UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Thursday, November 12, 2020
Place: Department B – Courtroom #13
Fresno, California

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

Pursuant to District Court General Order 618, no persons are permitted to appear in court unless authorized by order of the court until further notice. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. 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. 20-11602-B-13 **IN RE: CARLITO/CRISTINA CATUBIG**
KLG-2

MOTION TO CONFIRM PLAN
9-24-2020 [57]

CARLITO CATUBIG/MV
ARETE KOSTOPOULOS/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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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. 19-12212-B-13 **IN RE: MONICA GUTIERREZ**
TCS-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JOHNSON AND JOHNSON AND/OR MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH BOSTON SCIENTIFIC
10-8-2020 [28]

MONICA GUTIERREZ/MV
TIMOTHY SPRINGER/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.

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

The debtor, Monica Gutierrez ("Debtor"), filed this motion seeking to approve a settlement agreement with Johnson & Johnson and Boston Scientific (collectively "Creditors") for resolving a class action lawsuit involving defective medical products, which was filed prior to the filing of the petition. Doc. #28.

This motion will be GRANTED.

On a motion by the *trustee* and after notice and a hearing, the court may approve a compromise or settlement. Federal Rule of Bankruptcy Procedure ("FRBP") 9019(a). Absent from Rule 9019 is standing for the debtor to seek such approval. Typically, only the trustee may file a motion to approve a compromise or settlement.

Though 11 U.S.C. § 1303 does not expressly grant chapter 13 debtors standing to prosecute and settle claims, other courts have applied it to allow these claims to continue. The Second Circuit has stated, "we conclude that a Chapter 13 debtor, unlike a Chapter 7 debtor,

has standing to litigate causes of action that are not part of a case under title 11." *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515 (2d Cir. 1998)

The Second Circuit reasoned, "[t]he legislative history of § 1303, which sets out the exclusive rights of a Chapter 13 debtor, supports the holding that a Chapter 13 debtor's standing is different." *Olick*, 145 F.3d 513 at 516. "Both the House of Representatives and Senate floor managers of the Uniform Law on Bankruptcies, Pub.L. No. 95-598 (1978), stated that:

> Section 1303 . . . specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although Section [323] is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.

Olick, 145 F.3d 513 at 516 citing 124 Cong. Rec. H. 11,106 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); S. 17,423 (daily ed. Oct. 5, 1978) (remarks of Sen. DeConcini).

Ninth Circuit courts have applied *Olick*'s reasoning and agreed that chapter 13 debtors "have standing to pursue claims against others when those claims belong to the bankruptcy estate because 'the reality of a filing under Chapter 13 is that the debtors are the true representatives of the estate and should be given the broad latitude essential to control the progress of their case.'" *Donato v. Metro. Life Ins. Co.*, 230 B.R. 418, 425 (N.D. Cal. 1999) (quoting *Olick*, 145 F.3d 513 at 516). The court also favorably cited the Third Circuit's reasoning that a chapter 13 debtor could continue to prosecute prepetition claims after filing because "an essential feature of a Chapter 13 case is that the debtor retains possession of and may use all the property of his estate, including his prepetition causes of action . . ." *Donato*, 230 B.R. 418 at 425 (citing *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1209 at n.2 (3rd Cir. 1991).

Therefore, Debtor has standing to prosecute and settle this claim.

Debtor filed under chapter 13 on May 25, 2019. Doc. #1. Prior to filing, Debtor became a member of a class prosecuting a lawsuit against Johnson & Johnson and others, which was listed on her Schedule A/B as a "[c]laim against Johnson & Johnson for Mesh Lawsuit" with an "unknown" value. *Id.*, Schedule A/B at ¶ 33. Debtor exempted the lawsuit for $29,275.00 pursuant to California Code of Civil Procedure ("C.C.P.") § 703.140(b)(11)(D). *Id.*, Schedule C. This class action has settled and the settlement administrators, Laminack, Pirtle & Martines, are holding funds in the amounts of $569.96 from Boston Scientific and $24,043.00 from Johnson & Johnson, for a total of $24,612.96. Doc. #28; Doc. #30, Ex. B & C.

It appears from the moving papers that the Debtor has considered the standards of *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1987) and *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986):

(1) the probability of success in the litigation;
(2) the difficulties, if any, to be encountered in the matter of collection;
(3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
(4) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Accordingly, it appears that the compromise pursuant to Federal Rule of Bankruptcy Procedure 9019 is a reasonable exercise of the Debtor's business judgment. The order should be limited to the claims compromised as described in the motion.

Under the terms of the compromise, Laminack, Pirtle & Martines will pay out $24,043.00 from Johnson & Johnson and $569.96 from Boston Scientific to Debtor as part of their class action settlement to resolve Debtor's pre-petition claim. Doc. #28; Doc #30, Ex. B & C.

As discussed above, on a motion by the Debtor and after notice and a hearing, the court may approve a compromise or settlement. FRBP 9019. Approval of a compromise must be based upon considerations of fairness and equity. *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: (1) The probability of success is far from assured because this is a class action lawsuit involving millions of dollars. It is uncertain whether Debtor would prevail individually at trial. (2) Collection would be difficult if the claim were individually litigated, but the claims have already settled. As result, collection will be very easy as the funds for the class action settlement have already been allocated to a trust account specifically to deliver funds to Debtor. (3) The litigation involves allegations of defective medical products and would require medical experts, exhaustive discovery, and significant legal fees. (4) The settlement amount is fully exempted under C.C.P. § 703.140(b)(11)(D), and so creditors will not receive any additional benefit due to this settlement. However, Debtor's confirmed chapter 13 plan (Doc. #2) provides for a 100% dividend to unsecured creditors, so creditors may arguably benefit if this settlement helps Debtor make plan payments. The settlement appears to be equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law

favors compromise and not litigation for its own sake. *Id.* Accordingly, the motion will be GRANTED.

This ruling is not authorizing the payment of any fees or costs associated with the litigation.

3. 20-12512-B-13 **IN RE: CRYSTAL MENDOZA**

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-6-2020 [36]

13500 TUOLUMNE STREET, LP/MV
MARK MITCHELL/ATTY. FOR MV.
RESPONSIVE PLEADING. CASE DISMISSED 10/29/2020.

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion would have been DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR") but will be DENIED AS MOOT because the case has been dismissed.

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e) and LBR 9014-1(c), (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN. Here, this motion (Doc. #36) did not contain a DCN and therefore does not comply with the local rules. Each separate matter filed with the court must have a different DCN.

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

Here, the motion was filed on October 6, 2020 and set for hearing on November 12, 2020. Doc. #36. November 12, 2020 is thirty-seven (37) days after October 6, 2020, and therefore this motion was filed on at least 28 days' notice.

The movant filed two notices: the first notice (Doc. #37) was filed on October 6, 2020 and the second amended notice (Doc. #47) was filed on October 26, 2020. Both notices contained the following notice language:

> Any opposition or other response to this motion must be served upon the undersigned, and the original and one copy of such papers, and proof of service, must be filed with the Clerk of the U.S. Bankruptcy Court . . . NOT LATER THAN

FOURTEEN (14)* DAYS AFTER THE DATE OF SERVICE OF THIS NOTICE.

Doc. #37, #47. This is incorrect. The notice should have stated, pursuant to LBR 9014-1(f)(1)(B), that written opposition must be filed with the court at least 14 days before the date of the hearing. It is the date of the hearing that controls the deadline for written opposition, not the date on which notice is served.

Third, LBR 9014-1(e)(2) requires a proof of service, in the form of a certificate of service, to be filed with the Clerk of the court concurrently with the pleadings or documents served, or not more than three days after the papers are filed. Pursuant to LBR 9004-2(e), the proof of service shall not be attached to any pleadings or other documents and shall identify by title each of the pleadings and documents served.

Fed. R. Bankr. P. 9013 requires that any request for an order shall be by written motion and the moving party shall serve the motion on "the trustee or debtor in possession and on those entities specified by these rules" or any other entity the court directs. Fed. R. Bankr. P. 9013.

In this case, it does not appear that proof of service or a certificate of service was filed. If proof of service was filed, the court is unable to locate it because the motion documents are not linked together using a unique DCN.

Fourth, the notice did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

Fifth, LBR 9004-2(c)(1), (d)(1), and 9014-1(d)(4) require that all motions, notices, declarations, exhibits, proofs of service, *inter alia*, shall be filed as separate documents. The movant may not combine different documents into one filing. Here, the movant's declaration (Doc. #38) contained an exhibit, "Exhibit A." Multiple exhibits may be filed together with an exhibit index, but exhibits may not be filed with other types of documents (e.g., declarations). *See* LBR 9004-2(d).

Sixth, LBR 4001-1(a)(3) requires, with all motions for relief from stay, the movant to file and serve as a separate document completed Form EDC 3-468, *Relief from Stay Summary Sheet*. There does not appear to be a completed Form EDC 3-468 separately filed with this motion. Form EDC 3-468 can be located on the Court's website, www.caeb.uscourts.gov, under the "Forms and Publications" section.

Typically, this motion would be denied without prejudice for the foregoing reasons. However, on October 29, 2020, an order dismissing this case was entered. *See* Doc. #50. Therefore, this motion will be DENIED AS MOOT.

4. 17-12213-B-13 **IN RE: RENE ELLER**
TCS-6

MOTION TO MODIFY PLAN
10-8-2020 [120]

RENE ELLER/MV
TIMOTHY SPRINGER/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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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.

5. 20-12224-B-13 **IN RE: DONNA REYNA**
JBC-2

MOTION TO CONFIRM PLAN
9-30-2020 [25]

DONNA REYNA/MV
JAMES CANALEZ/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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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.

6. 17-13228-B-13 **IN RE: BENJAMIN WRIGHT**
TCS-1

MOTION TO SELL
10-20-2020 [62]

BENJAMIN WRIGHT/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 will submit a proposed order after hearing.

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.

This motion concerns a proposed sale of property of the estate other than in the ordinary course of business, and therefore was properly set for hearing on at least 21 days' notice as required by Fed. R. Bankr. P. 2002(a)(2).

The debtor, Benjamin Wright ("Debtor"), asks this court for authorization to sell a parcel of residential real property located

at 3334 N. Howard Ave., Fresno, CA 93726 ("Property") to Jesus Anaya ("Proposed Buyer") for $225,000.00. Doc. #62, #64.

This motion will be GRANTED.

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, LP (In re 240 N. Brand Partners, Ltd.)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enterprises, 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 Systems, Inc.*, 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 Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016).

Here, Debtor wishes to sell Property to Proposed Buyer for $225,000.00. Doc. #62. Property is encumbered by a deed of trust in favor of Specialized Loan Servicing, LLC ("SLS"), in the amount of approximately $151,000.00. Doc. #65, Ex. A. SLS is listed as a secured creditor on Schedule D. *Id.*, Ex. B-3 at ¶ 2.1. SLS filed a proof of claim in the amount of $172,492.55 on September 11, 2017. *See* claim no. 1.

Debtor initially listed the Property in his Schedule A/B with a value of $143,819.00. Doc. #10, Schedule A/B at ¶ 1.1. Debtor recently amended A/B to reflect appreciation in value to $225,000.00 since the case was filed. Doc. #64; *see also* Doc. #67. The motion states that Debtor did not exempt any equity under California Code of Civil Procedure ("C.C.P.") §§ 703.140 or 704.730. Doc. #62 at ¶ 7. However, Schedule C indicates that Debtor did claim an exemption under C.C.P. § 703.140(b)(5) in the amount of $13,348.00. *See* Doc.

#65, Ex. B-2. This error appears to be *de minimis*, however, because this proposed sale will pay off Debtor's chapter 13 plan in full. Doc. #62. Debtor estimates that approximately $5,000.00 will be used to pay off the chapter 13 plan, but the proposed closing statement indicates approximately $11,475.16 is due to the chapter 13 trustee. Doc. #64, #65 at Ex. A-2.

The proposed closing statement lists the following proposed payout:

Proposed sale price of Property		$225,000.00
Approximate amount of first mortgage payoff	-	$151,000.00
Broker commission (totals 5.5% of sale price)	-	$12,375.00
Costs of sale, taxes, and fees	-	$1,889.95
Approximate amount to be paid to the estate	-	**$11,475.16**
Net payable to the Debtor	=	**$48,259.89**

Doc. #65, Ex. A.

The sale of the Property appears to be in the best interests of the estate because it will pay off the first mortgage and the chapter 13 plan in full with a 100% dividend to unsecured creditors. *See* Doc. #9. The sale appears to be supported by a valid business judgment and proposed in good faith because the sale will pay all creditors 100% of their claims sooner than the Debtor's chapter 13 proposed to pay them. Doc. #64. Debtor's judgment appears to be reasonable and will be given deference.

However, very little is known about Proposed Buyer. It is unclear whether Proposed Buyer is an insider with respect to Debtor. Nothing in the record indicates that Proposed Buyer is an insider. Proposed Buyer does not appear to be a creditor of Debtor because he is not included on the master address list. Doc. #4. The court will inquire at the hearing whether Proposed Buyer is an insider and therefore subject to heightened scrutiny.

If Debtor provides satisfactory clarification, then this motion will be GRANTED, and the sale will proceed subject to higher and better bids. If opposition is presented at the hearing, the court will consider the opposition, consider whether further hearing is proper, and continue if a further hearing is necessary.

Any order approving the sale will need to be signed by the Trustee. Further, the order will require the Trustee be given and approve a seller's final closing statement before the sale is completed.

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."

7. 16-11129-B-13 **IN RE: DAVID/LINDA MILAZZO**
LKW-14

MOTION TO WAIVE FINANCIAL MANAGEMENT COURSE REQUIREMENT,WAIVE SECTION 1328 CERTIFICATE REQUIREMENT,CONTINUE CASE ADMINISTRATION,SUBSTITUTE PARTY, AS TO JOINT DEBTOR
10-9-2020 [216]

LINDA MILAZZO/MV
LEONARD WELSH/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

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

On September 19, 2020, Joint Debtor David Milazzo ("Mr. Milazzo") died and is survived by his wife, Joint Debtor Linda Milazzo ("Debtor"). Doc. #218.

Debtor asks this court to (1) be substituted as Mr. Milazzo's successor for the purposes of their joint chapter 13 case; (2) allow for the continued administration of the chapter 13 case after Mr. Milazzo's death; (3) waive the post-petition education requirements under § 1328(g) for the entry of discharge for Mr. Milazzo; and (4) waive the certification requirements of § 1328(a)-(f) for entry of discharge for Mr. Milazzo. Doc. #216.

This motion will be GRANTED.

LBR 1016-1 states:

> (a) In a bankruptcy case which has not been closed, a Notice of Death of the debtor [Fed. R. Civ. P. 25(a), Fed. R. Bankr. P. 7025] shall be filed within sixty (60) days

> of the death of a debtor by the counsel for the deceased debtor or the person who intends to be appointed as the representative for or successor to a deceased debtor. The Notice of Death shall be served on the trustee, U.S. Trustee, and all other parties in interest. A copy of the death certificate (redacted as appropriate) shall be filed as an exhibit to the Notice of Death.
>
> The Notice of Death may be combined with the single motion permitted by paragraph (b) of this Rule. . .
>
> . . .
> (b) When the debtor has died or has become incompetent prior to a closing of a bankruptcy case, the provisions of Federal Rule of Civil Procedure 18(a) [Fed. R. Bankr. P. 7018, 9014(c)] apply to the following claims for relief which may be requested in a single motion:
>
> 1) Substitution as the representative for or successor to the deceased or legally incompetent debtor in the bankruptcy case [Fed. R. Civ. P. 25(a), (b); Fed. R. Bankr. P. 1004.1 & 7025];
> 2) Continued administration of a case under chapter 11, 12, or 13 [Fed. R. Bankr. P. 1016];
> 3) Waiver of post-petition education requirement for entry of discharge [11 U.S.C. §§ 727(a)(11), 1328(g)]; and
> 4) Waiver of the certification requirements for entry of discharge in a Chapter 13 case, to the extent that the representative for or successor to the deceased or incompetent debtor can demonstrate an inability to provide such certifications [11 U.S.C. § 1328].

LBR 1016-1. Pursuant to LBR 1016-1, Debtor filed this omnibus motion with a redacted certificate of death for Mr. Milazzo (Doc. #219) asking the court to substitute her as successor for the decedent, allow for continued administration of the case, and waiver of the post-petition financial education requirement for entry of discharge under 11 U.S.C. § 1328(g) and the certification requirements for entry of discharge under § 1328(a)-(f).

Federal Rule of Bankruptcy Procedure 1016 provides:

> Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Fed. R. Bankr. P. 1016. Courts have held that chapter cases 13 do not need to be dismissed and may continue if (1) the debtor proposed a confirmable plan before the debtor's death; and (2) the plan is feasible after the debtor's death. *In re Perkins*, 381 B.R. 520, 537 (Bankr. S.D. Ill. 2007) (permitting further administration because it is both possible and in the best interest of parties); *In re Stewart*, 2004 Bankr. LEXIS 1042 (Bankr. D. Or. Mar. 2, 2004) (continued administration permitted if a personal representative is appointed and the confirmed plan is made current and paid through completion); *cf. In re Spiser*, 232 B.R. 669, 674 (Bankr. N.D. Tex. 1999) (further administration deemed not possible because debtors' chapter 13 plan was not confirmed before death).

Here, Debtors filed under chapter 13 on May 4, 2016. Doc. #1. The third modified chapter 13 plan was confirmed on November 30, 2017. Doc. #168. The plan provided for sixty months of payments with payments of $500.00 per month for months 17-60 and a 100% dividend to unsecured creditors. *See* Doc. #146. Debtor filed a declaration stating that the chapter 13 plan payments are current, and the plan is not in default. Doc. #222. Debtor further asserts her intent to continue plan payments through the end of the plan, which, by this court's estimate, appears to be set to be completed by the first or second quarters of 2021. *Id.* at ¶ 4. Debtor "believe[s] it is in the best interest of all parties concerned for [Mr. Milazzo]'s discharge to be entered at the end of the case so that the resolution of [Mr. Milazzo]'s debtor-creditor problems can be finalized." *Ibid.*

No party in interest has filed opposition to this motion. Therefore, pursuant to Fed. R. Bankr. P. 1016, the court will substitute Linda Milazzo as successor for David Milazzo for the purposes of this chapter 13 case. Administration of this case may continue because the chapter 13 plan is nearing completion and continued administration is in the best interest of the estate, the creditors, and Debtor.

In accordance with Fed. R. Bankr. P. 1016, Mr. Milazzo will be excused from completing and filing a certificate of completion of the financial management course required by § 1328(g). The clerk's office is to treat this case as it would if Joint Debtor David Milazzo had filed a certificate of completion of the financial management course.

Additionally, Debtor will be excused from filing a certification on behalf of Mr. Milazzo certifying that the requirements under § 1328(a)-(f) have been satisfied. Debtor must still certify completion of all § 1328(a)-(f) requirements with respect to herself. Debtor shall continue making the plan payments in accordance with her confirmed chapter 13 plan. Debtor must modify the plan if she is unable to make the payments under the plan.

Accordingly, this motion will be GRANTED.

8. 18-11537-B-13 **IN RE: THERESA MORALES**
PBB-2

MOTION TO MODIFY PLAN
9-25-2020 [31]

THERESA MORALES/MV
PETER BUNTING/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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The court notes that the proposed plan calls for payments of $2,000.00 per month starting in month 37, but the debtor's Schedule J reflects $1,206.01 net monthly income. Doc. #37 at ¶ 23c. The debtor filed a declaration stating that she has been receiving unemployment benefits since being furloughed on April 26, 2020 due to COVID-19. Doc. #33 at ¶ 8. The debtor expects to return to work on October 26, 2020 and thus anticipates being able to afford plan payments despite this apparent income discrepancy. *Id.* at ¶ 10. Therefore, the plan is feasible.

Upon request by the chapter 13 trustee, the debtor shall amend Schedule I and J to reflect her restored income after returning to work. If the debtor is furloughed again or otherwise will be unable to make the plan payments, she shall file, serve, and set for hearing a motion to modify the plan.

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

9. 20-12848-B-13 **IN RE: PATRICK/MARIBETH TABAJUNDA**
ALG-1

OBJECTION TO CONFIRMATION OF PLAN BY VALLEY STRONG CREDIT UNION
10-2-2020 [15]

VALLEY STRONG CREDIT UNION/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
ARNOLD GRAFF/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to December 9, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults. 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.

Secured Creditor Valley Strong Credit Union ("Creditor") objects to plan confirmation because the plan does not fully cure Creditor's pre-petition arrears as required by 11 U.S.C. § 1325(a)(5)(B)(ii).

Creditor's proof of claim in the amount of $407,364.80 was filed on October 2, 2020 and amended November 2, 2020. *See* claim no. 10. Creditor is listed as a Class 2(B) creditor, indicating that its claim will be reduced based on the value of collateral. Doc. #2. Sections 1.04 and 3.08(c) of the plan require separately filed and served motions to value collateral for claims classified in class 2. As of November 3, 2020, the debtor has not filed any such motion.

This matter will be continued to December 9, 2020 at 9:30 a.m. Unless this case is voluntarily converted to chapter 7, dismissed, or Creditor's opposition to confirmation is withdrawn, the debtors shall file and serve a written response not later than November 25, 2020. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. Creditor shall file and serve a reply, if any, by December 2, 2020.

If the debtors elect to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing not later than December 2, 2020. If the debtors do not timely file a modified plan or a written response, this objection will be sustained on the grounds stated without a further hearing.

10. 15-14849-B-13 **IN RE: FREDERICK SOLMS AND CONNIE HILL**
FW-3

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR GABRIEL J. WADDELL, ACCOUNTANT(S)
10-13-2020 [62]

PETER FEAR/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.

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

The motion will be GRANTED.

Debtor's counsel, Gabriel Waddell ("Movant") of Fear Waddell, P.C., requests fees of $3,464.00 and costs of $274.53 for a total of $3,738.53 for services rendered from September 1, 2016 through September 16, 2020. Doc. #62. The debtor has consented to this fee application. Doc. #65, Ex. E.

This case was filed as joint chapter 13 bankruptcy case on December 18, 2015. Doc. #1. Joint Debtor Frederick Mark Solms died on December 13, 2019 and is survived by Joint Debtor Connie Sue Hill ("Debtor"). Doc. #55. The court notes that Movant has not yet filed an omnibus motion under LBR 1016-1 and Fed. R. Bankr. P. 1016 to substitute or appoint Debtor as successor or representative of Mr. Solms, allow for continued administration of this case, waive filing of a post-petition financial education certificate under § 1328(g) for Mr. Solms, and waive certification requirements of § 1328(a)-(f) for Mr. Solms.

This is Movant's second and final fee application. Movant previously requested fees of $4,400.50 and expenses of $430.67 on September 28, 2016, which was granted on November 16, 2016. Doc. #42, #51.

Movant has noted that the chapter 13 plan (Doc. #6, ¶ 2.06) allocates $6,000.00 for attorney's fees. When combined with the first fee application, there will be insufficient funds in the plan to pay the total requested fees in this application. Movant has agreed to waive any fees in excess of those funded by the plan. Doc. #64. By this court's estimate, there should be approximately $1,168.83 available in the plan for attorney's fees.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) Administration of claims against the estate; (2) Preparation, filing, and confirming the chapter 13 plan; (3) Discharge and case closing; (4) Case administration; and (5) Preparation of this fee application. Doc. #65, Ex. A. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $3,464.00 in fees and $274.53 in costs. Trustee's payment of the fees is limited insofar as there are remaining funds for Debtor's attorney's fees under section 2.06 of the confirmed plan.

11. 18-12050-B-13 **IN RE: GENEVIEVE SANTOS**
ALG-3

MOTION TO MODIFY PLAN
9-29-2020 [77]

GENEVIEVE SANTOS/MV
JANINE ESQUIVEL OJI/ATTY. FOR DBT.
JANINE ESQUIVEL/ATTY. FOR MV.

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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages).

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

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.

12. 19-15350-B-13 **IN RE: LUIS BORGES**
MHM-1

OBJECTION TO CLAIM OF CAVALRY SPV I, LLC, CLAIM NUMBER 1
9-18-2020 [41]

MICHAEL MEYER/MV
STEVEN ALPERT/ATTY. FOR DBT.

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

DISPOSITION: Sustained.

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

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The chapter 13 trustee ("Trustee") filed this objection to claim no. 1 filed by Creditor Cavalry SPV I, LLC ("Creditor"), on January 3, 2020 in the amount of $466.23 and seeks that the claim be disallowed in its entirety. Doc. #41.

This objection will be SUSTAINED.

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

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

Here, Trustee has established that the statute of limitations in California bars a creditor's action to recover on a contract, obligation, or liability founded on an oral contract after two years and one founded on a written instrument after four years. *See* California Code of Civil Procedure ("C.C.P") §§ 312, 337(1), and 339. A claim that is unenforceable under state law is also not allowed under 11 U.S.C. § 502(b)(1) upon objection. *In re GI Indust., Inc.*, 204 F.3d 1276, 1281 (9th Cir. 2000). Trustee has demonstrated that the last transaction on Creditor's account was on July 7, 2012. Claim no. 1 at 6. This well past the four-year statute of limitations for written contracts under C.C.P. §§ 312, 337(1).

Therefore, claim no. 1 filed by Cavalry SPV I, LLC, will be disallowed in its entirety.

13. 20-10150-B-13 **IN RE: PAOLA ZAVALA LOPEZ**
BDB-2

OBJECTION TO CLAIM OF MARCOS V ROSAS, CLAIM NUMBER 6
10-12-2020 [44]

PAOLA ZAVALA LOPEZ/MV
BENNY BARCO/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

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

The debtor, Paola Zavala Lopez ("Debtor"), objects to claim no. 6 filed by Creditor Marcos V. Rosas ("Creditor") on February 12, 2020 in the amount of $11,840.18 and seeks that the claim be disallowed to the extent that it purports to be a domestic support obligation. Doc. #44. Though not required, Creditor filed written opposition. Doc. #54.

This objection will be SUSTAINED.

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

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

Here, Debtor claims that Creditor did not properly execute and file his proof of claim because it provides no evidence that his claim is a domestic support obligation entitled to priority treatment. Doc. #44. Debtor states that Creditor's claim is for "Overpayment of Spousal Support," which is not a "domestic support obligation" under 11 U.S.C. § 101(14A). Debtor listed Creditor as an unsecured nonpriority creditor in Schedule F. *See* Doc. #11, Schedule E/F at ¶ 4.14. Debtor filed a declaration stating that the debt is not a debt for child or spousal support, it is a debt she was ordered to pay for overpayment of spousal support. Doc. #46. Debtor asserts that she does not owe any domestic support obligation claims. *Id.* at ¶ 3.

As noted above, Creditor opposed. Doc. #54. Creditor, *pro se*, filed a handwritten letter wherein he states that he was ordered to make monthly spousal support payments in the amount of $1,653.00 for a period of eighteen months. Doc. #54. Creditor alleges that Debtor "sent the court order for spousal support for garnishment to both [of his] employers[,] . . . [w]hich cause[d] [Debtor] to be paid double the original amount of $1,653.00 [per] month." *Id.* at 1. Creditor states that upon realization he had overpaid spousal support, he returned to court and was awarded the overpayment. "But after that ruling [Debtor] filed for bankruptcy." *Ibid.* Creditor expresses his frustration in complying with the court order while simultaneously having his wages garnished and states that he had to refinance his house to avoid losing it. *Id.* Attached to his letter, Creditor included his application to reconsider and revoke request for order re overpayment of spousal support. *Id.* at 3.

Creditor's attached exhibit appears to be motion documents rather than a court order. *Ibid.* In these motion papers, Creditor's family law counsel alleges that Creditor paid an estimated $51,970.18 between 2016 and 2018, of which $22,216.18 was overpayment. *Id.* at 6.

11 U.S.C. § 101(14A) defines a "domestic support obligation" to mean a debt, including interest, that is:

> (A) owed to or recoverable by—
> (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
(i) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

This court is sympathetic to Creditor and his frustrations, but Debtor is correct that overpayment of spousal support is not a "domestic support obligation" as defined in § 101(14A) because it is not expressly designed "in the nature of alimony, maintenance, or support" of a "spouse, former spouse, or child. . ." 11 U.S.C. § 101(14A)(B). This court does not have evidence of the original court order in which Debtor was ordered to reimburse Creditor for his overpayment. Based on the family law motion that was submitted by Creditor as evidence (Doc. #54), Creditor appeared to be requesting relief from the family law court in the form of reimbursement for overpayment, and not alimony, maintenance, or support of a spouse, former spouse, or child. If this court is misconstruing the disposition of the family law case, Creditor may appear at the hearing and clarify whether his court order specifies that the debt is for a domestic support obligation, or whether it is reimbursement for overpayment.

Accordingly, the court is inclined to sustain the objection. In the absence of further opposition or additional evidence, this objection will be SUSTAINED. Claim no. 6 filed by Marcos V. Rosas will be disallowed as a priority claim to the extent that it purports to be a domestic support obligation. Mr. Rosas claim will be deemed allowed as a non-priority unsecured claim.

14. 20-10150-B-13 **IN RE: PAOLA ZAVALA LOPEZ**
BDB-3

MOTION TO AVOID LIEN OF WAHR FINANCIAL GROUP, LLC
10-12-2020 [49]

PAOLA ZAVALA LOPEZ/MV
BENNY BARCO/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

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

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the California Code of Civil Procedure ("C.C.P.").

C.C.P. § 416.40 states:

> A summons may be served on an unincorporated association (including a partnership) by delivering a copy of the summons and of the complaint:
>
> (a) If the association is a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to a general partner or the general manager of the partnership;
>
> (b) If the association is not a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to the president or other head of the association, vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process;
>
> (c) When authorized by Section 18220 of the Corporations Code, as provided by that section.

C.C.P. § 416.40. Here, the certificate of service indicates that WAHR Financial Group, LLC ("Creditor"), was served at the following addresses:

> **Address on proof of claim:**
> WAHR FINANCIAL GROUP, LLC
> Law Offices of Kenosian & Miele, LLP
> 8581 Santa Monica Blvd. #17
> Los Angeles, CA 90069
>
> **Address on CA SOS Website:**
> WAHR FINANCIAL GROUP, LLC
> 8502 E CHAPMAN AVE STE 375
> ORANGE CA 92869

Doc. #53 (emphasis in original). The certificate of service indicates that Creditor and Creditor's attorney were served. However, Creditor does not appear to be properly served. Creditor is a limited liability company, and therefore C.C.P. § 416.40(b) requires that service be addressed to the president or other head of the association, vice president, secretary or assistant secretary, treasurer or assistant treasurer, general manager, or a person authorized to receive service of process.

When searching Creditor within the records of the California Secretary of State (www.businesssearch.sos.ca.gov), Creditor's designated agent for service of process is Sunlan Corporation ("Sunlan"), whose mailing address is 8502 E. Chapman Ave. STE 375, Orange, CA 92869. This is the same address listed in the certificate of service. The most recent Statement of Information filed on January 28, 2019 indicates that the President of Creditor is Lee J. Ross.

When searching for Sunlan, the listed agent for service of process is also Lee J. Ross at the same address. Based on the most recently filed Statement of Information for Sunlan filed October 17, 2019, Mr. Ross is also the President of Sunlan.

To comply with C.C.P. § 416.40, the debtor's certificate of service should have been addressed to a named officer of Creditor. Creditor could have been properly served if any of the following were listed: (1) Mr. Ross, (2) the name of another known officer or authorized service agent, or (3) generally addressed to an officer or president if the name of a service of process agent was not known.

Additionally, the court notes that the motion is currently deficient because the debtor's claimed exemption under C.C.P. § 703.140(b)(1) is in the amount of $0.00. Doc. #30, Schedule C at ¶ 2. To avoid Creditor's lien under § 522(f)(1), the debtor must establish all of the following elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003), quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd* 24 F.3d 247 (9th Cir. 1994).

The debtor claimed an exemption in the amount of $0.00. Doc. #30, Schedule C at ¶ 2. This calls into question whether Creditor's lien impairs the debtor's exemption. No equity has been exempted. Creditor's lien cannot impair an exemption if nothing is being exempted. The debtor will need to amend Schedule C to exempt some amount of equity if she hopes to avoid Creditor's lien successfully. Even though the first deed of trust exceeds the value of the property, the debtor must exempt some amount of equity to prevail on this motion.

For the foregoing reasons, this motion will be DENIED WITHOUT PREJUDICE.

15. 18-11457-B-13 **IN RE: GREGG/WENDY SCHOFIELD**
PBB-4

MOTION TO MODIFY PLAN
10-9-2020 [82]

GREGG SCHOFIELD/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

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

LBR 3015-1(d)(1) requires any plan set for a confirmation hearing be set on at least thirty-five (35) days' notice. This motion was filed and served on October 9, 2020 and set for hearing on November 12, 2020. Doc. #87. November 12, 2020 is 34 days after October 9, 2020, and therefore this hearing was set on less than 35 days' notice as required by LBR 3015-1. The court notes that the motion documents are backdated to October 7, 2020, but the certificate of service (Doc. #87) indicates that they were not served until October 9, 2020. Therefore, the motion will be DENIED WITHOUT PREJUDICE.

16. 20-12359-B-13 **IN RE: CARINA LOERA**
MAZ-1

MOTION TO VALUE COLLATERAL OF SAFE 1 CREDIT UNION
9-30-2020 [22]

CARINA LOERA/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: This matter will proceed as a scheduling conference.

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

This motion was filed on 28 days' notice as required by Local Rule of Bankruptcy ("LBR") 9014-1(f)(1). The hearing on this motion will be called as scheduled and will proceed as a scheduling conference.

The debtor, Carina Loera ("Debtor") filed this motion seeking to value a 2017 Chevy Silverado with 60,000 miles ("Vehicle"). Doc. #22. The Vehicle is encumbered by a purchase-money security interest in favor of Creditor Safe 1 Credit Union ("Creditor") in the amount of $28,243.53. *See* claim no. 8. Debtor states that she purchased the Vehicle in November 2016, which is more than 910 days prior to filing for bankruptcy. Doc. #24. Debtor states her opinion that the replacement value of the Vehicle at the time of filing was $22,602.00. *Id.*

Creditor timely opposed this motion, stating that it believes the replacement value of the collateral is $34,760.00. Doc. #35. Both Debtor and Creditor rely on Kelley Blue Book. However, neither Debtor nor Creditor have established themselves as experts and cannot rely upon Kelley Blue Book in determining the replacement value of the Vehicle. *See* Federal Rules of Evidence 701, 702, 703.

This matter is now deemed to be a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The parties shall be prepared for the court to set an evidentiary hearing.

Based on the record, the sole factual issue appears to be the replacement value of Vehicle.

17. 20-12359-B-13 **IN RE: CARINA LOERA**
MHM-1

CONTINUED HEARING RE: MOTION TO DISMISS CASE
9-21-2020 [18]

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to December 9, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

The chapter 13 trustee asks this court to dismiss this case under 11 U.S.C. § 1307(c) for debtor's failure to confirm a chapter 13 plan. Doc. #18. Debtor timely responded (Doc. #28), stating that a motion to value collateral (Doc. #22) is set for hearing on November 12, 2020 at 9:30 a.m. *See* MAZ-1. On October 21, 2020, this matter was continued to November 12, 2020 so that it could be heard in conjunction with the motion to value collateral. Doc. #32.

The debtor's chapter 13 plan provides that the Class 2 claim of Creditor Safe 1 CU for a 2017 Chevy Silverado is set to be valued and reduced based on the value of the collateral. Doc. #3 at ¶ 3.08(c) & (d). The chapter 13 plan cannot be confirmed until an order valuing the collateral is entered.

However, Creditor Safe 1 CU has opposed the motion to value collateral, and it will become a contested matter pending a scheduling conference. *See* MAZ-1, matter #16 above. Accordingly, this motion will be continued to December 9, 2020 at 9:30 a.m. to determine whether the motion to value collateral has been resolved. The court will issue further continuance if necessary.

18. 20-11862-B-13 **IN RE: RACHEL DANIELS**
JES-1

MOTION FOR COMPENSATION FOR JAMES E. SALVEN, CHAPTER 7 TRUSTEE(S)
10-12-2020 [40]

JAMES SALVEN/MV
SCOTT LYONS/ATTY. FOR DBT.
JAMES SALVEN/ATTY. FOR MV.

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.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The former chapter 7 trustee James Salven ("Trustee") requests fees of $1,100.00 and costs of $144.00 for a total of $1,244.00 as statutory compensation and actual and necessary expenses. Doc. 40.

The debtor filed chapter 7 bankruptcy on May 29, 2020. Doc. #1. Trustee was appointed as interim trustee on that same date and became permanent trustee on July 9, 2020. Doc. #5. This case was voluntarily converted on October 6, 2020, Trustee was removed from the case, and a chapter 13 trustee was appointed. *See* Doc. #23, #25. Trustee now requests his claim as an administrative expense in the chapter 13 plan.

11 U.S.C. § 326 permits the court to allow reasonable compensation to the chapter 7 trustee under § 330 for the trustee's services. Section 326(a) states:

> In a case under chapter 7 or 11, other than a case under subchapter V of chapter 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including all holders of secured claims.

11 U.S.C. § 326(a).

11 U.S.C. § 330 requires the court to find that the fees requested are reasonable and for actual and necessary services to the estate, as well as reimbursement for actual and necessary expenses. 11 U.S.C. § 330(a)(1)(A) & (B).

Trustee states that his services resulted in disclosure of an undervaluation of a house and a car, and an attempt to claim an exemption under California Code of Civil Procedure ("C.C.P") § 704.060 to which the debtor was not entitled. Doc. #40 at 4. These disclosures lead to the conversion to chapter 13. *Ibid.* Trustee estimates the value of the undervalued assets and the exemption were approximately $10,000 to $15,000, which should be paid to creditors. *Ibid.*

Trustee states that the debtor's Schedule E/F indicated approximately $23,400 in unsecured claims will benefit from payment, which would provide for an estimated maximum allowable compensation under § 326(a) to be approximately $1,750.00. *Ibid.* Thus, Trustee has requested $1,244.00 (24.88%), which is less than 25% of the first $5,000.00. *Ibid.*

This percentage complies with the percentage restrictions imposed by § 326(a). These services included, but were not limited to: (1) Preparation and appearance at the meeting of creditors; (2) Review and reconciliation of the petition with financial records; (3) Discovery of undervalued assets and improper exemptions. *Id.* at Ex. A.

The court finds Trustee's services were actual and necessary to the estate, and the fees are reasonable and consistent with § 326(a). The motion will be GRANTED and Trustee will be awarded the requested fees and costs.

19. 18-11770-B-13 **IN RE: DAVID/DELIA HAYES**
SLL-1

MOTION TO MODIFY PLAN
9-24-2020 [67]

DAVID HAYES/MV
STEPHEN LABIAK/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.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This modified plan contemplates increasing attorney's fees from $4,000.00 to $12,000.00. *See* Doc. #9, Doc. #71 at ¶ 3.05. The debtors' attorney ("Attorney") initially opted-in to the "no look" fee under LBR 2016-1(c)(1). However, as discussed in matter #20 below, this case has required substantial and unanticipated post-confirmation work warranting deviation from the "no look" fee. *See* SLL-2. Attorney filed a declaration stating that the elements under 11 U.S.C. § 1325(a) have been met. Doc. #70. This increase in attorney's fees will be authorized due to the substantial and unanticipated work now realized. Attorney may only increase attorney's fees in the future if there is an additional showing of substantial and unanticipated work beyond what is now expected.

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.

20. 18-11770-B-13 **IN RE: DAVID/DELIA HAYES**
SLL-2

MOTION FOR COMPENSATION FOR STEPHEN LABIAK, DEBTORS ATTORNEY(S)
9-24-2020 [58]

STEPHEN LABIAK/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.

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

Debtors' counsel, Stephen L. Labiak of The Law Offices of Stephen Labiak ("Movant"), requests fees of $1,830.00 and costs of $0.00 for services rendered from September 4, 2020 through September 21, 2020. Doc. #58. Joint Debtor David Hayes filed a declaration stating that he and his wife, Joint Debtor Delia Hayes (collectively "Debtors"), consented to the fee application.

This motion will be GRANTED.

Movant initially opted-in to the "no look" fee, which provides for a maximum fee of $4,000.00 in nonbusiness cases and $6,000.00 in business cases pursuant to LBR 2016-1(c)(1). Under LBR 2016-1(c)(3) and (c)(5), a chapter 13 debtor's attorney may seek additional fees. LBR 2016-1(c)(3) provides:

> If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all

> pre-petition confirmation services and most post-confirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional fees. . . The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

LBR 2016-1(c)(3). LBR 2016-1(c)(5) provides:

> The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation.

LBR. 2016-1(c)(5).

Here, Movant contends that this case required substantial and unanticipated post-confirmation work and thereby requests additional fees under LBR 2016-1(c)(3). Movant filed a declaration stating that this case experienced additional issues due to Debtor's unique medical conditions. Doc. #62 at 4.

Movant states that this case had to be filed quickly due to an impending foreclosure sale of Debtors' home. *Ibid.* Movant's typical methodology is to file the plan contemporaneously with the petition, but due to the foreclosure, Movant was required to file prior to completing the plan. *Ibid.*

First, Movant encountered issues during the 341 meeting of creditors. One of the Debtors is severely visually impaired, which resulted in significantly higher medical expenses than a typical chapter 13 debtor. As result, Debtors were required to modify their home and living arrangements to accommodate this visual impairment, which resulted in a higher electricity bill. When this higher-than-average expense appeared on Form 122C-2, it was met with skepticism by the chapter 13 trustee. Movant provided documentation of the reasons for the increased medical expenses related to higher electricity costs. *Ibid.*

There was also a deduction for additional telecommunication expenses listed in Form 122C-2. Debtors had approximately 12 separate lines for a household of 3 people. These additional lines were needed to allow the communication of the various devices in the house used by Debtor to accommodate her disability. Bills and medical documentation were provided to show the necessity of this expense. *Ibid.*

Additionally, Debtors also had some issues regarding income. Mr. Hayes had a significant bonus that required amortization over the year as opposed to just taking the last 6 months of income. Movant states that there were also 401k loans that had to be accounted for,

tax debts, significant student loan debt, car debt, credit cards, and medical bills. *Id.* at 5.

Movant describes the 341 meetings as contentious, with extensions, amendments to documents including the creditor lists and 122C-2 and several of Debtors' declarations. *Ibid.* Eventually, the plan was confirmed on September 14, 2018. *See* Doc. #49.

Movant states that he received over 75 emails from Debtors alone, not including his replies nor any responses from the chapter 13 trustee. Doc. #62 at 5. "These were significant emails, not one or two word answers but information, explanation, and documentation in order to take several what are in my experience rare deductions on the 122C-2." *Ibid.* Movant estimates that he "easily exceeded 80 hours of work on [his] end," not including any hours spent by his paralegal. *Ibid.* Movant states that this was not anticipated when the case was filed. *Ibid.*

Due to circumstances on the filing of the case with the house sale pending, Movant did not have the opportunity to do as much pre-filing work as is normal and could not have anticipated the amount of work involved in getting this case confirmed. *Ibid.*

Movant states that Creditor activities included modified claims by the IRS, Navient, and three changes, so far, by the mortgage servicer Ocwen, which all have required additional care to ensure proper administration of this case. *Ibid.*

But Movant has also endured issues post-confirmation. There have been three motions to dismiss for failure to make plan payments. *Ibid.* At each occurrence, Movant gave the debtors several options, worked out estimates of new plan payments, and then waited to track the results. On the most recent motion to dismiss, the debtors opted to file a modified plan to extend the term to 84 months. *Ibid.*

Movant did not consider having to be responsible for a client for 7+ years when the normal case is typically, at most, 5.5 years from start to finish. Movant estimates that there will be extra work involved in having the case continue for an additional 2 years. *Ibid.* This case was originally estimated to be 0% to unsecured creditors, but now there is a small percentage of dividend to unsecured creditors. *Ibid.*

Movant has prepared numerous modified plans due to multiple motions to dismiss. Given all of Movant's pre- and post-confirmation work, he believes the flat fee does not accurately represent the amount of effort put into this case. *Ibid.* Given the extraordinary circumstances of dealing with COVID-19, and specifically what has happened in this case, Movant thinks it would be fair and in the interests of justice to allow this fee application. *Ibid.* Movant did not anticipate that there would be significant issues as to the Debtor's expenses due to her needs for accommodations because she is legally blind and will need different living arrangements than would be required for others. *Id.* at 6.

Movant describes this as "by far a record . . . in 10 years of practice . . ." and that he "could not have anticipated the Covid outbreak and its effects on the daily lives of people." *Ibid.*

Movant states that he did not begin keeping track of hours until the third motion to dismiss, so he is only asking to be compensated for time from September 5, 2020 going forward. This fee application specifically covers September 4 through September 21, 2020. *Ibid.*

The court finds that this is the type of situation contemplated by LBR 2016-1(c)(3). This case has required Movant to complete substantial and unanticipated post-confirmation work. Binding Movant to his initial "no look" fee under LBR 2016-1(c)(1) would be improvident in light of developments not capable of being anticipated at the time the plan was confirmed.

Debtors have a pending plan modification in matter #19 above. *See* SLL-1. Pursuant to LBR 2016-1(c)(3), the court will allow Movant to apply for additional fees in accordance with this new plan despite his initial opt-in because this case has required Movant to complete substantial and unanticipated post-confirmation work. This increase in attorney's fees will be authorized due to the substantial and unanticipated work now realized. Movant may only increase attorney's fees in the future if there is an additional showing of substantial and unanticipated work beyond what is now expected.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movants services included, without limitation: (1) Preparation and filing of the first amended or modified plan; (2) Preparation of defenses for motions to dismiss; (3) Preparation of this fee application. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $1,830.00 in fees and $0.00 in costs.

21. 20-11492-B-13 **IN RE: THOMAS LOGAN**
MHM-2

CONTINUED HEARING RE: MOTION TO DISMISS CASE
9-22-2020 [41]

MICHAEL MEYER/MV
PETER BUNTING/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to December 9, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c) for debtor's failure to confirm a chapter 13 plan.

Doc. #41. Debtor timely responded (Doc. #55), stating that two motions to value collateral (Doc. #45, #50) are set to be heard on November 12, 2020 at 9:30 a.m. *See* PBB-2, PBB-3.

The debtor's chapter 13 plan cannot be confirmed until an order valuing collateral is entered in matter #22 below. The debtor also seeks to avoid a judicial lien encumbering his claimed exemption in #23 below. The court intends to grant those two motions. Therefore, this motion will be continued to December 9, 2020 at 9:30 a.m. to allow the debtor an opportunity to confirm his chapter 13 plan.

22. 20-11492-B-13 **IN RE: THOMAS LOGAN**
PBB-2

MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE
10-6-2020 [45]

THOMAS LOGAN/MV
PETER BUNTING/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.

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

The debtor, Thomas Logan ("Debtor"), asks this court for an order valuing a 2014 Cadillac XTS Luxury ("Vehicle") at $15,434.00. Doc. #45. The Vehicle is secured by Capital One Auto Finance ("Creditor"). Creditor filed claim no. 7.

This motion will be GRANTED. 11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described in that paragraph if (1) the creditor has a purchase money security interest securing the debt that is the subject of the claim, (2) the debt was incurred within 910 days preceding the

filing of the petition, and (3) the collateral is a motor vehicle acquired for the personal use of the debtor.

11 U.S.C. § 506(a)(1) limits a secured creditor's claim "to the extent of the value of such creditor's interest in the estate's interest in such property . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

According to the proof of claim, Debtor purchased the vehicle on August 24, 2017, which is more than 910 days preceding the petition filing date. *See* Doc. #1, Doc. #48 at 12. Debtor's motion is silent as to whether the property was acquired for personal use. The elements of § 1325(a)(*) are not met and § 506 is applicable.

The only evidence Debtor submits to support the valuation is Creditor's proof of claim, which states the value of the Vehicle is $15,434.00. *See* claim no. 7. This jurisdiction's local rules require a motion to value collateral be noticed and set for a hearing before a plan can be confirmed if the plan reduces an allowed secured claim in class 2 based on collateral value. *See* Local Rule of Practice 3015-1(i). Because Creditor's claim is not actually being impaired and Debtor does not dispute the value asserted by creditor, the court does not require a declaration from Debtor, an appraisal, or some other form of evidence necessary to value the Vehicle at $15,434.00.

The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

23. 20-11492-B-13 **IN RE: THOMAS LOGAN**
PBB-3

MOTION TO AVOID LIEN OF KENDALL A. DC MENDONCA
10-6-2020 [50]

THOMAS LOGAN/MV
PETER BUNTING/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.

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

The debtor, Thomas Logan ("Debtor"), filed this motion to avoid a judicial lien encumbering his residential real property located at 1106 E. Howard Ct., Visalia, CA 93292 ("Property") in favor of Kendall A. DC Mendonca("Creditor"), in the sum of $10,144.50. Doc. #50.

This motion will be GRANTED.

In order to avoid a lien under 11 U.S.C. § 522(f)(1) Debtor must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003), quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd* 24 F.3d 247 (9th Cir. 1994).

A judgment was entered against Debtor in favor of Creditor in the sum of $10,144.50 on August 12, 2019. Doc. #53, Ex. E. The abstract of judgment was recorded with Tulare County on December 9, 2019 and attached to Property. *Id.* Creditor does not appear to have filed a proof of claim.

On the petition date, Property had an approximate value of $230,000.00. *Id.*, Ex. B at ¶ 1.1. The unavoidable liens encumbering Property totaled $165,854.04 on that same date, consisting of a first deed of trust in favor of Select Portfolio Servicing Inc. *Id.*, Ex. C at ¶ 2.4. Debtor claimed an exemption pursuant to California Civ. Proc. Code ("C.C.P.") § 704.730 in the amount of $75,000.00. *Id.*, Ex. D at ¶ 2.

Fair Market Value of the Property on the date of filing		$230,000.00
Total amount of all other liens on the Property on the date of filing (excluding judicial liens)	-	$165,854.04
Amount of Equity Available in Property	=	**$64,145.96**
Amount of Debtor's claimed exemption in the Property under C.C.P. § 704.730	-	$75,000.00
Amount of Creditor's Judicial Lien	-	$10,144.50
Extent of impairment of Debtor's exemption in the Property	=	**($20,998.54)**

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption of the real property and it will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

24. 18-13595-B-13 **IN RE: DIMAS COELHO**
TCS-2

MOTION TO MODIFY PLAN
10-5-2020 [71]

DIMAS COELHO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
THOMAS GILLIS/ATTY. FOR MV.
RESPONSIVE PLEADING
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

This motion was withdrawn by the debtor on November 3, 2020. Doc. #87. Therefore, the motion will be dropped from calendar.

25. 20-10152-B-13 **IN RE: RANDY/EUFEMIA BROWN**
MHM-4

CHAPTER 13 TRUSTEE'S FORBEARANCE STATUS CONFERENCE RE: NOTICE OF MORTGAGE PAYMENT CHANGE
11-4-2020 [101]

MARK ZIMMERMAN/ATTY. FOR DBT.

NO RULING.

11:00 AM

1. 11-63503-B-7 **IN RE: FRANK/ALICIA ITALIANE**
12-1053

CONTINUED STATUS CONFERENCE RE: FIRST AMENDED COMPLAINT
10-18-2012 [21]

JEFFREY CATANZARITE FAMILY
LIMITED PARTNERSHIP ET V. LANE
HAMID RAFATJOO/ATTY. FOR PL.
CLOSED: 10/05/2020

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

DISPOSITION: Dropped from calendar.

ORDER: The court will issue an order.

This court previously granted Plaintiffs' motion for summary judgment on September 10, 2020 and entered judgment against Defendant on September 17, 2020. *See* Doc. #205, #207, #208. The adversary proceeding was closed on October 5, 2020. On October 8, Defendant filed a notice of appeal. Doc. #216. This court granted Defendant's motion to extend the deadline for filing the notice of appeal to October 22, 2020. Doc. #249. Defendant's appeal is now pending.

Therefore, the status conference will be dropped from calendar and may be reset by any party on 10 days' notice. The clerk of the court will close the adversary proceeding without notice in 60 days unless the adversary proceeding has been concluded or set for a further status conference within that time. Either party may request an extension of this time up to 30 days by *ex parte* application for cause. After the adversary proceeding has been closed, the parties will have to file an application to reopen the adversary proceeding if further action is required. The court will issue an order.

2. 11-63503-B-7 **IN RE: FRANK/ALICIA ITALIANE**
12-1053 GRB-1

MOTION BY GILAD BERKOWITZ TO WITHDRAW AS ATTORNEY
10-9-2020 [222]

JEFFREY CATANZARITE FAMILY
LIMITED PARTNERSHIP ET V. LANE
CLOSED: 10/05/2020;

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.

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

The movant, Gilad Berkowitz ("Attorney"), filed this declaration seeking leave to withdraw from representing Debtor and Defendant, Frank Lane Italiane, Jr. ("Defendant"). Doc. #222. Defendant filed a declaration in which he states that he can no longer afford to be represented by counsel and wishes to terminate representation so that he may proceed to represent himself in his appeal. Doc. #224.

Pursuant to LBR 2017-1(e), and based upon the declarations, the court will GRANT this motion and Attorney may withdraw as the attorney for Defendant in this adversary proceeding. Withdrawal of an attorney is governed by the Rules of Professional Conduct of the State Bar of California, and Attorney shall conform to the requirements of those rules. The authority and duty of Attorney as attorney for Debtor in the bankruptcy case shall continue until the court enters the order. The order submitted shall state the debtor's last known address.

3. 19-15246-B-7 **IN RE: ANDREA CASTILLO**
20-1016

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-12-2020 [1]

SEMPER V. CASTILLO
BRIAN WHELAN/ATTY. FOR PL.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: This matter will proceed as a scheduling conference.

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

Mark Semper (“Plaintiff”) filed this adversary proceeding on March 12, 2020 seeking to determine that his claim against Debtor Andrea Castillo (“Defendant”) be deemed nondischargeable under 11 U.S.C. §§ 523(a)(2), (4), and (6). Doc. #1.

Defendant filed a Form EDC 3-101 Answer to the Complaint on October 22, 2020 denying every allegation of the Complaint other than the procedural facts regarding the filing of the bankruptcy petition. Doc. #37, 38.

This matter is now deemed a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The parties shall be prepared for the court to set an early evidentiary hearing.

Based on the record, the factual issues appear to include:

(1) The outcome of Plaintiff’s state court defamation lawsuit;
(2) Whether Defendant made defamatory statements about Plaintiff;
(3) Whether Defendant’s statements were made with malice and intent to injure Plaintiff;
(4) Whether Defendant was damaged by those statements; and
(5) The amount of those damages.

The legal issues appear to include:

(1) Whether Defendant’s debt and damages are nondischargeable.

4. 20-12269-B-7 **IN RE: ANTHONY VILLA**
20-1054

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-17-2020 [1]

VOKSHORI LAW GROUP V. VILLA
NIMA VOKSHORI/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

5. 20-12269-B-7 **IN RE: ANTHONY VILLA**
20-1054 TCS-2

MOTION TO DISMISS CASE AND/OR MOTION FOR COMPENSATION FOR TIMOTHY C. SPRINGER, DEFENDANTS ATTORNEY(S)
10-7-2020 [12]

VOKSHORI LAW GROUP V. VILLA
TIMOTHY SPRINGER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part, denied in part. Plaintiff shall file and serve an amended complaint within 14 days of entry of the order.

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

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.

This motion will be DENIED as to the first cause of action, GRANTED WITHOUT LEAVE TO AMEND as to the second cause of action, and GRANTED WITH LEAVE TO AMEND as to the third cause of action. The request for attorney's fees will be DENIED WITHOUT PREJUDICE.

Debtor and defendant, Anthony Villa ("Defendant"), filed this motion to dismiss this adversary proceeding under Federal Rule of Civil Procedure[1] 12(b)(6) (made applicable in bankruptcy proceedings under Fed. R. Bankr. P. 7012). Doc. #12. Defendant also seeks attorney's fees.

Plaintiff Vokshori Law Group ("Plaintiff") filed this adversary proceeding on August 17, 2020. Doc. #1. The complaint alleges that Defendant's debt owed to Plaintiff should be deemed nondischargeable and asserts three causes of action: (1) fraud under 11 U.S.C. § 523(a)(2)(A); (2) fraud under 11 U.S.C. § 523(a)(2)(C); (3) Plaintiff requests a money judgment on the basis that Defendant caused Plaintiff damage in the amount of $15,538.67, which is presumed to be nondischargeable thereby entitling Plaintiff to a money judgment of $15,538.67. *Id.*

Defendant filed a demurrer on September 17, 2020, which stated that Defendant's attorney was not served with a copy of the complaint as required by Rule 7004(g) and LBR 9014-1(e). Doc. #9. Demurrers are not recognized in federal practice. It is moot anyway since Defendant filed this motion to dismiss, which waives any service

[1] Future references to the Federal Rules of Civil Procedure will be shortened to "Civil Rule;" future reference to the Federal Rules of Bankruptcy Procedure will be shortened to "Rule."

defect on the moving party. On October 7, 2020, Defendant filed this motion to dismiss. Doc. #12.

Defendant contends Plaintiff failed to assert a claim upon which relief may be granted because (1) Defendant never misrepresented his financial condition and was upfront about his precarious financial position and (2) the debt is not nondischargeable under 11 U.S.C. § 523(a)(2)(C) because the debt was not incurred within 90 days prior to filing for bankruptcy; and (3) there is no legal basis for a claim of money damages. Doc. #12.

Plaintiff filed opposition to Defendant's motion to dismiss contending that the motion should be denied as to the first count under § 523(a)(2)(A) because the complaint "clearly spells out fraud." Doc. #19. Plaintiff consents to dismissal of the second count under § 523(a)(2)(C). *Id.* at ¶ 7. Plaintiff additionally contests Defendant's request for attorney's fees because the motion provides no legal or factual authority.

Background

Plaintiff and Defendant executed a legal services agreement ("Legal Agreement") for loan modification services on December 19, 2017 because Defendant was about eight months behind on his mortgage payments. Defendant promised to pay Plaintiff under the terms of the Legal Agreement. Between December 19, 2017 and July 2, 2020, the date Defendant filed bankruptcy, he had incurred $15,538.67 in charges under the terms of the Legal Agreement. Doc. #6. Plaintiff alleges that Defendant did not and has never made any payment to Plaintiff. Doc. #1 at ¶ 11.

Plaintiff's services to Defendant included, but were not limited to: (1) collecting documents from Defendant for a loan modification application; (2) contacting Defendant's lender to obtain information as to the history of the loan and the negotiation process; (3) preparing the loan modification application and submitting it to the lender; (4) successfully obtaining a trial loan modification that reduced Defendant's monthly mortgage payment by $459.82 per month.

On February 5, 2018, and on February 7, 2018, while Plaintiff was actively working on the loan modification process, Defendant advised Plaintiff that he was contemplating filing bankruptcy. On March 12, 2018, Defendant emailed Plaintiff stating that he was dissatisfied with Plaintiff's legal services rendered and would be consulting with an attorney to file bankruptcy. In April of 2018, Defendant's mortgage was assigned to a different mortgage servicer, New Penn Financial. On May 3, 2018, Plaintiff delivered the completed loan application to New Penn Financial. On May 24, 2018, Defendant was approved for a trial modification with a three-month trial plan beginning on July 1, 2018, with a payment of $2,458.00 per month, which was $459.82 per month less than Defendant's prior payment of $2,917.82. *Id.* at ¶ 19. Defendant agreed to this loan modification.

In September 2018, Defendant contacted Plaintiff to claim he and his spouse were filing for divorce and intended to sell the real property. Defendant executed the permanent loan modification

agreement, which was sent to Defendant on September 26, 2018. Defendant was approved for a permanent loan modification on November 1, 2018 with a payment of $2,474.47 per month. $39,595.07 of the loan's principal balance was deferred, which is $443.35 per month less than Defendant's prior, pre-modification payment of $2,917.82.

On March 1, 2019, Defendant filed his first chapter 13 bankruptcy, case no. 19-50435. Plaintiff filed an adversary proceeding objecting to dischargeability of indebtedness under 11 U.S.C. § 523 in the first bankruptcy. *See* case no. 19-05030. The first chapter 13 bankruptcy was dismissed prior to confirmation for failure to make plan payments, which caused the adversary proceeding to also be dismissed.

On January 7, 2020, Defendant's spouse, Maria Villa (Ms. Villa), filed for bankruptcy with the same attorney. *See* case no. 20-50017. Plaintiff filed an adversary proceeding, case no. 20-05023. Ms. Villa initially failed to make plan payments, resulting in a trustee's motion to dismiss. However, she opposed that motion, filed an amended plan, and now appears to wish to proceed.

On July 2, 2020, Defendant filed this chapter 7 bankruptcy petition, case no. 20-12269. *See In re Anthony Villa*, case no. 20-12269, Doc. #1. In response, Plaintiff filed this adversary proceeding.

Motion to Dismiss Standard

Civil Rule 12(b)(6) states dismissal is warranted "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 1035, 1041 (9th Cir. 2010)); *see also 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 to relief 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 a motion to dismiss, all material facts of the complaint are to be taken as true and should be 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 of the allegations contained 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.

Causes of Action

False pretenses, false representation, or actual fraud—§ 523(a)(2)(A)

Plaintiff's first cause of action states that the debt should be found nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). 11 U.S.C. § 523(a)(2)(A) provides, in relevant part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

11 U.S.C. § 523(a)(2)(A). Plaintiff contends that the charges incurred under the Legal Agreement were not incurred for goods or services reasonably necessary for the maintenance of support for Defendant and his dependents, and were instead incurred for consumer debt as defined in 11 U.S.C. § 101(8).

Plaintiff alleges that by entering into the contract and incurring the charges, Defendant represented an intention to repay them. Defendant exhibited an intention to repay Plaintiff the charges by accepting the benefits of the charges, including the successful modification of his mortgage loan. Incurrence of the charges and subsequent non-payment, Plaintiff contends, constitutes material misrepresentations of an intent to pay Plaintiff.

Defendant seeks dismissal of this cause of action on the basis that he disclosed his financial condition to Plaintiff. "Defendant was upfront about his need for help and that was the reason that the Plaintiff entered into the agreement."

Defendant states that Plaintiff has failed to show that the debt was obtained by false pretenses, a false representation, or actual fraud, and that nothing in Plaintiff's narrative supports the assertion. Defendant claims he entered into the agreement in good faith and fifteen months later decided to try bankruptcy to resolve his financial problems.

Plaintiff's opposition states that the complaint clearly lays the groundwork for a claim of fraud. The elements of § 523(a)(2)(A) are: (1) misrepresentation, fraudulent omission, or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of the representation or omission; (3) an intent to deceive; (4) the creditor's justifiable reliance on the misrepresentation or conduct; and (5) damage to the creditor proximately caused by reliance on the debtor's representations or conduct. *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010); *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19, 35 (B.A.P. 9th Cir. 2009).

Plaintiff submits that the complaint sufficiently alleges Defendant has engaged in misrepresentation, fraudulent omission, or deceptive conduct with knowledge of the falsity and intent to deceive.

The complaint alleges that Defendant signed the Legal Agreement, which contains clear and undisputed representations that Defendant intended to pay. Doc. #1, ¶ 7. The Legal Agreement constitutes a covenant and representation that the payment would be made. *Arciniega v. Clark (In re Arciniega)*, 2016 LEXIS 343 (B.A.P. 9th Cir. Feb. 3, 2016) (debtor's contractual promise to "take all necessary measures to pay off the existing VA loan" is a representation). A person who executes a contract and promises to pay the other contracting party impliedly represents that he has the present intention of paying and if there is no present intention, then this is a misrepresentation. *Id.* Defendant not only promised to pay in the Legal Agreement, he also represented that he would pay if required to do so. Plaintiff alleges that these representations were false because Defendant was contemplating a bankruptcy filing to avoid paying Plaintiff's debt under the Legal Agreement at the time the Legal Agreement was executed.

In the alternative, Plaintiff believes a fraudulent omission occurred when Defendant failed to inform Plaintiff at the time he signed the Legal Agreement that he had no intention of paying and would instead file bankruptcy at the conclusion of Plaintiff's services. The complaint alleges that Defendant made representations of his intent to file bankruptcy to avoid paying under the Legal Agreement on February 5, 2018 and on February 7, 2018, less than two months after signing the Legal Agreement and while the loan modification services were being performed. Doc. #1 at ¶ 14. Further, Defendant emailed Plaintiff to state he was dissatisfied with Plaintiff's services and would be meeting an attorney to contemplate bankruptcy. *Id.* at ¶ 15. Thereafter, Defendant requested Plaintiff to proceed with the loan modification. *Id.* at ¶ 16. Plaintiff argues that the request to proceed with the loan modification in 2018 constitutes an additional representation that Defendant would pay under the Legal Agreement.

Plaintiff contends that he justifiably relied on these misrepresentations and was damaged by them. Justifiable reliance is a subjective standard, which evaluates a person's knowledge under the particular circumstances. *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1090 (9th Cir. 1996). Reliance may be presumed where the fraud primarily involves omissions. *Bershaskiy v. Rodeo Realty, Inc. (In re Bershadsky)*, 2013 LEXIS 4597 (B.A.P. 9th Cir. Oct. 15, 2019). The complaint alleges that Plaintiff justifiably relied on the misrepresentations of his intent to pay the Legal Agreement fees. Doc. #1 at ¶ 51. The complaint alleges that this caused damage in the amount of $15,538.67. *Id.* at ¶¶ 52-53.

This reliance is justified, according to Plaintiff, because (1) Defendant signed the Legal Agreement; (2) Defendant initialed each and every page of the Legal Agreement; (3) Defendant did not manifest any disagreement with the Legal Agreement provision as to the obligation to pay; and (4) alternatively, a fraudulent omission

occurred when Defendant failed to inform Plaintiff at the time he signed the Legal Agreement that he had no intention of paying and would file bankruptcy instead.

This court agrees. Plaintiff's ability to prove fraudulent intent and/or omission is another matter altogether. Under the pleading rules, conditions of a person's mind may be generally alleged. Fed. R. Civ. P. 9(b) (Fed. R. Bankr. P. 7009).

When considering all material facts construed in the light most favorable to Plaintiff, Plaintiff has pled factual content that allows the court to draw a reasonable inference that Defendant may be liable for misconduct alleged. *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Therefore, Defendant's motion to dismiss as to the first cause of action under 11 U.S.C. § 523(a)(2)(A) will be DENIED.

Consumer debts aggregating more than $500 for luxury goods or services—§ 523(a)(2)(C)

Defendant contends that the second count under 11 U.S.C. § 523(a)(2)(C) fails to state a claim upon which relief may be granted. Doc. #12.

11 U.S.C. § 523(a)(2)(C):

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> (C)
> (i) for the purposes of subparagraph (A)—
> (I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
> (II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable . . .

11 U.S.C. § 523(a)(2)(C)(i). Defendant contends that nothing in the complaint states that the debt was incurred within the 90 days prior to filing. Doc. #12.

Plaintiff concedes that this debt was not incurred within 90 days of filing and consents to the dismissal of the second count. Doc. #19 at ¶ 7.

Therefore, as to the second cause of action under 11 U.S.C. § 523(a)(2)(C), this motion will be GRANTED IN PART and the second count will be DISMISSED WITHOUT LEAVE TO AMEND.

Money judgment

Lastly, Plaintiff seeks a money judgment in the amount of $15,538.67 because that is the amount presumed to be nondischargeable. Upon a finding that the debt is nondischargeable, Plaintiff will be entitled to a money judgment.

Defendant seeks dismissal of the third claim because a more definitive statement is required in order to respond to this claim.

This claim appears to be contingent on the first claim under § 523(a)(2)(A). If the debt is deemed nondischargeable, then Plaintiff will need to prove damages and, if proven, the debt will not be discharged.

This claim is duplicative because Plaintiff will either succeed on the § 523(a)(2)(A) claim, or not. If Plaintiff is successful on the § 523(a)(2)(A) claim, then Plaintiff will have its relief through its current claim being deemed nondischargeable. If Plaintiff is not successful, then it would not be entitled to a money judgment because it did not prove that the debt is nondischargeable and its debt would be treated as non-priority unsecured debt in what will likely be a no-asset case. Therefore, the motion to dismiss as to this count will be GRANTED WITH LEAVE TO AMEND.

Defendant's Request for Attorney's Fees

Defendant's motion to dismiss also requests attorney's fees for two reasons: (1) § 523(d); and (2) the Legal Agreement contains a clause that provides for attorney's fees to the prevailing party if the contract is litigated.

Defendant provides no legal authority other than citing 11 U.S.C. § 523(d) and a clause from the Legal Agreement as to why he should be granted attorney's fees.

Plaintiff opposes because Defendant did not provide any legal authority or factual basis for the request.

First, Defendant cannot request multiple types of relief (dismissal and attorney's fees, in this case) in one motion. Second, Defendant provides no authority for why he is entitled to this relief at this stage. Should Defendant ultimately prevail in this adversary proceeding, the issue of attorney's fees, including those fees incurred in bringing this motion, can be explored post-judgment.

Therefore, the request for attorney's fees will be DENIED WITHOUT PREJUDICE because Defendant has not made a *prima facie* showing that he is entitled to the relief sought.

Conclusion

For the foregoing reasons, this motion will be DENIED as to the first cause of action, GRANTED WITHOUT LEAVE TO AMEND as to the second cause of action, and GRANTED WITH LEAVE TO AMEND as to the third cause of action. The request for attorney's fees will be DENIED WITHOUT PREJUDICE.

The first cause of action under 11 U.S.C. § 523(a)(2)(A) may proceed because Plaintiff has pled factual content that, if taken in the light most favorable to Plaintiff, allows the court to draw a reasonable inference that Defendant may be liable for the misconduct alleged.

The second cause of action will be DISMISSED WITHOUT LEAVE TO AMEND because the debt was not incurred within 90 days before the chapter 7 petition was filed and Plaintiff concedes on that issue.

The third cause of action is DISMISSED WITH LEAVE TO AMEND because Plaintiff's relief is dependent upon the first cause of action and Plaintiff will either succeed or fail in obtaining relief on that claim. If there is another theory that can be properly pled, Plaintiff has a limited opportunity to amend the complaint.

The request for attorney's fees will be DENIED WITHOUT PREJUDICE because Defendant has not made a *prima facie* showing that he is entitled to the relief sought at this stage.

Plaintiff shall file and serve an amended complaint within 14 calendar days of entry of the order on this motion.