UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

February 20, 2018 at 10:00 a.m.

1.	17-26125-A-11 GEL-12	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY 1-31-18 [245]

Final Ruling: The motion will be dismissed without prejudice.

Counsel for the debtor seeks compensation for professional services rendered to the debtor in this case. This hearing was set on 20 days' notice. Docket 249. Fed. R. Bankr. P. 2002(a)(6) requires a minimum of 21 days' notice of the hearings on motions to approve professional compensation and reimbursement of expenses. While Local Bankruptcy Rule 9014-(f)(2) permits motions to be set on as little as 14 days of notice, and permits opposition to be made at the hearing, this local rule also provides this amount of notice is permitted "unless additional notice is required by the Federal Rules of Bankruptcy Procedure. . . ." Because Rule 2002(a)(6) requires a minimum of 21 days of notice of the hearing and because only 20 days' was given, notice is insufficient.

2.	17-26125-A-11 GEL-13	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO APPROVE STIPULATION 2-1-18 [250]

Tentative Ruling: The motion will be dismissed without prejudice.

The debtor seeks approval of a stipulation pursuant to Fed. R. Bankr. P. 4001(d)(1)(A)(i)&(iii), between the debtor and Cinnabon Franchisor SPV, L.L.C.

Agreements under Rule 4001(d)(1)(A)(i)&(iii) pertain to adequate protection and modification or termination of the automatic stay.

The motion will be dismissed because the notice for the motion violates Fed. R. Bankr. P. 2002(a)(3), which requires at least 21 days' notice of hearing on compromise motions, except for agreements pursuant to Rule 4001(d). As this motion was served and filed on February 1, it was brought on only 19 days' notice, in violation of Rule 2002(a)(3). See Dockets 250, 251, 254.

Also, the stipulation goes beyond the prescriptions of Rule 4001(d)(1)(A)(i)&(iii). The agreement is about much more than just adequate protection and modification or termination of the automatic stay.

The agreement, among other things, requires the debtor to have a buyer for the debtor's assets by a certain date, requires the debtor to have a fully-executed purchase agreement with no financing or due diligence contingencies by March 15, 2018, and requires the debtor to file a sale motion by March 23, 2018.

Even if the court were to disregard the foregoing, it would deny because it says nothing about the merits of the agreement and about how or whether the agreement is in the best interest of the estate. The supporting declaration alleges that the agreement is in the best interest of the estate because it will allow the debtor to continue operating its Cinnabon locations. Docket 252 at 2. However, the motion does not explain whether the debtor is able to perform under the agreement. Nor does the stipulation explain what would happen if the debtor breaches the agreement.

The court is not satisfied that the agreement is in the best interest of the estate, especially as the debtor has to perform on very short notice.

3.	17-26125-A-11 GEL-5	FIRST CAPITAL RETAIL, L.L.C.	MOTION FOR ORDER AVOIDING PREFERENTIAL TRANSFER, DIRECTING TURN OVER AND MANDATING DELIVERY OF FROZEN FUNDS 11-8-17 [110]

Final Ruling: The movant has requested dismissal (Docket 243, Notice of Withdrawal). Accordingly, the motion will be dismissed.

4.	15-29136-A-12 JPJ-2	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO DISMISS CASE 1-17-18 [513]

Tentative Ruling: The motion will be denied, and the case will remain pending.

The chapter 12 trustee moves for dismissal because the debtor is $76,644.93 delinquent under the terms of the chapter 12 plan. The delinquency is due to nonpayment of the initial annual plan payment due December 25, 2017.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

The debtor states the delinquency in its initial annual payment is due to planting delays with regard to its $1 million contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately $750,000 in the next three to four weeks. The debtor seeks to modify the plan to extend the December 2017 payment to March 15, 2018. The debtor is current on monthly plan payments.

Given the above setback and the debtor's intent to cure the delinquency shortly, the court will not dismiss the case. Accordingly, the motion will be denied.

5.	15-29136-A-12 MAS-10	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO DISMISS CASE 12-29-17 [508]

Tentative Ruling: The motion will be denied, and the case will remain pending.

Creditor AG-Seeds Unlimited moves for dismissal because the debtor delinquent

under the terms of the confirmed chapter 12 plan. The debtor's delinquency includes default on one $30,000 plan payment to the movant, that was due on December 25, 2017 as part of the debtor's initial annual plan payment.

11 U.S.C. § 1208(c) provides that "on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan."

The debtor states the delinquency is due to planting delays with regard to its $1 million contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately $750,000 in the next three to four weeks. The debtor has filed a motion to modify plan, to be heard concurrently with this motion, which seeks to extend the December 25, 2017 payment to March 15, 2018.

Given the above setback and the debtor's intent to cure the delinquency shortly, the court will not dismiss the case. Accordingly, the motion will be denied.

6.	15-29136-A-12	P&M SAMRA LAND	OBJECTION TO
	NCK-11	INVESTMENTS L.L.C.	CLAIM
	VS. SOUTHERN COUNTIES OIL CO.		12-27-17 [503]

Tentative Ruling: The objection will be overruled.

The debtor objects to the $4,809.47 general unsecured proof of claim of Southern Counties Oil Co. (POC 10-1), arguing that the claimant "has failed to allege facts sufficient to support the claim . . . [and] has failed to present any evidence showing it has actually suffered any damage at all in connection with the asserted Claim." Docket 503 at 2.

The proof of claim is presumed to be prima facie valid. 11 U.S.C. § 502(a).

"*Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more.*"

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)).

The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. Holm at 623; In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. In re Knize, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

Here, the debtor has not produced evidence to rebut the presumptive validity of the proof of claim. The only evidence in the record is a declaration of Manjit Samra, the debtor's managing member, merely stating that:

"Stone Lake Farm does not owe the moneys stated in Claim 10-1 by Southern Counties Oil Company; based on the alleged purchase by Stone Lake Farm from Southern Counties Oil Company of petroleum based and fuel related products for farm purposes."

Docket 505 at 2.

The declaration does not explain the relationship between the debtor, P&M Samra Land Investments, L.L.C., and Stone Lake Farm, or why a debt owed to Stone Lake Farm is relevant to this objection or the validity of the proof of claim.

The objection lacks relevant and probative evidence to the merits of the proof of claim.

Moreover, the objection fails to address the judgment by the claimant that is attached to the proof of claim. The judgment serves as basis for the proof of claim. POC 10-1. The objection says nothing about the judgment. The objection will be overruled.

7.	15-29136-A-12 NCK-14	P&M SAMRA LAND INVESTMENTS L.L.C.	MOTION TO MODIFY PLAN 2-6-18 [556]

Tentative Ruling: The motion will be granted.

The debtor asks the court to modify its chapter 12 plan confirmed on March 29, 2017. Docket 502. The debtor wishes to modify the plan in order to delay the initial annual payment date from December 25, 2017 to March 26, 2018 and to reimburse secured creditor Socotra Capital for funds advanced to cure the debtor's property tax arrears by March 26, 2018. The debtor also seeks authority establish a payment plan for any outstanding property tax arrears owed to Sutter County.

Creditor Ag-Seeds Unlimited opposes the motion challenging the feasiblity of the plan.

11 U.S.C. § 1229 allows the court to modify a chapter 12 plan after confirmation to:
(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan,
(2) extend or reduce the time for payments due under the plan,
(3)alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan, or
(4) provide for the payment of a claim described in section 1232 (a) that arose after the date on which the petition was filed.

The reason for the extension in the initial annual plan payment is due to planting delays with regard to the debtor's $1 million fulfillment contract for corn. The debtor expects to have access to both income from the corn fulfillment contract as well as funds from a new operating loan valued at approximately $750,000 before March 26, 2018.

In order to protect the priority of their lien on the debtor's property, creditor Socotra Capital advanced the debtor's outstanding post-petition delinquent property tax obligations in the amount of $30,120.80 to Sutter County on October 31, 2017 and recorded a notice of default and intent to sell on the subject property on December 8, 2017. The debtor contends that property tax payments were inadvertently omitted from the original plan. The debtor seeks to reimburse Socotra Capital for the forwarded tax arrears payment on or before March 26, 2018 in exchange for removal of the notice of default and seeks authority to provide payment for any further property tax arrears.

Given the above production setback and inadvertent omission of property tax payments, the court is willing to grant the motion and modify the plan to extend the deadline for the annual plan payment to March 26, 2018 and to include payment of debts related to property tax arrears. Due to multiple prior motions to dismiss the case filed by the trustee and creditors, the court will dismiss the case if the debtor fails to tender payments due by the modified deadline.

The motion will be granted.

8. 17-27936-A-11 ABACUS INVESTMENT GROUP, INC. — ORDER TO SHOW CAUSE 1-26-18 [24]

Tentative Ruling: Counsel for the debtor shall pay the filing fee and the $53 administrative/bank fee incurred by the clerk because counsel's original check was returned for insufficient funds.

This order to show cause was issued by the court because counsel for the debtor paid the case filing fee with a check drawn of his account that was dishonored by his bank.

Counsel's response explains that he filed the case on an emergency basis and that he paid the filing fee with a check from his trust account after depositing the debtor's check into the trust account. The debtor's check was not honored by its bank, and for this reason, counsel's check was subsequently not honored. Counsel admits that he made an error in not assuring that the debtor's check had cleared before writing his trust account check to the court. Counsel states that this is the first time in his 30 years of practice that a check from his trust account was not honored.

While this convinces the court that counsel did not tender a check he knew was not backed by sufficient funds, he nonetheless paid the clerk with a check that was dishonored. It was his check, not his client's check. Counsel's recourse is against his client; the clerk of court cannot pursue the client because counsel's check was dishonored.

The order to show cause will be withdrawn without sanction provided counsel makes good on his dishonored check and pays the $53 fee incurred by the clerk by March 16. The hearing will be continued to March 19 at 10:00 a.m. If the filing fee, plus $53, have been paid the order to show cause will be discharged. If not paid, the court will consider whether a sanctions is appropriate.

9. 10-36150-A-11 KARIN FRANK
JHH-1

MOTION TO SELL
1-17-18 [510]

Tentative Ruling: The motion will be dismissed as moot.

The debtor in possession requests authority to sell real property located in Sacramento, California for $95,000 in cash. The debtor says that all sales proceeds will be turned over to the senior lender secured by the property, JPMorgan Chase Bank.

Creditor Bob Filderman opposes the motion.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's right to sell property of the estate pursuant to section 363. Section 363(b) allows, then, a debtor-in-possession to sell property of the estate, other than in the ordinary course of business. The sale must be fair, equitable, and in the best interest of the estate. Mozer v. Goldman (In re Mozer), 302 B.R. 892, 897 (C.D. Cal. 2003). Sale of property outside the ordinary course of business requires the estate to show good faith and valid business justification for the sale. 240 N. Brand Partners, Ltd. v. Colony GFP Partners, LP (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996). Good faith "encompasses fair value, and further speaks to the integrity of the transaction." Id.

11 U.S.C. § 1141(b) provides that confirmation of a chapter 11 plan vests all of the property of the estate in the debtor, unless the plan or order confirming provide otherwise.

11 U.S.C. § 1141(c) provides that after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors.

This motion seeks to sell property under the authority of 11 U.S.C. § 363, a provision governing the sale of estate property. The debtor's chapter 11 plan was confirmed on April 18, 2011. The plan was completed, and the debtor received a discharge on April 25, 2016. Pursuant to 11 U.S.C. § 1141(b), all estate property, including the subject property, vested in the debtor upon confirmation of the plan, thereby extinguishing the bankruptcy estate. Accordingly, this post-confirmation sale does not require court approval under § 363 because the subject property is no longer part of the estate. The motion is therefore moot.

Per the terms of the confirmed plan, the junior lien of creditor Bob Filderman was stripped off entirely and his claim rendered entirely unsecured. The debtor may file an adversary proceeding for declaratory relief under Federal Rule of Bankruptcy Procedure 7001 if refusing to reconvey a lien violates the plan.

The motion will be dismissed as moot.

10. 17-22851-A-7 ABDUL/TAHMINA RAUF MOTION TO
17-2142 PA-3 COMPEL
STOHLMAN AND ROGERS, INC. V. RAUF ET AL. 1-23-18 [41]

Tentative Ruling: The motion will be granted.

The plaintiff, Stohlman & Rogers, Inc. dba Lakeview Petroleum Company, seeks to compel the defendants, Abdul Raug and Tahmina Rauf, to produce documents by March 2, 2018. The plaintiff also asks for sanctions against the defendants and their counsel in the form of an award of the attorney's fees necessary to bring this motion.

The defendants filed a response to the motion stating that documents would be produced on or before the hearing date for this motion. Docket 46.

This is the plaintiff's third motion to compel the defendants to comply with discovery deadlines. The first motion was voluntarily withdrawn by the movant as a professional courtesy to opposing counsel. The court granted the second motion to compel on December 28, 2017 requiring the defendants to provide initial disclosures by December 29, 2017 and to pay sanctions in the amount of $1,030.22 by January 5, 2018. Docket 37. The defendants have not complied with the court's December 28 order.

This third motion seeks to compel the defendants to produce documents that were requested by the plaintiff on October 12, 2017 and due on November 15, 2017. As of February 15, 2017, these documents are three months past due. After the November 15 production deadline past, plaintiff's counsel made multiple attempts to meet and confer with defendants' counsel before filing this motion. This motion recounts, in much the same fashion as the plaintiff's prior motion to compel, counsel's repeated attempts to meet and confer with defendants' counsel to no avail. For this reason, the court incorporates by reference the analysis in its ruling on the prior motion to compel heard December 26, 2017. Docket 35.

A court may compel a party to make disclosures or to cooperate in discovery after the moving party has attempted in good faith to obtain such without court action. Fed. R. Civ. P. 37(a), incorporated by Fed. R. Bankr. P. 7037.

The movant must show that it conferred or attempted to confer in good faith. In order to comply with Fed. R. Civ. P. 37, the movant must accurately and specifically certify with whom, where, how, and when the movant attempted to personally resolve the discovery dispute. Shuffle Master v. Progressive Games, 170 F.R.D. 166, 170 (D. Nev. 1996). The movant must also certify that it has, in good faith, conferred or attempted to confer to resolve the discovery dispute without judicial intervention. Id. at 171.

The plaintiff has complied with Rule 37's certification document requirements and performance requirement by attempting to confer with the defendants's counsel in multiple emails and letters. See Dockets 43 & 44.

Thus, the plaintiff is entitled to an order compelling the defendants to produce documents that were due on November 15, 2017. The defendants shall have until March 2, 2018, to provide the plaintiff with initial disclosures.

Finally, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay the movant's reasonable expenses incurred in making the motion, including

attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). This remedy, however, is limited only to expenses incurred in making the motion.

The plaintiff seeks $750.00 in attorney's fees and $22.00 in expenses, for a total of $772.00 as sanctions for the bringing of this motion. The court concludes that the requested fees and costs are reasonable and necessary for the preparation and prosecution of this motion. The plaintiff's attorney reduced her hourly rate from $400 to $250, reduced the fees charged in connection with drafting, reviewing, and revising the motion the motion from 4 hours to 3 hours. Costs in the amount of $22.00 were incurred for postage and copies fo the service of this motion and supporting documents. The court will award sanctions totaling $772.00.

The motion is granted. The defendants shall produce the requested documents and pay sanctions in the amount of $772.00 to the plaintiff's counsel no later than March 2, 2018.

11. 10-32656-A-13 MICHAEL/CHERYL CARTER — MOTION TO VACATE
17-2219 ECH-1 — 1-11-18 [19]
CARTER, JR. ET AL V. OCWEN LOAN SERVICING, L.L.C. ET AL

Tentative Ruling: The motion will be granted.

Defendant Ocwen Loan Servicing, L.L.C., asks the court to vacate its December 29, 2017 default. Counsel for the defendant did not calendar a reminder to file an answer.

Plaintiffs Michael Carter and Cheryl Carter oppose the motion, contending that service of this motion was improper and the defendants have not shown good cause for the setting aside the entry the default.

Fed. R. Civ. P. 55(c), made applicable here by Fed. R. Bankr. P. 7055, provides that the court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b). Three factors govern the setting aside of an entry of default: (1) whether the defendant's culpable conduct led to the default; (2) whether the defendant had a meritorious defense to the action, and (3) whether vacating the default would prejudice the plaintiff, beyond simply delaying resolution of the action. TCI Group Life Ins. Plan v. Knoebbler, 244 F.3d 691, 696 (9th Cir. 2001); see also Kajander v. Phoenix, No. CV 09-02164-PHX-JAT, 2010 WL 653386 *1 (D. Ariz. Fed. 19, 2010).

A defendant seeking to set aside the entry of default must present "specific facts that would constitute a defense." TCI Group at 700 (citing Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969)). But, "the burden ... is not extraordinarily heavy." Id. (citing In re Stone, 588 F.2d 1316, 1319 n.2 (10th Cir. 1978) ("explaining that the movant need only demonstrate facts or law showing the trial court that 'a sufficient defense is assertible'"). "[I]t is not necessary that the defendant prove that it will prevail on that defense." United States v. Approximately $73,562 in U.S. Currency, No. C 08-2458 SBA, 2010 WL 503040 *3 (N.D. Cal. Feb. 5, 2010).

Neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process is not "intentional" under our default cases, and is therefore not necessarily —although it certainly may be, once the equitable factors are

considered—culpable or inexcusable. TCI Group at 697–98.

To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case. TCI Group at 701. Rather, "the standard is whether [plaintiff's] ability to pursue his claim will be hindered." Id. To be considered prejudicial, "the delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." Id.

As a preliminary matter, counsel for plaintiffs contends that he did not receive notice of this motion. The proof of service reflects that notice was mailed to counsel at his office and was correctly addressed - save an incorrect zip code. Docket 24. It is highly suspect that a zip code error would prevent the notice from arriving at counsel's office where the recipient name, street, and city were listed correctly. A zip code only informs as to city and state, it is therefore redundant. Further, plaintiffs' counsel filed a timely and detailed opposition to the motion and has not submitted a declaration under penalty of perjury or any other evidence to support his contention that he did not receive notice of the motion. In light of the evidence, the court concludes service was proper and the scrivener's error in the zip code was harmless.

The court disagrees with the plaintiffs that the defendant has not met its evidentiary burden in establishing both the lack of culpable conduct requirement and the meritorious defense requirement. With regard to culpability, counsel for the defendant contends, in both the motion and her supporting declaration, that she missed the deadline to respond to the complaint due to an unintentional oversight in calendaring. Dockets 19, 22, 23. The court finds counsel's calendaring error to be a credible, good faith explanation supported by declaratory evidence. Further, counsel has filed a lengthy proposed answer to the complaint thereby demonstrating good faith intent to respond to the complaint and, conversely, lack of intent to manipulate the legal process. See Docket 21, Ex. 1. In sum, the evidence demonstrates that counsel's calendaring error lacked culpability.

Turning to the meritorious defense requirement, the defendant must only present specific facts that would constitute a defense upon proof at trial under Rule 55. The complaint alleges that the defendant has collected and are attempting to collect pre-petition escrow fees, pre-petition arrears, and post-petition arrears after discharge. The plaintiffs further allege that the defendant misapplied payments made in the bankruptcy plan and failed to provide statutorily required notices of fees and costs associated with Claim 9-1 during the plan. The plaintiffs also contend that the current escrow is inaccurate, the current payments are incorrect, the defendant wrongfully failed to provide account statements, and the account statements do not reflect the current amount owed on the loan. In the motion to vacate and supporting documents, including a 418 paragraph proposed answer to the complaint that includes twelve affirmative defenses, the defendant states that its records reflect that the escrow was properly assessed pursuant to the loan documents, and that the defendant complied with its obligations under the loan documents, the bankruptcy rules and bankruptcy plan, and the federal regulations and statutes.

The court concludes that the defendant has pointed to specific facts - in the form of business records - that would, if proven at trial, establish that the defendant properly accounted for all charges and that no improper charges have been assessed. This is not a summary judgment motion. The defendant does not have to establish it will win at trial. The key consideration is to determine

whether there is a possibility that the outcome will be contrary to the result achieved by the default. It is possible that the defendant's records could constitute a defense negating all alleged wrongdoing. For the forgoing reasons, the defendant has met their burden of establishing the meritorious defense requirement.

Finally, the court finds that setting aside entry of default will not prejudice the plaintiffs. The defendant has moved diligently to set aside the default. The case has been pending for one month. The answer is at most two weeks overdue, and there is no trial date. As a result, the plaintiffs' ability to present and prove their claims has not been affected in any way. The case has simply been delayed without any tangible loss to the plaintiffs. Requiring the plaintiffs to adjudicate a claim on the merits does not constitute prejudice.

For the forgoing reasons, the motion is granted.

12.	10-32656-A-13 17-2219 CARTER, JR. ET AL V. OCWEN LOAN SERVICING, L.L.C. ET AL	MICHAEL/CHERYL CARTER WW-4	MOTION FOR ENTRY OF DEFAULT JUDGMENT 1-25-18 [25]

Tentative Ruling: Inasmuch as the defendants' default will be vacated, this motion will be dismissed.