UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, September 22, 2021
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. 21-11100-B-13 **IN RE: JULIE OSEJO**
SLL-1

CONTINUED MOTION TO MODIFY PLAN
7-26-2021 [21]

JULIE OSEJO/MV
STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

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.

As stated in the previous minutes (Doc. #40), the court continued the matter so that Julie Osejo ("Debtor") could amend Schedules I and J to prove that the plan was feasible. Doc. #42. The court also entered the defaults of all non-responding parties except chapter 13 trustee Michael H. Meyer ("Trustee"). Doc. #40.

Trustee had argued that the plan was not feasible as proposed and would need to increase the plan payment to $992.00 per month to fund the plan. Doc. #36. Trustee also stated that Section 6.01 of the plan was unclear because it provides that property shall both revest and not revest in the Debtor upon confirmation. Trustee was informed that Debtor wishes to have property revest in herself upon confirmation, which could be reflected in the order confirming plan. *Id.*

Debtor agreed to increase the plan payment to $992.00 for the remaining terms of the plan. Doc. #38. At the hearing, Debtor agreed to file an Amended Schedules I and J. Doc. #44. Debtor amended Schedules I and J on September 3, 2021. Doc. #47. The amendment indicates that Debtor has $992.00 in monthly net income available to pay her chapter 13 plan, so the plan appears to be feasible.

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

2. 21-11619-B-13 **IN RE: JUSTINA GONZALEZ**
SL-1

MOTION FOR COMPENSATION FOR SCOTT LYONS, DEBTORS ATTORNEY(S)
8-17-2021 [19]

SCOTT LYONS/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.

Scott Lyons ("Applicant"), attorney for Justina Jane Gonzalez ("Debtor"), requests interim compensation in the sum of $8,487.58 under 11 U.S.C. §§ 330, 331. Doc. #19. This amount consists of $8,051.66 for reasonable compensation and $435.92 for reimbursement of actual, necessary expenses for services rendered from July 22, 2019 through August 11, 2021.

Debtor signed a statement of consent on August 17, 2021 indicating that she has reviewed the fee application and has no objection. *Id.*, § 9(7).

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

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

The notice of hearing (Doc. #19) and the exhibits (Doc. #21) do not comply with the local rules. LBR 9014-1(d)(3)(B)(i) requires the notice to include the names and addresses of any persons who must be served with any opposition. Here, the notice lists the parties who must be served opposition, but all addresses are omitted. LBR 9004-2(d)(2) and (3) require exhibit indices to state the page number at which each exhibit is found within the exhibit document and use consecutively numbered exhibit pages throughout the exhibit document, including any separator, cover, or divider sheets. Here,

the index omits the page number where each exhibit is located, and the document is not consecutively numbered. The local rules require the entire document to be consecutively numbered and the exhibit index to identify by page number each exhibit's placement. Counsel is advised to review the local rules and ensure procedural compliance in subsequent matters. Future violations of the local rules may result in the motion being denied without prejudice.

Debtor filed bankruptcy on June 25, 2021.[1] Doc. #1. Section 3.05 of the confirmed chapter 13 plan provides that Applicant was paid $1,460.00 prior to the filing of the case and, subject to court approval, additional fees of $10,540.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #3, § 3.05.

The application, meanwhile, states that $1,810.00 in pre-filing fees were paid. It appears that the initial filing fee of $313 and $37 credit report were subtracted from the fees listed in the plan, resulting in $1,460 paid pre-petition.

This is Applicant's first interim fee application. The source of funds will be from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. Applicant's office provided 51.5166 hours of legal services totaling **$8,051.66** as follows:

FEE SUMMARY

Professional	**Rate**	**Billed**	**Amount**
Scott Lyons	$400.00	0.50	$200.00
Louis Lyons	$350.00	11.20	$3,920.00
Sylvia Gutierrez	$100.00	39.3166	$3,931.66
Total Hours & Fees		**51.02**	**$8,051.66**

Doc. #21, Ex. B. Applicant also incurred **$435.92** in costs:

EXPENSES

Postage	$85.92
Filing fees	$313.00
Credit reports	$37.00
Total Expenses	**$435.92**

Ibid. These combined fees and expenses total **$8,487.58.**

11 U.S.C. § 330(a)(1)(A) and (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person, or attorney" and "reimbursement for actual, necessary expenses."

Applicant's services included, without limitation: (1) pre-petition consulting with Debtor and fact gathering; (3) preparing and filing the petition, schedules, plan, and other forms; (3) confirming the original chapter 13 plan; (4) preparing for and appearing at the 341 meeting of creditors; (5) claims administration; and (6) preparing this fee application. Doc. #21, Ex. B. The court finds the services and expenses reasonable, actual, and necessary.

No party in interest timely filed written opposition. As noted above, Debtor has consented to the application. Accordingly, this motion will be GRANTED. Applicant will be awarded $8,487.58, consisting of fees of $8,051.66 and costs of $435.92 on an interim basis under § 331, subject to final review pursuant to § 330. After application of the $1,810.00 pre-filing fees, the chapter 13 trustee is authorized, in his discretion, to pay Applicant $6,677.58 in accordance with the confirmed chapter 13 plan for services rendered and expenses incurred from July 22, 2019 through August 11, 2021.

[1] The fee application requests fees beginning July 22, 2019 because Debtor's initial consultation occurred on July 22, 2019, but no fees were charged. Doc. #21, Ex. B. Fees begin accruing over a year and a half later on February 10, 2021. *Ibid.*

3. 21-11221-B-13 **IN RE: WILLIAM SIFUENTES**
TCS-1

MOTION TO CONFIRM PLAN
7-30-2021 [30]

WILLIAM SIFUENTES/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
DISMISSED 8/11/21

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

The court entered an order dismissing this case on August 11, 2021. Doc. #43. Accordingly, this motion will be DENIED AS MOOT.

4. 21-11822-B-13 **IN RE: MARIA PAREDES**
AP-1

OBJECTION TO CONFIRMATION OF PLAN BY PENNYMAC LOAN SERVICES, LLC
8-31-2021 [17]

PENNYMAC LOAN SERVICES, LLC/MV
PETER BUNTING/ATTY. FOR DBT.
WENDY LOCKE/ATTY. FOR MV.

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

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

PennyMac Loan Services, LLC ("Creditor") objects to Maria De La Luz Paredes' ("Debtor") chapter 13 plan because the plan does not account for the entire amount of pre-petition arrearages owed to Creditor, so the plan does not comply with 11 U.S.C. § 1325(a)(5)(b)(ii) and should be denied. Doc. #17.

Debtor withdrew the chapter 13 plan on September 21, 2021. Doc. #20. Accordingly, this objection will be OVERRULED AS MOOT.

5. 21-11223-B-13 **IN RE: CHRISTOPHER/TRACEY PRESS**
APN-1

OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA MOTOR CREDIT CORPORATION
8-11-2021 [57]

TOYOTA MOTOR CREDIT CORPORATION/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.

NO RULING.

Toyota Motor Credit Corporation ("Creditor") objects to confirmation of the Second Modified Chapter 13 Plan of Christopher David Press and Tracey Lee Press ("Debtors"). Doc. #57.

Creditor filed this objection separately under the wrong Docket Control Number ("DCN"), APN-1, rather than in response to the Debtors' motion to confirm plan in matter #6 below. *See* TCS-3. Additionally, all objection documents are filed together in one document. LBR 9004-2(c)(1) requires that objections, notices, exhibits, certificates of service, and other specified pleadings are to be filed as separate documents.

LBR 9004-2(d)(2) and (3) require exhibit indices to state the page number at which each exhibit is found within the exhibit document and use consecutively numbered exhibit pages throughout the exhibit document, including any separator, cover, or divider sheets. Here, the index includes the number of pages in the exhibits (not required) and omits the page number where each exhibit is located (required). Doc. #57. Further, the pages are not consecutively numbered, including the index, any separator, cover, and divider sheets. The local rules require the entire document to be consecutively numbered and the index to identify the page number of each exhibit's placement. Counsel is advised to review the local rules and ensure procedural compliance in future matters.

Creditor is the holder of a security interest in Debtors' personal property, a 2015 Dodge Journey ("Vehicle"). Creditor filed Proof of Claim No. 8-1 on June 4, 2021 in the amount of $14,127.23, with arrears of $7,834.46. Claim #8.

Creditor objects under 11 U.S.C. § 1325(a)(5)(B) on the basis that the value of Vehicle to be distributed to Creditor is less than the

amount of its claim. Doc. #57. Creditor believes Vehicle is valued at $16,143.75, but the plan provides payment of only $12,500 at 6.50% interest. No motions to value collateral have been filed or granted to determine the fair market value of the claim to be anything less than its proof of claim.

Further, because the claim and the arrears are over secured, Creditor believes that it is entitled to the contract interest rate of 7.55%. After amending the amount paid to Creditor and accounting for the increased interest rate, Creditor claims that the plan will not be feasible with Debtors' current monthly net income.

Sections 1.04 and 3.08(c) of the plan require separately served and filed motions to value collateral for claims classified in class 2. Doc. #48. Creditor's claim is in Class 2B. As of September 20, 2021, Debtors have not filed any motions to value collateral.

This matter will be called as scheduled and heard with matter #6 below.

6. 21-11223-B-13 **IN RE: CHRISTOPHER/TRACEY PRESS**
TCS-3

MOTION TO CONFIRM PLAN
7-30-2021 [46]

TRACEY PRESS/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

NO RULING.

Christopher David Press and Tracey Lee Press ("Debtors") seek confirmation of their Second Modified Chapter 13 Plan. Doc. #46.

Toyota Motor Credit Corporation ("Creditor") objected to plan confirmation under 11 U.S.C. § 1325(a)(5)(B) because the plan fails to pay the full replacement value of Creditor's collateral, a 2015 Dodge Journey ("Vehicle"). Doc. #57. However, Creditor filed that objection under the wrong Docket Control Number ("DCN"), APN-1, rather than DCN TCS-3.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1) and will proceed as scheduled. The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest except Toyota Motor Creditor Corporation 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. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties except Toyota Motor Credit Corporation are entered.

Creditor is the holder of a security interest in Debtors' personal property, a 2015 Dodge Journey ("Vehicle"). Creditor filed Proof of Claim No. 8-1 on June 4, 2021 in the amount of $14,127.23, with arrears of $7,834.46. Claim #8.

Creditor objects under 11 U.S.C. § 1325(a)(5)(B) on the basis that the value of Vehicle to be distributed to Creditor is less than the amount of its claim. Doc. #57. Creditor believes Vehicle is valued at $16,143.75, but the plan provides payment of only $12,500 at 6.50% interest. No motions to value collateral have been filed or granted to determine the fair market value of the claim to be anything less than its proof of claim.

Further, because the claim and the arrears are over secured, Creditor believes that it is entitled to the contract interest rate of 7.55%. After amending the amount paid to Creditor and accounting for the increased interest rate, Creditor claims that the plan will not be feasible with Debtors' current monthly net income.

Sections 1.04 and 3.08(c) of the plan require separately served and filed motions to value collateral for claims classified in class 2. Doc. #48. Creditor's claim is in Class 2B. As of September 20, 2021, Debtors have not filed any motions to value collateral.

This matter will be called as scheduled and heard with matter #5 above.

7. 19-12724-B-13 **IN RE: RICHARD/KATHLEEN KOHLER**
PLG-5

MOTION TO MODIFY PLAN
8-6-2021 [66]

KATHLEEN KOHLER/MV
RABIN POURNAZARIAN/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.

Richard Charles Kohler and Kathleen Ann Kohler ("Debtors") seek confirmation of their Second Modified Chapter 13 Plan. Doc. #66.

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

Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

8. 18-11825-B-13 **IN RE: JESSICA RAMOS**
MHM-4

MOTION TO DISMISS CASE
8-10-2021 [101]

MICHAEL MEYER/MV
PETER CIANCHETTA/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted or continued.

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

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan and § 1307(c)(8) for termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan. Doc #101. Jessica Ramos ("Debtor") did not oppose.

Debtor filed an *ex parte* motion for leave to file a late reply to Trustee's motion. Doc. #111. The motion was granted, allowing Debtor to file an untimely reply. Doc. #114.

Debtor replied, stating that she has resolved the difference in two claims filed by the same creditor against her personal residence. Doc. #112. If the stipulation is approved, then Debtor will have completed the chapter 13 plan. Debtor believes she has paid the amounts required to complete the plan, but if there is a minor deficiency, she will pay it within 10 days of the hearing. Debtor requests the motion be denied or continued to September 29, 2021 to be heard in connection with the claim objection.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest except Debtors to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except Debtor are entered.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for "cause". "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan and § 1307(c)(8) for termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan.

The court has looked at the schedules and there appear to be insignificant assets in the estate to be administered for the benefit of unsecured claims. Doc. #10, *Scheds. A/B, C, D*. Debtor's real and personal property is fully exempted or encumbered, except for $150 in unexempted equity in a vehicle valued at $3,200. *Id.* Costs for the sale of the vehicle would exceed the net to the estate. Therefore, dismissal serves the interests of creditors and the estate.

This matter will be called as scheduled to inquire whether Debtor has resolved the claim objection and completed the plan. If not, this motion may be granted or continued to September 29, 2021.

9. 17-13932-B-13 **IN RE: OSCAR HERNANDEZ-SANDOVAL AND NIDIA PAYAN**

ORDER TO SHOW CAUSE - FAILURE TO TENDER FEE FOR FILING TRANSFER OF CLAIM
8-18-2021 [69]

KRISTY HERNANDEZ/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The minutes of the hearing will be the court's findings and conclusions.

ORDER: The court will issue an order.

This matter will proceed as scheduled. A transfer of claim (Doc. #64) was filed by Transferee Sortis Financial, Inc. transferring claim #7, filed on February 7, 2018 in the amount of $39,186.43, from Transferor Personal Energy Finance, Inc. A fee of $26.00 is required at the time of filing of the transfer of claim. The fee was not paid. A notice of payment due was served on Sortis Financial, Inc. on August 11, 2021. Doc. #68.

If the filing fee of $26.00 is not paid prior to the hearing, the transfer of claim (Doc. #64) may be stricken, and sanctions imposed on the filer and/or their counsel on the grounds stated in the OSC.

10. 18-12246-B-13 **IN RE: CHARLES/MICHAELA GIBBS**
DRJ-2

MOTION TO MODIFY PLAN
8-4-2021 [63]

MICHAELA GIBBS/MV
DAVID JENKINS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

Charles Henry Gibbs and Michaela Raya Gibbs ("Debtors") seek confirmation of their First Modified Chapter 13 Plan. Doc. #63.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered.

The court notes that section 3.14 of the plan states that a 100% dividend will be paid to allowed unsecured claims. Doc. #65. But section 7.11 states that it will be a 62% dividend, which is consistent with the motion and declaration. Docs. #63; #66. Since these appear to be inconsistent, section 3.14 needs to reference the change in section 7.11.

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

11. 21-11758-B-13 **IN RE: SERENA/COLE BLASINGAME**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-19-2021 [19]

BENNY BARCO/ATTY. FOR DBT.
$79.00 INSTALLMENT FEE PAID ON 8/20/21

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid. The first installment fee in the amount of $79.00 was paid on August 20, 2021, and the second installment fee in the amount of $78.00 was paid on September 14, 2021. Accordingly, the Order to Show Cause will be vacated.

The order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

12. 20-10859-B-13 **IN RE: KEITH/GERALDINE CASH**
TCS-3

CONTINUED MOTION TO MODIFY PLAN
6-30-2021 [40]

GERALDINE CASH/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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.

Keith Raymond Cash and Geraldine Lee Cash ("Debtors") seek confirmation of their First Modified Chapter 13 Plan. Doc. #40.

Chapter 13 trustee Michael H. Meyer ("Trustee") opposed under 11 U.S.C. § 1325(b)(4) because the plan provides for payments to creditors for a period shorter than three years, which requires for payment in full of all unsecured claims. Doc. #48.

This motion was originally scheduled for August 11, 2021. The court continued the matter and entered the defaults of all non-responding parties except Trustee. Doc. #50. Debtors were required to file a written response to the not later than September 8, 2021 or file a confirmable modified plan by September 15, 2021. Doc. #51.

The parties' stipulation resolving Trustee's objections to confirmation was filed on September 14, 2021 and (a) set the plan term to 36 months and (b) withdrew Trustee's objection. Docs. #53; #54, Ex. A.

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

13. 18-13679-B-13 **IN RE: JUAN CORONADO AND VERONICA ANGUIANO**
TMO-1

MOTION TO APPROVE LOAN MODIFICATION
8-30-2021 [25]

VERONICA ANGUIANO/MV
T. O'TOOLE/ATTY. FOR DBT.
T. O'TOOLE/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

Juan Anguiano Coronado and Veronica Aguiano ("Debtors") seek authorization to enter into a loan modification agreement to amortize the arrears due on their mortgage throughout their modified plan. Doc. #25. The modified loan will be paid over 30 years at 3.250% interest with payments of $770.07 per month.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and 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. All parties in interest were notified at least 21 days before the hearing pursuant to Fed. R. Bankr. P. 2002.

The court notes that the exhibits do not comply with the local rules. LBR 9004-2(d)(2) and (3) require exhibit indices to state the page number at which each exhibit is found within the exhibit document and use consecutively numbered exhibit pages throughout the exhibit document, including any separator, cover, or divider sheets. Here, the index omits the page number where each exhibit is located, and the document is not consecutively numbered. The local rules require the entire document to be consecutively numbered and the exhibit index to identify by page number each exhibit's placement. Counsel is advised to review the local rules and ensure procedural compliance in subsequent matters. Future violations of the local rules may result in the motion being denied without prejudice.

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 is 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 Fed. R. Bankr. P. 2002 and LBR 9014-1.

Debtors ask for authority to refinance their mortgage securing their residence located at 2040 Lynn Lane, Hanford, CA 93230 with Wells Fargo Bank, N.A. ("Creditor"). The loan will be secured by the residence and include the following terms:

Principal Balance:	$118,047.21
Interest Rate:	3.250%
Monthly Payment:	$770.07/month
Maximum Loan Term:	30 years

Doc. #28, Ex. B. Joint debtor Veronica Aguiano declares that Debtors are behind on their mortgage in the amount of $10,379.58, which is a 30-year loan with 4.750% interest. Doc. #27. Debtors' monthly payment is $946.58, which includes principal, interest, property taxes, and escrow. The proposed loan decreases the monthly payment to $770.07 and interest rate to 3.250%. Aguiano declares that the property involved is Debtors' primary residence and is reasonably necessary for the maintenance and support of their family. The only security will be the residence. *Id.*

This matter will be called as scheduled to inquire whether any parties in interest oppose the loan modification. The court is inclined to GRANT the motion. If there is opposition, a schedule will be set for further briefing and hearings.

14. 21-12079-B-13 **IN RE: CURTIS/CHARTOTTE ALLEN**
TCS-1

MOTION TO EXTEND AUTOMATIC STAY
9-7-2021 [9]

CHARTOTTE ALLEN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

Curtis James Allen and Charlotte Yvette Jackson ("Debtors") seek an order to extend the automatic stay under 11 U.S.C. § 362(c)(3). Doc. #9.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, this motion will be GRANTED.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and 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 set a briefing schedule and final hearing unless there is no need to develop the record further. The court will issue an order if a further hearing is necessary.

Under 11 U.S.C. § 362(c)(3)(A), if the debtor has had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay under subsection (a) of this section shall terminate with respect to the debtor on the 30th day after the filing of the latter case. Debtors had one case pending within the preceding one-year period that was dismissed: Case No. 19-13984-A-13. That case was filed on September 19, 2019 and was dismissed on June 16, 2021 for failure to pay plan payments. This case was filed on August 27, 2021 and the automatic stay will expire on September 26, 2021. Doc. #1. Debtor has also filed four other bankruptcy cases, but none of those were pending within the previous one-year period.[2]

11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest demonstrates that the filing of the latter case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction

that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition.'" *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288, n.11 (B.A.P. 9th Cir. 2016) (citations omitted) (vacated and remanded on other grounds by *Taggart v. Lorenzen*, 139 S. Ct. 1785 (2019)).

In this case the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith — the prior case was dismissed because Debtors failed to perform the terms of a plan confirmed by the court. 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc).

Joint debtor Charlotte Allen declares that their prior bankruptcy case was pending for 21 months before being dismissed after Debtors experienced financial difficulties. Doc. #11. Debtors acknowledge that they have had several chances to reorganize their finances in prior bankruptcies but state that they have resolved all of the issues preventing them from being successful. *Id.* In the most recent dismissal, Debtors' daughter was unable to pay rent due to the COVID-19 pandemic and joint debtor Curtis Allen's rent in Los Angeles was too high, causing Debtors to fall behind on plan payments. In the cases before that, Debtors did not understand bankruptcy procedure. In one instance, they thought they had paid the filing fee, but it had been credited to another case instead. Ms. Allen also underwent a medical surgery which required Debtors to go to New Orleans, causing them to fall behind on plan payments. *Id.*

Over the past two cases, Debtors have paid over $100,000 towards their mortgage and plan payments. Due to the surgery and COVID-19, both cases were dismissed. *Id.* Ms. Allen declares that Debtors' circumstances have changed because Mr. Allen moved out of the property in Los Angeles, decreasing Debtors' expenses, and Debtors' daughter is now working and able to contribute to rent. *Id.* Debtors make sufficient income to stay current going forward and believe all prior issues have been resolved. *Id.*

Additionally, Debtors filed a chapter 13 plan that provides for 60 monthly payments of $3,120.00 and a 3% dividend to allowed unsecured claims. Doc. #14. Debtors' schedules indicate that Debtors have $3,120.00 monthly net income. Doc. #13, *Sched. J*.

Based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the presumption has been rebutted. Debtors' petition appears to have been filed in good faith. The court intends to grant the motion and extend the automatic stay as to all creditors provided that no opposition is presented at the hearing.

The court is inclined to GRANT the motion and extend the automatic stay 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).

[2] Debtors' other prior cases consist of four chapter 13 cases:
(1) Case No. 17-11047-B-13 was filed on March 24, 2017 and dismissed on August 19, 2019 for failure to make chapter 13 plan payments.
(2) Case No. 16-13491-B-13 was filed on September 26, 2016 and dismissed on January 3, 2017. That dismissal was conditionally vacated on January 31, 2017 but dismissed on February 1, 2021 for failure to make plan payments.
(3) Case No. 15-10123-A-13 was filed on January 16, 2015 and dismissed on August 2, 2016 for failure to make chapter 13 plan payments.
(4) Case No. 11-63674-B-13 was filed on December 23, 2011 and was dismissed on November 21, 2012 for failure to make chapter 13 plan payments.

15. 19-14186-B-13 **IN RE: HUMBERTO/NANCY VIDALES**
TCS-6

MOTION FOR AUTHORIZATION TO MODIFY EXISTING DEBT
8-19-2021 [121]

NANCY VIDALES/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

Humberto Crispin Vidales and Nancy E. Garcia Vidales ("Debtors") seek authorization to enter into a loan modification agreement to amortize the arrears due on their mortgage through September 1, 2046. Doc. #121. The modified loan will be paid over 25 years at 3.125% interest with payments of $1,318.86 per month.

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) and will proceed as scheduled. The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered.

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 is 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 Fed. R. Bankr. P. 2002 and LBR 9014-1.

Debtors ask for authority to refinance their mortgage securing their residence located at 15821 W. B St., Kerman, CA 93630 and encumbered by a security interest in favor of Wells Fargo Home Mortgage. ("Creditor"). The loan will be secured by the residence and include the following terms:

Interest Rate:	3.125%
Monthly Payment:	$1,318.86/month
Loan Term:	25 years

Doc. #121. The amount of the refinanced loan is unclear. No proposed modification agreement was attached to this motion. However, Creditor filed Proof of Claim No. 2-1 on October 18, 2019 in the amount of $197,963.42. Claim #2. On September 1, 2021, Creditor filed a Supplemental Proof of Claim for Forbearance Claim. Creditor indicates that $13,928.61 in payments were not received during the forbearance period. Claim #2, Suppl. Proof of Claim.

Joint debtor Humberto Vidales declares that Debtors are current on their mortgage, but subsequently became delinquent due to the COVID-19 deferment. Doc. #123. They are seeking to modify the loan to become current and will not receive any cash out from the modification. The loan modification will extend the duration of the loan until September 1, 2046 with a proposed payment of $1,318.86 per month. This is approximately equal to their current mortgage payment at $1,300.00, and therefore will not affect their chapter 13 plan. *Id.* Debtors' income is also approximately the same, so their disposable income will not change. Debtors Schedules I and J prove that they can pay all future plan payments, projected living expenses, and repay the modified debt. Doc. #104.

This matter will be called as scheduled to inquire about the refinanced loan amount and the proposed modification agreement. The court may GRANT the motion.

16. 18-13887-B-13 **IN RE: GREG/MARY JENNINGS**
SAH-4

MOTION TO SELL
8-24-2021 [70]

MARY JENNINGS/MV
SUSAN HEMB/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled for higher and better bids, only.

DISPOSITION: Granted.

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

Greg W. Jennings and Mary L. Jennings ("Debtors") seek authorization to sell the estate's interest in real property located at 24418 Summit Drive, Lemon Cove, California 93247 ("Property") to Elijah McClain and Stephanie McClain ("Proposed Buyers") for $345,000.00, subject to higher and better bids. Doc. #70.

Bank of America, N.A. ("Secured Creditor") timely filed a response consenting to the sale provided that (1) a written payoff statement is obtained from Secured Creditor prior to closing; (2) said payoff statement shall not have expired at the time of closing; and (3) funds from the sale shall be remitted to Secured Creditor within 48 hours of the close of escrow. Doc. #80.

No other parties 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 chapter 13 trustee, the U.S. Trustee, or any other party in interest except Bank of America 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). Therefore, the defaults of the above-mentioned parties in interest except Bank of America are entered and the matter will proceed for higher and better bids only. 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 notice of hearing (Doc. #71) and exhibits (Docs. ##73-75) do not comply with the local rules. LBR 9014-1(d)(3)(B)(i) requires the notice to include the names and addresses of any persons who must be served with any opposition. LBR 9004-2(d)(2) and (3) require exhibit indices to state the page number at which each exhibit is found within the exhibit document and use consecutively numbered exhibit

pages throughout the exhibit document, including any separator, cover, or divider sheets. Here, the indices for each exhibit omit the page number where the exhibit is located, and the documents are not consecutively numbered. The local rules require the entire document to be consecutively numbered and the exhibit index to identify by page number each exhibit's placement.[3] Counsel is advised to review the local rules and ensure procedural compliance in subsequent matters. Future violations of the local rules may result in the motion being denied without prejudice.

11 U.S.C. § 363(b)(1) allows the chapter 13 trustee to "sell, or lease, other than in the ordinary course of business, property of the estate."

11 U.S.C. § 1303 states that the "debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections . . . 363(b) . . . of this title." 11 U.S.C. § 1302(b)(1) excludes from a chapter 13 trustee's duties the collection of estate property and reduction of estate assets to money. Therefore, the debtor has the authority to sell property of the estate under § 363(b).

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) (citing *240 North Brand Partners, Ltd. v. Colony GFP Partners, Ltd. (In re 240 N. Brand Partners, Ltd.)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991)). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the [debtor]'s judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he [debtor]'s business judgment is to be given great judicial deference.'" *Id.* (citing *In re Psychometric Sys.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998)).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887 citing *Mission Prod. Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016). This sale is to Proposed Buyers. Doc. #70. There is no indication that Proposed Buyers are insiders with respect to the Debtors. Proposed Buyers are not listed in Amended Schedule D, Schedule E/F or H, or the original or amended master address lists. Docs. #1; #6; ##22-23. The court will verify at the hearing that Proposed Buyers are not insiders.

Debtors wish to sell Property to Proposed Buyers for $345,000.00. Joint debtor Mary Jennings is a 50% owner of Property and her sister, Josephine Smith, owns the remaining 50% interest. Doc. #72. Ms. Jennings declares that the current value of Property is $345,000. *Id.*; *cf.* Doc. #1, *Sched. A/B*. It is encumbered by a secured home equity lien in favor of Bank of America Home Loans in

the approximate amount of $90,250.41. Doc. #72. Secured Creditor filed Claim Nos. 7-1 and 8-1 on November 14, 2018 in the amounts of $7,804.68 and $87,874.71 with $1,048.50 in arrears. Claims ##7-8.

After payoff of the liens, real estate commissions, title and escrow charges, and miscellaneous charges, Ms. Jennings estimates that there will be $64,608.06 remaining in proceeds. Doc. #72. Debtors claimed an exemption in the net proceeds in the amount of $23,045.00 under Cal. Code Civ. Proc. § 703.140(b)(5). Doc. #78, *Sched. C*.

However, Federal Rule of Bankruptcy Procedure ("Rule") 4003(b) allows a party in interest to file an objection to a claim of exemption within 30 days after the § 341 meeting of creditors is held or within 30 days after any amendment to Schedule C is filed, whichever is later. Here, Schedule C was amended on August 24, 2021, so the 30-day timeframe will expire on September 23, 2021, which is after the date of this hearing. Doc. #78. Any party in interest may object to the exemption through September 23, 2021, which could affect the payout on Debtors' claimed exemption if the objection is sustained.

As noted above, Secured Creditor consents to the sale so long as (1) Debtors obtain a written payoff statement from Secured Creditor prior to closing; (2) said payoff statement has not have expired at the time of closing; and (3) funds from the sale are remitted to Secured Creditor within 48 hours of the close of escrow. Doc. #80.

The estimated seller's statement filed with this motion lists the following proposed payout:

SALE OF PROPERTY

Proposed sale price of Property		$345,000.00
Joint debtor's 50% interest	=	$172,500.00
Secured Creditor's deed of trust	-	$90,250.41
Broker commission (5.5% total, split by sellers)	-	$9,487.50
Title & escrow charges (split by sellers)	-	$1,021.50
County and transfer taxes (split by sellers)	-	$303.56
Cal FRPTA withholding	-	$5,744.00
Miscellaneous charges (split by sellers)	-	$1,084.97
Remaining proceeds	=	$64,608.06
Debtors' "wildcard" exemption	-	$23,045.00
Net payable to the estate	=	**$41,563.06**

Doc. #75, Ex. B, at 22. If any party objects to Debtors' exemptions, then the net to the estate would be $64,608.06. If no objections are filed by September 23, 2021, then the net to the estate would be $41,563.06. Joint debtor and her sister are splitting payment of the broker commission, title & escrow charges, county and transfer taxes, and miscellaneous charges. Debtors are paying the Cal FRPTA withholding to the franchise tax board and Secured Creditor's deed of trust.

The proposed brokerage commission is 5.5% of the sale price, or $18,975.00 total, to be split equally between the buyer's and seller's brokers.

The sale of Property appears to be in the best interests of the estate, supported by a valid business judgment, and proposed in good faith. Debtors' judgment appears to be reasonable and will be given deference.

Any order approving the sale will need to be signed by the chapter 13 trustee. Further, the order will require the trustee be given and approve a seller's final closing statement before the sale is completed. The order shall not reflect that the court has allowed the exemption before the expiration of the objection period.

Any party wishing to overbid must be present at the time of the hearing. No warranties or representations are included with the Property; it will be sold "as-is."

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[3] The court notes that all exhibits may be filed in the same exhibit document provided that it is filed separately from the document(s) to which it relates. LBR 9004-2(d)(1).

17. 16-11999-B-13 **IN RE: MANUEL QUICHOCHO**
MHM-2

MOTION TO DISMISS CASE
8-10-2021 [46]

MICHAEL MEYER/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN 09/15/2021

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 trustee Michael H. Meyer withdrew this motion on September 15, 2021. Doc. #54. Accordingly, this motion will be dropped from calendar.

11:00 AM

1. 14-14343-B-13 **IN RE: RICHARD KELLEY**
21-1021

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-24-2021 [1]

KELLEY V. LANDSKRONER
ROBERT HAWKINS/ATTY. FOR PL.

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

DISPOSITION: Continued to September 29, 2021 at 11:00 a.m.

ORDER: The court will issue an order.

Plaintiff Richard Kelley's motion for entry of default judgment is set for hearing on September 29, 2021. RH-2. Accordingly, this status conference will be continued to September 29, 2021 at 11:00 a.m. to be heard in connection with the motion for entry of default judgment.

2. 20-13855-B-11 **IN RE: MOHOMMAD KHAN**
21-1026

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-21-2021 [1]

KHAN V. WILMINGTON TRUST N.A
MOHAMMAD KHAN/ATTY. FOR PL.

NO RULING.

3. 20-13855-B-11 **IN RE: MOHOMMAD KHAN**
21-1026

ORDER TO SHOW CAUSE REGARDING DISMISSAL OF ADVERSARY PROCEEDING
8-25-2021 [15]

KHAN V. WILMINGTON TRUST N.A

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The minutes of the hearing will be the court's findings and conclusions.

ORDER: The court will issue an order.

Pro se debtor Mohommad Mahmood Khan ("Plaintiff") was ordered to file and serve a response to this Order to Show Cause ("OSC") not

later than September 8, 2021. Doc. #15. Since no timely written response was filed, this complaint will be DISMISSED.

The court takes judicial notice of all documents and pleadings docketed in Plaintiff's chapter 11 bankruptcy case filed December 15, 2020 (Case No. 20-13855) and the United States Trustee's ("UST") adversary proceeding (Adv. Proc. No. 20-01068) against Plaintiff filed on December 30, 2020.[4] Fed. R. Evid. 201. The court takes notice of exhibits filed in both cases that contain motions, declarations, and orders from Plaintiff's ten other bankruptcy cases and the bankruptcies of Plaintiff's wife, Ayesha Khan, and his business partner, Bruce Chadbourne.

I. BACKGROUND

Plaintiff filed his eleventh bankruptcy case since 2011 – the tenth since 2016 – on December 15, 2020 in the Eastern District of California, Fresno Division. *See* Bankr. Doc. #1. This chapter 11 case was dismissed with prejudice for cause under 11 U.S.C. § 1112(b) and Rules 1017(f) and 9014 on February 24, 2021.[5] Bankr. Doc. #103. The court concluded that Plaintiff filed his bankruptcy petition in bad faith because:

1. It was Plaintiff's tenth serial filing since 2016;
2. Plaintiff failed to timely file accurate schedules and other documents;
3. Plaintiff repeatedly sought time extensions and failed to use them to make progress in or prosecute the case;
4. Plaintiff failed to retain counsel;
5. Plaintiff failed to demonstrate an ability to prosecute this case without counsel;
6. Plaintiff failed to file monthly operating reports;
7. Plaintiff failed to turnover proof of insurance, identification, or Social Security Number to the UST;
8. Plaintiff failed to attend the continued Initial Debtor Interview; and
9. Unreasonable delay that is prejudicial to creditors.

See Bankr. Doc. #98. The court barred Plaintiff from filing any petition for relief in the Eastern District of California U.S. Bankruptcy Court for 180 days after entry of dismissal. The court also retained jurisdiction of an adversary proceeding filed by the UST seeking to enjoin Plaintiff from filing a petition in this district for two years without obtaining permission from the Chief Bankruptcy Judge. *See also* AP Doc. #1.

In that adversary proceeding, the court entered Plaintiff's default on April 1, 2021 after giving Plaintiff three extensions of time to file an answer, striking Plaintiff's nonconforming answer, and denying subsequent requests for further time extensions. AP Docs. ##7-10; #12; ##14-15; ##19-20; #22; ##26-27; #29; #32. Default judgment was entered on July 6, 2021 and Plaintiff is enjoined from filing any subsequent petition in this district for two years without permission from the Chief Bankruptcy Judge. AP Doc. #70.

A. Complaint

On June 21, 2021, after dismissal of the bankruptcy case with prejudice but before judgment was entered against Plaintiff in UST's adversary proceeding, Plaintiff filed this complaint against Wilmington Trust, N.A. ("Defendant"). Doc. #1.

The core of Plaintiff's claim are allegations that Defendant violated the automatic stay from December 16, 2020 through January 14, 2021 by seeking to remove Plaintiff from residential real property located at 1810 Mora Avenue, Calistoga, California 94515 ("Mora Property"). *Id.*, at 2. Plaintiff contends that Defendant conspired with the Napa County Sheriff's Department and Plaintiff's state court attorney to dismiss his related state court case and repossess Mora Property. Plaintiff alleges the following timeline:

1. December 15, 2020: Plaintiff filed bankruptcy.

2. December 16, 2020: An unnamed "sergeant" of the sheriff's department informed Plaintiff that Defendant "was very upset about the filing and said that [Defendant] ordered the sheriff department to violate the automatic stay and take possession of [Mora Property] in violation of the chapter 11 case where [Plaintiff] had business leases under protection for the property under title 11 USC 365."[6] *Ibid.*

3. December 17 or 18, 2020: The unnamed sergeant came to Mora Property to conduct a lockout and informed Plaintiff that Defendant supplied to the department an order of dismissal for a bankruptcy appeal. Plaintiff claims this order was fraudulent. The lockout was halted temporarily.

5. December 22, 2021: The sheriff's department returned to Mora Property and conducted a lockout. Possession of Mora Property was returned to Defendant. Plaintiff alleges that Defendant committed fraud by providing the sheriff with an order of dismissal of a related appeal regarding the bankruptcy stay on December 17, 2020. Plaintiff concedes that the sheriff informed him that the stay relief order made the automatic stay ineffective, but then Plaintiff says this court confirmed the automatic stay was in effect for the first 30 days of the bankruptcy on February 26, 2021.[7] So, on this basis, Plaintiff declares Defendant's repossession void.

6. December 26, 2020: Defendant violated the automatic stay again by delivering an auction notice to Plaintiff stating that the possessions located in Mora Property would be sold at auction unless Plaintiff arranged for their retrieval. Plaintiff says that he was given only one day to move out of Mora Property and later learned he had been misled into believing that he would be given full access to Mora Property over the course of the bankruptcy. As result of the stay violation, Plaintiff contends that all notices filed after the bankruptcy are void. *Id.*, at 3.

Plaintiff also accuses Defendant of previous elder abuse and claims he was injured by Defendant on September 14, 2017, September 6, 2019, October 20, 2019, and December 22, 2020. *Id.*, at 4. No

additional information about these allegations is provided. Plaintiff then claims that the court in Napa County erred when it issued a default against "the defendants and against the violation of automatic stay 10/20/20." *Id.* This claim is repeated throughout the complaint.

And in UST's adversary proceeding, Plaintiff claims his answer was filed and he was surprised to see that it was not on the docket.[8] He also claims to be the victim of fraud, conspiracy, and elder abuse by an employee, former counsel, and "the plaintiffs" (presumably the UST). Because he filed an answer, Plaintiff argues the court's authority to issue a judgment is void under bankruptcy law provisions and applicable laws.

Plaintiff insists the automatic stay was in place and was violated when the sheriff's department locked him out on December 22, 2021, which has caused him irreparable harm. He requests an order to protect his belongings since the foreclosure, unlawful detainer judgment, and abandonment notices are all void due to fraud and violations of the bankruptcy stay. An auction to sell Plaintiff's belongings is scheduled for June 22, 2021 at 10:00 a.m. in Santa Rosa, California. Plaintiff requests a temporary restraining order to prevent this auction from proceeding. Plaintiff alleges four causes of action:

(1) Violation of the automatic stay under § 362, for which Plaintiff requests a restraining order under Rule 7001(7) to prevent the sale of personal property located at Mora Property scheduled for June 22, 2021, along with an order that the notice of repossession and subsequent documents are void. *Id.*, at 5.

(2) Fraud under Rule 7001(6) and § 523(a)(6). Plaintiff asserts the [state] court erred when it issued the default "against the defendants [in] violation of automatic stay 10/20/20." Plaintiff repeats that the automatic stay was in place when he lost possession of Mora Property, the sheriff's department violated the stay and injured him and may have caused irreparable harm. Plaintiff makes the same request for a temporary restraining order under Rule 7001(7). *Id.*, at 5-6.

(3) Turnover of property due to willful violation of the automatic stay, injunctive relief under Rules 7001 (1), (7), and § 542 "[d]ue to the fraud and violation[.]" *Id.*, at 6.

(4) Recovery. *Ibid.* Plaintiff prays for an order requiring Defendant to turnover possession of Mora Property to Plaintiff and return belongings that were removed from Mora Property and that were scheduled to be sold at auction on June 22, 2021 in Santa Rosa, California. Plaintiff prays for injunctive relief to restore possession of Mora Property to him because Defendant violated the automatic stay, committed fraud, and had no authority or jurisdiction to repossess Mora Property on December 22, 2020. *Ibid.* Plaintiff requests an order stating that the notice of repossession and all subsequent notices are void due to fraud and violations of the automatic stay. Plaintiff claims to have lost "countless resources" including loss of personal and intellectual property and

has been injured as result of Defendant's alleged fraudulent actions and this motion, proceeding, bankruptcy case, and appeal. Plaintiff requests punitive damages of $3 million dollars and additional time to amend the complaint. *Id.*, at 7.

B. Mora Property was not affected by the automatic stay

Before Plaintiff's serial-filings in 2016, his business partner, Bruce Chadbourne, filed Bankruptcy Case No. 15-10249 in the Northern District of California on March 12, 2015. *See* Bankr. Doc. #82, Ex. 4. Chadbourne was the original owner of Mora Property, and this case was allegedly filed to prevent its foreclosure. Bankr. Doc. #78. That case was dismissed on March 31, 2015.

Foreclosure proceedings resumed post-dismissal. On September 20, 2017, Chadbourne transferred a 25% fractional interest in Mora Property to Plaintiff as a gift for no consideration by way of an unauthorized grant deed. Bankr. Doc. #82, Ex. 5. The next day, September 21, 2017, Plaintiff filed his fifth bankruptcy case since 2011 (Case No. 17-13630). Plaintiff's fifth bankruptcy was quickly dismissed on December 1, 2017. He and Chadbourne continued to file bankruptcy cases to protect Mora Property and other real property.

A year later, after Plaintiff's seventh bankruptcy case (Case No. 19-10027) was dismissed on January 31, 2019, a new foreclosure sale for Mora Property was rescheduled for February 14, 2019. Having exhausted the automatic stay between himself and Plaintiff, Chadbourne transferred an 8% interest in Mora Property, again as a gift, to Plaintiff's spouse, Ayesha Khan. *Id.*, Ex. 11. Ayesha Khan filed a chapter 13 bankruptcy petition in the Eastern District of California (Case No. 19-10511), which was dismissed on March 15, 2021. *Id.*, Ex. 12. The foreclosure of Mora Property was rescheduled for May 17, 2019. The day before the sale, Chadbourne filed another petition in the Northern District of California, Santa Rosa Division, Case No. 19-10346. *Id.*, Ex. 13.

Defendant filed a motion for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), (2), and (4) on May 24, 2019. *Id.*, Ex. 14. Defendant alleged there was substantial default on the underlying loan, no equity in Mora Property, and bad faith since there had been six filings purporting to affect Mora Property since 2016 and all were dismissed for failing to comply with a court order. The court denied relief under § 362(d)(1) and (2) as moot because Chadbourne's case had already been dismissed, but the court granted the request for relief from the stay *in rem* under § 362(d)(4). *Id.*, Ex. 15.

An order entered under § 362(d)(4) is binding in any other bankruptcy case purporting to affect real property filed not later than two years after the date of the order. The order was entered on July 8, 2019, so the automatic stay in any bankruptcy will not affect Mora Property until after July 8, 2021.[9] This order was recorded in Napa County on July 25, 2019. Bankr. Doc. #80, Ex. 1.

So, although the automatic stay in this case did exist for 30 days before expiring under § 362(c)(3)(A), the stay did not affect Mora

Property because the order under § 362(d)(4) in the earlier case was effective.

C. The OSC

On August 25, 2021, the court issued an OSC directing Plaintiff to show any legal cause why this case should not be dismissed for the following reasons:

1. Insufficient service of process because the summons and the complaint were not served;
2. Lack of subject matter jurisdiction because the underlying bankruptcy case was dismissed with prejudice; and
3. Failure to state a claim upon which relief can be granted.

Doc. #15. Plaintiff was ordered to appear at the hearing and file a written response not later than September 8, 2021 in response to the OSC. Plaintiff did not file a response and his default is entered.

II. DISCUSSION

This case should be dismissed under Civil Rule 12 (incorporated by Rule 7012) because Plaintiff has failed (1) to serve the complaint, (2) establish jurisdiction, and (3) state a claim upon which relief can be granted.

The court must treat *pro se* litigants "with great leniency when evaluating compliance with the technical rules of civil procedure." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (citing *Draper v. Coombs*, 795 F.2d 915, 924 (9th Cir. 1986)). "Thus, before dismissing a *pro se* complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity amend effectively." *Ferdik*, 963 F.2d at 1261 (citing *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Unless it is clear that the deficiencies of the complaint cannot be cured by amendment, *pro se* litigants must be given leave to amend. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (*en banc*). If amendment would be futile, the court may exercise its discretion and deny leave to amend. *Id.*

A. Insufficient Service of Process

The complaint should be dismissed because Plaintiff did not serve the complaint. The complaint was filed on June 21, 2021 and a summons was issued on that same date. Docs. #1; #3. Defendant is a National Bank insured by the Federal Deposit Insurance Corporation ("FDIC"), which makes it an insured depository institution. 11 U.S.C. § 101(35)(A); 12 U.S.C. § 1813(c)(2) ("insured depository institution" means any bank whose deposits are insured by the FDIC).

Service on insured depository institutions in adversary proceedings is governed by Rule 7004(h). Rule 7004(h) requires service to be made by certified mail addressed to a named officer, unless one of three exceptions specified in Rule 7004(h)(1-3) have been met. There is no indication that any of these exceptions apply, and even if any did, those exceptions still require service by other means.

Plaintiff did not make any attempt to serve Defendant under Rule 7004(h) or by any other means.

Rule 7004(e) provides:

> Service made under [Civil] Rule 4(e), (g), (h)(1), (i), or (j)(2) . . . shall be by delivery of the summons and complaint within 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

Rule 7004(e). The summons was issued on June 21, 2021 and more than seven days have passed since its issuance. Doc. #3. So, if Plaintiff wants to serve Defendant, he must first obtain a re-issued summons from the clerk and serve a copy of it with the complaint under Rule 7004(h).

Civil Rule 4(m) (incorporated by Rule 7004(a)(1)) provides:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under [Civil] Rule 4(f), 4(h)(2), or 4(j)(1), or to service under [Civil] Rule 71.1(d)(3)(A).

Civil Rule 4(m). Civil Rule 4(m) requires a court to grant an extension of time when the plaintiff shows good cause for the delay and permits the court to grant an extension even in the absence of good cause. *Mann v. Am. Airlines*, 324 F.3d 1088, 1090 n.2 (9th Cir. 2003). Courts have broad discretion to extend time for service under Civil Rule 4(m). *In re Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *Henderson v. United States*, 517 U.S. 654, 661 (1996) (the Civil Rule 4 90-day provision "operates not as an outer limit subject to reduction, but as an irreducible allowance.").

There are several factors that the court may consider in deciding whether to exercise its discretion to extend the time for service, including "a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service." *Scott v. Sebelius*, 379 F. App'x 603 (9th Cir. 2010) quoting *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007).

September 19, 2021 was the 90th day since Plaintiff filed the complaint. Plaintiff was notified that he did not properly serve the complaint and that this adversary proceeding would be dismissed for failure to serve the complaint in the OSC. Doc. #15. That said, even if Plaintiff had properly served Defendant under Rule 7004(h), the

court still may dismiss the adversary proceeding for the myriad of other reasons stated below.

B. Jurisdiction

This proceeding should be dismissed because Plaintiff has failed to meet his burden of demonstrating that this court has jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981) citing *Cal. ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979). The party asserting jurisdiction has the burden of proof of demonstrating jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Plaintiff conclusively states in his complaint that this is a core proceeding, and the court has jurisdiction under Rules 7001(1), (6), and (7). Doc. #1, at 1. But Plaintiff has failed to provide any additional statements or other evidence supporting his contention that jurisdiction exists here. Citation to the Federal Rules of Bankruptcy Procedure in a pleading does not confer jurisdiction. The procedural rules Plaintiff cites identify what type of proceeding filed in a bankruptcy case must be an adversary proceeding. The rules do not confer *power* on the court to adjudicate a proceeding. 28 U.S.C. § 2075; *Holder v. Simon*, 384 F. App'x 669 (9th Cir. June 21, 2010) [Rule 60 (b) does not confer jurisdiction to set aside a state court order]; *U.S. v. Sadler*, 480 F. 3d 932, 936 (9th Cir. 2007); *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 910 (B.A.P. 9th Cir. 1999).

1. *Core Proceeding*

A proceeding is classified as "core" under 28 U.S.C. § 157 "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Torkelsen v. Maggio (In re Guild & Gallery Plus)*, 72 F.3d 1171, 1178 (3d Cir. 1996) (quoting *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261, 267 (3d Cir. 1991); *Beard v. Braunstein*, 914 F.2d 434, 444 (3d Cir. 1990); *Matter of Wood*, 825 F.2d 90, 97 (5th Cir. 1987)).

Here, the complaint (1) alleges violations of the automatic stay under § 362; (2) requests a temporary restraining order to prevent a sale of personal property under Civil Rule 65 (Rule 7065); (3) alleges a fraudulent conveyance and seeks turnover of property under § 542.

Some of these are "core" proceedings under 28 U.S.C. § 157(b)(2): orders to turnover property of the estate (E); proceedings to determine, avoid, or recover fraudulent conveyances (H), and arguably other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

A determination on the stay violation issue also could arguably affect the liquidation of assets of the estate but does not here because no stay was in effect with respect to Mora Property.

As noted in the minutes denying Plaintiff's request for a temporary restraining order, the request was stale because the sale was scheduled for June 22, 2021 while the hearing was scheduled for August 17, 2021 — 56 days after the sale occurred. Docs. ##8-9.

The cause of action for turnover of property is also impacted by 11 U.S.C. § 349(b)(2), which states that unless the court, for cause, orders otherwise, a dismissal vacates any order, judgment, or transfer ordered under 11 U.S.C. § 542. The underlying case is dismissed. There is no trustee or debtor-in-possession to accept a turnover even it was appropriate under these facts. So, the court cannot fashion relief such as the turnover of assets and Plaintiff's cause of action for turnover of property to the estate under § 542 fails.

The fraudulent transfer claims also fail to establish this court's jurisdiction. The underlying bankruptcy case is dismissed and has been since February 24, 2021. The authority to bring such an action resides with the case trustee or debtor-in-possession. See 11 U.S.C. §§ 544, 548. Neither exist now. There is no basis for this court to retain jurisdiction over that claim.

2. *Arising in/Related to in Jurisdiction*

"As a general rule, the dismissal of a bankruptcy case should result in the dismissal of 'related proceedings' because the court's jurisdiction of the latter depends, in the first instance, upon the nexus between the underlying bankruptcy case and the related proceedings." *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989).

"[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). "A bankruptcy court's 'related to' jurisdiction is very broad, 'including nearly every matter directly or indirectly related to the bankruptcy.'" *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005) quoting *In re Mann*, 907 F.2d 923, 926 n.4 (9th Cir. 1990).

Plaintiff's underlying bankruptcy case was dismissed with prejudice on February 24, 2021. Bankr. Doc. #103. Plaintiff was barred from refiling any petition in this district for a period of 180 days after entry of the order – until August 23, 2021. *Id.* The court specifically retained jurisdiction of UST's adversary proceeding. *Id.* Then, in that adversary proceeding, the court entered Plaintiff's default on April 1, 2021. AP Doc. #42. Judgment was entered against Plaintiff on July 6, 2021 barring him from filing another petition in this district without the Chief Bankruptcy Judge's permission. AP Doc. #71. The court denied Plaintiff's motion to set aside the bankruptcy dismissal on July 29, 2021. Bankr. Doc. #149. Plaintiff's motion to set aside the default and judgment in

UST's adversary proceeding is scheduled for September 29, 2021. AP Docs. ##75-76.

Plaintiff filed this adversary proceeding while barred from filing any petition in this district, but there is no pending bankruptcy case upon which it is based. The orders dismissing the bankruptcy case and denying the motion for reconsideration are now final.

Dismissal of a bankruptcy case normally results in dismissal of related adversary proceedings unless the court retains jurisdiction, as it did for the UST's adversary proceeding. *Porges v. Gruntal & Co. (In re Porges)*, 44 F.3d 159, 162-63 (2d Cir. 1995). But bankruptcy courts are not automatically divested of jurisdiction over related claims when the underlying bankruptcy case is dismissed and have jurisdiction over related claims. *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992). Courts look to 11 U.S.C. § 349 to determine whether bankruptcy jurisdiction terminates over related cases when the underlying bankruptcy case is dismissed. *Ibid.* If not covered under § 349, then the court may use discretion to retain jurisdiction after considering: (1) judicial economy; (2) convenience; (3) fairness; and (4) comity. *Linkway Inv. Co. v. Olsen (In re Casamont Investors)*, 196 B.R. 517, 524-25 (B.A.P. 9th Cir. 1996); *accord.*, *Carraher*, 971 F.2d at 328; *Smith*, 866 F.2d at 580; *In re Morris*, 950 F.2d 1531, 1534 (11th Cir. 1992).

The stay violation claim does trigger "arising in or related to" jurisdiction under 28 U.S.C. § 1334(b). 11 U.S.C. § 362(k); *see also Burgner v. Ga. Fed. Credit Union (In re Burgner)*, 218 B.R. 413 (Bankr. E.D. Tenn. 1998) (finding that 11 U.S.C. § 349 does not require dismissal of alleged stay violations).

Even though the case is dismissed, 28 U.S.C. § 1334(a) suggests that the bankruptcy case does not need to be open to exercise § 1334(b) jurisdiction. *Menk*, 241 B.R. at 904-05 (finding that reopening a case under Rule 4007(b) was not a jurisdictional prerequisite to considering a dischargeability action under 11 U.S.C. § 523(a)).

But, as noted above and in the minutes denying Plaintiff's request for a temporary restraining order (Doc. #8) and denying Plaintiff's request to vacate dismissal of the bankruptcy (Bankr. Doc. #148), the automatic stay was not in effect at the time the underlying bankruptcy case was filed with respect to Mora Property. Bankr. Docs. #80, Ex. 1; #82, Exs. 15, 17. Even though violations of the automatic stay would be something this court could hear post-dismissal, there was no automatic stay concerning Mora Property to violate. So, as a matter of law, assuming everything Plaintiff alleges is true, his stay violation cause of action fails as a matter of law. Plaintiff cannot succeed on the merits.

3. *Supplemental and Ancillary Jurisdiction*

The Ninth Circuit has approved the bankruptcy court's exercise of supplemental jurisdiction "over state tort and contract claims not otherwise connected to the bankruptcy so long as those claims share a common nucleus of operative facts with 'related to' claims and would ordinarily be expected to be resolved in one judicial

proceeding along with the 'related to' claims." *Deitz v. Ford (In re Deitz)*, 760 F.3d 1038, 1054 n.4 (9th Cir. 2014) (internal quotations omitted) quoting *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1194-95 (9th Cir. 2005).

Since there do not appear to be any related to or arising in claims, supplemental jurisdiction over claims sharing a common nucleus of fact is not applicable here.

If there is no other basis for jurisdiction and the adversary proceeding has been filed after dismissal, the court must find ancillary jurisdiction to hear the proceeding. *Sea Hawk Seafoods, Inc. v. Alaska (In re Valdez Fisheries Dev. Ass'n)*, 439 F.3d 545 (9th Cir. 2006). The court may assert ancillary jurisdiction to (1) permit disposition of factually interdependent claims by a single court; or (2) vindicate its authority or effectuate its decrees. *Id.* at 549, citing *Kokkonen*, 511 U.S. at 379-80; *see also Battle Ground Plaza, LLC v. Ray (In re Ray)*, 624 F.3d 1124, 1136 (9th Cir. 2010) (rejecting ancillary jurisdiction because litigation in a breach of contract claim was predicated on evidence that came to light after the case had been closed).

There is no indication here that this adversary proceeding will permit this court to dispose of factually interdependent claims nor a need for this court to vindicate its authority or effectuate its decrees. No stay violation occurred because of the effectiveness of an order issued in another bankruptcy case under § 362(d)(4).

C. Failure to state a claim upon which relief can be granted

This proceeding should be dismissed because the complaint fails to state a claim upon which relief can be granted. As the court has stated in other rulings, there was no automatic stay affecting Mora Property when the relevant events allegedly occurred. Mora Property was the subject of *in rem* stay relief order entered in the Northern District of California under 11 U.S.C. § 362(d)(4) on July 8, 2019 and could not be affected by any automatic stay in any other bankruptcy case until at least July 9, 2021. The underlying bankruptcy case here was dismissed by then.

Civil Rule 12(b)(6) is applicable to adversary proceedings under Rule 7012(b) and allows the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Courts may dismiss a complaint if it "fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016) (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1060, 1041 (9th Cir. 2010); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "A complaint need not state 'detailed factual allegations,' but must contain sufficient factual matter to 'state a claim that is plausible on its face.'" *Doan v. Singh*, 617 F.App'x 684, 685 (9th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544-55 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is

liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

When considering dismissal, all material facts alleged in the complaint are to be taken as true and viewed in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). "[T]he tenet that a court must accept as true all allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 555). The court may also draw on its "judicial experience and common sense." *Id.* at 679.

Dismissal under Civil Rule 12(b)(6) without leave to amend is proper only if there is some obvious bar to securing relief on the face of the complaint. *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2004). The court is only required to give the parties "an opportunity to at least submit a written memorandum in opposition to such motion." *Wong v. Bell*, 642 F.2d 359, 361-62 (9th Cir. 1981) (quotation omitted); *cf. Reed v. Lieurance*, 863 F.3d 1196, 1207-08 (9th Cir. 2017).

Here, Plaintiff asks for injunctive relief to prevent Defendants from selling personal property located at Mora Property. That sale has already occurred, so the cause of action is stale. The court already denied Plaintiff's motion for a temporary restraining order on August 17, 2021. Docs. ##8-9.

Plaintiff also asks for damages as result of a purported stay violation by repossessing Mora Property. But as discussed above, the automatic stay did not affect Mora Property because of the recorded § 362(d)(4) order. So, this claim also fails as a matter of law.

Plaintiff seeks damages and turnover of real and personal property, but as discussed above, the claim for turnover of property also fails due to the dismissal of the bankruptcy case. The real property was not affected by the stay, so the foreclosure was not stayed by 11 U.S.C. § 362. It also appears that Defendant did provide an opportunity for Plaintiff to retrieve his personal property. *See* Bankr. Doc. #80, Exs. 2-14.

III. CONCLUSION

Plaintiff failed to timely file a written response to the OSC, and his default is entered. No party in interest timely filed written opposition. Accordingly, this proceeding will be DISMISSED for insufficient proof of service, lack of subject matter jurisdiction, and failure to state a claim upon which relief can be granted. The court will issue an order.

[4] Citations to "Doc." are to the docket of this adversary proceeding, Adv. Proc. No. 21-1026; "Bankr." citations are to the docket of Plaintiff's bankruptcy, Case No. 20-13855; and "AP" refers to UST's adversary proceeding, Adv. Proc. No. 20-01068.
[5] Unless otherwise indicated, references to "LBR" are to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; references to "Rule" are to the Federal Rules of Bankruptcy Procedure; references to "Civil Rule" are to the Federal Rules of Civil Procedure; and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
[6] This is hearsay. Fed. R. Evid. 801, 802.
[7] Plaintiff is likely referring to the February 23, 2021 hearings on his motions to extend the automatic stay and extend the time to extend the automatic stay. In the rulings denying those motions, the court noted that § 362(c)(3)(A) causes the automatic stay to expire 30 days after a case is filed if it is the second pending case within a one-year period, unless a motion to extend the automatic stay under § 362(c)(3)(B) is heard within 30 days of filing. Bankr. Case No. 20-13855, Docs. #94; #96. While true that the automatic stay was in effect for 30 days, that stay did not affect Mora Property due to the *in rem* relief order recorded against it in another bankruptcy case.
[8] Plaintiff may be referring to the "DEBTORS RESPONSE" document filed on March 31, 2021, nine days after the March 22, 2021 deadline to file an answer. *See* Bankr. Doc. #117. That document was the first filed after his two motions to extend time to file an answer were denied. But this "response" was not an answer. Even if it were to be construed as an answer, it did not comply with the requirements of Civil Rule 8(b) and was not timely.
[9] In other filings, Defendant has indicated that Chadbourne filed a motion for reconsideration, which was denied for rehashing prior argument and including new arguments not in the original motion. Bankr. Docs. #78; #80, Exs. 16, 17. Chadbourne filed a notice of appeal regarding the *in rem* order on September 3, 2019. Doc. #80, Ex. 18. That appeal was dismissed on June 16, 2020, reinstated on July 16, 2020, and dismissed again on November 5, 2020. *Id.*

4. 19-13374-B-7 **IN RE: KENNETH HUDSON**
19-1128 GEG-3

MOTION FOR COMPENSATION FOR GLEN E GATES, PLAINTIFFS ATTORNEY(S)
8-3-2021 [152]

BROWN V. HUDSON
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The order is to be prepared by Plaintiff's counsel.

Michelle Brown ("Plaintiff") requests $32,488.61 in fees and $1,348.50 in costs pursuant to judgment entered July 22, 2021 under Fed. R. Civ. P. ("Civil Rule") 54 (incorporated by Fed. R. Bankr. P.

("Rule") 7054) and Cal. Code Civ. P. ("C.C.P.") §§ 1021, 685.040, 1032, and 1033.5. Doc. #152.

Kenneth Ray Hudson ("Defendant") timely filed written opposition. Defendant contends (1) the fees should be reduced because Plaintiff artificially and unreasonably increased the fees incurred in this adversary proceeding; (2) the fees incurred in the lead bankruptcy are unreasonable and should be disallowed; and (3) the fees incurred drafting an unnecessarily long motion for summary judgment should be disallowed. Doc. #160.

Plaintiff replied, arguing that Defendant's lack of cooperation throughout this proceeding necessitated the requested fees. Doc. #161.

This motion was filed on 28 days' notice under LBR 9014-1(f)(1) and will proceed as scheduled.

Plaintiff retained Gates Law Group as counsel on August 2, 2019. Docs. #155; #156, Ex. 1. Plaintiff's counsel spent 103.60 hours at an average rate of $350.00 an hour, resulting in $36,260.00 in fees and expenses. Doc. #154. Plaintiff received a $3,771.39 professional credit, resulting in $32,488.61 in fees. Plaintiff's counsel's services included, but are not limited to: (1) conferencing with other creditors, researching fraud issues, attending the 341 meeting of creditors, and corresponding with Defendant's and trustee's counsel; (2) preparing and filing the complaint, corresponding with counsel, reviewing claims, responses, and state court pleadings; (3) conducting discovery; (4) drafting pretrial statement, reviewing evidence, preparing and filing the motion for summary judgment and replying to Defendant's response; and (5) preparing and filing this motion. Doc. #157, Ex. 2.

In response, Defendant argues that the court should diverge downwards from the lodestar method of calculating fees because Plaintiff artificially and unreasonably increased the amount of fees incurred. Doc. #160.

The lodestar method is a two-step process. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). First, the court calculates the lodestar figure by multiplying the number of hours reasonably expensed on a case at a reasonable hourly rate, or the "prevailing market rate in the relevant community." *Purdue v. Kenny A.*, 559 U.S. 542, 551 (2010). This amount is meant to represent the amount the prevailing attorney would have received if he or she had been representing a paying client in a comparable case. This amount is presumptively reasonable. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). Second, the court determines whether to modify the lodestar figure upward or downward, based on factors not included in the lodestar figure. *Perdue*, 559 U.S. at 553-54.

Defendant argues that the lodestar figure should be modified downwards because Plaintiff intentionally incurred more fees than necessary to prosecute this action. Doc. #160. This includes unreasonably billing Defendant for administrative matters in the main bankruptcy case.

Since this was an extremely simple and straightforward adversary proceeding due to collateral estoppel, there was no reason for Plaintiff to file a 482-page motion for summary judgment (after inclusion of exhibits). Further, Defendant contends that Plaintiff never attempted to resolve the matter informally and sought to increase her maximum recovery in excess of fees previously awarded in state court. Defendant cites to a letter dated December 10, 2020 in which Plaintiff's counsel requested $65,000, which was an amount considerably more than the underlying judgment. This request for future unearned fees is unreasonable, Defendant claims, because Plaintiff took an $8,813.21 judgment and added $34,000 in attorney fees to the judgment, and then used the bankruptcy process to add an additional $35,000+ in attorney fees.

Defendant insists that the fees incurred in the main bankruptcy case are unreasonable and should be disallowed. Defendant claims that Plaintiff misstates 10.4 hours for reviewing pleadings and conferencing with other creditors, Defendant's counsel, and the trustee. Instead, Plaintiff argues that Defendant billed for 18.7 hours ($6,545 in fees), which should be disallowed because they consist of the following:

- 0.3 hours for a telephone call with Don Poole on October 2, 2019, totaling $105;
- 0.6 hours for a telephone call with the trustee October 7, 2019, totaling $210;
- 0.3 hours in a telephone conference with the trustee on October 25, 2019, for $105;
- 6.0 hours to attend the 341 meeting of creditors on November 1, 2019, including travel time, totaling $2,100;
- 0.3 hours to review correspondences from the bankruptcy court on November 2, 2019, totaling $105;
- 0.5 hours on November 6 and 8, 2019 for corresponding with Don Poole and reviewing trustee's attorney's pleadings, totaling $175;
- 0.3 hours to review correspondence from the court on November 27, 2019, totaling $105;
- 0.5 hours to review bankruptcy notices and communicate with the trustee on January 6 and 15, 2020, for $175 in fees;
- 0.5 hours to review proofs of claim on January 28 and February 4, 2020, for $175 in fees;
- 4.8 hours from February 13, 2020 through February 20, 2020 to review documents relating to a motion to sell Defendant's mineral interests and corresponding with the trustee, for $1,680 in fees;
- 1.5 hours to attend the hearing on the motion to sell and then review the pre-hearing disposition on February 25 and March 4, 2020, totaling $525;
- 0.3 hours on April 3, 2020 for work related to the mineral rights sale, totaling $105;
- 1.2 hours from May 1 to 5, 2020, to review matters regarding a preferential lien recorded on the mineral rights, totaling $420;
- 0.3 hours on May 26, 2020 to review a notice regarding application regarding appointment as counsel, totaling $105;

- 0.3 hours on July 20, 2020 to review the court's order regarding scheduling, which was a 1-page minute order, totaling $105; and
- 1.4 hours to review bankruptcy abandonment motions between August 10, and October 20, 2020, totaling $490.

Defendant argues that all of these fees should be disallowed because they are unreasonable. Doc. #160. The court notes that the fees to which Defendant objects add up to 19.1 hours, or $6,685 in fees.

Finally, Defendant argues that the fees incurred drafting the unnecessary long motion for summary judgment should be disallowed, since it consisted of 482 total pages. Much of this consisted of documents in the underlying state court judgment. Thus, Defendant disputes the reasonableness of spending 67.80 hours and $23,748.70 in fees to draft the motion for summary judgment. Since the motion consisted of only 35 pages, in which 14 pages contained irrelevant statements of fact, Plaintiff should only receive 21 hours of billable time. Defendant calculates this amount by equating 1 page to 1 hour of billable time, resulting in $7,350.00 in fees.

In sum, Defendant argues that the request for fees should be reduced by $16,398.70 for the overly lengthy summary judgment motion, $6,545.00 for the unreasonable work relating to the main bankruptcy case and communication with the trustee. This would reduce the fees from $32,488.61 to $9,544.91, plus $1,348.50 in costs, for a total award of $10,893.41. *Id.*

In response, Plaintiff argues that reference to the state court documents was because every document submitted as part of the summary judgment motion was part of the state court's findings of facts and conclusions of law. Doc. #161. Further, Plaintiff insists that she did attempt to resolve this case earlier.

Defendant's argument that the motion was unnecessarily long and was a "simple" matter of adopting the state court's findings ignores two important points. First, Defendant opposed the "simple" adoption of state court findings by opposing the application of issue preclusion. Second, it ignores the rule that it is incumbent on the party seeking issue preclusion to reveal [in a summary judgment motion] the controlling facts and the exact issues litigated in the first suit. *Kelly v. Okoye (In re Kelly)*, 182 B.R. 255, 258 (B.A.P. 9th Cir. 1995). Reasonable doubt as to what was decided weighs against issue preclusion. *Id.* So, Plaintiff had a high burden to meet in the motion. Plaintiff needed to convince this court that all elements of issue preclusion were present. Defendant's "simplification" of Plaintiff's burden here is unpersuasive.

Add to this that the state court awarded equitable relief to the Plaintiff. The award was not only for damages. So, Plaintiff was required to show actual findings of issues that would result in a non-dischargeable judgment.

Defendant's reference to an early Plaintiff offer to accept a $65,000 payment does not evidence unreasonableness of fees. The fee request here as a component of the previous offer is less. But that

is not even relevant to "disprove the validity or amount of a disputed claim." Fed. Rule Evid. 408 (a).

That said, the court does find a portion of the fees requested as not reasonable to award against the Defendant here. That is not to say the fees charged were unreasonable—the $350.00 per hour rate is not disputed by Defendant. But the court finds a portion of 19.1 hours identified by Defendant should not be awarded against the Defendant in this action:

1. The hours charged for telephone conferences with the Trustee are not all related to the prosecution of the claim of this litigation. The court will disallow the 1.2 hours billed on October 2, 7, and 25, 2019. This results in a reduction of $420 (1.2 hours).
2. Travel time to the meeting of creditors was necessarily incurred by counsel for Plaintiff because this is a case assigned to the Bakersfield session of the court. The court will allow 2.0 hours at $350/hour for the meeting of creditors and 4 hours at $175/hour for travel time. This is a one-half reduction of the 4.0 hours billed for the round trip from Fresno to Bakersfield. The court is very familiar with that "commute." This reduces the charge by $700.00.
3. The hours for communication with creditors, third parties, and the trustee is likewise a high charge for what was at stake in this litigation. The court will disallow the fees billed on November 2, 6, 8, and 27, 2019, and January 6, 15, 28, and February 4, 2020. This results in a reduction of $735 (2.1 hours).
4. Of the 4.8 hours billed from February 13 to 20, 2020, the court will allow the 1.9 hours from February 15-17, and February 20, 2020 for reviewing the Answer, pleadings, and exhibits from Defendant, correspondence with the Plaintiff, and review of the file. The remaining fees in this block of time will be disallowed. This results in a reduction of $1,015 (2.9 hours).
5. The court will allow 1.3 hours for correspondence with the Plaintiff on February 25, 2021 and attendance at the telephone hearing in Bakersfield on March 4, 2020. This results in a $70 reduction for reviewing correspondence and pleadings on March 3, 2020 (0.2 hours).
6. The 0.3 hours billed for a telephone conference with the claimant for "sale v. secured creditor" will be disallowed. This is a reduction of $105.
7. The time charged for analyzing/reviewing the preferential lien does not seem appropriate to the issues in this litigation. If the lien was preferential, the trustee would administer the asset. However, that block of time also includes 0.3 hours for reviewing a stipulation from the Defendant, which is related to this litigation and will be allowed. This reduces the request by $315 (0.9 hours).
8. The time charged for reviewing the notice of appointment of trustee's counsel is likewise unrelated. This reduces the request by $105 (0.3 hours).

9. The time charged for reviewing the order regarding scheduling appears to be unrelated also. This will be reduced by $105 (0.3 hours)
10. Finally, the 1.4 hours charged for reviewing the abandonment motion is not appropriate for this claim litigation and will be disallowed, except for the 0.2 hours on August 17, 2020 to review pleadings from opposing counsel. This results in a reduction of $420 (1.2 hours).

Except for those reductions of $3,990, the court finds the remaining fees reasonable as a component of the judgment here. The fees billed in connection with the "unnecessarily" long summary judgment motion will be allowed. There is no dispute as to costs claimed. So, the court will enter an order awarding Plaintiff $28,498.61 in fees and $1,348.50 in costs.

5. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 MRH-2

MOTION TO EXTEND TIME
8-9-2021 [58]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part and denied in part.

ORDER: As determined at the hearing.

Medline Industries, Inc. ("Defendant") moves for an extension of the deadlines in the court's scheduling order (Doc. #56) by 90 days. Doc. #58.

Tulare Local Healthcare District ("Plaintiff") timely opposed the motion to extend the deadlines. Doc. #79.

Defendant replied. Doc. #87.

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

Prior to Plaintiff's chapter 9 bankruptcy, Defendant provided Plaintiff with goods used in its healthcare operations. Defendant filed Proof of Claim No. 208 on April 9, 2018 in the amount of $328,123.58 for goods sold by Defendant to Plaintiff. Claim. #208.

On November 4, 2019, Plaintiff filed a complaint against Defendant seeking to (a) avoid and recover certain payments Plaintiff made to Defendant prior to the petition date under §§ 547, 550 and (b) disallow Claim No. 208 under § 502(d). Doc. #1. Defendant answered the complaint and denied all liability. Doc. #25. The court entered

a scheduling order on March 16, 2020. Doc. #33. This scheduling order was amended on February 25, 2021. Doc. #56. This amendment was largely needed because of Medline's apparent policy disallowing travel by their employees during the COVID-19 pandemic.

Defendant states that it was contacted by Plaintiff on July 22, 2021 regarding outstanding discovery requests and depositions and scheduled a telephone call for July 23, 2021. Doc. #58. Defendant claims that Plaintiff's counsel failed to attend the telephone call and did not speak until August 5, 2021. During that conversation, Plaintiff's counsel advised Defendant that it would be moving for summary judgment. Defendant noticed the deposition of Plaintiff's corporate representative for August 26, 2021, but Plaintiff did not confirm whether the representative will be available for that date, but that she will be on vacation for one week in August. Defendant further states that Plaintiff would not agree to extend the deadlines under the scheduling order despite its good faith efforts.

As result, Defendant requests a 90-day extension of the deadlines to permit it to complete discovery. If Defendant does not receive this extension, it will not be able to obtain discovery, take Defendant's representatives' depositions, and obtain discovery from certain third-party witnesses prior to the close of discovery and the forthcoming summary judgment motion. Defendant argues that third-party discovery is appropriate in this case because Plaintiff claims that certain aspects of its relationship with Plaintiff were unusual. However, the discovery taken so far suggests that those aspects were common to many, if not all, of Plaintiff's vendors leading up to the bankruptcy case. And given allegations surrounding Plaintiff's management pre-petition, discovery is needed because it impacts Defendant's ordinary course of business defense.

Further, Defendant claims that Plaintiff has not answered written discovery pending since June 29, 2020 and has generally been difficult to reach regarding discovery and scheduling issues. Defendant has not previously sought an extension of time and claims to have been diligent seeking discovery in this adversary proceeding.

In response, Plaintiff alleges that Defendant has failed to diligently pursue discovery for the past 21 months. Doc. #79. Plaintiff claims to have produced over 42,000 pages of documents to Defendant. The court has already extended the scheduling deadlines once and Plaintiff argues that Defendant has failed to show good cause for extending the discovery deadlines a second time.

A scheduling order "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. ("Civil Rule") 16(b)(4). "A scheduling order is not 'a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). "[Civil] Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Id.* at 609. "Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Id.* Prejudice to the opposing party may be considered, but "the focus of the inquiry is

upon the moving party's reasons for seeking modification . . . If that party was not diligent, the inquiry should end." *Id.*; *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294-95 (9th Cir. 2000).

Defendant insists that Plaintiff has failed to make a showing of diligence. Plaintiff claims it produced over 42,000 documents to Defendant by March 2021, but Defendant did not produce any discovery until August 23 and 26, 2021, which consisted of only 74 pages. Doc. #84. Though Defendant alleges that there has been a lack of communication, Plaintiff claims that the parties have routinely met and conferred over discovery and even agreed to mutual deadline extensions. Moreover, Plaintiff argues that Defendant has failed to timely review the information provided by Plaintiff between December 2020 and March 2021. *Id.* Due to Defendant's lack of diligence, it now seeks to delay trial by three more months. Plaintiff argues that Defendant's carelessness and delay does not meet the good cause standard under Civil Rule 16(b), so the motion should be denied. Doc. #79.

In reply, Defendant claims there is good cause for an extension of time. First, Defendant states that a mediation was scheduled early in this case, but there were conflicts of interest because the mediators' law firm is counsel for the Plaintiff. Defendant insists that this should have been disclosed earlier. After a mediator was chosen, Defendant says that Plaintiff took an objectively unreasonable position – that Defendant had no subsequent new value even though Plaintiff acknowledges that subsequent new value had been provided in other pleadings. Doc. #88. Since this position is at odds with that taken by Plaintiff in its motion for summary judgment (Doc. #67), Defendant declined to move forward with mediation.

Second, Defendant says that Plaintiff failed to respond to discovery requests for nearly a year. When it finally produced documents, Plaintiff failed to produce certain "native" files critical to Defendant's ordinary course of business defense. *Id.* Defendant noted this deficiency in an email to Plaintiff's counsel on August 26, 2021. Then, Plaintiff produced hundreds of files in their native format that had not been previously produced.

Third, Defendant alleges that Plaintiff's counsel failed to meet and confer regarding discovery issues in a timely manner. Doc. #87. Plaintiff's counsel unilaterally canceled or did not appear at the discovery conferences and was difficult to reach regarding outstanding discovery matters.

Fourth, due to scheduling conflicts, another attorney at Greenberg Traurig, LLP planned to conduct the deposition of Plaintiff's Civil Rule 30(b)(6) witness, but the attorney contracted COVID-19, which made the deposition unfeasible. When seeking an extension of the discovery period to permit the rescheduling of the deposition, Plaintiff refused to agree to the 90-day extension and any extension of the discovery period.

Due to all of the above circumstances, Defendant claims that it has been diligent in pursuing discovery in the adversary proceeding.

However, due to the COVID-19 diagnosis and Plaintiff's failure to produce documents timely or appear at discovery conferences, Defendant insists good cause exists to grant the extension of time.

Alternatively, Defendant requests a shorter extension of time so the court can consider the arbitration motion and, depending on the outcome, the parties can proceed to arbitration or complete discovery.

This court has wide discretion in determining whether a scheduling order can be modified. *DRK Photo v. McGraw Hill Global Educ. Holdings, LLC,* 870 F. 3d 978, 989 (9th Cir. 2017). The court is not going to make a finding as to whether any party or their counsel failed to appear at discovery conferences. No party filed a motion to compel or otherwise seek to enforce discovery demands. The claims of both parties are therefore impossible to decipher and are now nothing more than mutual griping. Either party had a panoply of remedies to bring to the court before this.

Defendant essentially "paused" this litigation precluding in-person depositions early because of defendant's policies. Doc. #38. "Virtual" depositions were unworkable, according to both parties. *Id.* This court has been accommodating to the parties in revising the scheduling order to accommodate counsel's needs. Defendant has not articulated a reason 90 additional days are necessary to prepare a defense. This is troubling because of the length of time this litigation has been pending.

Plaintiff has really provided no reason it is prejudiced by a further modification under the circumstances. *Johnson*, 975 F.2d at 609 ("The existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny" a motion to modify a scheduling order).

The parties shall be prepared to provide the court with a modified schedule at the hearing. That schedule shall be agreed upon by both parties. If it is not, the court will issue a modified scheduling order after the hearing.