UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, January 5, 2022
Place: Department B – 510 19th Street
Bakersfield, California

ALL APPEARANCES MUST BE TELEPHONIC
(Please see the court's website for instructions.)

Pursuant to District Court General Order 631, courthouses for the Eastern District of California will be reopened to the public effective June 14, 2021.

At this time, when in-person hearings in Bakersfield will resume is to be determined. No persons are permitted to appear in court for the time being. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, **and all parties will need to appear at the hearing unless otherwise ordered.** The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:00 AM

1. 19-13021-B-13 **IN RE: ANNA SOLIS**
RSW-3

MOTION TO MODIFY PLAN
11-8-2021 [81]

ANNA SOLIS/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Anna Marie Solis ("Debtor") seeks confirmation of the Third Modified Chapter 13 Plan. Doc. #81. Debtor wishes to retain the 84-month duration of her previous plan under 11 U.S.C. § 1329(d) and the COVID-19 Bankruptcy Relief Extension Act of 2021. 117 P.L. 5, 135 Stat. 249.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Under 11 U.S.C. § 1329(d), a plan can be extended to not more than 7 years after the time that the first payment under the original

confirmed plan was due if the debtor is experiencing or has experienced a material financial hardship due to the COVID-19 pandemic. Section 1329(d)(1) requires the plan to have been confirmed prior to the COVID-19 Bankruptcy Relief Extension Act of 2021 (March 27, 2021).

Here, Debtor declares that her income has decreased significantly due to COVID-19. Doc. #84. Debtor's brother, who supplements Debtor's income, was diagnosed with COVID-19 in August 2021. *Id.* Debtor states that he is 72 years old, has other health issues like COPD, and will likely be moved to a permanent resident living facility and not return home. *Id.* Debtor has not been receiving any money from him since he became sick in August. *Id.* Debtor believes she can afford the new plan payment and will file an amended budget. *Id.*

The 84-month Second Modified Plan was confirmed on September 13, 2021. Doc. #78. The preceding First Modified Plan was confirmed on November 30, 2020, prior to enactment of the COVID-19 Bankruptcy Relief Extension Act on March 27, 2021. Doc. #64. This plan provided for an 84-month duration under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Doc. #59. Lastly, Debtor's original plan was confirmed on December 9, 2019. Doc. #45. Accordingly, Debtor satisfies the requirements to retain the 84-month plan duration under § 1329(d).

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

2. 21-12223-B-13 **IN RE: KENNETH MCMILLON**
RSW-1

OBJECTION TO CLAIM OF MR. COOPER, CLAIM NUMBER 2
12-6-2021 [16]

KENNETH MCMILLON/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

Since posting the original pre-hearing dispositions, the court has changed its intended ruling on this matter.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to February 2, 2022 at 9:00 a.m.

ORDER: The court will issue an order.

Kenneth Douglas McMillon ("Debtor") objects to Proof of Claim No. 2-1 filed by Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar") as the mortgage servicer of U.S. Bank National Association as Trustee for Lehman XS Trust Mortgage Pass-through certificates Series 2007-7N ("U.S. Bank") in the amount of $236,007.44. Doc. #16. Debtor objects

to the arrears listed by Claimant in the amount of $25,511.91 and argues that they should be reduced to $16,879.21. *Id.*; *cf.* Claim #2-1.

On December 22, 2021, Debtor and Aldridge Pite, LLP ("Aldridge Pite"), the attorney for U.S. Bank, jointly stipulated to continue the hearing on this objection to the next available calendar date. Doc #21. On January 3, 2021, the parties filed a stipulation resolving this objection, but it was not signed or approved by the chapter 13 trustee. Doc. #22.

This objection will be CONTINUED to February 2, 2022. The parties are directed include the chapter 13 trustee in the stipulation and obtain his approval, refile the stipulation with trustee's signature, and lodge an order approving the same.

Additionally, the court notes that Debtors have failed to comply with the Federal Rules of Bankruptcy Procedure ("Rule") and Local Rules of Practice ("LBR").

First, service on U.S. Bank was insufficient. Rule 3007(a)(2)(A) requires an objection to a proof of claim and its corresponding notice to be served on a claimant by first-class mail to the person most recently designated on the claimant's proof of claim as the person to receive notices *and* if the objection is to a claim of an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act, in the manner provided in Rule 7004(h).

Debtor properly served the person most recently designated on the proof of claim: Nationstar Mortgage LLC d/b/a Mr. Cooper, Attn: Bankruptcy Dept, at PO Box 619096. Doc. #19; *cf.* Claim #2-1. However, Nationstar is the loan servicer here. The creditor is U.S. Bank in its capacity as a trustee. U.S. Bank is insured by the Federal Deposit Insurance Corporation ("FDIC"), so it is an insured depository institution under 11 U.S.C. § 101(35)(A) and 12 U.S.C. § 1813(c)(2) (an "insured depository institution" is any bank insured by the FDIC).[1] U.S. Bank must therefore be served in accordance with Rule 7004(h) in addition to serving Nationstar.

Under Rule 7004(h), service must be made by certified mail and addressed to a named officer, unless one of three exceptions specified in subsections (h)(1) to (3) have been met. There is no indication that these exceptions apply. Though Aldridge Pite filed a *Request for Special Notice* on September 28, 2021, it expressly does not constitute a waiver U.S. Bank's entitlement to Rule 7004(h) service and specifically withholds authorization for Aldridge Pite to receive Rule 7004 service on its behalf. Doc. #12, at 2.

Even though Debtor served Bryan S. Fairman of Aldridge Pite, Aldridge Pite does not have express or implied authority to receive Rule 7004(h) service on behalf of U.S. Bank. So, a named officer of U.S. Bank must be served by certified mail in conformance with Rule 7004(h).

Since Aldridge Pite signed the stipulation to continue this objection to the next hearing date, and signed the stipulation to resolve the objection, it has implied authority to act on U.S. Bank's behalf. Aldridge Pite shall file a representation that it had authority to accept Rule 7004(h) service on U.S. Bank's behalf with respect to this objection.

Second, LBR 3007-1(b)(1) provides that an objecting party shall file and serve an objection to proofs of claim on at least forty-four (44) days' notice unless the objecting party elects to give the notice permitted by LBR 3007-1(b)(2). LBR 3007-1(b)(2) imposes procedure for objections set on thirty (30) days' notice. When fewer than 44 days' notice of a hearing is given, no party in interest shall be required to file written opposition to the objection, which, if any, shall be presented at the hearing.

Here, the objection was filed and served on December 6, 2021 and set for hearing on January 5, 2022. Doc. #19. December 6, 2021 is **thirty (30)** days before January 5, 2022. The *Notice of Hearing* states that written opposition was required, must be filed at least 14 days before the hearing, and failure to timely file written opposition may be deemed a waiver of any opposition to the objection. Doc. #17. This is incorrect and otherwise warrants overruling the objection. Because the hearing was set on less than 44 days' notice, the notice should have followed the procedure under LBR 3007-1(b)(2) by stating that opposition was not required and may be presented at the hearing. The second issue is resolved by the continuance.

Accordingly, this objection will be CONTINUED to February 2, 2022 at 9:00 a.m. The parties shall obtain the trustee's consent as to the stipulation, refile the stipulation with trustee's signature, and lodge an order approving the same. Aldridge Pite shall file a declaration or other evidence indicating that it was authorized to appear and receive Rule 7004 service on behalf of U.S. Bank.

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[1] *See* FDIC Cert #6548, https://banks.data.fdic.gov/bankfind-suite/bankfind (Dec. 21, 2021).

3. 16-13240-B-13 **IN RE: EDWARD/SHARON RODGERS**
MHM-1

MOTION TO DISMISS CASE
11-18-2021 [56]

MICHAEL MEYER/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case for cause due to material default by the debtors with respect to a term of a confirmed plan (11 U.S.C. § 1307(c)(6)), termination of a confirmed plan by occurrence of a condition specified in the plan other than completion of payments (§ 1307(c)(8)), and unreasonable delay by the debtors that is prejudicial to creditors (§ 1307(c)(1)). Doc. #56.

Trustee states that the 60-month plan term ended September 2021. Doc. #58. As of November 18, 2021, payments are delinquent in the amount of $1,400.40. *Id.* The total claims filed require an aggregate payment of $92,841.61 and the debtors have only paid $89,085.00, so the $1,400.40 delinquency plus an additional payment of $2,356.21, totaling $3,756.61, is necessary to complete the case. *Id.*

Edward Henry Rodgers and Sharon Jean Rogers ("Debtors") responded on December 23, 2021, one day after the December 22, 2021 responsive pleading deadline. Doc. #60. Debtors believed that they had paid the plan in full as of September 2021. Debtors will pay $1,400.40 before the hearing, but the outstanding $2,356.21 is not addressed. *Id.*

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for

cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(6) for being delinquent in making plan payments.

This matter will be called to confirm whether Debtors have cured the outstanding delinquency. If Debtors have cured the $3,756.61 delinquency, the motion will be denied. If not, the motion may be granted unless the Debtors can, with competent evidence, establish a material factual dispute.

According to the schedules, it appears there are no non-exempt assets in the estate to be administered for the benefit of unsecured claims. All of Debtors' property is either fully encumbered or exempted in its entirety. Doc. #1. Accordingly, dismissal serves the interests of creditors and the estate.

4. 18-11141-B-13 **IN RE: ELENA HARPER**
DWE-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-18-2021 [102]

FREEDOM MORTGAGE
CORPORATION/MV
NICHOLAS WAJDA/ATTY. FOR DBT.
DANE EXNOWSKI/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

Freedom Mortgage Corporation ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) for cause with respect to real property commonly known as 3017 McCall Avenue, Bakersfield, CA 93304 ("Property"). Doc. #102. Movant states that there is a post-petition delinquency totaling $5,745.22, consisting of six payments of $974.84 from June 2021 through November 2021. Doc. #104. Movant included post-petition accounting history and a copy of the trustee's payment ledger as exhibits. Doc. #106, *Exs. E*, *F*. Movant also requests waiver of the 14-day stay described in Fed. R. Bankr. P. 4001(a)(3).

Chapter 13 trustee Michael H. Meyer ("Trustee") timely responded, indicating that no payments were made during the forbearance period of April 2021 through August 2021. Doc. #109, citing *Order*, Doc. #86. Trustee resumed making the mortgage payment on November 1, 2021 and has paid a total of $24,053.25. The total prepetition arrearage balance due is $8,692.86, not the $32,746.11 listed in *Movant's Information Sheet* (Doc. #107). Trustee notes that the delinquency

could be cured with a modified plan to address the post-petition mortgage.

Elena Janel Harper ("Debtor") timely responded. Debtor intends to shortly file an amended plan and amended schedules to resolve the prepetition arrearage balance. Doc. #114. Alternatively, Debtor will file a motion to borrow to refinance the loan owed to Movant. Debtor also objects to any waiver of the 14-day stay described in Fed. R. Bankr. P. 4001(a)(3).

This motion was filed on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest who have not responded are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

This matter will be called as scheduled. The court is inclined to CONTINUE this matter to February 2, 2022 at 9:00 a.m. because there is a bona fide dispute as to the amount owed for post-petition mortgage payments. If continued, the court will order the automatic stay continued in effect under 11 U.S.C. § 362(e)(2)(B) pending resolution of the final hearing on this motion. Good cause exists to continue the stay until the parties resolve the accounting dispute or the Debtor files and sets for hearing a motion to confirm a modified plan.

5. 21-11443-B-13 **IN RE: CARLOS DELGADILLO**
JV-2

MOTION TO CONFIRM PLAN
11-19-2021 [43]

CARLOS DELGADILLO/MV
JASON VOGELPOHL/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Carlos Alejandro Delgadillo ("Debtor") seeks confirmation of his original Chapter 13 Plan. Doc. #43.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected for the following reasons:

(i) the plan fails to provide for submission of all or such portion of future earnings to the supervision and control of the Trustee to execute the plan (11 U.S.C. § 1322(a));
(ii) the plan does not provide for all of Debtor's projected disposable income to be applied to unsecured creditors (§ 1325(b));
(iii) Debtor will not be able to make all payments under the plan and comply with the plan (§ 1325(a)(6));
(iv) Debtor failed to file, serve, and set a motion to value collateral for hearing (LBR 3015-1(i)); and
(v) the motion is unsupported by a declaration addressing each element of § 1325(a) (LBR 9014-1(d)(3)(D)).

Doc. #50.

This motion will be DENIED for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule") and Local Rules of Practice ("LBR"). Debtor has failed to cure the infirmities outlined in the October 7, 2021 ruling denying Debtor's motion for plan confirmation (JV-1). *See* Doc. #37.

First, the plan (Doc. #13), motion (Doc. #43), and supporting documentation were not served on all parties in interest. Rule 2002(b) requires 28 days' notice to the debtor, trustee, and all creditors for the hearing to consider confirmation of a chapter 13 plan. LBR 9014-1(e)(2) requires a proof of service, in the form of a certificate of service, to be filed with the Clerk of the court concurrently with the pleadings or documents served, or not more than three days after the papers are filed. No proof of service was filed here.

As noted in the previous minutes (Doc. #37) denying Debtor's previous motion, the original plan was never served. LBR 3015-1(c)(2) requires Debtor to serve the chapter 13 plan on the Trustee, along with Forms EDC 3-086, 3-087, and 3-088, and must be *received* by Trustee no later than 14 days after the petition date. If Trustee timely receives the plan, he will serve it on all creditors and other parties entitled to notice with a copy of the plan. LBR 3015-1(c)(3). If Trustee does not timely receive the plan, then Debtor must seek confirmation under the procedure specified in LBR 3015-1(d).

Debtor filed chapter 13 bankruptcy on June 1, 2021 and the plan on June 15, 2021. Doc. #1. The plan was filed on the 14th day after the petition date, but not until 7:07:28 PM, which suggests that Trustee did not receive it until at least the 15th day. Doc. #13. No certificate of service was filed with the plan within three days as required by LBR 9014-1(e)(1) and (2).

Second, the *Notice of Hearing* still omits the language required under LBR 9014-1(d)(3). Doc. #44; *cf.* Doc. #37. LBR 9014-1(d)(3)(B)(iii) requires the movant to notify respondents that they can determine: (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at http://www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

Third, LBR 9014-1(d)(3)(B)(i) requires the notice to include the names and addresses of persons who must be served with any opposition. The notice here states that opposition must be "filed and served on the Debtor by mail and his counsel, at the address on this pleading," but does list the Debtor's address. Doc. #44. The names and addresses of the Debtor and the Chapter 13 Trustee, as representative of the estate, should have been included in the notice.

Fourth, the evidence supporting the motion is insufficient. Debtor filed the exact same *Declaration of Jason Vogelpohl*. Doc. #45. The declaration even contains the same typo: "Upon information and believe, the Debtor's Chapter 13 Plan satisfies the requires of 11 U.S.C. §1322 and §1325 [*sic*]." It also contains objectionable evidence. By basing statements on "information and belief" the declarant admits lack of personal knowledge or the statements are based on hearsay.

For the above reasons, this motion will be DENIED. In addition to fixing these procedural issues, Debtor must also resolve Trustee's substantive objections.

6. 20-10445-B-13 **IN RE: GERARDO/BRITTANY MEDEL**
RSW-2

CONTINUED MOTION TO MODIFY PLAN
10-12-2021 [48]

BRITTANY MEDEL/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Gerardo Luis Medel and Brittany Anne Medel ("Debtors") seek confirmation of their First Modified Chapter 13 Plan. Doc. #48. Debtors also wish to increase the plan term from 60 to 84 months under 11 U.S.C. § 1329(d) and the COVID-19 Bankruptcy Relief Extension Act of 2021.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected under 11 U.S.C. § 1322(a) because the plan fails to provide for submission of all or such portion of Debtors' future earnings to the supervision and control of Trustee to execute the plan. Doc. #54. Trustee also noted a clerical error in the Paragraph 7.04 of the addition provisions, which could be fixed in the order confirming plan. *Id.*

The court entered the defaults of nonresponding parties, continued the matter, and required Debtors to file and serve a written response not later than December 22, 2021, with the Trustee to file a reply by December 29, 2021. Docs. ##58-59.

Debtors responded on December 20, 2021, noting that they had filed amended schedules and requesting that Trustee's objection be overruled. Doc. #61.

Trustee timely replied. Doc. #69. Trustee indicates that the recently filed schedules show that monthly income has increased by $627.58. *Id.*, citing Doc. #56, *Am. Sched. I*. In contrast, Mr. Medel's declaration supporting plan confirmation states that his wife's work hours were cut from "40 plus to 24-32 about a month and a half ago." Doc. #50, ¶ 4. Trustee questions how Ms. Medel's hours can decrease while maintaining an increase in income. Doc. #69. Meanwhile, Debtors' expenses have increased by $751.92, which includes increases of $50 to home maintenance, $101.92 to electricity & heat, $160 to phone & internet, $200 to home & housekeeping, $35 to personal care, and $430 to car payments. Doc. #56, *Am. Sched. J*. The car payment relates to a

vehicle purchased without court authorization, the hearing for which is in matter #7 below. RSW-3.

Trustee requests the last two months of paystubs that include the year-to-date amounts, and the last two months of utility bills, including telephone and internet. Doc. #69. Trustee requests evidence that the increases to Debtors' utility bills are actual necessary.

This matter will be called as scheduled. The court is inclined to DENY WITHOUT PREJUDICE Debtors' request for confirmation because no satisfactory explanation or supporting evidence for the income discrepancy has been provided.

7. 20-10445-B-13 **IN RE: GERARDO/BRITTANY MEDEL**
RSW-3

MOTION TO INCUR DEBT
12-20-2021 [63]

BRITTANY MEDEL/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Gerardo Luis Medel and Brittany Anne Medel ("Debtors") seek *nunc pro tunc* authorization for a $22,365.72 debt incurred to purchase a 2017 Mazda 3 ("Vehicle"). Doc. #63. The monthly payments are approximately $430.00 for 72 months at 12.76% interest.

Mr. Medel declares that one of Debtors' other vehicles was repossessed by Laguna Auto Sales ("Creditor") without obtaining stay relief in November 2021. Doc. #65. Creditor refused to return the vehicle without a court order, so Debtors immediately purchased Vehicle to have transportation to and from work. *Id.*

Chapter 13 trustee Michael H. Meyer ("Trustee") objects because the motion was filed on 16 days' notice in violation of Local Rule of Practice ("LBR") 3015-1(h)(1)(E) and Fed. R. Bankr. P. ("Rule") 2002(a)(2). Doc. #67. Additionally, Debtors are delinquent $10,824.45 through November 2021, with an additional payment that became due in December 2021. *Id.*

This motion will be DENIED WITHOUT PREJUDICE.

First, the motion was filed on insufficient notice. LBR 3015-1(h)(1)(A) allows a debtor, *ex parte* and with court approval, to

finance the purchase of a motor vehicle if the trustee's written consent is filed with or as part of the motion. The trustee's approval is a certification to the court that: (i) all chapter 13 plan payments are current; (ii) the chapter 13 plan is not in default; (iii) the debtor has, in the last 30 days, evidenced the ability to pay all future plan payments, projected living and business expenses, and the new debt; (iv) the new debt is a single loan incurred to purchase a motor vehicle that is reasonably necessary for the maintenance or support of the debtor, a dependent of the debtor, or, if debtor is engaged in business, is necessary for the continuation, preservation, and operation of the debtor's business; (v) the only security for the new debt will be the motor vehicle; and (vi) the new debt does not exceed $20,000.

If the trustee will not give consent, or if a debtor wishes to incur new debt on terms and conditions not authorized by subsection (h)(1)(A), the debtor may still seek court approval under LBR 3015-1(h)(1)(E) by filing and serving a motion on the notice required by Rule 2002 and LBR 9014-1. Under 11 U.S.C. § 1306(a), incurring new debt secured by the vehicle is a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, so 21 days' notice to the trustee, all creditors, and parties in interest is required under Rule 2002(a)(2).

This motion was filed and served on December 20, 2021 and set for hearing on January 5, 2022. Doc. #66. December 20, 2021 is 16 days before January 5, 2022, so the motion was filed on insufficient notice under Rule 2002(a)(2).

Second, Debtors request *nunc pro tunc* relief backdated to the date the loan was incurred. However, the Supreme Court has rejected federal courts' use of *nunc pro tunc* orders to retroactively re-write the record. *See Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696, 701 (2020).

Third, Trustee says that the chapter 13 plan is delinquent $10,824.45 with an additional payment due in December 2021. Doc. #67. Though Debtors seek confirmation of their modified plan in matter #6 above, the court is inclined to deny that motion. RSW-2. So, the delinquency will remain outstanding and the elements of LBR 3015-1(h)(1)(A)(i) and (ii) are not met.

Debtors' request for *nunc pro tunc* authorization to incur debt will be DENIED WITHOUT PREJUDICE.

8. 20-12848-B-13 **IN RE: PATRICK/MARIBETH TABAJUNDA**
RSW-5

MOTION TO CONFIRM PLAN
11-15-2021 [112]

MARIBETH TABAJUNDA/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice to filing a five-year plan.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Patrick B. Tabajunda and Maribeth E. Tabajunda ("Debtors") seek confirmation of their Second Modified Chapter 13 Plan. Doc. #112. Debtors wish to extend the duration of their plan to 84-months under 11 U.S.C. § 1329(d) and the COVID-19 Bankruptcy Relief Extension Act of 2021 ("CBREA"). 117 P.L. 5, 135 Stat. 249.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to confirmation under 11 U.S.C. § 1325(a)(3) because the unsecured repayment percentage is reduced significantly from 78.178% to 50% and Debtor has failed to produce evidence that the modification has been proposed in good faith. Doc. #122.

In sum, the Second Modified Plan proposes to (1) reduce the plan payment from $6,700 to $4,000 per month; (2) reduce the percentage unsecured creditors receive from 78.178% to 50%; (3) increase the term from 60 to 84 months; and (4) forgive or postpone approximately $17,100 in missed plan payments due through October 2021. Docs. #116; #123.

Trustee objects because Debtors' explanation is limited to the significant decrease in plan payment. Doc. #122. Debtors' declaration states that he is on disability due to sciatica, but no explanation is provided as to the amounts received from disability or how long it will last. Doc. #114.

Under 11 U.S.C. § 1329(d), a plan can be extended to not more than 7 years after the time that the first payment under the original plan was due if the debtor is experiencing or has experienced a material financial hardship due to the COVID-19 pandemic. Section 1329(d)(1) requires a previous plan to have been confirmed prior to the enactment of CBREA: March 27, 2021.

Here, Debtor filed chapter 13 bankruptcy on August 31, 2020. Doc. #1. The original proposed plan was filed with the petition. Doc. #2. Secured creditor Valley Strong Credit Union objected to confirmation (ALG-1), which was sustained on January 6, 2021. Doc. #48. Debtors' First Amended Plan was filed on March 24, 2021. Doc. #63. It was confirmed on May 7, 2021, which is after the deadline for having a prior confirmed plan before the CBREA was enacted. Doc. #84. Even though the First Amended Plan was filed before the March 27, 2021 deadline, it was not confirmed until later. Section 1329(d) is clear that the prior plan must be *confirmed*, not merely filed. So, Debtors are not eligible to extend their plan beyond five-years under the CBREA.

Other courts have similarly interpreted the prior plan confirmation provision of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, the predecessor to the CBREA. *See*, *e.g.*, *In re Robinson*, No. 19-22498-beh, 2020 Bankr. LEXIS 3421 (Bankr. E.D. Wis. Dec. 8, 2020) (debtor could not amend her confirmed plan to extend the total plan length under § 1329(d) under the CARES Act because her original plan was confirmed four days after enactment of the CARES Act), *superseded by CBREA*; *In re Bridges*, No. 19-31012, 2020 Bankr. LEXIS 2049 (Bankr. S.D. Ill. July 30, 2020) (finding (i) debtor was not eligible to confirm a plan with a term greater than five years under the CARES Act, (ii) the equitable powers of 11 U.S.C. § 105(a) could not be used to contravene specific statutory provisions, and (iii) it was not possible to issue a *nunc pro tunc* order to "back date" confirmation to the plan filing date).

Accordingly, this motion will be DENIED WITHOUT PREJUDICE to filing a five-year plan. Constitutional due process requires that the movant make a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Tracht Gut, LLC v. County of L.A. (In re Tracht Gut, LLC)*, 503 B.R. 804, 811 (B.A.P. 9th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

9. 17-12562-B-13 **IN RE: RICARDO/ELVIA MARTINEZ**
MHM-1

OBJECTION TO DISCHARGE BY MICHAEL H. MEYER
11-29-2021 [71]

PATRICK KAVANAGH/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Sustained.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to the entry of discharge for Ricardo Martinez and Elvia Martinez ("Debtors"). Doc. #71.

Debtors did not oppose.

This objection will be SUSTAINED.

This objection was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the sustaining of the objection. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the trustee has done here.

11 U.S.C. § 1328(f) provides that the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502 if the debtor has received a discharge: (1) in a case under chapters 7, 11, or 12 during the four-year period preceding the petition date; or (2) in a case under chapter 13 during the two-year period preceding the petition date.

Here, Debtors received a chapter 7 discharge on July 28, 2014. *See* Case No. 14-11512. This case was filed on July 5, 2017, which is 2 years, 11 months, and 7 days after Debtors received a chapter 7 discharge. Doc. #1. Since Debtors received a chapter 7 discharge

during the four-year period preceding the petition date, Debtors are not eligible to receive a chapter 13 discharge here.

Accordingly, Trustee's objection to discharge will be SUSTAINED.

10. 16-12580-B-13 **IN RE: EDWARD PADILLA**
MHM-1

MOTION TO DETERMINE FINAL CURE AND MORTGAGE PAYMENT RULE 3002.1
12-3-2021 [53]

MICHAEL MEYER/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Chapter 13 trustee Michael H. Meyer ("Trustee") moves for an order determining: (1) Edward Padilla ("Debtor") has cured the default with respect to a loan in favor of Bankers Home Loans ("Creditor") secured by a deed of trust encumbering residential real property located at 3304 Brisbane Avenue, Bakersfield, CA 93313 ("Property"); and (2) all post-petition payments due and owing from August 2016 through July 2021 have been paid. Doc. #53.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Federal Rule of Bankruptcy Procedure ("Rule") 3002.1(g) requires that within 21 days after service of the notice under subdivision (f), the holder shall file and serve on the debtor, debtor's counsel, and the trustee, a statement indicating: (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim; and (2) whether the debtor is otherwise current on all payments consistent with 11 U.S.C. § 1322(b)(5).

Rule 3002.1(h) provides, on motion by the trustee filed within 21 days after service of the statement under subdivision (g), the court shall, after notice and a hearing, determine whether the debtor has cured the default and paid all required post-petition amounts. Trustee filed a *Notice of Final Cure Payment* pursuant to Rule 3002.1(h) on October 7, 2021. Docs. ##50-51.

The record shows that Debtor has cured the default on the loan with Creditor and is current on mortgage payments through July 2021. Doc. #55. Trustee states that its office has paid a total of $66,000.00 towards the ongoing mortgage payment, $12,897.53 towards the pre-petition arrearage claim, and $110.00 in late fees. *Id.*

Accordingly, this motion will be GRANTED. Creditor and its successors in interest will be precluded from presenting any omitted information because it was required to be provided in the response to the *Notice of Final Cure* pursuant to Rule 3002.1(i). Debtor has cured the default and is current on mortgage payments through July 2021.

10:00 AM

1. 16-11528-B-7 **IN RE: RV PEDDLER, INC.**
JMV-1

MOTION TO PAY
12-6-2021 [74]

JEFFREY VETTER/MV
LEONARD WELSH/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Chapter 7 trustee Jeffrey M. Vetter ("Trustee") seeks authority to pay administrative tax claims in the amount of $832.00 to the Franchise Tax Board ("FTB") for the January 1, 2021 to December 31, 2021 timeframe. Doc. #74. Trustee also requests to be authorized to pay up to $1,000.00 for any unexpected tax liabilities without further court approval.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 503 allows an entity to file a request for payment of administrative expenses. After notice and a hearing, payment of certain administrative expenses shall be allowed, other than those specified in § 502(f), including taxes. § 503(b)(1)(B). Under 28

U.S.C. § 960(b), trustees are required to pay estate taxes on or before the date they become due even if the respective tax agency does not file a request for administrative expenses. *Dreyfuss v. Cory (In re Cloobeck)*, 788 F.3d 1243, 1246 (9th Cir. 2015).

RV Peddler, Inc. ("Debtor") filed chapter 7 bankruptcy on April 29, 2016. Doc. #1. Randell Parker was appointed as trustee. Doc. #2. The case was closed, and final decree issued, on September 19, 2016. Doc. #50. The case was reopened on May 11, 2021. Doc. #57. Trustee was appointed as successor trustee on June 7, 2021. Doc. #63. Trustee employed James E. Salven ("Accountant") as the estate's accountant effective October 25, 2021. Doc. #73. Accountant determined that the estate has a tax liability due to the FTB in the amount of $823.00 for the January 1, 2021 – December 31, 2021 timeframe. Doc. #76. This tax represents the minimum tax due for the 2021 tax year. *Id.*

Trustee asks for an order allowing payment to FTB of $823.00, plus an additional $1,000.00 as a small buffer for any interest, fees, or other additional taxes owed so the estate will not need to incur further expense seeking additional approval for a nominal amount of tax liability.

This motion was fully noticed and no party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Trustee will be authorized to pay, in Trustee's discretion, $823.00 to FTB for the 2021 tax year. Further, Trustee will be authorized to pay an additional amount not to exceed $1,000.00 for any unexpected tax liabilities without further court approval.

2. 21-12598-B-7 **IN RE: YINGCHUN LOU**
KR-2

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-8-2021 [24]

THE GOLDEN 1 CREDIT UNION/MV
SAM WU/ATTY. FOR DBT.
KAREL ROCHA/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Golden 1 Credit Union ("Movant") seeks relief from the automatic stay pursuant to 11 U.S.C. § 362 with respect to a 2020 Ford F250 vehicle. Docs. #24; #26.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

For motions filed on 28 days' notice, LBR 9014-1(f)(1)(B) requires the movant to notify respondents that any opposition to the motion must be in writing and filed with the court at least 14 days preceding the date of the hearing.

Here, the motion was filed and served on December 8, 2021 and set for hearing on January 5, 2022. Doc. #30. December 8, 2021 is 28 days before January 5, 2022. Therefore, this motion was set for hearing on 28 days' notice under LBR 9014-1(f)(1). However, the notice stated:

> PLEASE BE ADVISED THAT, pursuant to Local Bankruptcy Rule 9014-1(f)(2), you are not required to file written opposition to the Motion. Opposition, if any, shall be presented at the hearing on the Motion. If opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

Doc. #25, at 2, ¶¶ 11-14. This is incorrect. Because the hearing was set on 28 days' notice, the notice should have included the language of LBR 9014-1(f)(1)(B), stating that written opposition was required, must be filed 14 days before the hearing, and failure to file written opposition may be deemed a waiver of any opposition to the granting of the motion.

For the above reason, this motion will be DENIED WITHOUT PREJUDICE.

3. 21-11999-B-7 **IN RE: RAUL TORRES**
DMG-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR DISCHARGE INJUNCTION TO PURSUE INSURANCE PROCEEDS IN NON-BANKRUPTCY FORUM
11-15-2021 [16]

STEVEN BLANCO/MV
T. O'TOOLE/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted in part.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Daniel Gonzalez, Steven Blanco, and Elizabeth Gonzalez (collectively "Movants") seek to modify the automatic stay under 11 U.S.C. § 362 to proceed to final judgment in a state court lawsuit pending against Raul Torres, Jr. ("Debtor") dba RTM Transportation and others in Kern

County Superior Court, Case No. BCV-21-101730-DRL ("State Court Action"). Doc. #16.

Debtor filed non-opposition. Doc. #21.

This motion will be GRANTED IN PART.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest except Debtor are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Movants filed the State Court Action on July 28, 2021 alleging negligence and loss of consortium. Doc. #19, *Ex. A*. Debtor is the owner of RTM Transportation and non-debtor third party Javier Cecilo Navarro Rodriguez is named as a co-debtor. Doc. #18. The State Court Action arose from a truck crash on Interstate 5 on May 6, 2021 whereby the plaintiffs sustained personal injuries. *Id.* Debtor and his business were insured, so Movants seek only to pursue insurance proceeds available to them in litigation. Movants assert that no proceeds will be personally sought from Debtor nor the bankruptcy estate. *Id.*

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

Since Movants' stay modification involves discretionary abstention in favor of allowing Movants to proceed in state court, the court must analyze the following factors when deciding whether to abstain from exercising jurisdiction:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state

> court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th Cir. 1990), quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987).

The *Tucson Estates* factors permit abstention as follows:

1. *Effect on administration of the estate if the court abstains*: Movants are seeking insurance proceeds only, so the administration of the estate will not be affected if the court abstains. This factor weighs in favor of abstention.

2. *Extent to which state law issues predominate*: The State Court Action concerns only state court claims. This factor weighs in favor of abstention.

3. *Difficulty or unsettled nature of the applicable law*: There is nothing to suggest that the State Court Action claims are difficult or unsettled. This factor weighs against abstention.

4. *Presence of a related proceeding commenced in state court*: The State Court Action has commenced and is proceeding. This factor weighs in favor of abstention.

5. *Jurisdictional basis other than 28 U.S.C. § 1334*: There does not appear to be any supplemental jurisdiction because the State Court Action involves no claims which would fall under this court's original jurisdiction. This factor weighs in favor of abstention.

6. *Degree of relatedness or remoteness to the bankruptcy case*: The State Court Action is only related to the bankruptcy case insofar as Debtor is liable to Movants. However, Movants are only seeking insurance proceeds, so this factor weighs in favor of abstention.

7. *Substance rather than form of the asserted "core" proceeding*: The State Court Action does not involve "core" proceedings, so this factor weighs in favor of abstention.

8. *Feasibility of severing state law claims from core bankruptcy matters*: There are no "core" matters in the State Court Action that could be severed from the state law claims. This factor weighs in favor of abstention.

9. *Burden on the bankruptcy court's docket*: Liquidating the State Court Action in bankruptcy court would use bankruptcy court resources instead of Kern County Superior Court resources. Modification of the stay would ease the burden on the bankruptcy court's docket. This factor weighs in favor of abstention.

10. *Likelihood of forum shopping*: There is nothing to suggest that either party has engaged in forum shopping here. This factor weighs in favor of abstention.

11. *Existence of a right to a jury trial*: The Movants have demanded a trial by jury as to all issues of law and fact to which they are entitled. This factor weighs heavily in favor of abstention.

12. *Presence of non-debtor parties in related proceedings*: There are several non-debtor parties that are named as defendants and have not filed for bankruptcy. This factor weighs in favor of abstention.

Most of the *Tucson Estates* factors weigh in favor of this court abstaining from exercising its jurisdiction over the State Court Action. The court finds that cause exists to modify the automatic stay to permit Movants to take necessary actions to liquidate their claims against the insurance proceeds only.

When a movant prays for relief from the automatic stay to initiate or continue non-bankruptcy court proceedings, a bankruptcy court must consider the "*Curtis* factors" in making its decision. *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer)*, 405 B.R. 915, 921 (9th Cir. B.A.P. 2009). The relevant factors in this case include:

> (1) Whether the relief will result in a partial or complete resolution of the issues; (2) The lack of any connection with or interference with the bankruptcy case; (3) Whether the foreign proceeding involves the debtor as a fiduciary; (4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases; (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation; (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question; (7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee, and other interested parties; (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c); (9) Whether

> movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f); (10) The interests of judicial economy and the expeditious and economical determination of litigation for the parties; (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and (12) The impact of the stay on the parties and the "balance of hurt."

Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.), 311 B.R. 551 (Bankr. C.D. Cal. 2004) citing *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984); *see also Kronemyer*, 405 B.R. at 921.

Here, (1) stay modification will result in complete resolution of the State Court Action and allow Movants to liquidate their claims against the insurance proceeds. (2) The State Court Action should not interfere with the bankruptcy case provided that Movants are only permitted to liquidate their claims. (3) Debtor does not appear to be involved as a fiduciary. (4) The action involves state law claims and was filed in state court, which is experienced in handling the state law claims. (5) Movants are seeking to liquidate their claims against insurance proceeds. (6) The action involves multiple third parties, but Debtor does not appear to be functioning as a bailee or conduit for goods or proceeds. (7) Litigation in another forum should not prejudice the interests of other creditors or interested parties. (8) Movants' success in state court will not create a judicial lien because this court is not authorizing Movants to obtain a judgment lien Debtor. (9) And because Movants are not authorized to obtain a judgment lien, lien avoidance under § 522(f) will be inapplicable. (10) The interests of judicial economy and the expeditious and economical determination of litigation weighs in favor of stay modification because the State Court Action is proceeding. (11) It is unclear whether the proceeding has progressed to the point of trial. (12) The impact of the stay on the parties and the "balance of hurt" weighs in favor of stay modification. The State Court Action involves multiple third parties and cannot proceed until the stay is modified, which is preventing the liquidation of Movants' claim. Further, Debtor does not oppose stay modification, so the balance of hurt analysis weighs in favor of stay modification.

Both the *Curtis* and *Tucson Estates* factors weigh in favor of modifying the automatic stay to permit Movants to liquidate their claims against Debtor's insurance carrier. The court finds cause exists to modify the automatic stay. This motion will be GRANTED IN PART pursuant to 11 U.S.C. § 362(d)(1) to permit Movants to prosecute and liquidate, but not enforce against the debtor, their claims against Debtor's insurance carrier in the State Court Action.

No relief will be granted relative to the discharge injunction. First, Debtor's non-opposition is limited to the stay relief motion. Second, it is unnecessary. Section 524(a)(2) provides for the injunction as to

proceedings seeking to collect a discharged liability as a personal liability of the debtor. The motion does not request that relief; only relief to collect insurance. Third, a declaratory judgment would require an adversary proceeding.

11:00 AM

1. 17-11028-B-11 **IN RE: PACE DIVERSIFIED CORPORATION**
18-1006

FURTHER STATUS CONFERENCE RE: COMPLAINT
2-5-2018 [1]

PACE DIVERSIFIED CORPORATION
ET AL V. MACPHERSON OIL
T. BELDEN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

2. 21-10734-B-7 **IN RE: MANUEL GONZALES**
21-1030 BMO-2

MOTION FOR ENTRY OF DEFAULT JUDGMENT
12-2-2021 [45]

STRATA FEDERAL CREDIT UNION V.
GONZALES, III
BRANDON ORMONDE/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order in conformance with the ruling below.

Secured creditor Strata Federal Credit Union ("Plaintiff") seeks entry of a default judgment against debtor Manuel Gonzales, III ("Defendant") finding that the debts owed by Defendant to Plaintiff for the refinance of a 2018 Toyota Camry ("Vehicle") are non-dischargeable pursuant to 11 U.S.C. § 523. Doc. #45. Plaintiff seeks judgment: (1) determining that Defendant is obligated to pay Plaintiff the total sum of $19,722.00; (2) determining that the debt owed to Plaintiff by Defendant is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6); and (3) said sum shall bear interest at 0.25% pursuant to 28 U.S.C. § 1961 as of the date of entry of judgment.

There is no opposition from Defendant.

The court is inclined to GRANT this motion.

Plaintiff's motion was filed on 28 days' notice pursuant to LBR 9014-1(f)(1) and will proceed as scheduled. Defendant and his attorney were properly served the following in accordance with Rules 7004(b)(1) and (9): the complaint on July 14, 2021, the request for entry of default on August 27, 2021, and this motion and supporting documentation on December 2, 2021. Docs. ##7-8; #13; #51.

The United States District Court for the Eastern District of California has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) because this is a case arising under title 11. This court has jurisdiction to hear and determine this matter by reference from the District Court under 28 U.S.C. § 157(a). This is a "core" proceeding under 28 U.S.C. § 157(b)(2)(I).

Plaintiff requests the court take judicial notice of certain documents from its lawsuit against Plaintiff in Kern County Superior Court entitled, Case No. BCL 20-011736. Doc. #50. The court may take judicial notice of all documents and other pleadings filed in this adversary proceeding, the underlying bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Gmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, as well as the pleadings filed in this adversary proceeding, and Defendant's underlying chapter 7 bankruptcy case, Case No. 21-10734, but not the truth or falsity of such documents as related to findings of fact. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

The court entered Defendant's default on August 30, 2021 and directed Plaintiff to apply for a default judgment and set this "prove up" hearing within 30 days of entry of default. Doc. #14. Plaintiff properly applied for default judgment on September 28, 2021, but the motion was denied without prejudice for procedural and other reasons. Plaintiff's renewed motion was filed on December 2, 2021. Doc. #45.

BACKGROUND

On or about July 1, 2019, Plaintiff and Defendant executed a written loan agreement ("Loan Agreement") to refinance Defendant's 2018 Toyota Camry ("Vehicle") in the amount of $23,977.57 at 4.44% interest to be paid back in monthly payments of $405.31 beginning August 15, 2019. Docs. #48, ¶ 3; #49, *Ex. A*. Under the Loan Agreement, Plaintiff agreed that Vehicle would be the collateral securing the refinance. *Id.*, *Ex. A*, at 3, 7. Prior to executing the Loan Agreement, Defendant was the registered owner of Vehicle, which was valued at $19,722.00 encumbered by Bank of the West. Doc. #48, ¶¶ 4-5.

On July 5, 2019, Plaintiff issued a $23,977.57 check to Bank of the West to pay off its security interest. *Id.*, ¶ 6; Doc. #49, *Ex. C*. Plaintiff included an *Authorization for Payoff and Demand for Certificate of Title*. *Id.* Plaintiff provided the check and written authorization to Defendant to deliver to Bank of the West to pay off

the loan, including instruction regarding transfer of Vehicle's title. Doc. #48, ¶ 7.

Plaintiff did not receive Vehicle's *Certificate of Title*. Doc. #48, ¶ 11. Plaintiff learned that Bank of the West sent title directly to Defendant instead of Plaintiff. *Id.*, *Ex. D*, at 5, ¶¶ 13-24. Defendant used the *Certificate of Title* to obtain a secured loan with third party Check Into Cash ("CIC"). *Id.*, *Ex. D*, at 5, ¶¶ 22-24.

Thereafter, Plaintiff ran a Vehicle Inquiry Report through the Dealertrack title report system and learned that Vehicle was encumbered by the loan in favor of CIC. *Id.*, *Ex. E*.

Defendant defaulted under the Loan Agreement on October 15, 2019 and did not make a single payment. *Id.*, ¶ 19. Since Plaintiff was unable to perfect its lien rights, it was unable to repossess Vehicle to mitigate its damages upon Defendant's default under the Loan Agreement. *Id.*, ¶ 20.

On March 4, 2020, Plaintiff filed a complaint in Kern County Superior Court, Case No. BCL 20-011736, alleging breach of contract, fraud, negligence, and breach of implied contract. *Id.*, ¶ 21. The Kern County complaint is included in Plaintiff's *Request for Judicial Notice* ("RJN"). *See* Doc. #50. RJN #1. The Kern County Superior Court entered judgment by default on August 19, 2020 in the amount of $29,282.10. *Id.*, RJN #2. This amount consisted of $24,595.83 in damages, $559.13 in prejudgment interest at 4.44%, $3,459.58 in attorney fees, and $667.56 in costs. *Ibid.*

Though Plaintiff obtained a judgment, it was never able to perfect its security interest as to Vehicle. Doc. #48, ¶ 23. Vehicle was ultimately repossessed by a third party. Doc. #49, *Ex. D*, at 6, ¶¶ 12-16.

Defendant filed bankruptcy on March 27, 2021. Bankr. Case No. 21-10734 ("Bankr.") Doc. #1.

Plaintiff filed this adversary proceeding on July 8, 2021 asserting three causes of action for non-dischargeability: (1) for a refinance of credit to the extent it was obtained by false pretenses, a false representation, or actual fraud under 11 U.S.C. § 523(a)(2)(A); (2) refinance of credit to the extent it was obtained by use of a statement in writing that is materially false under § 523(a)(2)(B); and (3) for willful and malicious injury under § 523(a)(6). Doc. #1.

Plaintiff concedes the first two counts but maintains that the debt should be deemed non-dischargeable for willful and malicious injury under § 523(a)(6). Doc. #45.

Plaintiff alleges that it specifically advised that Vehicle would be security for the Loan Agreement. Doc. #48, ¶ 8. Pursuant to the Loan Agreement, Defendant stated that the collateral would be used as

security for the loan and that he would not use it as security for a loan with any other creditor until the loan was repaid. *See* Doc. #49, *Ex. A*, at 6, ¶ 3. Defendant further testified at the § 341 meeting of creditors that he agreed that Vehicle would be used as collateral for loan. *Id.*, *Ex. D.*

Plaintiff alleges that Defendant had no intention of using Vehicle as security for the Loan Agreement. Doc. #48, ¶ 15. Plaintiff relied on Defendant's representations and the Loan Agreement that Vehicle would be used as security when releasing a check to Defendant. *Id.*, ¶ 16. Plaintiff made several attempts to contact Defendant, but Defendant refused to answer any correspondence or telephone calls. *Id.*, ¶ 17. Plaintiff was unable to secure its lien rights with respect to Vehicle. *Id.*, ¶ 18.

Plaintiff claims it suffered damage in the form of being unable to secure its lien rights with Vehicle as the result of Defendant's intentional actions. Since Plaintiff was unable to perfect its lien on Vehicle, Vehicle was repossessed by a third party and Plaintiff was unable to mitigate its damages through repossessing its security. Doc. #48, ¶ 23.

DISCUSSION

I. Default Judgment Standard

Federal Rule of Civil Procedure ("Civil Rule") 55 (applicable under Federal Rule of Bankruptcy Procedure ("Rule") 7055) governs default judgments. "To obtain a default judgment of nondischargeability of a loan debt, a two-step process is required: (1) entry of the party's default (normally by the clerk), and (2) entry of default judgment." *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006), citing *Brooks v. United States*, 29 F.Supp 2d 613, 618 (N.D. Cal. 1998), *aff'd mem.*, 162 F.3d 1167 (9th Cir. 1998). "[A] default establishes the well-pleaded allegations of a complaint unless they are . . . contrary to facts judicially noticed or to uncontroverted material in the file." *Anderson v. Air West Inc. (In re Consol. Pretrial Proceedings in Air West Secs. Litig.)*, 436 F.Supp 1281, 1285-86 (N.D. Cal. 1977), citing *Thomson v. Wooster*, 114 U.S. 104, 114 (1885). Thus, a default judgment based solely on the pleadings may only be granted if the factual allegations are well-pled and only for relief sufficiently asserted in the complaint. *Benny v. Pipes*, 799 F.2d 487, 495 (9th Cir. 1986), *amended on other grounds*, 807 F.2d 1514 (9th Cir. 1987).

The court has broad discretion to require that a plaintiff prove up a case and require the plaintiff to establish the necessary facts to determine whether a valid claim exists supporting relief against the defaulting party. Entry of default does not automatically entitle a plaintiff to a default judgment. *Beltran*, 182 B.R. at 823; *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) ("Rule 55 gives the court considerable leeway as to what it may require as a prerequisite to entry of a default judgment.").

A. § 523(a)(6)

11 U.S.C. § 523(a)(6) excepts from discharge any debt for willful and malicious by the debtor to another entity or property of another entity. To prevail under this subsection, a creditor must establish that the debtor deliberately or intentionally produced harm without just cause or excuse. *Lin v. Ehrle (In re Ehrle)*, 189 B.R. 771, 776 (B.A.P. 9th Cir. 1995), citing *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986). The court must separately inquire as to whether the injury was willful and whether it was malicious. *In re Su*, 259 B.R. 909, 914 (B.A.P. 9th Cir. 2001), *aff'd*, 290 F.3d 1140 (9th Cir. 2002).

"The willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001), *cert. den.*, 533 U.S. 930 (2001). "In order to apply this 'subjective standard,' the court must examine the debtor's state of mind and 'actual knowledge that harm to the creditor was substantially certain.' *Christen v. Himber (In re Himber)*, 296 B.R. 217, 226 (Bankr. C.D. Cal. 2002), quoting *Su*, 290 F.3d at 1146.

An injury is malicious if caused by "a wrongful act, done intentionally, which necessarily causes injury, and which is done without just cause or excuse." *Jercich*, 238 F.3d at 1208. To prove malice, a creditor must make a further showing that "the debtor's actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor." *In re Britton*, 950 F.2d 602, 605 (9th Cir. 1991), quoting *CIT Fin. Servcs., Inc. v. Posta (In re Posta)*, 866 F.2d 364, 367 (10th Cir. 1989).

The Ninth Circuit has stated that "willful and malicious conduct" in the context of § 523(a)(6) refers to a wrongful act that is done intentionally, necessarily produces harm, and is without just cause or excuse, even without proof of a specific intent to injure. *Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986). A "reckless disregard" for the rights of another is not sufficient to prove that a wrongful act is deliberate. *Id.; Newsom*, 186 B.R. at 973.

Here, under the Loan Agreement, Defendant received money from Plaintiff to refinance Vehicle with Bank of the West. Defendant acknowledged that he knew the Vehicle was to be used as collateral for the Loan Agreement. The Loan Agreement specifically stated that Vehicle would not be used as collateral for any other loan until the Loan Agreement with Plaintiff was paid off. Defendant did not make a single payment to Plaintiff under the Loan Agreement.

Despite promising to make monthly payments and not to use Vehicle as collateral for any other loan, Defendant used Vehicle as security to

obtain a second loan with CIC and then did not make the payments to CIC either, resulting in Vehicle's repossession by CIC.

Plaintiff argues that anybody with reasonable intelligence would know that they need to deliver title to their new financing company upon erroneously receiving the title from their previous financing company in connection with promising the new finance company that the title was to be used as collateral for a new loan. Doc. #47. In using that title to obtain the second loan, Defendant had a subjective motive to inflict injury or was substantially certain that Plaintiff would be injured as the result of using the *Certificate of Titl*e to obtain a second loan. That harm was done intentionally, reasonably foreseeable because Defendant had just recently completed the loan refinance and executed the Loan Agreement, and without just cause or excuse.

As result, Defendant willfully and maliciously injured Plaintiff by requesting money from Plaintiff to refinance the Vehicle, not making a single payment, and using the title he erroneously received to obtain a second loan. Plaintiff's damages were the total sum of $19,722.00 that was executed in favor of Bank of the West pursuant to the Loan Agreement.

CONCLUSION

Plaintiff refinanced Defendant's loan with Bank of the West. Defendant promised to use Vehicle as collateral for that loan and promised not to use Vehicle as security for any other loan. Plaintiff provided to Bank of the West a check in the sum of $19,722.00 for payoff proceeds an *Authorization for Payoff and Demand for Certificate of Title*. Bank of the West erroneously sent the title directly to Defendant instead of to Plaintiff. Defendant knew that the Vehicle was to be used as collateral for the loan but used the title to obtain a second secured loan in favor of Check Into Cash. Plaintiff was never able to perfect its security interest and Vehicle was repossessed by a third party.

Defendant had subjective motive or was substantially certain that using Vehicle as security for a second loan with Check Into Cash would injure Plaintiff. The harm was intentional, foreseeable, and done without just cause or excuse. Defendant willfully and maliciously injured Plaintiff by failing to turn over title so Plaintiff could secure the loan, causing Plaintiff $19,722.00 in damages. Under 11 U.S.C. § 523(a)(6), that debt is non-dischargeable.

Accordingly, this motion will be GRANTED. Judgment will be entered in favor of Plaintiff against Defendant in the sum of $19,722.00. The judgment is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6) and shall accrue interest at the rate of 0.25% under 28 U.S.C. § 1961 as of the date of entry of judgment.