UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, January 12, 2022
Place: Department B – Courtroom #13
Fresno, California

The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click here.

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.

9:30 AM

1. 19-13822-B-13 **IN RE: SALVADOR PULIDO**
TCS-5

MOTION TO REFINANCE
12-6-2021 [89]

SALVADOR PULIDO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

Salvador Pulido ("Debtor") seeks authority to refinance the loan on his primary residence located at 1366 Linda Mesa Drive, Madera, CA 93638 ("Property"). Doc. #89. Property is encumbered by a first priority deed of trust in favor of HomeStreet Bank ("Creditor") in the amount of $220,454.00. Doc. #21, *Am. Sched. D*.

Creditor filed a conditional non-opposition to the refinance, provided that: (1) Creditor's lien is paid in full from the proceeds of the refinance; (2) Creditor is authorized to submit an updated payoff demand to the escrow company facilitating the refinance prior to its closing; and (3) if the refinance does not occur and Creditor's claim is not paid in full from the proceeds, Creditor shall retain its lien for the full amount due under the loan agreement. Doc. #94

No other parties in interest timely filed written opposition. This matter will be called as scheduled.

This motion was set for hearing on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

LBR 3015-1(h)(1)(C) allows a debtor, *ex parte* and with court approval, to refinance existing debts encumbering the debtor's residence if the written consent of the chapter 13 trustee 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 demonstrated an ability to pay all future plan payments, projected living expenses, and the refinanced debt; (iv) the new debt is a single loan incurred only to refinance existing debt encumbering the debtor's residence; (v) the only security for the new debt will be the debtor's existing residence; (vi) all creditors with liens and security interests encumbering the debtor's residence will be paid in full from the proceeds of the new debt and in a manner consistent with the plan; and (vii) the monthly payment will not exceed the greater of the debtor's current monthly payments on the existing debt, or $2,500.

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)(C), 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.

Here, Debtor wants to refinance the deed of trust encumbering Property, which is his primary residence. Doc. #91. This will allow Debtor to have a lower mortgage payment while providing approximately $50,000.00 in liquidity to pay off the chapter 13 plan in full. *Id.* The terms of the proposed refinance are as follows:

Amount:	Unknown
Term:	Unknown
Interest:	3.25% fixed for 720 months
Payment:	$1,443.00/month

Id. Though information about the refinanced loan amount and the loan term are not provided, Debtor declares that the refinance would set the interest rate at 3.25% for 720 months, which is 60 years. *Id.*, ¶ 14. Does this imply that the loan term is 720 months, meaning Debtor will pay approximately $1,038,960.00 over the life of the loan? No copies of the refinance paperwork are included.

Nevertheless, Debtor declares that: (1) all payments required under the chapter 13 plan are current; (2) the plan and mortgage are not in default; (3) all future payments will be made outside of the plan after it is completed; (4) *Schedules I* and *J* indicate Debtor has the ability to pay all projected living expenses as well as repay the new debt, (5) the debt is a single loan incurred only to refinance the existing debt encumbering Property; (6) the only security for the new debt is Property; (7) all creditors with liens and security interests will be paid in full from the proceeds and in a manner consistent with the chapter 13 plan, and (8) the monthly payment will not exceed $2,000. *Id.*, ¶¶ 6-7, 15-21. Debtor also filed proposed *Schedules I* and *J* indicating that his adjusted monthly net income will be $905.00 if the refinance is approved. Doc. #92, *Ex. A*, at 5.

As noted above, Creditor does not oppose the refinance provided that its lien is paid in full, it is authorized to submit an updated payoff demand, and it shall retain its lien if the refinance is not completed. Doc. #94.

This matter will be called as scheduled to inquire as to the proposed refinanced loan amount and loan term, as well as to verify that Debtor's chapter 13 plan is current and not in default.

If granted, any order approving the refinance shall provide that Debtor is authorized, but not required, to refinance the existing debt encumbering Debtor's real property at 1366 Linda Mesa Drive, Madera, CA 93638. Debtor shall continue making regular chapter 13 plan

payments until the chapter 13 plan is completed or the plan is modified.

2. 17-13929-B-13 **IN RE: ALBERT/TERRY MCCLAREN**
PLG-1

NOTICE OF DEATH OF A DEBTOR, MOTION TO WAIVE SECTION 1328 CERTIFICATE REQUIREMENT,SUBSTITUTE PARTY, AS TO DEBTOR
12-23-2021 [58]

ALBERT MCCLAREN/MV
L. RODKEY/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

On September 22, 2021, joint debtor Terry Sue McClaren ("Decedent") died. Doc. #61. She is survived by her husband, joint debtor Albert Steve McClaren ("Debtor"). Debtor seeks (1) be substituted as the representative for or successor to Decedent for this joint chapter 13 case; (2) allow for the continued administration of the chapter 13 case after Decedent death; and (3) waive the 11 U.S.C. § 1328 certification requirements for entry of discharge with respect to Decedent. Doc. #58.

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

Here, the *Notice of Hearing* (Doc. #59) does not contain the appropriate language. 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.

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

3. 21-12355-B-13 **IN RE: MONICA RAMOS**
DMG-1

OBJECTION TO CONFIRMATION OF PLAN BY ABDUL H. ALI AND NAZLI ABBAS
11-23-2021 [14]

NAZLI ABBAS/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.

NO RULING.

Secured creditors Abdul H. Ali and Nazli Abbas (collectively "Creditors") object to confirmation of Monica Marcella Ramos' ("Debtor") chapter 13 plan confirmation. Doc. #14.

Debtor opposed. Doc. #20.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Written opposition was not required and may be presented at the hearing.

First, the objection does not procedurally comply with the local rules. LBR 3015-1(c)(4) outlines the procedure for filing objections to confirm the original chapter 13 plan and specifies that the notice of hearing shall inform the debtor, the debtor's attorney, and the trustee that no written response to the objection is necessary. Here, the *Notice of Hearing* (Doc. #15) says:

> Opposition, if any, to the granting of the motion [*sic*] shall be in writing and shall be served and filed with the Court by the responding party no later than fourteen days prior to hearing. Opposition shall be accompanied by evidence establishing its factual allegations. Without good cause, no party shall be heard in opposition to a motion at oral argument if written opposition to the motion has not been timely filed. Failure of the responding party to timely file written opposition may be deemed a waiver of any opposition to the granting of the motion or may result in the imposition of sanctions.

This is incorrect. Because the objection was filed pursuant to LBR 3015-1(c)(4), it should have complied with the procedure specified in LBR 9014-1(f)(2) and stated that written opposition was not required and may be presented at the hearing.

Typically, this error would result in overruling the objection without prejudice. However, doing so here would likely result in confirmation of Debtor's plan. Further, LBR 3015-1(c)(4) objections can only be filed within seven days after the first date set for the § 341(a)

meeting of creditors, which concluded on November 16, 2021. As result, this objection will be called and proceed as scheduled.

Here, Creditors were owed approximately $66,883.73 by Debtor on the petition date. Doc. #16. Debtor executed a promissory note in favor of Creditors in the amount of $54,500 at 12% interest on February 10, 2021, which is secured by Debtor's personal residence located at 2201 Verdugo Lane, Bakersfield, CA ("Property"). Doc. #17, *Exs. A*, *B*. The loan was to be paid in full by August 2021.

Creditors object because the plan is not feasible and fails to provide the proper "formula" discount rate in conformance with 11 U.S.C. § 1325(a)(2)(B)(ii) and the Supreme Court's ruling in *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004). Doc. #14.

First, Debtor's *Schedule I* (Doc. #1) indicates that Debtor receives $3,000 from "SECOND JOB" to assist in funding the $2,250 plan payment, but no information about the second job is provided.

Second, Creditors' claim is listed in the plan in Class 2(A), which Debtor proposes to pay with a 4% interest rate. Doc. #3. In *Till*, the Supreme Court determined that the appropriate interest rate for a secured claim should be determined by the 'formula approach,' which requires the court to take the national prime interest rate and adjust it to compensate for an increased risk of default. *Till*, 124 S. Ct. at 1957. Such factors include (1) circumstances of the estate, (2) the nature of the security, and (3) duration and feasibility of the reorganization plan. *Id.*, 1960.

Creditors object because Debtor adjusted the note balance from 12% to 10%, and then proceeded to make no payments on the note prior to filing bankruptcy. Doc. #14. Now, Debtor seeks to extend the original 6-month payment term to 60 months under the plan. Creditors are fourth in line for payment, behind a $185,134 first mortgage, a $8,246.03 judgment lien, and $35,799.66 in property taxes (paid at 18%). While Debtor intends to surrender the solar panels, it is unclear what the consequences of doing so will be, whether the solar panels will be removed, to what extent the solar lender Tesla seeks to assert its security interest in the residence, and the impact that surrender will have on a lien superior to Creditors'. Due to all of these risk factors, Creditors assert the interest should be no less than 8%.

In response, Debtor asserts an intention to file a motion to avoid the abstract of judgment, so the only obligations senior to Creditors will be the property taxes and first deed of trust. Doc. #20. Property has a value of $351,300.00 and the senior debt totals approximately $224,000.00. Debtor says that Tesla's security interest only encumbers the solar panels and is not a lien on real property, so there is equity over and above $100,000 to adequately protect Creditors. The prime rate was 3.25% on the petition date and *Till* requires payment of interest at the prime rate adjusted by risk factors, so Debtor asserts that 4% interest is reasonable here. *Id.*

This objection will be called and proceed as scheduled to inquire about Creditor's position.

4. 19-12663-B-13 **IN RE: OLIVIA GARCIA**
DRJ-2

MOTION FOR COMPENSATION FOR DAVID R. JENKINS, DEBTORS ATTORNEY(S)
12-13-2021 [45]

DAVID JENKINS/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.

David R. Jenkins ("Applicant"), attorney for Olivia Lopez Portillo Garcia ("Debtor"), seeks final compensation in the sum of $6,000.00 under to 11 U.S.C. § 330. Doc. #45. Applicant provided services for $8,890.00 in fees and incurred $75.00 in actual, necessary expenses from June 20, 2019 through December 9, 2021, but Applicant provided a courtesy discount of $1,015.00, and the remaining $2,000.00 was paid by Debtor pre-petition. The remaining balance of $6,000.00 is requested in this motion. *Id.*

Debtor signed a statement of consent on December 13, 2021 indicating that Debtor had received and read the fee application and approves the same. Doc. #47, *Ex. D*.

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 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 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.

The original chapter 13 plan is the operative plan in this case. Docs. #9; #31. Section 3.05 indicates that Applicant was paid $2,000.00 prior to filing the case and, subject to court approval, additional fees of $6,000.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. § 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #9. Applicant declares, other than the $2,000.00 paid prior to filing, Applicant has not accepted or demanded from Debtor or any other person any payment for services or costs without first seeking a court order permitting payment of those fees and costs. Doc. #47, *Ex. A*.

This is Applicant's first and final request for compensation. Doc. #45. The source of funds for payment of the fees will be $6,000.00 from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. *Id.*

Applicant provided 25.40 billable hours of legal services at a rate of $350.00 per hour, totaling $8,890.00 in fees, and incurred $125.00 in costs, but Applicant provided a courtesy discount of $1,015.00 and Debtor paid $2,000.00 prior to filing. So, the requested fees and expenses here are limited to **$6,000.00**. *Id.*; Doc. #47, *Ex. B*.

Applicant's services included, without limitation: (1) advising Debtor about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition, schedules, and plan, and reviewing Debtor's financial information, the effects of exemptions and value of assets; (3) preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting documents to the trustee; (5) attending and completing the § 341 meeting of creditors; (6) responding to the trustee's objection to plan confirmation (MHM-1) and confirming the original chapter 13 plan; and (7) preparing and filing this motion for compensation (DRJ-2). Doc. #47, *Exs. A*, *B*, *C*. The court finds the services and expenses reasonable, actual, and necessary. Debtor has consented to the fee application. *Id.*, *Ex. D*.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Applicant will be awarded $6,000.00 in fees and expenses on a final basis pursuant to § 330. The chapter 13 trustee is authorized, in his discretion, to pay Applicant $6,000.00 in accordance with the chapter 13 plan for services rendered and expenses incurred from June 20, 2019 through December 9, 2021.

5. 19-12365-B-13 **IN RE: SCOTT PARSONS**
DRJ-2

MOTION FOR COMPENSATION FOR DAVID R. JENKINS, DEBTORS ATTORNEY(S)
12-13-2021 [36]

DAVID JENKINS/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.

David R. Jenkins ("Applicant"), attorney for Scott D. Parsons ("Debtor"), seeks final compensation in the sum of $3,000.00 under to 11 U.S.C. § 330. Doc. #36. Applicant provided legal services totaling $7,140.00 in fees and incurred $75.00 in actual, necessary expenses from May 17, 2019 through December 11, 2021, but Applicant provided a courtesy discount of $2,215.00, and the remaining $2,000.00 was paid by Debtor pre-petition. The remaining balance of $3,000.00 is requested in this motion. *Id.*

Debtor signed a statement of consent on December 12, 2021 indicating that Debtor had received and read the fee application and approves the same. Doc. #38, *Ex. D*.

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 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 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.

The original chapter 13 plan is the operative plan in this case. Docs. #3; #27. Section 3.05 indicates that Applicant was paid $2,000.00

prior to filing the case and, subject to court approval, additional fees of $3,000.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. § 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #3. Applicant declares, other than the $2,000.00 paid prior to filing, Applicant has not accepted or demanded from Debtor or any other person any payment for services or costs without first seeking a court order permitting payment of those fees and costs. Doc. #38, *Ex. A*.

This is Applicant's first and final request for compensation. Doc. #36. The source of funds for payment of the fees will be $3,000.00 from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. *Id.*

Applicant provided 20.40 billable hours of legal services at a rate of $350.00 per hour, totaling $7,140.00 in fees, and incurred $75.00 in costs, but Applicant provided a courtesy discount of $2,215.00 and Debtor paid $2,000.00 prior to filing. So, the requested fees and expenses here are limited to **$3,000.00**. *Id.;* Doc. #38, *Ex. B*.

Applicant's services included, without limitation: (1) advising Debtor about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition, schedules, and plan, and reviewing Debtor's financial information, the effects of exemptions and value of assets; (3) preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting documents to the trustee; (5) attending and completing the § 341 meeting of creditors; (6) responding to a motion to dismiss (MHM-1); (7) confirming the original chapter 13 plan; and (8) preparing and filing this motion for compensation (DRJ-2). Doc. #38, *Exs. A*, *B*, *C*. The court finds the services and expenses reasonable, actual, and necessary. Debtor has consented to the fee application. *Id.*, *Ex. D*.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Applicant will be awarded $3,000.00 in fees and expenses on a final basis pursuant to § 330. The chapter 13 trustee is authorized, in his discretion, to pay Applicant $3,000.00 in accordance with the chapter 13 plan for services rendered and expenses incurred from May 17, 2019 through December 11, 2021.

6. 21-12383-B-13 **IN RE: SHAWN/MARCY LAMPHERE**
PBB-1

OBJECTION TO CLAIM OF SERVHL UNDERLYING TRUST 2019-1, CLAIM NUMBER 10
12-13-2021 [19]

MARCY LAMPHERE/MV
PETER BUNTING/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

Shawn Earl Lamphere and Marcy Ann Lamphere ("Debtors") object to Proof of Claim No. 10 filed by Servhl Underlying Trust 2019-1 ("Claimant") in the sum of $16,077.15 on November 29, 2021. Doc. #19; Claim #10-1.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, the court is inclined to SUSTAIN this objection.

This objection was filed on 30 days' notice pursuant to Local Rule of Practice ("LBR") 3007-1(b)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states that a proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim. If a party objects to a proof of claim, the burden of proof is on the objecting party. *Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1039 (B.A.P. 9th Cir. 2000).

Here, Debtors object on the basis that the claim should be reclassified from "general unsecured" to "secured." Doc. #19. Debtors own and occupy their residence at 2125 E. Burlingame Avenue, Fresno, CA 93710 ("Property").

Claimant beneficially owns a secured interest in and service a Retail Installment Contract ("RIC") for the sale of solar equipment located

at Property. Claim #10-1, *Attach.*, at 4-9. Under the terms of the RIC, Debtors will make 144 monthly installment payments in the amount of $179.19. Doc. #21.

Meanwhile, under Debtors' confirmed plan, Claimant is listed in Class 4 and scheduled to be paid $180.00 per month directly by Debtors. Doc. #4. In contrast, non-priority unsecured claims under Class 7 are scheduled to be paid a 100% dividend at 3.3% interest. *Id.* If the claim is not reclassified as Class 4, it will be paid under Class 7, which will accelerate the term set forth in the RIC from nine years to five years. Accordingly, Debtors request an order reclassifying Claim No. 10 from general unsecured to secured.

This objection will be called and proceed as scheduled. In the absence of opposition, the court is inclined to SUSTAIN the objection and order Claim No. 10 reclassified from general unsecured to secured.

11:00 AM

1. 20-10809-B-11 **IN RE: STEPHEN SLOAN**
   21-1039

   STATUS CONFERENCE RE: COMPLAINT
   9-3-2021 [1]

   SANDTON CREDIT SOLUTIONS
   MASTER FUND IV, LP V. SLOAN ET
   KURT VOTE/ATTY. FOR PL.
   RESPONSIVE PLEADING

NO RULING.

2. 20-12037-B-7 **IN RE: GURDIAL SINGH**
   21-1017

   CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT
   3-30-2021 [1]

   SALVEN V. SINGH
   ANTHONY JOHNSTON/ATTY. FOR PL.
   RESPONSIVE PLEADING

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

DISPOSITION: Continued to January 26, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties stipulated to resolve this case in the underlying bankruptcy, which was approved by this court on January 6, 2022. *See* Bankr. Case No. 20-12037, Doc. #55. Under the terms of the settlement, plaintiff James E. Salven will file a notice of dismissal with prejudice. No such dismissal has been filed as of the date of this writing. This pre-trial conference will be CONTINUED to January 26, 2022 at 11:00 a.m. to give the plaintiff time to file a notice of dismissal.

3. 21-10368-B-7 **IN RE: SIMONA PASILLAS**
21-1038

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-1-2021 [1]

SALVEN V. PASILLAS ET AL
GABRIEL WADDELL/ATTY. FOR PL.

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

DISPOSITION: Continued to February 9, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court entered the defendants' defaults on November 30, 2021. Docs. ##35-46. Plaintiff James E. Salven moved for entry of default judgment and scheduled a "prove-up" hearing on February 9, 2022. FW-1. Accordingly, this status conference will be continued to February 9, 2022 at 11:00 a.m. to be heard with the motion for entry of default judgment.

4. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 WJH-2

CONTINUED HEARING RE: MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
8-31-2021 [67]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL WILHELM/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Partial Summary Judgment granted in part and denied in part.

ORDER: Order preparation as ordered below.

Under the authority of its confirmed Chapter 9 Plan of Adjustment, Tulare Local Health Care District dba Tulare Regional Medical Center ("District") sued Medline Industries, Inc. ("Medline") to recover a $507,128.12 preference under 11 U.S.C. § 547.[1] District now seeks a summary judgment, or alternatively summary adjudication, against Medline. District asserts there is no genuine dispute as to any material fact and that it is entitled to judgment for the "net" preference after applying the undisputed "subsequent new value" Medline extended District during the preference period.

Construing the evidence in favor of the non-moving party, the court finds there are material factual disputes concerning the ordinary course of business defense asserted by Medline and will DENY the motion as to that defense. But based on Medline's and District's concessions (Docs. #152; #158), partial summary judgment is appropriate as to the existence of the preference under § 547(b). Also, partial summary judgment is appropriate as to Medline's subsequent new value defense. So, Medline can be liable for no more than $244,082.54 in this action. Partial summary judgment will be GRANTED as to those issues.

I.

After several years of financial upheaval, District filed this Chapter 9 case on September 30, 2017. Bankr. Case No. 17-13797, Doc. #1. One of its vendors was Medline. District and Medline (and Medline's predecessor, Professional Hospital Supply, Inc.) had a fourteen-year relationship before the bankruptcy case was filed. Doc. ##117-18. Medline manufactured and provided medical supplies to District.

During the ninety days before the filing, District paid Medline $507,128.12. Doc. #71. Most of this was for antecedent invoices. But during this "preference" period, Medline continued to deliver supplies with a value of $263,045.58.[2]

Though in substantial dispute, Medline and District experienced challenging payment terms for some time. District says that though Medline had pursued collection activity before the "preference period," they "altered their behavior" in the months leading to the filing. Docs. #69; #71. This behavior included requiring payment in advance before orders were delivered, credit holds, constant contact, and a "two-for-one" payment requirement before orders would be shipped. *Id.*

Medline disputes that they "altered their behavior" at all, instead continuing to work with District to provide supplies despite financial challenges and slow payment of Medline's invoices. Docs. ##117-18. They further state that credit holds were "normal" when dealing with District over the years when the outstanding balance was too high, and that Medline often contacted District to determine when payment would be forthcoming. Medline claims these were routine practices used throughout the fourteen-year relationship and not only during the preference period.

In 2019, after its Plan was confirmed, District filed this adversary proceeding to avoid those transfers. Doc. #1. Discovery has been conducted. In August 2021, this motion was filed. Doc. #67. Medline did respond but requested additional time to complete discovery under Civ. Rule 56(d) (Rule 7056). Doc. #115. The court granted the request. Docs. #142; #148. Though District contends Medline squandered its opportunity, Medline did depose the declarants supporting District's

motion. Docs. #152; #158. Supplemental opposition and replies have been filed and considered by the court.

II.

In adversary proceedings before the bankruptcy court, the familiar summary judgment standard in Civ. Rule 56 applies. Rule 7056; *Barboza v. New Form, Inc. (In re Barboza),* 545 F.3d 702, 707 (9th Cir. 2008). The moving party must support its position by evidence from the record showing the materials do not establish the existence or presence of a genuine dispute of material fact, or that an adverse party cannot produce admissible evidence to support the fact. Civ. Rule 56(a). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Barboza*, 545 F.3d at 707.

The moving party bears the initial burden to prove that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant meets the initial burden, the nonmoving party must demonstrate that there is a genuine issue of material fact for trial. *Id.*, at 324. In making this determination, the court must view the evidence in the light most favorable to the opposing party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Blankenhorn v. City of Orange*, 485 F.3d 463, 468 n.1 (9th Cir. 2007) ("[A]ll justifiable inferences must be drawn in favor of the non-movant.") (internal quotation omitted).

A court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented. *Barboza*, 545 F.3d at 707, quoting *Agosto v. INS*, 436 U.S. 748, 756 (1978). "At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

To establish that a transfer is a preference, allowing the debtor to avoid and recoup the transfer, the debtor must establish that there has been a transfer of an interest of the debtor:

> (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made which the debtor was insolvent; (4) made—(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and (5) that enables such creditor to receive more than such creditor would receive if—(A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b); *Union Bank v. Wolas*, 502 U.S. 151, 155 (1991). The parties here agree that the $507,128.12 in transfers from District to Medline during the ninety days preceding the petition date were preferences but dispute the extent to which those transfers are avoidable. Docs. #126; #153.

III.

District may not avoid a transfer even if it is preferential:

> [T]o the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
> (B) made according to ordinary business terms.

§ 547(c)(2).

The ordinary course defense is intended to "protect recurring, customary credit transactions which are incurred and paid in the ordinary course of business of the debtor and the transferee." *Energy Coop., Inc. v. SOCAP Int'l Ltd. (In re Energy Coop., Inc.)*, 832 F.2d 997, 1004 (7th Cir. 1987). The purpose of the defense is "to leave undisturbed normal financial relations because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy." *Sigma Micro Corp. v. Healthcentral.com, (In re Healthcentral.com)*, 504 F.3d 775, 789 (9th Cir. 2007) (citations omitted).

There is no dispute here that District's payments to Medline during the preference period were in the ordinary course of business or financial affairs of District and Medline. It was the ordinary course for Medline to provide medical supplies and District to pay for them. The parties had a fourteen-year relationship before the filing. Ms. Ormonde's declaration states that cash flow shortages plagued District in the latter half of 2017. Doc. #69. Mr. Reed testified to frequent contact throughout Medline's relationship with District. Doc. #117.

What is disputed are the "subjective" and "objective" prongs of the ordinary course of business defense here. § 547(c)(2)(A), (B).

A.

To establish that a payment was made in the ordinary course of business between the transferor and the transferee, the creditor must demonstrate that the alleged preferential transfer was ordinary in relation to the past practices. *Healthcentral.com*, 504 F.3d at 790.

The creditor must show (1) the baseline of past practices between itself and the debtor; and (2) that the relevant payments were ordinary in relation to those past practices. *Id.*

In determining whether a payment is ordinary in relation to past practices, courts consider (1) the length of time the parties were engaged in the transactions at issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and (4) whether the creditor took advantage of the debtor's deteriorating financial condition. *Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys.)*, 482 F.3d 1118, 1129 (9th Cir. 2007), citing *Sulmeyer v. Pac. Suzuki (In re Grand Chevrolet, Inc.)*, 25 F.3d 728, 732 (9th Cir. 1994).

Medline presented evidence from Mr. Reed, Medline's director of credit since 2007 (ten years before the petition), who noted that District was between 52 and 352 days past due before the preference period, and that credit holds were normal. Doc. #117. Ms. Ormonde disagrees and says Medline's activities differed during the preference period. Doc. #69. District's former controller, Mr. Bryant, disputes the accuracy of Ms. Ormonde's statement. Doc. #118. District's expert, Mr. Schaeffer, disagrees with both Messrs. Reed and Bryant, concluding that different payment schedules existed both pre- and during the preference period. So, even the "baseline" and "relation to baseline" evidence is disputed. This precludes summary judgment.

Late payments do not necessarily show lack of ordinary course if "the prior course of conduct between the parties demonstrates that those types of payments were ordinarily made late." *Grand Chevrolet*, 25 F.3d at 732. All parties seem to agree it was not unusual for District to pay Medline's invoices late. But District's position evidenced through Ms. Ormonde and Mr. Schaeffer is that significantly different actions occurred during the preference period. Medline has presented conflicting testimony from both Medline's credit director and District's former controller.

District points to the "two-for-one" payment schedule and acceptance of a check from the spouse of a Medline employee as examples of unusual behavior by Medline. The court is being asked to weigh the significance of these on this motion, which is inappropriate. Messrs. Reed and Bryant dispute the significance and Ms. Ormonde and Mr. Schaeffer state otherwise. These issues need to be considered at trial not on this motion.

No one factor in this analysis is conclusive. *Healthcentral.com*, 504 F.3d at 791. "All evidence shedding light on the practices between the parties, past and present needs to be considered." *Id.* The narrow focus of this motion does not present this opportunity for the court.

Factual disputes exist as to whether Medline "took advantage" of District's deteriorating condition. In addition to past practices, it is undisputed Medline continued to supply District. There is little

undisputed evidence that any of these "practices" were either effective or significantly different.

Significant factual disputes exist on the "subjective" prong. That is enough to deny the motion on this issue alone. Nonetheless, the court will briefly consider the "objective" prong.

B.

The defendant must first "establish the 'broad range' of business terms employed by similarly situated debtors and creditors, including those in financial distress, during the relevant period." *Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.)*, 315 F.3d 1192, 1197 (9th Cir. 2003), *amended*, *In re Jan Weilert RV, Inc.*, 326 F.3d 1028 (9th Cir. 2003). Second, the creditor must show that the transfer was ordinary in relation to the established prevailing business terms. *Id.* "Only a transaction that is so unusual or uncommon as to render it an aberration in the relevant industry falls outside the broad range of terms encompassed by the meaning of 'ordinary business terms.'" *Id.*, at 1198. In general, the court in *Grand Chevrolet* concluded that these requirements should not pose a particularly high burden for creditors. *Healthcentral.com*, 504 F.3d at 791.

Mr. Schaeffer, District's expert, presented persuasive testimony about the data he gathered on industry wide practices.[3] Doc. #71. He examined both the Surgical and Medical Instrument and Medical Dental and Hospital Equipment and Supplies industries and concluded that the 78-378-day payment periods experienced by District in the preference period were outside of the norm. But Mr. Schaeffer purposely excluded "outliers." His testimony was less clear on whether his data included those industry payors in financial distress. That is a relevant consideration since it appears undisputed that District had long experienced prompt payment challenges. One interpretation of the data could be District and Medline always behaved as "outliers," which may defeat the "objective" prong but bolster the "subjective" prong.

Yet, Mr. Reed testified that District experienced 52-352 days' past due during the period before the preference period, so the District's payments were well within the range of usual business activity. Doc. #117. Mr. Bryant testified about credit holds other vendors were placing on District both before and during the preference period. Doc. #118. He also testified that Southern California Edison required a similar "two-for-one" payment schedule from District. These payments schemes are no different from routine credit holds in which additional credit is declined until further payments are made, and are not uncharacteristic, unexpected, or unusual within the industry or the parties' ordinary business practices.

In short, there are material factual disputes concerning the "objective" prong as well.[4] Summary judgment as to this issue is inappropriate.

IV.

This matter will be called and proceed as scheduled. This motion will be GRANTED IN PART. Partial summary judgment will be entered with respect to the existence of the preference under § 547(b) and Medline's new value defense. The motion will be DENIED IN PART as to the ordinary course of business defense because there exist significant material factual disputes.

That said, Civ. Rule 56(g) permits a court to enter an order "stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." The primary purpose of the rule is to salvage some results from the effort involved in the denial of the motion for summary judgment. *McCollough v. Johnson, Rodenberg & Lauinger*, 587 F. Supp. 2d 1170, 1177 (D. Mont. 2008) (applying the precursor to Civ. Rule 56(g)).

The parties listed numerous facts which are undisputed in their separate statements filed in support of and opposition to the motion. The court will enter an order prepared by District and approved as to form by Medline's counsel consistent with this ruling setting forth those facts the parties agree are undisputed and can be established in this case.

The court rules on the parties' evidentiary objections as follows:

Medline's objections to the declarations of Sandra Ormonde, Harold A. Schaeffer, Jr., and request for judicial notice (Doc. #98)

The court need not consider these objections as they were in improper form and not in accordance with LBR 7056-1(f) and are OVERRULED on that basis.

Even if the court could consider the "generic" objections to the "entirety of the declarations," they would be OVERRULED.

1. Declaration of Sandra Ormonde: Proper foundation laid for Business Records exception under Fed. R. Evid. ("FRE") 803(6). Objection goes to weight of testimony.

2. Declaration of Harold A. Schaeffer, Jr.: Objection ignores proper basis for expert testimony under FRE 703.

3. Request for judicial notice: 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. FRE 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 District's chapter 9 case, Case No. 17-13797, but not the truth or falsity of such documents as related

to findings of fact and conclusions of law. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

District's objections to the declarations of Delbert Bryant and Shane Reed (Doc. #129)

Declaration of Delbert Bryant (Doc. #118)

1. Entire declaration: Logical relevance, FRE 401. OVERRULED.

2. Entire declaration: Logical relevance, FRE 403. OVERRULED.

3. Entire declaration: Improper lay opinion not helpful, FRE 701. OVERRULED.

4. Paragraphs 5-7: Improper lay opinion based on specialized knowledge within the scope of FRE 702. OVERRULED.

5. Paragraph 8, *Ex. A*: Inadmissible hearsay, FRE 801, 802. SUSTAINED if offered for the truth. OVERRULED if offered for another purpose such as evidencing District's unique cash flow issues.

6. Paragraph 8, *Ex. A*: Logical relevance, FRE 401, 402. OVERRULED.

7. Paragraphs 9-13: Logical relevance, FRE 401, 402. OVERRULED.

8. Paragraph 14: Logical relevance, FRE 401, 402; lacks personal knowledge, FRE 602. OVERRULED.

9. Paragraphs 15-19: Logical relevance, FRE 401, 402. OVERRULED.

Declaration of Shane Reed (Doc. #117)

10. Entire declaration Improper lay opinion based on specialized knowledge within the scope of FRE 702. SUSTAINED as to opinion; OVERRULED if offered for his personal knowledge.

11. Paragraph 6: Logical relevance, FRE 401, 402. OVERRULED. Objection goes to weight of testimony.

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[1] References to section numbers will be, unless otherwise indicated, to the Bankruptcy Code. "Rule" references will be to the Federal Rules of Bankruptcy Procedure and "Civ. Rule" references will be to the Federal Rules of Civil Procedure.

[2] Both parties agree this was the "subsequent new value" provided District by Medline during the relevant period. Doc. #74.

[3] Mr. Schaeffer obtained industry-wide data from the Risk Management Association, which was used to analyze the average number of days to pay invoices. Doc. #71.

[4] District attacks the assumptions and veracity of Messrs. Reed and Bryant and asks the court to accept their evidence as more specific and grounded in actual documentation. But this is simply another way of arguing for a favorable interpretation of District's evidence demonstrating the factual disputes here.