The relief described hereinbelow is SO ORDERED.

SIGNED this 7th day of March, 2019.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

Kirastin N. Johnson, **Case No. 18-20274-7**

Debtor.

Order Denying Creditor's Motion for Relief from Stay

Debtor Kirastin Johnson has indicated her intent to surrender her interest in a 2010 Kia Forte, and the Creditor assigned the rights to the contract for the purchase of that vehicle—Creditor Bomb Investments, LLC—has moved for relief from stay to repossess and foreclose on the collateral. The parties' interests have aligned and typically the Court would enter an agreed order and all would be on their way. But, the chapter 7 Trustee of Debtor's bankruptcy estate—Christopher Redmond—has objected to the stay relief motion, and argues that Creditor did not properly perfect a security interest in the vehicle and is not, therefore, entitled to stay relief.

The Court finds that Creditor has not carried its burden to show that it is entitled to relief

from the automatic stay of bankruptcy, and therefore denies the motion for relief from stay.[1] Creditor did not substantially comply with the perfection requirements for the collateral at issue.

I. Background

On December 15, 2017, Debtor entered into a Retail Installment Contract with No Credit Check Auto Sales for the purchase of a 2010 Kia Forte. The purchase price was $9440 with a 23.99% annual percentage rate. Debtor was to make seventy-two payments of $180.04/bi-weekly, beginning December 29, 2017, and due every other Friday thereafter. The seller No Credit Auto Sales then assigned the rights to that contract to Creditor Bomb Investments, LLC. The photocopied title for the Kia Forte submitted by the parties is difficult to read. It appears, however, to show the transfer from No Credit Check Auto Sales to Debtor on December 15, 2017, and indicates the vehicle is subject to a lien held by Bomb Investments, LLC.

Debtor filed for chapter 7 bankruptcy relief on February 22, 2018, sixty-nine days later. On her Schedules, she declared the 2010 Kia Forte, with 96,000 miles, valued at only $4,300. Debtor owed $12,154 at that point, however, to Creditor. Debtor indicated her intent to surrender the automobile to the Creditor.

Three weeks after Debtor's filing, on March 15, 2018, Creditor filed a motion for relief from the automatic stay. Creditor indicated that Debtor was two payments delinquent under the terms of their contract, and that Creditor was owed $12,257.82. On the same date, March 15, 2018, Creditor filed a notice of security interest on the Kia Forte with the Kansas Department of Revenue.

The Trustee objected to Creditor's motion for relief from stay and argues that Creditor

[1] Doc. 9.

did not properly perfect a security interest in the vehicle. (The Trustee has not opposed stay relief on any other grounds.) The Kia Forte is being held by the Trustee while the parties dispute Creditor's motion for relief from stay. As Debtor indicated her intent to surrender the vehicle at filing, she filed a response indicating she has no objection to the motion.

II. Analysis

A. Legal Standard for Assessing Creditor's Motion for Relief from Stay

Proceedings concerning "motions to terminate, annul, or modify the automatic stay" are core proceedings under 28 U.S.C. § 157(b)(2)(G), over which this Court may exercise subject matter jurisdiction.[2]

The filing of a petition for bankruptcy relief activates the bankruptcy automatic stay as to all property of the bankruptcy estate.[3] Creditor moves for relief from that stay in order to repossess the Kia Forte due to material default. Creditor does not state any statutory authority for its motion, but it is presumably acting under 11 U.S.C. § 362(d). Section 362(d) states:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
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> (2) with respect to a stay of an act against property under subsection (a) of this section, if–
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> (A) the debtor does not have an equity in such property; and

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[2] 28 U.S.C. § 157(b)(1) and § 1334(b).

[3] 11 U.S.C. § 362(a) (filing of petition operates as a stay); § 541(a)(1) (commencement of case creates estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case").

> (B) such property is not necessary to an effective reorganization;

The Trustee challenges Creditor's secured status as to the Kia Forte—arguing that Creditor did not properly perfect a security interest in the vehicle and therefore is not entitled to stay relief. Creditor, as the purported "party in interest" bears the burden of proving its standing.[4]

Under the first subsection of § 362(d), the court can grant relief from the automatic stay "for cause,"[5] which is generally shown by a lack of adequate protection on secured property.[6] Under the second subsection of § 362(d), two elements must be shown for relief: both that there is no equity in the property and that the "property is not necessary to an effective reorganization." Under § 362(g), "the party requesting [stay relief] has the burden of proof on the issue of the debtor's equity in property" and "the party opposing such relief has the burden of proof on all other issues." Regardless of which subsection under which Creditor proceeds, Creditor must show that it is entitled to repossess and act against the Kia Forte.

B. Kansas Law Relating to Security Interests in Vehicles

Commercial transactions in Kansas are generally governed by the Kansas Uniform Commercial Code (UCC) and, more specifically, secured transaction are governed by Article 9

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[4] *See Miller v. Deutsche Bank National Trust Co. (In re Miller)*, 666 F.3d 1255, 1261 n.4 (10th Cir. 2012) (concluding that the moving party bears the burden of proving its statutory standing as a 'party in interest' in order to obtain relief from the automatic stay in a bankruptcy proceeding).

[5] "Cause" is a discretionary, fact-based determination. *In re Auld*, No. 14-20424, 2014 WL 2780302, at *11 (Bankr. D. Kan. June 11, 2014).

[6] *Busch v. Busch (In re Busch)*, 294 B.R. 137, 140–41 (10th Cir. BAP 2003) (movant "has the burden to show that 'cause' exists to lift the stay, after which the burden shifts to [the] debtor to demonstrate why the stay should remain in place").

of the UCC.[7] Filing a financing statement to perfect a security interest in a piece of collateral protects secured creditors from claims against third parties who may claim an interest in the same collateral.[8] Generally, there is "an exception to the required filing of a financing statement" under the UCC, however, when "secured collateral is purchased by the debtor with money provided by the creditor just for that purpose"—those purchase money security interests are "deemed perfected at the time [they] attach to the collateral."[9]

All this hornbook law shifts slightly when an automobile is involved.[10] In Kansas, "[w]hen a secured creditor takes a security interest in a motor vehicle . . ., that creditor's means of perfecting its security interest is defined by Kan. Stat. Ann. § 84–9–311 (2009 Supp.) and Kan. Stat. Ann. § 8–135."[11] Subsection (a)(2) of UCC § 9-311 "excuses a creditor from filing a financing statement when the collateral is covered by a state certificate-of-title statute."[12] In other words, in Kansas, "compliance with the certificate of title statutes is the equivalent of filing a

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[7] *Stanley Bank v. Parish*, 264 P.3d 491, 494 (Kan. Ct. App. 2011).

[8] *Id.* (citing Kan. Stat. Ann. § 84-9-310(a)).

[9] *Id.* (citing Kan. Stat. Ann. §§ 84-9-103(b)(1); 84-9-309(1), 84-9-310(b)(2), and 84-9-309).

[10] As the Kansas Court of Appeals notes, "a purchase money security interest in property that is subject to any certificate-of-title law in Kansas, including automobiles, will not be perfected upon attachment but instead can be perfected only by compliance with K.S.A. 2010 Supp. 8–135(c)(5), the Kansas statute applicable to certificates of title and security interests in motor vehicles." *Id.* (citing Kan. Stat. Ann. § 84-9-311(a)(2)).

[11] *In re McMullen*, 441 B.R. 144, 146 (Bankr. D. Kan. 2011)

[12] *Stanley Bank*, 264 P.3d at 494 (citing Kan. Stat. Ann. § 84-9-311(a)(2) (filing of a financing statement not necessary or effective to perfect if property is subject to "any law of this state covering automobiles . . . which provides for a security interest to be indicated on a certificate of title") and § 84-9-310(b)(3) (filing of a financing statement not necessary to perfect security interest in property perfected by other methods under § 84-9-311)).

financing statement under Article 9."[13]

One of the "state certificate of title statutes" mentioned in § 84-9-311(a)(2) is Kan. State. Ann. § 8-135(c)(5). Section 8-135(c)(5) states, in pertinent part:

> . . . upon sale and delivery to the purchaser of every vehicle subject to a purchase money security interest . . ., the dealer or secured party may complete a notice of security interest and when so completed, the purchaser shall execute the notice, in a form prescribed by the division, describing the vehicle and showing the name and address of the secured party and of the debtor and other information the division requires. . . . The dealer or secured party, within 30 days of the sale and delivery, may mail or deliver the notice of security interest, together with a fee of $2.50, to the division. The notice of security interest shall be retained by the division until it receives an application for a certificate of title to the vehicle and a certificate of title is issued. The certificate of title shall indicate any security interest in the vehicle. Upon issuance of the certificate of title, the division shall mail or deliver confirmation of the receipt of the notice of security interest, the date the certificate of title is issued and the security interest indicated, to the secured party at the address shown on the notice of security interest. The proper completion and timely mailing or delivery of a notice of security interest by a dealer or secured party shall perfect a security interest in the vehicle, as referenced in K.S.A. 84-9-311, and amendments thereto, on the date of such mailing or delivery.[14]

Regarding the purchase and sale of used vehicles, section 8-135(c)(6) states, in pertinent part:

> In the event of a sale or transfer of ownership of a vehicle for which a certificate of title has been issued, which certificate of title is in the possession of the transferor at the time of delivery of the vehicle, the holder of such certificate of title shall endorse on the same an assignment thereof, with warranty of title . . . and the transferor shall deliver the same to the buyer at the time of delivery to the buyer of the vehicle or at a time agreed upon by the parties . . . . The buyer shall then present such assigned certificate of title to the division at the time of making application for registration of such vehicle. . . . . When a person acquires a security interest that such person seeks to perfect on a vehicle subsequent to the issuance of the original title on such vehicle, such person shall require the holder of the certificate of title to surrender the same and sign an application for a mortgage title in form prescribed by the division. Upon such surrender such person shall immediately deliver the certificate of title, application, and a fee of $10 to the division. Delivery of the

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[13] *Id.*

[14] Emphasis added.

> surrendered title, application and tender of the required fee shall perfect a security interest in the vehicle as referenced in K.S.A. 84-9-311, and amendments thereto. On and after July 1, 2007, only one lien may be taken or accepted for security for an obligation to be secured by a lien to be shown on a certificate of title for vehicles with a gross vehicle weight rating. . . of 26,000 pounds or less. . . . A lien in violation of this provision is void. Upon receipt of the surrendered title, application and fee, the division shall issue a new certificate of title showing the liens or encumbrances so created, but only one lien or encumbrance may be shown upon a title for vehicles with a gross vehicle rating of 26,000 pounds or less, and not more than two liens or encumbrances may be shown upon a title for vehicles in excess of 26,000 pounds gross vehicle weight rating. When a prior lienholder's name is removed from the title, there must be satisfactory evidence presented to the division that the lien or encumbrance has been paid.

The Kansas Court of Appeals has summarized the above statutory structure as follows: "First and foremost, Kansas law provides that a purchase money security interest in an automobile held by a secured creditor is perfected when the certificate of title issues with the lien noted thereon. Secondly, and because purchasers do not always register and title their vehicles in a timely manner, Kansas law affords a secured creditor the opportunity to perfect its purchase money security interest during the interim time period between purchase and issuance of a certificate of title by timely mailing or delivering a formal notice of security interest, along with the applicable fee, to the Division."[15] The Tenth Circuit has said the same: "there are two alternative ways that a secured creditor on a motor vehicle can perfect its security interest: (1) by having its lien noted on the certificate of title which is then duly filed, or (2) by filing a 'notice of security interest.'"[16]

In this case, the title for the 2010 Kia Forte was transferred from No Credit Check Auto Sales to Debtor on December 15, 2017. The box for "Yes" is checked in response to the question

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[15] *Stanley Bank*, 264 P.3d at 495.

[16] *Morris v. The CIT Group/Equip. Fin., Inc. (In re Charles)*, 323 F.3d 841, 843 (10th Cir. 2003) (internal quotations omitted).

on the title "Is vehicle subject to lien?" and Bomb Investments, LLC is then noted. Creditor alleges Debtor became delinquent on the debt, and Debtor filed for chapter 7 bankruptcy relief on February 22, 2018. Debtor apparently did not register the vehicle, which makes sense considering she filed for bankruptcy and indicated her intent to surrender the vehicle only sixty-nine days after its purchase.[17] It is undisputed that Creditor did not avail itself of the opportunity to file a notice of security interest to protect itself during the interim between sale to Debtor and registration (i.e, the required but not complied with registration), and also did not file its notice of security interest until filing its motion for stay relief. As a result, Creditor did not strictly comply with the Kansas statutes for perfection: it neither delivered the title with its lien noted to the Department of Revenue for registration nor filed a notice of security interest within the required time limits advising of the same.[18]

Failing with the statutory framework, Creditor turns to case law to try and save its motion. Creditor first points out the following:

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[17] Creditor states in its briefing on the underlying motion that it wrote its name on the back of the title and then gave the title to Debtor for registering with the Department of Revenue. The Trustee disputes these statements because they are not established by the parties' Joint Stipulation of Facts. The fact that Creditor's name is written on the back of the title is clearly established by the stipulated exhibits. The fact that Creditor gave the title to Debtor for registering is immaterial.

[18] *See also In re Hoffman*, 500 B.R. 37, 41–42 (Bankr. D. Kan. 2013) (finding that a lien may be perfected under the certificate of title statutes either by properly registering a title with a line noted thereon or by timely filing a notice of security interest; granting a creditor's motion for relief from stay over trustee's objection solely based on trustee claim that creditor failed to properly perfect its lien).

Creditor also notes that Kan. Stat. Ann. § 8-135(c)(5) states that a secured party "may" deliver a notice of security interest to the Department of Revenue during the relevant time period, and it argues, therefore, that a notice of security interest is not mandated for perfection in Kansas. But the statutory language Creditor is citing is referring to the option of a secured party to file a notice of security interest to protect itself while a vehicle is being registered. Creditor did not, in this instance, avail itself of that option, although it could have.

- it filed its notice of security interest only ninety days after purchase (rather than the thirty days required by the statute contemplated for protection during the initial purchase period);
- its lien was noted on the actual title of the vehicle for any other potential creditors to see; and
- its notice of security interest was filed less than thirty days after Debtor filed her bankruptcy petition and before the 11 U.S.C. § 341 meeting of creditors was held.

Creditor argues that it has, therefore, "substantially complied" with the Kansas certificate of title statutes, relying on *Morris v. CIT Group/Equip. Fin., Inc. (In re Charles)*.[19] In the *Charles* case, the trustee challenged whether the secured creditor had properly perfected its security interest in vehicles (the case was a disguised security agreement versus true lease situation).[20] In that case, the lienholder was listed as the owner on the title of the vehicles, instead of being listed as the lienholder, when the titles were registered and the lienholder did not file a notice of security interest.[21]

The Tenth Circuit noted the "majority approach" was to require only "substantial compliance" with perfection of security interests under certificate of title statutes and stated: "Under the majority approach, regardless of any express statutory requirements, a secured creditor is not required to disclose its status as a lienholder on a vehicle's certificate of title in order to achieve perfected status. Instead, it is sufficient if the creditor is identified as the owner

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[19] 323 F.3d 841 (10th Cir. 2003).

[20] *Id.* at 842.

[21] *Id.* at 843.

of the vehicle."[22] The Tenth Circuit relied on the Kansas UCC section stating that "[a] financing statement substantially satisfying the requirements of this part is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading."[23] The Tenth Circuit quoted approvingly the bankruptcy court's application of the substantial compliance standards, where it stated that "the test for perfection under the substantial compliance standard is whether the creditor gave adequate notice of its interest to other potential secured creditors."[24] Creditor argues that the above bulleted points indicate that other potential secured creditors had adequate notice of its interest, and that it should be held to have substantially complied with the perfection statutes under *Charles*.

But this Court has considered the *Charles* substantial compliance holding before.[25] In *Redmond v. MHC Financial Services (In re Barker)*,[26] the record did not reveal if or when the State of Kansas received the documents required to issue a certificate of title with a lien noted on the vehicle at issue, and no notice of security interest was filed.[27] The Court first noted that "the

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[22] *Id.*

[23] *Id.* at 844 (citing newly numbered UCC § 84-9-506).

[24] *Id.* at 844.

[25] The Trustee's only response to Creditor's argument about substantial compliance is that the *Charles* case was decided in 2003, which is before the UCC was substantially revised in Kansas in 2010 and before the Kansas Court of Appeals decision *Stanley Bank v. Parish* in 2011, cited extensively above. But nothing in *Charles* is inconsistent with either the current UCC or the *Stanley Bank* case. The Trustee cited no countervailing case law, and apparently did not research the issue at all.

[26] 358 B.R. 399 (Bankr. D. Kan. 2007).

[27] *Id.* at 411.

substantial compliance doctrine has not been extended to filing requirements."[28] And furthermore, the Court held that the doctrine "should not shield a creditor that fails to avail itself of the protections provided by the simple, inexpensive act of filing a [notice of security interest]."[29] Yes, the lien was noted on the certificate of title, but Creditor in no way otherwise complied with the Kansas statutes for perfecting an interest in a motor vehicle—let alone substantially complied. Creditor has failed to show perfection here.

III. Conclusion

To prevail on its motion for relief from the automatic stay, Creditor must show it is a party in interest and that there is either a lack of adequate protection on secured property or that there is no equity in property that is not necessary to an effective reorganization. Creditor has not carried its burden on its motion, and the motion for relief from stay[30] is denied.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

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[28] *Id.*

[29] *Id.*

[30] Doc. 9.