UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

October 8, 2013 at 1:30 p.m.

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1. 12-35317-E-13 SW-1 JOHN VIRGEN AND ELIZABETH LOWERY-VIRGEN Scott J. Sagaria
MOTION FOR RELIEF FROM AUTOMATIC STAY
8-23-13 [31]
WELLS FARGO BANK, N.A. VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee, and Office of the United States Trustee on September 18, 2013. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Wells Fargo Bank, N.A., seeks relief from the automatic stay with respect to an asset identified as a 2006 Chrysler PT Cruiser, VIN ending in 53351. The moving party has provided the Declaration of Carina Olivares to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Olivares Declaration states that the Debtor has voluntarily surrendered the vehicle to the Movant. The Movant does not provide number or amount of past due payment since the filing of the payment. 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 $2,730.84, as stated in the

Olivares Declaration, while the value of the asset is determined to be $2,730.84, as stated in Schedules B and D filed by Debtor.

The Olivares Declaration also seeks to introduce evidence establishing the value of the asset as $2,985.00, in the form of a Kelly Blue Book Valuation (Exhibit C). The declaration purports to state that it is her opinion that the vehicle has a retail value of $3,910.00 and wholesale value to be $2,985.00. However, the declarant provides no testimony that (1) she is an expert and (2) how she has an opinion, other than merely parroting what she is reading in the Kelly Blue Book valuation.

The Federal Rules of Evidence are clear and straight forward with respect to what constitutes proper and competent evidence. These Rules include the following.

Federal Rule of Evidence 602. Need for Personal Knowledge

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703. FN.1.

FN.1. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2ND EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VI, § 602.02

§ 602.02 Purpose and Applicability of Rule

[1] Personal Knowledge as Most Reliable Evidence

A witness may testify only about matters on which he or she has first-hand knowledge. The witness's testimony must be based on events perceived by the witness through one of the five senses.

The Rule is an extension of the law's usual preference that decisions be based on the best evidence available, although this preference is not an actual rule of evidence. The Rule acknowledges that distortion increases with transfers of testimony, and that the most reliable testimony is obtained from a witness who has actually perceived the event.

Rule 602 permits evidence of the requisite personal knowledge to be provided either through the witness's own testimony or through extrinsic testimony. The Rule authorizes the judge to exercise some, although minimal, control over the jury by empowering the judge to reject inherently incredible testimonial evidence, something that rarely occurs (see § 602.03).

Federal Rule of Evidence 701. Opinion Testimony by Lay Witnesses

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. FN.2.

FN.2. WEINSTEIN'S FEDERAL RULES OF EVIDENCE MANUAL 2ND EDITION, MATTHEW BENDER & COMPANY, INC., ARTICLE VII, § 701.03, 701.06

§ 701.03 Requirements for Admissibility

[1] Opinion Must Be Based on Personal Perception

To be admissible, lay opinion testimony must be based on the witness's personal perception. This requirement is no more than a restatement of the traditional requirement that most witness testimony be based on first-hand knowledge or observation.

In its purest form, lay opinion testimony is based on the witness's observations of the event or situation in question and amounts to little more than a shorthand rendition of facts that the witness personally perceived. Lay opinion testimony is also admissible when the opinion is a conclusion drawn from a series of personal observations over time. Most courts have also permitted lay witnesses to testify under Rule 701 to their opinions when those opinions are based on a combination of their personal observations of the incident in question and background information they acquired through earlier personal observations....

§ 701.06 Trial Judge Has Broad Discretion to Admit or Exclude Lay Opinion Testimony

Trial courts have broad discretion in determining whether to admit or to exclude lay opinion testimony. This discretion applies both to the general decision to admit or exclude the evidence and to the subsidiary questions included in that determination:

Whether the opinion is based on the witness's personal perception.

Whether the opinion is rationally connected to the witness's personal perceptions.

Whether the opinion will assist the trier of fact in understanding the witness's testimony or in determining a fact in issue. (cont.)

Whether the probative value of the testimony outweighed its potential prejudicial effect.

Federal Rule of Evidence 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Federal Rule of Evidence 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

The Declarant is not an expert on car values and demonstrates that she has no personal knowledge as to the vehicle and its value. The court finds this lay witnesses "opinion" of little value and credibility.

Though the Declarant provides no testimony concerning the Kelly Blue Book valuations, the court takes judicial notice that the Kelley Blue Book and the valuations provided therein are in the nature of market reports, trade guides, and compilations that are generally relied upon by the public and persons in the vehicle valuation business. Fed. R. Evid. 803(17), California Commercial Code § 2724. This resolves the hearsay issues relating to this report. Though not expressly stated by the Declarant, the court infers that the Declarant obtained this report from Kelly Blue Book and is providing a copy as Exhibit C. That is sufficient to authenticate Exhibit C as required by Federal Rule of Evidence 901.

The Chapter 13 Trustee filed a non-opposition statement to the Motion for Relief from Automatic Stay.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments and there is little to no equity remaining in the asset. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

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

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

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2006 Chrysler PT Cruiser, VIN ending in 53351, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.
>
> No other or additional relief is granted.

2. 13-26582-E-13 APN-1 VENIAMIN FURSOV AND ALLA FURSOVA-TIMOFEYEVA Peter G. Macaluso
CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 7-26-13 [24]
TOYOTA LEASE TRUST VS.

CONT. FROM 9-10-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 26, 2013. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

No Tentative Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The court's tentative decision is to xxxx the Motion for Relief from the Automatic Stay. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

AUGUST 27, 2013 HEARING

Toyota Lease Trust seeks relief from the automatic stay with respect to an asset identified as a 2008 Lexus ES350, VIN ending in 9436. FN.1. The moving party has provided the Declaration of Mary Ibarra to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

FN.1. The court is baffled by the Debtors' attorney's inclusion of a heading entitled "Points & Authorities" in his motion. Local Bankruptcy Rule 9004-1(a) and the Revised Guidelines for Preparation of Documents ¶ (3)(a), which require that the motion, points and authorities, each declaration, and the exhibits be filed as separate electronic documents. The court notes the subheading "Points and Authorities In Support of Motion for Relief" in the motion is followed by one brief paragraph referencing 11 U.S.C. §§ 362(d)(1) and (d)(2). Counsel would be wise to consider the Local Rules more carefully, as self designating the pleading as a points and authorities is sufficient to have it denied under the Local Rules.

The Ibarra Declaration states that under and pursuant to the Chapter 13 plan put forth by Debtor, Movant is to be paid directly, pursuant to the terms of the prevailing contractual agreement. The monthly payments are in the sum of $598.09 per month. The Ibarra Declaration states Debtor has defaulted under the contract because the lease agreement reached maturity May 2, 2013, and Debtor remains in possession of the vehicle.

The Chapter 13 Trustee filed a statement of non-opposition.

DEBTOR'S OPPOSITION

Debtor argues that a review of the contract reveals that the debtor had a right to purchase this vehicle at the end of the contract. As such, Debtor has included the claim in both section 3.02 as "disguised PMSI" and as a class 2 claim of $14,614.66, the payoff balance.

Debtor contends that Movant received proper notice of the filing, the plan and confirmation. No objection was made to the plan and it was confirmed on August 3, 2013. Dckt. 32. The Debtors assert they are current under the terms of the confirmed plan.

CONTINUANCE

Because of the poor print quality of the Lease Agreement (both filed as Exhibit A to this Motion and to the Proof of Claim), the court was unable to read the terms of the contract. The court will not guess or blindly adopt the contention of one party or the other. The court continued the hearing to allow Creditor to file a legible copy of the lease agreement.

SEPTEMBER 10, 2013 HEARING

The Creditor provided a legible lease agreement. The hearing was continued to October 8, 2013 to allow the parties to amend the plan to provide for the correct payment and amortization to Lexis Financial. The parties stated at the hearing that if the Debtor amended the reference to the lease being disguised financing and providing for the amount of buyout stated in the lease, the plan could be confirmed, mooting the motion for relief from the automatic stay.

DEBTORS' REPLY

The Debtors filed a reply on October 1, 2013 asking to amend the Plan in the Order Confirming to provide for the Class 2 of Lexus Financial Services/Toyota Lease Trust to receive monthly dividend of $297.00 at 5%. Dckt. 40. The Debtors include a proposed order which states that attorneys fees in the amount of $5000.00 are approved, of which $1,025.00 was paid prior to the filing of the petition. Dckt. 41.

The Court does not find the stated amendment to the plan to provide for Creditor Lexus Financial to be unreasonable, but the Debtors have failed to provide the court with a proposed amended confirmation order to document the resolution of this Contested Matter.

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

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

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the Motion is xxxx.

3. 13-30988-E-13 SANDRA O'CONNELL — **MOTION TO RECONSIDER DISMISSAL OF CASE**
Pro Se — **9-25-13 [28]**

CASE DISMISSED 9-9-13

Notice Provided: The Motion to Reconsider Dismissal was set for hearing by the court by Order dated October 1, 2013 (Dckt. 29), and served by the Clerk of the Court through the Bankruptcy Noticing Center on all parties on October 2, 2013. 6 days notice of the hearing was provided.

No Tentative.

Debtor filed a typed letter on September 25, 2013, stating that she understood that the plan would be created with the Trustee during the meeting with the Trustee. However, after she contacted the bankruptcy court, she was advised that she must submit a plan along with a letter stating why the plan was not submitted on time. Debtor states she is now submitting a plan with the court which will allow her case to be reinstated.

Review of Court's File and Documents

The bankruptcy case was filed on August 21, 2013. The Debtor's Petition provides the following information: (1) her business is "other," (2) Debtor is a small business debtor as defined by 11 U.S.C. § 101(51D), and (3) the Debtor estimates that she has 1 to 49 creditors, $0 to $50,000 in assets, and (3) $0 to $50,000 in liabilities. Dckt. 1. Schedule D lists the following creditors holding secured claims:

ADT Alarm – No Collateral Identified	$1,000.00
All Service Propane - No Collateral Identified	$385.75
Aspen National Collections – No Collateral Identified	$1,013.71
TDS - No Collateral Identified	$695.61
PG&E – No Collateral Identified	$1,795.33
Ameri Gas - No Collateral Identified	$1,500.00

Dckt. 1 at 4-5.

Schedule A states that the Debtor has no interest in any real property. Dckt. 18 at 3. Schedule B lists common personal use property and a growing medical crop (for which the value is listed at $0.00). The Debtor's personal property assets are stated to have a value of $3,350.15. *Id.* at 5-6. Schedule C lists no exempt assets. *Id.* at 7. Schedule E lists no creditors with priority unsecured claims. *Id.* at 8. Schedule F lists the same creditors as listed previously on Schedule D. *Id.* at 11.

On Schedule I the Debtor states that she is unemployed and receives Social Security benefits of $986.30 for herself and $537.00 for her son a month. She lists her total income to be $1,523.30. *Id.* at 15. Schedule J lists $1,772.00 a month in expenses. These income $435.00 for rent or mortgage, $300.00 for food, $250.00 for transportation, and $150.00 a month for auto insurance. *Id.* at 16.

The Statement of Financial Affairs, response to Questions 1 and 2, state that the Debtor had no income for the current year and the two years preceding the filing of this Bankruptcy Case. *Id.* at 17, 18.

The Debtor filed a Chapter 13 Plan on September 25, 2013. Dckt. 26. The Plan provides for a monthly payment of $30.00 by the Debtor to the Chapter 13 Trustee for a period of 60 months. No information is provided in the sections of the plan for any Class 1, 2, 3, 4, 5, 6, or 7 claims. Other than stating that the monthly payment is $30.00, that the Debtor will make no other payments, that the Plan is 60 months, and signing the plan form, it has been left blank.

Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations

omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id*. at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default" Falk, 739 F.2d at 463.

For the motion before the court, the Debtor states that she believed that the Trustee would prepare the Chapter 13 Plan. When she subsequently learned that it was her responsibility, she prepared and filed a plan. Motion, Dckt. 28.

The court also has before it a motion for relief from the automatic stay filed by Federal Home Loan Mortgage Corporation seeking relief to proceed with obtaining possession of real property commonly known as 4800 Old Ranch Road, Anderson, California. Motion for Relief ("MFR"), Dckt. 11. This address is the same as listed by the Debtor on her Petition as her street address. Petition, Dckt. 1.

4. 13-30988-E-13 SANDRA O'CONNELL
MDZ-1 Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-29-13 [11]

FEDERAL HOME LOAN MORTGAGE CORPORATION VS.

CASE DISMISSED 9-9-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 29, 2013. By the court's calculation, 40 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Federal Home Loan Mortgage Corporation seeks relief from the automatic stay with respect to the real property commonly known as 4800 Old Ranch Road, Anderson, California. The moving party has provided the Declaration of Michael D. Zeff to introduce evidence which establishes that the Debtor is no longer the owner of the property, Movant having purchased the property from GMAC Mortgage, LLC fka GMAC Mortgage Corporation, who purchased the property at a pre-petition Trustee's Sale. Debtors are tenants at sufferance, as Movant commenced an unlawful detainer action in Shasta County Superior Court, Case No. 13UD0318 on May 29, 2013, and received a Writ of Execution on August 2, 2013.

The Zeff Declaration states that Mr. Zeff is the attorney for Movant and has personal knowledge of the Movant's right to possession of the real property because he is the attorney of record in the unlawful detainer action in Shasta County. Therefore, the court finds credible Mr. Zeff's authentication of the judgment from the Shasta County unlawful detainer action and the Writ of Possession. FN.1.

FN.1. Mr. Zeff also testifies to the following:

1. Movant is the legal owner of the Property. On or about December 17, 2012, GMAC Mortgage, LLC f/k/a GMAC Mortgage Corporation purchased the Property at a Trustee's Sale following foreclosure proceedings against the prior owner. On or about January 9, 2013, Movant purchased the Property, as reflected in the Corporation Grant Deed in favor of Movant recorded by the Shasta County Recorder on January 15, 2013. Movant concurrently submits under separate cover as Exhibits "A" and "B", respectively, true and correct copies of the recorded Trustee's Deed upon Sale and subsequently recorded Grant Deed in favor of Movant.

2. Debtor has no equity in the Property because Debtor does not have a lease interest that could be assumed or assigned under 11 U.S.C. § 365.

3. The Property is not necessary to an effective reorganization because the Property is residential and is not producing income for the Debtor.

A witness is one who has personal knowledge (other than an expert witness) of the facts which are to be presented to the court. Here, Mr. Zeff does not appear to have personal knowledge of the purchase of the property by GMAC Mortgage, LLC or the subsequent purchase by Movant. Furthermore, Mr. Zeff appears to make legal conclusions rather than factual statements. The court cannot determine what, if any, of what Mr. Zeff is testifying to is of his personal knowledge and what is made up or hearsay testimony as to these matters.

Mr. Zeff shall present to the court the basis he has for providing competent, credible testimony to the court on the above points at the hearing.

Movant has provided authenticated copies of the judgment from the Shasta County unlawful detainer action and the Writ of Possession to substantiate its claim of ownership. Based upon the evidence submitted to the court, and no opposition having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case. 11 U.S.C. § 362(d)(2).

The court shall issue a minute order terminating and vacating the automatic stay to allow Federal Home Loan Mortgage Corporation, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 4800 Old Ranch Road, Anderson, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

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

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Federal Home Loan Mortgage Corporation and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 4800 Old Ranch Road, Anderson, California.
>
> **IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.
>
> No other or additional relief is granted.

5. 11-30989-E-13 AMORSOLO/MARILYN TANGONAN
SDA-2 Chinonye Ugorji

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
9-10-13 [48]

SERRANO EL DORADO OWNERS ASSOCIATION VS.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 13 Trustee on September 10, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

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

The court's tentative decision is to grant the Motion for Relief from the Automatic Stay. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Serrano El Dorado Owners' Association seeks relief from the automatic stay with respect to the real property commonly known as 4648 Village Green Drive, El Dorado Hills, California. The moving party has provided the Declaration of John Bowman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Bowman Declaration states that the Debtor has not made 22 post-petition payments, with a total of $3,867.17 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be $980,559.73(including $968,773.00 secured by movant's first trust deed), as stated in the Bowman Declaration, while the value of the property is determined to be $808,500.00, as stated in Schedules A and D filed by Debtor.

TRUSTEE'S NON- OPPOSITION

The Chapter 13 Trustee has filed a statement of no-opposition to the Motion for Relief from Automatic Stay.

DEBTOR'S OPPOSITION

The Debtors filed an opposition stating that they have been offered a Mortgage Loan Modification by Ocwen Loan Servicing, LLC which is awaiting approval Order from the Court. The Debtors seek to approve the Mortgage Loan Modification and will modify their Chapter 13 Plan to re-classify secured Creditors as applicable. Debtor will re-classify, Serrano El Dorado Owners' Association as Class 2, to be paid in full and Ocwen Loan Servicing, LLC will be reclassified as Class 4 to paid outside of the Plan.

On October 3, 2013, the Debtors filed a motion to approve a loan modification. Dckt. 65. The Motion states with particularity the following grounds for the requested relief:

A. Debtors have been offered a loan modification,

B. The modification adds the arrearage to the principal balance.

C. The monthly mortgage payment is reduced from $4,062.00 to $3,168.01, including property taxes and interest.

D. A copy of the Modified Loan Agreement is filed as Exhibit A.

Exhibit A, Dckt. 68, discloses the following information:

A. It is dated April 2, 2013.

B. In order for the Debtors to accept the April 2, 2013 Loan Modification they were required to,

1. Sign the Agreement,

2. Fax the Agreement to Home Retention Department,

3. Pay the initial payment of $3,168.01,

4. Make the regular monthly payment of $3,168.01 due on June 1, 2013, and

5. Send proof of insurance to the Escrow Department.

The Agreement further states, "Time is of the essence on this offer. If ALL of the items above are not completed by the Due Date, which includes the receipt of an executed counterpart to the Agreement signed by all parties, the Agreement will have no force and effect and the original terms of your loan will apply." The Due Date stated in the Agreement was May 1, 2013. The Loan Modification Agreement is signed by the Debtors and dated April 9, 2013.

The Debtors have filed a proposed Second Modified Plan on October 3, 2013. Dckt. 62. The proposed Second Modified Plan provides for the following payments to be made by the Debtors, and payments for administrative expenses and creditor claims.

Debtor Plan Payments		

Months May 2011 through September 2013 (29 months)	$90,814.00	Average monthly payment of $3,131.52
For 32 remaining months	$2,361.00 a month	
Claims and Expenses Paid Through Second Modified Plan		
Class 1 Secured	None	
Class 2 Secured		
Internal Revenue Service	$895 a month	
Serrano El Dorado Owners' Association	$388.55 a month	
Capital One Auto Finance	$229.38 a month	
Class 3 (Surrender)	None	
Class 4 (Direct Debtor Payment)		$3,168.01 to Ocwen Loan Servicing, LLC
Class 5 Priority Unsecured		
Franchise Tax Board	$44.71 when amortized over 60 months	$2682.64
Internal Revenue Service	$759.64 When amortized over 60 months	$43,378.23
Class 6 Unsecured Claims	None	
Class 7 General Unsecured Claims	$0.00	
Chapter 13 Administrative Expense	$73.79	Computed at 6% of the Monthly Plan Payment

The Claims and Administrative Expenses to be paid over the remaining 32 months of the Plan are $2,391.07. This exceeds the proposed monthly plan payment of $2,361.00 by $30.00 a month.

On July 19, 2012, the court confirmed the Debtor's First Modified Plan. Order, Dckt. 38. That confirmed plan provides that disbursement made to American Home Mortgage in the amounts of $6,092.80 and $36,747.45 by the Trustee are authorized under the First Modified Plan, and that the treatment

on that claim is changed to a Class 3 surrender of the collateral. Order, *id.* The First Modified Plan provides for monthly payments of only $1,952.00 a month beginning May 25, 2012, and continuing through the final 49 months of the Plan (Dckt. 25).

The First Modified Plan provides for payment of only the Internal Revenue Service secured claim ($40,875.22, with $896.00 a month payments) and Capital One Auto Fin. ($12,455.00, with $229.38 a month payment). The First Modified Plan provides for the Class 3 surrender of collateral (which operates as a termination of the automatic stay) for American Home Mortgage and Serrano El Dorado Association/HOA. The only other payments on claims are for the Franchise Tax Board $2,682.64 and the Internal Revenue Service $43,576.23 priority unsecured claims.

The projected disposable income was computed based upon Mrs. Tangonan having to undergo serious medical treatment and receiving only $4,000.00 a month in disability payments. The Debtors included $2,000.00 a month for a rental expense, since they were immediately surrendering their residence pursuant to the Class 3 treatment of the two secured claims.

In seeking to confirm the Second Modified Plan, the Debtors provide a perfunctory explanation of their finances. Declaration, Dckt. 60. While providing their current wage statements, showing $10,015.00 a month in gross income, they carefully avoid providing any history of their income and when Mrs. Tangonan stopped receiving a disability payment and went back to work. The current wage statements, for 2013 through July 13, 2013, show the following:

Mr. Tangonan

Mr. Tangonan		Average Pay or Deduction Per Month 6.5 Months - 1/1/13 through 7/13/13
Gross Income YTD	$73,545.38	$9,776.15
401K Deduction	($3,677.28)	($567.74)
401K Loan Payment	($3,109.26)	($478.35)
		Average Pay or Deduction Per Month 8.5 Months 1/1/13 through 9/21/13
Mrs. Tangonan	$104,099.63	$12,224.95
401K/TSR	($5,204.99)	($612.35)
401K Loan	($3,997.62)	($470.31)

In confirming the First Modified Plan, the Debtors based the lowered payments on surrendering the residence and Mrs. Tangonan receiving only $4,000.00 a month in income. From only a cursory review, Mrs. Tangonan has

received just in 2013 greater average monthly income of $12,224.95, which is $8,224.95 greater than the amount previously represented to the court as the basis for the First Modified Plan. Just in 2013 this represents $69,912.08 though just the September 21, 2013 pay period.

In addition, the Debtors represented to the court that they had a necessary house expense of $2,000.00 a month since they were immediately surrendering their house. However, the Debtors did not surrender the house, but entered into a loan modification by which the house payment was reduced to $3,168.01, with those payments beginning in May 1, 2013. From at least May 2012, when they filed the First Modified Chapter 13 Plan, the Debtors have not made a $2,000.00 a month house payment. Without taking into account any prior months in which the payment was not made, for the twelve months from May 2012 through April 2013, the Debtors had no mortgage or rent payment. This allowed the Debtors to retain an additional $24,000 ($2,000 a month "actual expense" for rent which was not paid).

With the additional $69,912.08 income of Mrs. Tangonan for 2013 through the September 21, 2013 pay period and the $24,000.00 of rent payments not made, the Debtors have at least $73,012.08 in income unaccounted for in considering confirmation of a plan and the current relief requested. (This does not take into account the Debtors continuing to pay more money to themselves through 401K contributions and the 401K loan repayments.)

Additionally, the Debtors entered into the Loan Modification Agreement in April 2013. The Debtors failed to bring this Agreement to the court or obtain authorization for any such proposed transaction. The court has not approved any loan modification for the Debtors, any payments which have been made by the Debtors to the creditor in 2013, and the Chapter 13 Plan does not authorize any payments to be made to the creditor.

Instead of truthfully and honestly disclosing the additional income, non-existent housing expense, and a loan modification, the Debtors kept that information from the Chapter 13 Trustee, creditors, the U.S. Trustee, and the court. Only now, facing a motion for relief from the automatic stay were the Debtors forced to disclose the information. In reviewing motion to confirm the Second Modified Plan, the Debtors gloss over the dramatic increase in income, do not address their reasonable current expenses, and that they have been entering into unauthorized post-petition credit transactions.

DISCUSSION

Movant provides evidence that, as Movant puts it, "The Debtors and the Property have a long history of failing to pay the homeowners assessments owed to the Association. The Debtors and Property are more than four (4) years delinquent and currently owe the Association at least $11,786.73 for unpaid homeowners assessments and related charges...Further, post-petition assessments of $177.80 per month continue to accrue..." Declaration, Dckt. 51. The statement provided by Movant setting forth the defaults show the Debtors having failed to make post-petition payments for the following calendar quarters:

2011 July-September
2011 October-December
2012 January-March
2012 April-June

2012 July-September
2012 October-December
2013 January-March

Even before deciding to surrender the Property, the Debtors were defaulting on the post-petition payments due Movant. Exhibit 4, Dckt. 53.

The Debtors offer no evidence in opposition to the Motion, only arguments by counsel. The arguments are that:

A. "Debtors have been offered a Mortgage Modification,"

B. "Debtors will seek to move this court to approved the Mortgage Loan Modification,"

C. "[Debtors will] seek to modify their Chapter 13 Plan to re-classify Secured Creditors as applicable"

D. Debtor will re-classify secured creditor, [Movant] as Class 2 to be paid in full."

Opposition, Dckt. 56. This opposition is not complete or accurate. The Debtors were offered a loan modification in April 2013, which they accepted and began making payments pursuant thereto, without court authorization, in May 2013. Debtors hid the loan modification from the court, Chapter 13 Trustee, and creditors, until they had to respond to this Motion. The Debtors have also had income well in excess of the amounts stated in confirming the First Modified Plan, but have failed to disclose that in any meaningful way, including in the motion and supporting declaration to confirm the proposed Second Modified Plan. The Debtors have also not been paying the $2,000.00 a month rent which was in the budget and relied upon by the court, creditors, and the Chapter 13 Trustee in confirming the First Modified Chapter 13 Plan.

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

In addition, the Debtors treatment of Movant's claim and the defaulting in payments since July 2011 while they continued to occupy the property and made payments to the lender under the original confirmed plan manifest a lack of good faith (1) prosecuting this case and (2) in dealing with Movant. This is also cause to terminate the stay.

From reviewing the motion to confirm the Second Modified Plan and the supporting declaration, the Debtors' contention that they will confirm another modified plan to provide for this claim appears problematic. Neither the motion nor the declaration in support of the motion to confirm the Second Modified Chapter 13 Plan clearly and candidly disclose the Debtors true finances, their income in 2013, and that they never paid the $2,000.00 a month in rent which was stated as an actual and necessary expense in confirming the

First Modified Plan. The Debtors make no disclosure as to where all of this additional money is or make it available to pay creditors under the proposed Second Modified Plan.

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted to the court, and no opposition or showing having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue a minute order terminating and vacating the automatic stay to allow Serrano El Dorado Owners' Association, 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 moving party has pleaded adequate facts and has not presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is also granted. The Debtors have continued to occupy the Property and benefit from the benefits of the Home Owners Association without making any payments since June 2011.

No other or additional relief is granted by the court.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Serrano El Dorado Owners' Association, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 4648 Village Green Drive, El Dorado Hills, California.
>
> **IT IS FURTHER ORDERED** that the stay 14-day stay of enforcement of this order pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.

No other or additional relief is granted.

6.	**10-38007-E-7 GLENDA/JOSHUA GOLDEN** **11-2741** **CHUNG ET AL V. GOLDEN ET AL**	**FINAL RULING RE: COMPLAINT TO DETERMINE NONDISCHARGEABILITY OF A DEBT** **11-21-11 [1]**

Final Ruling: At the direction of the court, the hearing on this matter is continued to **3:00 p.m.** on **October 29, 2013**. No appearance required at the October 8, 2013 hearing.

Due to the press of other matters, the court has not completed the review of the evidence and drafting of the decision to be stated on the record.