UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Thursday, May 25, 2017
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. The following rulings are tentative. The tentative ruling will not become the final ruling until the matter is called at the scheduled hearing. **Pre-disposed matters will generally be called, and the rulings placed on the record at the end of the calendar.** Any party who desires to be heard with regard to a pre-disposed matter may appear at the hearing. If the party wishes to contest the tentative ruling, he/she shall notify the opposing party/counsel of his/her intention to appear. **If no disposition is set forth below, the hearing will take place as scheduled.**

2. Submission of Orders:

   Unless the tentative ruling expressly states that the court will prepare an order, then the tentative ruling will only appear in the minutes. If any party desires an order, then the appropriate form of order, which conforms to the tentative ruling, must be submitted to the court. When the debtor(s) discharge has been entered, proposed orders for relief from stay must reflect that the motion is denied as to the debtor(s) and granted only as to the trustee. Entry of discharge normally is indicated on the calendar.

3. Matters Resolved Without Opposition:

   If the tentative ruling states that no opposition was filed, and the moving party is aware of any reason, such as a settlement, why a response may not have been filed, the moving party must advise Vicky McKinney, the Calendar Clerk, at (559) 499-5825 by 4:00 p.m. the day before the scheduled hearing.

4. Matters Resolved by Stipulation:

   If the parties resolve a matter by stipulation after the tentative ruling has been posted, but **before the formal order is entered on the docket**, the **moving party** may appear at the hearing and advise the court of the settlement or withdraw the motion. Alternatively, the parties may submit a stipulation and order to modify the tentative ruling together with the proposed order resolving the matter.

5. Resubmittal of Denied Matters:

   If the moving party decides to re-file a matter that is denied without prejudice for any reason set forth below, the moving party must file and serve a new set of pleadings with a new docket control number. It may not simply re-notice the original motion.

THE COURT ENDEAVORS TO PUBLISH ITS PREDISPOSITIONS AS SOON AS POSSIBLE, HOWEVER CALENDAR PREPARATION IS ONGOING AND THESE PREDISPOSITIONS 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 A.M.

1.	17-11028-B-11 WW-1 MACPHERSON OIL T. BELDEN/Atty. for dbt. RILEY WALTER/Atty. for mv.	PACE DIVERSIFIED CORPORATION COMPANY/MV	MOTION FOR RELIEF FROM AUTOMATIC STAY 4-25-17 [73]

This matter will proceed as scheduled. The court has considered the motion, the opposition, and the reply, as well as the evidence submitted by the parties. The court intends to enter the following tentative ruling.

Tentative Ruling- The motion for modification of the automatic stay is GRANTED to permit the trial of the "Gardner lease litigation" to judgment only in order to liquidate all pending claims. No further relief is granted. The stay of the order under FRBP 4001(a) (3) will not be waived. Any further stay relief needed must be the subject of a separate motion. The movant shall prepare the order which shall specifically reference the KCSC case number.

National Petroleum Associates and MacPherson Oil Company (collectively "MOC") seek modification of the automatic stay "for cause" under 11 U.S.C. § 362 (d) (1) to permit the prosecution of a long-pending lawsuit in the Kern County Superior Court (KCSC) known as "the Gardner lease litigation" (KCSC No. S-1500-CV-279640). MOC argues that, the substantial judicial resources that have been expended by the KCSC in bringing the matter to trial on numerous occasions, the fact that the assigned judge may retire before the end of the year, and other factors including the right to a jury trial, all militate in favor of a modification of the stay now to permit the matter to proceed to liquidate the remaining claims.

Pace Diversified Corporation ("Debtor" or "debtor") opposes the motion. The debtor agrees that the claims need to be liquidated and that the KCSC is the right jurisdiction to resolve the claims. The debtor argues stay relief should not be granted now because it needs a "breathing spell" to secure debtor's state court counsel's representation and to stabilize its cash position so that the expensive and complicated litigation can go forward. Underlying the debtor's argument is the primary premise that the estate would be negatively impacted by immediate stay relief. In addition the debtor argues MOC has not established "cause" for relief.

A creditor seeking to proceed post-petition with litigation against the debtor typically must request and obtain relief from the automatic stay. Such relief is granted only upon a showing of cause. *In re Conejo Enterprises, Inc.*, 96 F. 3d 346, 351 (9th Cir. 1996). The Bankruptcy Code

does not specify what constitutes cause in this context, therefore bankruptcy courts must determine whether cause exists on a case-by-case basis. *Id.; Kronemeyer v. American Contractors Indemn. Co. (In re Kronemeyer)*, 405 B.R. 915, 921 (9th Cir. BAP 2009). Once a *prima facie* case for "cause" is established by the movant, the burden of proof shifts to the debtor to show that relief from the stay is unwarranted. Stay relief should be denied if the movant fails to establish a *prima facie* case of the existence of "cause." *In re Plumberex Specialty Products, Inc.,* 311 B.R. 551, 557 (Bankr. C.D. Cal. 2004). Judicial economy is a factor to be considered when courts decide stay lift issues. *Piombo Corp. v. Castlerock Props. (In re Castle rock Prop.),* 781 F. 2d 159, 163 (9th Cir. 1986). At the same time the bankruptcy court must be cognizant "of the entire bankruptcy case and its progress," and adjudicate "stay relief issues from this perspective." *Santa Clara County Fair Assn v. Sanders (In re Santa Clara County Fair Assn),* 180 BR 564, 567 (9th Cir. BAP 1995).

Both parties in this case have asked the court to apply the twelve nonexclusive factors discussed in, *In re Curtis,* 40 BR 795 (Bankr. Utah, 1984) in weighing whether "cause" for modification of the stay exists in this case. The BAP agrees these "*Curtis* factors" are appropriate nonexclusive factors to consider in deciding whether to grant relief from the automatic stay to allow pending litigation to continue in another forum. *Kronemeyer*, 405 B.R., 921. The parties agree that three of the twelve factors are not applicable. The court will discuss those factors that do apply.

<u>1. Effect of stay relief on resolution of the issues.</u> Both parties agree that permitting the litigation to go forward will result in a complete resolution of the factual issues and that there are no "bankruptcy issues" to be resolved in the underlying litigation. (Doc.# 77, 107).

<u>2. Lack of connection with or interference with the bankruptcy case.</u> MOC argues that this bankruptcy case is a "two party dispute" only. The court is not persuaded. There are other creditors involved in the case and the debtor is in a business that has seen difficult economic times. (Doc.# 109) Certainly the impending trial date may have been a reason the debtor filed this case but, without more evidence, the court cannot find it was the only reason.

Further, MOC claims the KCSC's finding, that the debtor's interest in the lease at issue was terminated, means that the continued use of the property by the debtor will result in a large administrative claim. However, there may be appeals of that finding. Additionally, the litigation of an allowed administrative expense has not yet been commenced let alone completed. These arguments are unpersuasive.

However, the fixing of MOC's claims will have to be completed at some time. The parties do not dispute the KCSC is in the best position to do so. Further, until the claims are liquidated, reorganization seems difficult at

best. Modification of the stay would not prevent the resolution of the claims in this forum through a negotiated settlement or as part of a consensual plan. There is also a right to a jury trial on the remaining issues which MOC has indicated it will not waive at this time. The motion for relief alleges that the only issues to be tried relate to MOC's remaining causes of action in its cross-complaint. This is not disputed by the debtor.

The debtor's arguments here are that it needs time and that the liquidation of the MOC claim will be expensive. However, that expense will need to be incurred anyway. The debtor has had to deal with administrative matters at this early stage of the case, but by the time this motion is heard, nearly 15 of the 30 days debtor's state court counsel has indicated is needed (Doc.# 108) will have expired.

On balance, the debtor has not met its burden on this factor which does militate in favor of relief.

3. Specialized tribunal. Both parties agree that KCSC is the appropriate forum to try the issues and thus this factor weighs in favor of relief. While KCSC is a court of general jurisdiction, the amount of resources already devoted to this case strongly weigh in favor of allowing the KCSC hear the matter.

4. Insurance coverage. MOC claims this is not a factor since there is no insurance coverage for intentional acts and the remaining claims to be tried are cross-claims of MOC against the debtor. The debtor agrees there is no coverage. The lack of coverage presents the same argument as is the discussion of the second factor above. This factor is neutral or militates in favor of denying relief except for the claim liquidation aspect of the litigation.

5. Presence of Third Parties in the litigation. Both parties agree that there are no third parties involved. Thus this is a neutral factor.

6. Prejudice to other creditors. MOC claims that the liquidation of its claim will benefit creditors because the plan process will be hastened. The debtor argues this bankruptcy case is not a two party dispute and "premature" modification of the stay will hurt the other unsecured creditors. It is not clear how they will be injured since MOC's claim will need to be liquidated in any case. The relevant issue is the amount of the claim.

The court is not persuaded by MOC's claim it is entitled to "millions" because of the alleged improper extraction of oil by the debtor since the lease has been terminated. The "millions" are just a claim. If MOC prevails then the claim will be paid according to the terms of the confirmed plan and consistent with the Bankruptcy Code. The size of the claim may affect the amount of distribution, should MOC prevail, but it is

not prejudiced simply because its "claim" at this time is unliquidated and contingent.

In fact, the re-litigation of the claim in this court would probably damage the creditor's interests even more than the liquidation of the claim by the KCSC. Having to again prepare for trial from "square one" in this court will likely cost the creditors more in uncertainty or delay. This factor militates in favor of relief.

7. Judicial economy. Both parties agree that judicial economy will be served by allowing the KCSC to try the case and determine the result of the dispute. The debtor essentially asks for more time. The evidence is that 30 days from the date of the Perrino declaration (Doc.# 108) would likely be enough time to settle on terms for continued representation of the debtor. The declaration is dated May 10, 2017. Thirty days thereafter is June 10, 2017.

The debtor asks this court to delay the effectiveness of any order until such time as the debtor retains counsel. The court declines to condition its order on the contingency of contract. This factor is agreed by both parties to militate in favor of relief.

8. Parties preparation for trial. Both parties agree that the matter is ready to try in the KCSC. No further discovery needs to be done. Both parties have filed a total of 24 motions *in limine*. (Doc.# 76) Most of those have been decided by the KCSC. This factor militates in favor of relief.

9. Balance of harm. The "harm" isolated by MOC is that it has been prepared to try the case on at least three occasions. Further MOC argues the KCSC judge with intimate knowledge of the case will be retiring. While this court has the utmost respect for Judge Chapin, the court is sure there are other members of the fine KCSC bench who can hear and determine the matter should Judge Chapin decide to retire before the case is brought to trial (even if there was evidence that retirement was imminent-see below). Nevertheless, there has been a great deal of litigation in this case including two trips to the California Court of Appeal. (Doc.# 76) Judicial economy and the inevitable need to liquidate the MOC claim are strong factors for relief.

The debtor claims that MOC is "adequately protected" by the requirement that certain funds representing the proceeds from the Gardner lease are currently being set aside and thus no ongoing harm is suffered by MOC. To be sure, the funds set aside should mitigate or completely eliminate any ongoing administrative expense claim should MOC prevail. However, the debtor's argument misses the point regarding the fact that the claim needs to be liquidated in any event. Further, the argument proves too much. It seems equally appropriate that the debtor would want to quickly resolve the claims so that the debtor's efforts to reorganize are advanced.

This litigation has been expensive. It has been pending for almost four years. The case has been up for trial at least three times, and for various procedural reasons, primarily involving the debtor's rights as a litigant to amend pleadings or challenge trial court orders, it has not gone forward, all of which has added to its expense. The debtor is faced with additional legal bills if the case proceeds in KCSC. However, those bills would be exponentially increased if the liquidation of the claim was in this court. Looking at the "entire bankruptcy case and its progress" the court concludes that modification of the stay is appropriate.

The debtor has objected to the admission of the Waldron declaration (Doc.# 110) to the extent it purports to state on "information and belief" that Judge Chapin is going to retire in November. "Information and belief" means the testimony is not based on personal knowledge. No hearsay exception is referenced or evidenced in the declaration. Accordingly, the testimony isolated by the debtor in its objection will be stricken and the objection sustained.

The motion for modification of the stay is GRANTED to permit the trial of the "Gardner lease litigation" to proceed to judgment to liquidate all pending claims, only. No further relief is granted. The stay of the order under FRBP 4001(a) (3) will not be waived. Any further stay relief needed must be the subject of a separate motion. The movant shall prepare the order which shall specifically reference the KCSC case number. This matter will proceed as scheduled.

2.	17-10238-B-11 EAT-1 U.S. BANK TRUST, N.A./MV JACOB EATON/Atty. for dbt. DARLENE VIGIL/Atty. for mv.	SILO CITY, INC.MOTION FOR RELIEF FROM AUTOMATIC STAY 4-18-17 [55]

This motion will be denied without prejudice. The record does not show that it was served on the 20 largest unsecured creditors. FRBP 4001(a)(1).

3. 17-10238-B-11 SILO CITY, INC.
KDG-3

MOTION FOR COMPENSATION BY THE LAW OFFICE OF KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB & KIMBALL, LLP FOR JACOB L. EATON, DEBTORS ATTORNEY(S)
4-27-17 [61]

JACOB EATON/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount 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. Accordingly, the respondents' defaults will be entered.

4. 16-13849-B-12 DON FALLERT
DMG-6

MOTION FOR COMPENSATION FOR D. MAX GARDNER, DEBTORS ATTORNEY(S)
5-1-17 [138]

D. GARDNER/Atty. for dbt.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. 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.

5. 17-11263-B-11 SAMUEL CASTILLO

STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
4-3-17 [1]

PETER FEAR/Atty. for dbt.

This matter will proceed as scheduled. The court intends to inquire as to the issues raised by the U.S. Trustee in her Status Report.

6. 15-14685-B-11 B&L EQUIPMENT RENTALS, INC.
CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION 11-30-15 [1]

LEONARD WELSH/Atty. for dbt.

This matter will proceed as scheduled. If the plan is confirmed (calendar no. 7, below), the matter will be dropped from calendar.

7. 15-14685-B-11 LKW-43 B&L EQUIPMENT RENTALS, INC.
AMENDED/MODIFIED PLAN 3-17-17 [676]

LEONARD WELSH/Atty. for dbt.

This matter will proceed as scheduled.

8. 15-14685-B-11 LKW-48 B&L EQUIPMENT RENTALS, INC.
MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S) 5-3-17 [722]

LEONARD WELSH/Atty. for dbt.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. 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.

1:30 P.M.

1. 16-11024-B-13 MICHELLE MILLER — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER L. FEAR, DEBTORS ATTORNEY(S)
FW-1
4-20-17 [19]

PETER FEAR/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount 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. Accordingly, the respondents' defaults will be entered. The motion for approval of applicant's final fee application will be granted.

2. 15-10233-B-13 PEDRO/ZENAIDA NAVEIRAS — MOTION TO MODIFY PLAN
LKW-6
4-19-17 [203]
PEDRO NAVEIRAS/MV
LEONARD WELSH/Atty. for dbt.
RESPONSIVE PLEADING

This matter will proceed as scheduled. It appears that the issue in controversy is whether or not the debtors may modify their confirmed plan through this motion based on the authority of LRB 3015-1(d)(3), which reads:

> **Minor Modifications. The Court may approve, on the written stipulation of the debtor and the trustee, nonmaterial modifications of a confirmed chapter 13 plan. To be regarded as nonmaterial, the modification must not delay or reduce the dividend payable on account of any claim or otherwise modify the claim of any creditor absent the affected creditor's written consent.**

The court notes that the change sought by the debtors does not meet the definition of "nonmaterial" as defined in LRB 3015-1(d)(3). LRB 3015-1(d)(3) does not provide for minor modifications that "delay or reduce the dividend payable on account of any claim or otherwise modify the claim of any creditor" based on the creditor's non-opposition. LRB 3015-1(d)(3) requires "the affected creditor's written consent" if a creditor's dividend is affected by the proposed modification. That has not occurred here. In addition, the trustee's agreement is required and, here, the trustee does not seem to be so inclined.

3. 17-10236-B-13 PAUL/KATHLEEN LANGSTON
JLG-1
VICTORIA GEESMAN/MV

PETER FEAR/Atty. for dbt.
JOHN GEESMAN/Atty. for mv.

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY VICTORIA GEESMAN
3-20-17 [24]

This objection has been withdrawn. No appearance is necessary.

4. 17-10336-B-13 ROBERT DUNCAN
MAZ-1

MARK ZIMMERMAN/Atty. for dbt.

MOTION FOR COMPENSATION FOR MARK ZIMMERMAN, DEBTORS ATTORNEY(S)
4-25-17 [33]

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. The record shows that an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" has been filed that is consistent with the moving papers.

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. The court notes that no plan has been confirmed and an objection to confirmation has been sustained without prejudice.

5. 13-14140-B-13 JIM/PAMILA HESTILY
SL-5
JIM HESTILY/MV
STEPHEN LABIAK/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO MODIFY PLAN
3-27-17 [102]

This matter will be denied as moot. The debtors have withdrawn their plan and have filed, served, and set for hearing, a fifth modified plan. The court will enter an order. No appearance is necessary.

6. 17-11256-B-13 VARGHA ESHRAGHI — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
5-8-17 [27]

This matter will be called as scheduled. If the installment payment now due has not been paid by the time of the hearing, the case will be dismissed. If the installment payment now due is fully paid by the time of the hearing, the OSC will be vacated.

If the OSC is vacated, the court will modify the order permitting the payment of filing fees in installments to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

7. 17-11256-B-13 VARGHA ESHRAGHI — NOTICE OF INCOMPLETE FILING AND NOTICE OF INTENT TO DISMISS CASE IF DOCUMENTS ARE NOT TIMELY FILED
4-3-17 [3]

This matter will proceed as scheduled. If the missing documents have not been filed by the time of the hearing, the court intends to dismiss the case while retaining jurisdiction over the Motion for Relief from the Automatic Stay under §362 filed on May 1, 2017, by creditor Wells Fargo Bank, N.A., set for June 1, 2017, at 1:30 p.m.

8. 17-10764-B-13 WILLIAM MULLER — MOTION TO VALUE COLLATERAL OF BALBOA THRIFT AND LOAN ASSOCIATION
JDM-1 — 3-29-17 [10]
WILLIAM MULLER/MV

JAMES MILLER/Atty. for dbt.

The motion will be granted without oral argument based on well-pled facts. The moving party shall submit a proposed order consistent with this ruling. No appearance is necessary.

This motion to value respondent's collateral was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount 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.

The debtor is competent to testify as to the value of the 2012 Chevrolet Malibu LT. Given the absence of contrary evidence, the debtor's opinion of

value may be conclusive. *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir, 2004). The respondent's secured claim will be fixed at $$9,828. The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

9. 16-10169-B-13 FRANK/MARY ANNE DORES
AMM-6

RESCHEDULED HEARING RE: MOTION FOR COMPENSATION BY THE LAW OFFICE OF SCHNIFF HARDIN LLP FOR MATTHEW F. PREWITT, CREDITORS ATTORNEY(S)
12-22-16 [290]

PETER FEAR/Atty. for dbt.
RESPONSIVE PLEADING

The motion will proceed as scheduled.

Tentative Ruling -The motion will be DENIED. The court will issue an order.

Movants Bunnett & Co., Inc. and Energy Feeds International, LLC (collectively "Bunnett" or Movant) ask the court for an award $10,232.75 of attorney's fees against the debtors because Bunnett filed and prosecuted a Motion to Compel: (i) the production of documents withheld from discovery by debtors' state court counsel Rodarakis & Sousa as protected by the attorney-client privilege; (ii) responses to certain deposition questions posed to debtor Frank Dores who did not answer on the same ground and (iii) responses to certain deposition questions posed to Mary Dores who did not answer on spousal privilege grounds. After the first motion to compel was unsuccessful, Bunnett filed a second motion to compel (AMM-5). Bunnett argued that the privileges were legally waived by application of the "crime-fraud" exception. The court granted the motion in part and denied it in part stating detailed findings and conclusions on the record on November 9, 2016 and entered a written order on December 14, 2016 (Doc. # 279). Pursuant to that order, certain documents were produced by Rodarakis & Sousa *in camera*. After review, the court issued what is now a final order January 31, 2017 (Doc. # 312), requiring Rodarakis & Sousa to produce certain documents but also ordering that other certain documents need not be produced.

Movant contends that their "application" for fees"[1] is appropriate under 11 U.S.C. § 107 and 9018. Both of those provisions deal with protections the bankruptcy court can provide for sensitive or other types of materials. Also, Movant contends that FRCP 37(a)(5) (made applicable to the underlying contested matters before this court by FRBP 9014(c)) compel the court to award attorney's fees.[2] The Prewitt declaration (Doc. # 290) states the fees requested are actually one half of what Bunnett actually incurred. This unilateral reduction presumably represents Bunnett's acknowledgement that their motion to compel was not fully successful.

[1] Calling this motion an "application" is a technical misnomer. Ordinarily, professionals who work for the bankruptcy estate file "applications" for approval of fees as required by 11 U.S.C. § 330 and FRBP 2016. Nevertheless, the court is treating this proceeding as a "motion" as instructed by FRBP 9013 and 7037.

[2] The underlying motions are, Bunnett's motion to dismiss the Dores' bankruptcy case and the motion for an order that the automatic stay was not in effect as to bar certain state court litigation activity, and the Dores' motion for contempt sanctions for Bunnett's alleged violations of the automatic stay.

The debtors contend Movant prevailed on only a small portion of all of its requests and most of those involved Rodarakis & Sousa's production of documents, not those directed to the debtors. They also contend there was a "legitimate difference of opinion" on the applicability of the privileges on the motion to compel. Finally, debtors assert that Movants are untimely and have not complied with this court's scheduling orders requiring that fee requests in connection with discovery disputes must accompany the motion dealing with discovery and not be a separate motion.[3]

First, the initial ground for a fee award raised by Movant is inapplicable. Movant's reliance on 11 U.S.C. § 107 and FRBP 9018 is misplaced. These provisions relate to the court's authority and procedures to implement safeguards to protect certain material from being in the public record. These provisions do not support a claim for fees in a discovery dispute.

Second, Movant has not established that any claim of privilege was inappropriately made by the debtors or by Rodarakis & Sousa. When a privilege is claimed, FRCP 26(b)(5)(A) (FRBP 7026) requires that the claim be expressly made and that the claim include a description of the nature of the documents, communications or tangible things not produced or disclosed to enable the parties to assess that claim. There is no claim that either the debtors or Rodarakis & Sousa failed to comply with those requirements.

Third, there was substantial justification for the debtors and Rodarakis & Sousa to claim the privileges they asserted. FRCP 37(a)(5)(A) (FRBP 7037) provides that, if a motion to compel is granted, the court must (after giving an opportunity to be heard) require the withholding party or entity or their attorney or both to pay reasonable expenses incurred in making the motion including attorney's fees. However the rule is equally clear that the court must not order the payment if: the opposing party's nondisclosure, response, or objection, was substantially justified.

Generally, discovery behavior is "substantially justified" if reasonable people could differ as to whether the party requested must comply. *Reygo Rac. Corp. v. Johnston*, 68 F. 2d 647, 649 (9th Cir. 1982) *disapproved on other grounds*, *Molski v. Evergreen Dynasty Corp.*, 500 F. 3d 1047, 1055 n. 2 (9th Cir, 2007). "The Supreme Court has clarified that an individual's discovery conduct should be found 'substantially justified' under Rule 37 if it is a response to a 'genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'" *Devaney v. Continental American Ins. Co.*, 989 F. 2d 1154, 1163 (11th Cir. 1993) *quoting, Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

The motion itself outlines the significant legal issues facing the parties in this discovery dispute. Rodarakis & Sousa was compelled to

[3] This argument can be quickly dispatched. This motion for fees was filed December 22, 2016 (Doc. # 290) and has been continued at least once. When this motion was filed an "Amended Scheduling Order" was in effect providing *inter alia* for the procedure to seek fees in a discovery dispute. The parties stipulated to vacate that order and re-schedule dates. The last Scheduling Order setting the trial date was entered recently. (Doc. # 325).

claim the attorney client privilege when asked to produce certain documents and the debtors' counsel was compelled to remind the debtors of both the attorney-client and spousal privileges when deposition questions were posed. Notably, the issues regarding implied waiver of these privileges were central to the motion to compel. The implied waivers necessitated review of contested factual and legal positions by the court. Even after detailed findings were announced, further review by the court of documents *in camera* was required. This was not a situation involving a blanket assertion of privilege with no factual or legal basis. Actually, it was not the assertion of the privilege that necessitated the motion to compel, but rather Movant's effort to establish a legal waiver. That position was opposed with good faith arguments.

Ultimately, the court did not find the privilege waived as to all discovery requests and, indeed, found that some requests were irrelevant. Enforcing an irrelevant request would have been error. *Cacique v. Robert Reiser & Co. Inc.*, 169 F.3d 619, 622 (9th Cir, 1999) *citing, Epstein v. MCA*, 54 F.3d 1422 (9th Cir. 1995).[4] Further, the court found that many requests should not be compelled and that attorney impressions or opinions should be redacted. *See, Kannaday v. Ball*, 292 FRD 640, 651 (D.KS 2013) *citing, Linnebur v. United Tel. Ass'n.*, 2012 WL 1183073 at * 1 (D.KS April 9, 2012) [no sanctions appropriate against a witness since there was a reasonable dispute as to the applicability of the attorney-client privilege or work product doctrine].

Magistrate Judge Khalsa from the District of New Mexico summarizes the applicable process in assessing discovery behavior in light of legitimate claims of privilege in the unpublished decision, *Certain Underwriters of Lloyd's v. Old Republic Insurance Company*, 2015 WL 12748248 at *14 (D.NM 2015). Judge Khalsa writes, "Each party has taken some positions that are substantially justified and some are without merit . . . [one party's] reliance on the attorney-client privilege and work product doctrine and [one party's] waiver argument, present complex and significant legal issues, which are appropriately submitted to the court for resolution. In these circumstances, an award of expenses to either party would be unjust and inappropriate under Rule 37(a)(5)(A) and (B) and the court declines to exercise discretion under Rule 37(a)(5)(C) to apportion expenses between the parties."

The same thing occurred here. The claims of privilege were not illegitimate on their face. The waiver argument was found applicable in some but not all cases. This is certainly evidence of substantial justification. If that were not enough, the limited nature of the relief awarded by the court through orders which are now final demonstrates the justification of both parties' positions. The position of the debtors and of Rodarakis & Soousa were justified. No sanctions or expenses will be awarded.

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[4] *Cacique* has been cited by the Ninth Circuit BAP in an unpublished decision, *In re Vandevort*, 2007 WL 7540971 *7 (9th Cir, BAP, 2007).

The court having found substantial justification for the opposition to the discovery and not awarding fees there is no need to discuss the remaining issues raised by the debtors in opposition to the motion.

The motion will be DENIED.

10. 12-18670-B-13 ESTEBAN/GUADALUPE OROZCO — MOTION TO MODIFY PLAN
JDM-5 — 4-10-17 [79]
ESTEBAN OROZCO/MV
JAMES MILLER/Atty. for dbt.

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules of Practice; there is no opposition and the respondents' default will be entered. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

11. 17-10870-B-13 CAROL SHIELDS — OBJECTION TO CONFIRMATION OF PLAN BY MEDALLION BANK
TGM-1 — 4-14-17 [23]
MEDALLION BANK/MV
DAVID JENKINS/Atty. for dbt.
TYNEIA MERRITT/Atty. for mv.

This objection will be continued to July 7, 2017, at 9:30 a.m., for a scheduling conference. Movant Medallion Bank shall file and serve evidence as specified below by June 23, 2017. The debtor's response shall be filed by June 30, 2017. The court will enter an order. No appearance is necessary.

This matter is now deemed to be a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The parties shall immediately commence formal discovery, meet and confer, set deposition dates if necessary, and be prepared for the court to set an early evidentiary hearing if the matter is not resolved by the continued hearing date.

Medallion objects to the treatment of its secured claim which is based on debt incurred in 2014 for the purchase of a 2014 Coleman Catalina. Medallion's claim is scheduled at an amount less than the balance of the claim in class 2 of the debtor's plan. Medallion's objection, filed on April 14, is based, first, on the fact that no motion to value its collateral had been filed at the time its objection was filed. The second ground is the proposed interest rate which is less than one-third the contract rate of interest.

As to the first ground for objection, the court has already entered an order, on May 11, 2017, valuing Medallion's claim and so that objection is waived. The record shows that a motion to value Medallion's claim was filed approximately two weeks prior to the filing of this objection and was properly served on movant on March 29, 2017, by certified mail to the attention of Donald S. Poulton, CEO, Pres., at the address listed for Medallion Bank on the FDIC website: Medallion Bank, 1100 East 6600 South, Ste. 510, Salt Lake City, UT 84121. The motion was fully noticed and set for a hearing on May 11, 2017. No written opposition was filed and the court entered an order on May 11, 2017, valuing Medallion's claim at the amount scheduled in the debtor's chapter 13 plan.

The second ground for Medallion's objection is based on the proposed interest rate, however Medallion has submitted no evidence as to what rate of interest would be required under the holding in *Till v. SCS Credit Corp.*, 541 U.S. 465, 579 (2004).

"[U]nder *Till*, Creditor bears the burden of proof as to any risk factors which justify a particular interest rate. In *Till*, the Supreme Court identified the appropriate method to determine a cramdown interest rate in the context of a Chapter 13 case as the 'formula approach.' Under the formula approach, the Court calculates the appropriate interest rate by beginning with the national prime rate and then adjusting upward based upon any risk factors. [citations omitted.] These risk factors include, but are not limited to, the circumstances of the estate, the nature of the security, and the duration and feasibility of the plan. *Id.* The Supreme Court made clear that, 'starting from a concededly low estimate and adjusting upward places the evidentiary burden squarely on the creditors[.]'." *In re Tapang*, 540 B.R. 701, 707 (Bankr. N.D. Cal. 2015).

12. 14-13374-B-13 DAVID MARTINEZ
TCS-1
DAVID MARTINEZ/MV
TIMOTHY SPRINGER/Atty. for dbt.

MOTION TO MODIFY PLAN
4-13-17 [22]

The motion will be continued to Wednesday, June 14, 2013, at 9:30 a.m., for submission of additional evidence pertaining to the requirements of §1325(a)(8) to be filed by June 12, 2017. The court will enter an order. No appearance is necessary.

This motion was fully noticed and there was no objection. Accordingly, the defaults of respondents will be entered.

13. 17-10875-B-13 GERALD STULLER AND BARBARA WIKINSON-STULLER
AP-1
WELLS FARGO BANK, N.A./MV
SCOTT SAGARIA/Atty. for dbt.
JAMIE HANAWALT/Atty. for mv.
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OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A.
5-1-17 [28]

This matter will be continued to Friday, July 7, 2017, at 9:30 a.m. The court will issue an order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. At the continued hearing, if the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter and set an evidentiary hearing.

14. 17-10683-B-13 MALYNDA KEMMER
MJA-1
MALYNDA KEMMER/MV
MICHAEL ARNOLD/Atty. for dbt.

MOTION TO CONFIRM PLAN
3-31-17 [17]

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules of Practice; there is no opposition and the respondents' default will be entered. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

15. 17-10794-B-13 DAVID GONZALEZ
AP-1
BANK OF AMERICA, N.A./MV
JAMIE HANAWALT/Atty. for mv.

OBJECTION TO CONFIRMATION OF PLAN BY BANK OF AMERICA, N.A.
5-2-17 [24]

If the case is not dismissed at calendar no. 16 (MHM-1) then this matter will be continued to Friday, July 7, 2017, at 9:30 a.m. If the case is dismissed then this objection will be denied as moot. The court will issue an order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. At the continued hearing, if the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter and set an evidentiary hearing.

16. 17-10794-B-13 DAVID GONZALEZ — MOTION TO DISMISS CASE
MHM-1 — 5-2-17 [28]
MICHAEL MEYER/MV

This matter was noticed pursuant LR 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondent's default and grant the motion. 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.

The record shows the debtor has failed to appear at the §341 meeting of creditors.

17. 15-10679-B-13 HARVEY JONES — MOTION TO SELL
RSW-2 — 5-11-17 [28]
HARVEY JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

This motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

The motion to sell property of the estate other than in the ordinary course of business was not served at least 21 days before the hearing and no order was requested or entered shortening time for cause. FRBP 2002(a)(2), LBR 3015-1(i)(1)(E).

The court directs movant to the alternative provisions for an *ex parte* motion to sell real property by chapter 13 debtors pursuant to LBR 3015-1(i)(1)(D).

18. 15-10679-B-13 HARVEY JONES — MOTION TO INCUR DEBT
RSW-3 — 5-11-17 [32]
HARVEY JONES/MV
ROBERT WILLIAMS/Atty. for dbt.

The motion will be denied without prejudice. The record does not show when the motion was served on respondents because the proof of service filed with the court is not dated.

The court directs movant to the alternative provisions for an *ex parte* motion to incur new debt by chapter 13 debtors pursuant to LBR 3015-1(i)(1)(B).

19. 17-11712-B-13 ADAN MANRIQUEZ ZAMORA — MOTION TO EXTEND AUTOMATIC STAY
SL-1 — 5-11-17 [8]
ADAN MANRIQUEZ ZAMORA/MV
SCOTT LYONS/Atty. for dbt.

This matter will be called as scheduled. Unless opposition is presented at the hearing, the court intends to grant the motion.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by LBR 9014-1(f)(2). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Courts consider many factors - including those used to determine good faith under §§ 1307 and 1325(a) - but the two basic issues to determine good faith under 11 U.S.C. § 362(c)(3) are:

1. **Why was the previous plan filed?**
2. **What has changed so that the present plan is likely to succeed?**

***In re Elliot-Cook*, 357 B.R. 811, 814-15 (Bankr. N.D. Cal.2006)**

In this case the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith if the debtor failed to perform the terms of a plan confirmed by the court. 11 U.S.C. §362(c)(3)(C)(i)(II)(cc). The prior case was dismissed because the debtor failed to make the payments required under the plan. The party with the burden of proof may rebut the presumption of bad faith by clear and convincing evidence. §362(c)(3)(c). This evidence standard has been defined, in *Singh v. Holder*, 649 F.3d 1161, 1165, n. 7 (9th Cir. 2011), as "between a preponderance of the evidence and proof beyond a reasonable doubt." It may further be defined as a level of proof that will produce in the mind of the fact finder a firm belief or conviction that the allegations sought to be established are true; it is "evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *In re Castaneda*, 342 B.R. 90, (Bankr. S.D. Cal. 2006), *citations omitted*.

However, based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the presumption has been rebutted and that the debtor's petition was filed in good faith, and it intends to grant the motion to extend the automatic stay. It appears that several

circumstances arose in the debtor's prior case that culminated in his inability to make the plan payment in his prior case. It appears unlikely that those particular circumstances will reoccur. The motion will be granted and the automatic stay extended for all purposes as to all parties who received notice, unless terminated by further order of this court. 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.

20. 17-10064-B-13 JOE HAYES
THL-1
MRO INVESTMENTS, INC./MV
JERRY LOWE/Atty. for dbt.
TYLER LESTER/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
5-12-17 [57]

This motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

The record does not show that the motion was served in conformance with either LBR 9014-1(f)(1), which requires 28 days notice, or (f)(2), which requires 14 days notice. The certificate of proof of service shows the motion was served on May 12, 2017, which was 13 days prior to this hearing. In addition, the certificate does not show that the motion was served on the debtor, Joe Hayes.

The court notes that the record shows that the automatic stay became effective as to movant on February 2, 2017, the date the order imposing the automatic stay was entered as to all creditors that received notice. That motion was served on "MRO Investments, 8839 N. Cedar Ave., Fresno, CA 93720." The movant has requested *nunc pro tunc* relief for actions taken during the pendency of the imposed stay, however has not supported that request with either evidence or applicable authority.