standing to seek this relief. As the evidence has been presented to this court, it appears that a substantial cause of the multiple filings is Creditor and Creditor's counsel, with Debtor and Debtor's counsel so cowed by them that Debtor has agreed to unreasonable payment plans for Creditor's secured claim in the prior cases.

The Motion is denied.

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 to Dismiss the Chapter 13 case filed by Creditor, Robert Guerra ("Creditor"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied.

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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 7, 2019. By the court's calculation, 37 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p>The Motion to Confirm the Amended Plan is granted.</p>
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The debtor, Eduardo M Ortega and Marie E Ortega ("Debtor"), seek confirmation of the Amended Plan. The Amended Plan provides for monthly plan payments of \$8,000.00 for sixty months and a 0 percent dividend to unsecured claims totaling \$200,355.64. Amended Plan, Dckt. 71. 11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

CREDITOR'S OPPOSITION

Robert Guerra holding a secured, nondischargeable claim ("Creditor") filed an Opposition on July 19, 2019. Dckt. 76. Creditor argues that the Plan and case were filed in bad faith, as has already been discussed by this court in a tentative ruling on a dismissal motion. Creditor argues the facts indicating bad faith include the following:

1. Debtor knowingly filed false schedules because they knew Creditor's claim was greater than \$10.00.
2. Debtor in the first proposed plan listed Creditor's claim as \$1.00 and failed to provide for the claim.

3. Debtor has had four prior bankruptcy cases dismissed, all based on plan defaults.
4. Since the prior cases, Debtor has only incurred more priority tax and secured debt, demonstrating that Debtor is syphoning money away from creditors.
5. Debtor has continued to delay payment to Creditor's claim.

This Opposition has now been fully resolved with Creditor now having had his claim paid in full. Stipulation, Order and Response; Dckts. 100, 102, 103.

CHAPTER 13 TRUSTEE'S RESPONSE

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on July 22, 2019. Dckt. 83. Trustee notes several of the plan provisions, pending motions to dismiss and for relief from automatic stay, that no evidence has been presented as to prior filed cases, and that Debtor is current in plan payments with the next payment coming due July 25, 2019.

However, Trustee does not take a position on the confirmability of the plan.

DEBTOR'S REPLY

Debtor filed a Reply on August 5, 2019. Dckt. 92. Debtor's counsel asserts that the present plan is feasible, three payments of \$8,045.00 having been made.

As to Creditor's claim, Debtor's counsel proposes paying the claim off with two more payments made in August and September 2019.

In reply to Trustee's Response, Debtor provides the following explanations for prior case history:

1. Debtor has paid \$229,133.48 through the Trustee and \$118,072.24 to Creditor (during an unspecified time period). Declaration ¶ 1, Dckt. 93.
2. Debtor's daughter experienced mental health issues that caused expenses for treatment. When combined with Creditor's claim, paying creditors inside or outside the bankruptcy became difficult. *Id.*, ¶ 2.
3. Debtor's grandfather died in 2016, and Debtor's father died in May 2019. *Id.*, ¶ 3.
4. Debtor Marie Ortega has an education but could only get hired at temporary agencies. *Id.*, ¶ 4.
5. Debtor Eduardo Ortega "took two changes in positions as the corporations were changing, so after a year and a half in the startup [Debtor Eduardo Ortega] was promoted into the present position." *Id.*, ¶

AUGUST 13, 2019 HEARING

At the August 13, 2019, hearing the court further continued the hearing to allow Debtor to get the case on track. Civil Minutes, Dckt. 96.

DEBTOR'S SUPPLEMENTAL REPLY

Debtor filed a Supplemental Reply on September 23, 2019, asserting that creditor Robert Guerra has been paid in full. Exhibit B filed with the Reply is a copy of a satisfaction of judgement. Dckt. 104.

DISCUSSION

This is Debtor's fourth Chapter 13 case. It has been evident to the court that much of the Debtor's problems have arisen by being over solicitous to paying the secured claim of Robert Guerra. That impediment to Debtor properly performing a Chapter 13 Plan has now been removed.

Upon review of the First Amended Plan, the files in this case, and evidence presented, the Motion is granted and the Plan is confirmed.

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 to Confirm the Amended Chapter 13 Plan filed by the debtor, Eduardo M Ortega and Marie E Ortega ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Amended Plan is granted and the Amended Plan, Dckt. 71, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

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.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

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 Movant has asserted that 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.

Debtor's counsel is not a "for hire witness" who presents the court with hearsay and ties to manufacture it as evidence. That such testimony, by which counsel seeks to remove himself as counsel and make himself a witness (whose credibility is clearly impaired) speaks volumes as to the legitimacy of the opposition.

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.

SHERWOOD IRON POINT, LP VS.

Final Ruling: No appearance at the October 1, 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 (*pro se*), Co-Debtors, Chapter 13 Trustee, creditors, and Office of the United States Trustee on August 29, 2019. By the court’s calculation, 33 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.

Sherwood Iron Point, LP (“Movant”) seeks relief from the automatic stay with respect to the real property commonly known as 2300 Iron Point Road #1021, Folsom, California (“Property”). The moving party has provided the Declaration of Michael West to introduce evidence as a basis for Movant’s contention that Joseph Benjiman Burchett (“Debtor”) does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of, and Debtor was merely leasing, the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance.

Based upon the evidence submitted, the court determines that there is no equity in the Property for either Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the Property is *per se* not necessary for an effective reorganization. *See Ramco Indus. v. Preuss (In re Preuss)*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel, relief from stay proceedings are summary proceedings that

address issues arising only under 11 U.S.C. Section 362(d). *Hamilton v. Hernandez (In re Hamilton)*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427, at *8–9 (B.A.P. 9th Cir. Aug. 1, 2005) (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 as part of a motion for relief from the automatic stay in a Contested Matter (Federal Rule of Bankruptcy Procedure 9014).

Additionally, Movant has provided sufficient grounds to grant relief from the co-debtor stay under 11 U.S.C. § 1301(a). Movant has established, pursuant to 11 U.S.C. § 1301(a), that it would be irreparably harmed if relief from the co-debtor stay.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the Property, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

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 Debtor has no interest in the Property.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Sherwood Iron Point, LP (“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 and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2300 Iron Point Road #1021, Folsom, California.

IT IS FURTHER ORDERED that the request to terminate the co-debtor stay of Donald R. Farrar of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the foregoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

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

No other or additional relief is granted.

6. [19-25620](#)-E-13 NANCY NEWCOMB **MOTION FOR RELIEF FROM**
[CJC-15](#) Pro Se **AUTOMATIC STAY**
9-11-19 [10](#)
WILLIAMS PORTFOLIO 3 VS.

Final Ruling: No appearance at the October 1, 2019, hearing is required.

The case having previously been dismissed, the Motion seeking relief only as provided in 11 U.S.C. § 362(d)(2) is dismissed as moot.

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 Stay having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is dismissed as moot, the case having been dismissed.

**CREDIT ACCEPTANCE
CORPORATION VS.**

Final Ruling: No appearance at the October 1, 2019, hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Not 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, parties requesting special notice, and Office of the United States Trustee on August 27, 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.

Credit Acceptance Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2016 Ford Fusion, VIN ending in 5949 ("Vehicle"). The moving party has provided the Declaration of Cynthia Litton to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Anthony George Tokuno and Renee A. Tokuno ("Debtor").

Movant argues Debtor has not made 11 pre-petition payments, with a total of \$5,304.83 in post-petition payments past due. Declaration, Dckt. 16. Movant also argues its claim is not provided for in the Chapter 13 plan.

The Chapter 13 Trustee, David Cusick ("Trustee"), filed a Response on September 16, 2019. Dckt. 20. Trustee also notes that Movant's claim is not provided for.

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 \$18,413.33. Declaration, Dckt. 16. No evidence of value for the Vehicle was presented by any party—the Vehicle not being listed on Debtor's Schedules.

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 payments due and Debtor’s failure to list the Vehicle as an asset. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

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

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court. Movant argues this relief is warranted

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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

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

The Motion for Relief from the Automatic Stay filed by Credit Acceptance Corporation (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Vehicle, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Ford Fusion, VIN ending in 5949 (“Vehicle”), and applicable nonbankruptcy law to obtain

possession of, nonjudicially sell, and apply proceeds from the sale of the Vehicle to the obligation secured thereby.

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

No other or additional relief is granted.