UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, January 6, 2021
Place: Department B – 510 19th Street
Bakersfield, 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.

9:00 AM

1. 19-11408-B-13 **IN RE: DOUGLAS MCDANIEL**
RSW-5

MOTION TO MODIFY PLAN
11-12-2020 [148]

DOUGLAS MCDANIEL/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

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) and will proceed as scheduled.

Douglas Krug McDaniel ("Debtor") seeks confirmation of his Fifth Modified Chapter 13 Plan. Doc. #148. The Bank of New York Mellon ("Creditor") filed a limited opposition on the basis that Debtor is finalizing a loan modification to cure pre- and post-petition arrears and the plan does not reflect the actual, final loan modification terms. Doc. #154. Creditor is the holder of a secured claim encumbering Debtor's real property commonly known as 21146 Perch Ave., Tehachapi, CA 93571. *Id.*, ¶ 1. Creditor filed a proof of claim in the amount of $287,144.46 on May 14, 2019. *See* Claim #5-1.

Pursuant to 11 U.S.C. § 1322(b)(2), Creditor argues that the plan is modifying its rights as a secured creditor holding a claim against Debtor's principal residence. On this basis, Creditor requests that confirmation be denied or, in the alternative, for the confirmation order to state that the plan is not yet final regarding the cure of pre- and post-petition payments, along with ongoing mortgage payments. *Id.*, at 3, ¶ 2.

Debtor responded, stating that he does not want this motion to be denied. Doc. #156. Debtor requests that the matter be continued, or Creditor's objection be overruled.

Presently, Creditor is listed in Class 4, which includes secured claims paid directly by Debtor or a third party. Doc. #152, ¶ 3.10. But section 3.02 of the plan provides that it is the proof of claim, not the plan itself, that determines the amount that will be repaid under the plan. *Id.*, ¶ 3.02. Creditor's proof of claim states an arrearage of $24,939.18. Claim #5-1. The claim is still classified in Class 4 and paid directly by Debtor. If confirmed, the plan terminates the automatic stay for Class 4 creditors, so Creditor would have stay relief. *See* Doc. #152, ¶ 3.11. But if Debtor needed to modify the plan to account for the pre- and post-petition arrearage after the loan modification is finalized, then the objection would be moot.

Accordingly, this objection will be OVERRULED, the motion will be GRANTED, and the plan will be confirmed.

2. 20-13208-B-13 **IN RE: ELIZABETH MARTIN AND AARON HAMPTON**
MHM-1

MOTION TO DISMISS CASE
11-13-2020 [17]

MICHAEL MEYER/MV
PHILLIP GILLET/ATTY. FOR DBT.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 Trustee Michael Meyer withdrew this objection on January 4, 2021. Doc. #26. Accordingly, this motion will be dismissed and the matter will be dropped from calendar.

3. 17-13122-B-13 **IN RE: TANYA MADDOX**
RSW-2

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH NATHAN GARRELTS, WHEELER MACHINERY CORPORATION, AND WHEELER MACHINERY INSURANCE CORPORATION
12-3-2020 [58]

TANYA MADDOX/MV
ROBERT WILLIAMS/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 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.

Tanya Maddox ("Debtor") filed this motion seeking to approve a settlement agreement with Nathan Garrelts and Wheeler Machinery ("Wheeler") for personal injuries and damages she and her two daughters sustained on January 1, 2018 in a vehicular accident in Clark County, Nevada. Doc. #58. No parties in interest timely filed written opposition.

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 ("Rule") 9019(a). Absent from Rule 9019 is standing for a 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 for bankruptcy on August 12, 2017 and confirmed a chapter 13 plan on October 30, 2017. Doc. #1; #22. On January 1, 2018, Debtor was involved in a vehicular accident with her two daughters in Clark County, Nevada. Doc. #60, ¶ 2. Debtor alleges that the other driver, Nathan Garrelts, was at fault. *Ibid.* The vehicle Mr. Garrelts was driving was owned by Wheeler. *Ibid.* Debtor filed suit in Clark County, Nevada, case no. A-19-805069-C, alleging personal injuries and seeking damages. *Ibid.*

Recently, Debtor, Wheeler, and Mr. Garrelts reached a settlement agreement in the gross amount of $50,000.00. *Id.*, ¶ 3. After payment of costs, medical liens, and attorney fees, Debtor will receive $20,000.00, which Debtor states will be enough to pay off her chapter 13 plan. *Id.*, ¶¶ 3, 6. The court notes that Schedules A/B and C have not recently been amended to include the claim against Mr. Garrelts and Wheeler nor exempt its proceeds. However, because

the funds will go to Debtor's attorney, who will then pay off the chapter 13 plan before disbursing remaining funds to Debtor, failure to amend the schedules appears to be *de minimis*.

It appears from the moving papers that 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):

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

Under the terms of the compromise, Wheeler or Mr. Garrelts will make a gross payment of $50,000.00 to Debtor, which will be used to pay her costs, medical liens, attorney fees, and the remainder of her chapter 13 plan. Doc. #60, ¶¶ 3, 6. Since the court was not provided a copy of the Settlement Agreement, the court does not speculate what consideration Debtor provides under the agreement.

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: the probability of success is far from assured; collection could be easy if the settlement is approved, but difficult depending on the financial status of Mr. Garrelts and Wheeler if the state court case were tried to judgment; the litigation could become complex and require an evidentiary hearing, causing a potential decrease in the net to the estate due to legal fees; and the creditors will benefit from the plan being paid off in full, which provides for a 100% dividend to unsecured creditors. *See* Doc. #5, ¶ 2.15. Debtor also contends the settlement agreement: (a) was negotiated in good faith; (b) is the best result that can be achieved under the facts of the case; (c) is fair and equitable; and (d) all necessary documents have been provided to Michael Meyer, the chapter 13 trustee ("Trustee"). Because the Trustee has not objected, nor any other party in interest, the settlement will be found equitable and fair.

It appears that the compromise pursuant to Rule 9019 is a reasonable exercise of the Debtor's business judgment. 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). The law favors compromise and not litigation for its own sake. *Id.* Moreover, Trustee did not file written opposition. Accordingly, the motion will be granted. The order should be limited to the claims compromised as described in the motion.

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

4. 15-13332-B-13 **IN RE: MARIA VILLALOBOS**
PK-2

CONTINUED MOTION TO MODIFY PLAN
10-1-2020 [31]

MARIA VILLALOBOS/MV
PATRICK KAVANAGH/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion was previously heard on December 2, 2020 after 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1) and continued to January 6, 2021. Doc. #45. Chapter 13 Trustee Michael Meyer ("Trustee") objected to confirmation of First Modified Plan on grounds that Maria Villalobos ("Debtor") could no longer modify the plan because payments were already completed as of June 2020. Doc. #40. Debtor responded and requested that the plan be confirmed. Doc. #42.

Per our last order, the matter was continued so that Debtor could file further response, if any, by December 23, 2020 or the objection would be sustained, and the motion denied. Doc. #47.

Debtor did not file further response. Accordingly, the objection will be SUSTAINED, and the motion will be DENIED WITHOUT PREJUDICE.

5. 19-13437-B-13 **IN RE: JOSE REYES**
RSW-2

CONTINUED MOTION TO MODIFY PLAN
10-13-2020 [44]

JOSE REYES/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING WITHDRAWN

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 previously heard on December 2, 2020 after 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1) and continued to January 6, 2021. Doc. #57. Chapter 13 Trustee Michael Meyer ("Trustee") objected to confirmation of the Second Modified Plan. Doc. #52. Per the last order, Jose Reyes ("Debtor") had until December 23, 2020 to file and serve further written

response addressing each issue raised in the opposition and admissible evidence to support Debtor's position. Doc. #56. Trustee, meanwhile, was to file and serve a reply, if any, by December 30, 2020.

Debtor and Trustee jointly filed a stipulation and proposed order on December 11, 2020 resolving Trustee's objections to the proposed plan. Doc. #59; #60. Based on this stipulation, Trustee withdraws his opposition. Doc. #59, ¶ 4. No other party in interest timely filed written opposition.

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

6. 20-13245-B-13 **IN RE: MARIA BARAJAS**
MHM-1

MOTION TO DISMISS CASE
12-9-2020 [17]

MICHAEL MEYER/MV
PHILLIP GILLET/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

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.

Here, the chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors. Doc. #17. Debtor did not oppose.

The record shows that there has been unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtor failed to set a plan for hearing with notice to creditors. Accordingly, the motion will be GRANTED, and the case dismissed.

7. 20-12848-B-13 **IN RE: PATRICK/MARIBETH TABAJUNDA**
ALG-1

CONTINUED 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.

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

DISPOSITION: Sustained.

ORDER: The court will issue an order.

This objection was filed, served, and set for hearing on November 12, 2020 pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4), continued to December 9, 2020, and continued again to January 6, 2021. Doc. #24; #42.

Valley Strong Credit Union ("Creditor") objects to plan confirmation because the plan does not fully cure Creditor's pre- and post-petition arrears as required by 11 U.S.C. § 1325(a). Doc. #15.

This matter was originally pre-disposed on December 9, 2020 because no written opposition was filed before the continued hearing, but Patrick Tabajunda and Maribeth Tabajunda ("Debtors") requested the matter be continued because they had resolved the objection with Creditor. *See* Doc. #43. At the last hearing, this court stated that the objection would be overruled as moot if the plan was confirmed before the January 6, 2021 hearing. *Id.* If the plan was not confirmed by then, this would indicate to the court that the objection was not resolved, and the objection would be sustained on the merits without further hearing. *Id.*

Creditor is a Class 1 Creditor according to the plan. Doc. #2, ¶ 3.07. Although section 3.02 of the plan states that it is the proof of claim, not the plan or schedules, that shall determine the amount and classification of a claim, section 3.07(b)(2) states that if a Class 1 creditor's proof of claim demands a higher or lower post-petition monthly payment, the plan payment shall be adjusted accordingly. *Id.*, ¶ 3.02; ¶ 3.07(b)(2).

Therefore, this objection will be SUSTAINED. Debtors shall file a modified plan.

8. 20-12848-B-13 **IN RE: PATRICK/MARIBETH TABAJUNDA**
RSW-2

MOTION TO VALUE COLLATERAL OF VALLEY STRONG CREDIT UNION
12-5-2020 [31]

PATRICK TABAJUNDA/MV
ROBERT WILLIAMS/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 Federal Rules of Bankruptcy Procedure.[1]

Rule 9036 governs notice and service generally, and provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but it is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.

Rule 9036. Meanwhile, Rule 3012(b) provides:

> [A] request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.

Rule 3012(b). Rule 9014(b) requires motions in contested matters to be served as provided by Rule 7004. Rule 7004 allows service in the United States by first class mail by "mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business" and "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to

[1] Unless otherwise indicated, references to "Rules" will be to the Federal Rules of Bankruptcy Procedure; and "Civil Rule" will be to the Federal Rules of Civil Procedure.

receive service of process." Rules 7004(b)(1), (b)(3). If the United States trustee is sued or otherwise a party to litigation unrelated to its capacity as a trustee, then the requirements of Rule 7004(b)(5) also apply. *See* 10 Collier on Bankruptcy App. 7004, at ¶ 3 (16th 2020).

Here, the certificate of service indicates that both the chapter 13 trustee ("Trustee") and United States Trustee ("UST") were served via email. Doc. #35. Rule 7004, which is applicable for motions to determine the amount of a secured claim under Rule 3012, is specifically precluded from electronic service pursuant to Rule 9036. This service requirement is not subject to waiver under Civil Rule 5(d). Rule 7004(a)(1). Debtors must serve UST and Trustee in conformance with Rule 7004.

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

9. 20-12848-B-13 **IN RE: PATRICK/MARIBETH TABAJUNDA**
RSW-3

MOTION TO VALUE COLLATERAL OF FRANCHISE TAX BOARD
12-5-2020 [36]

PATRICK TABAJUNDA/MV
ROBERT WILLIAMS/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 Federal Rules of Bankruptcy Procedure.[2]

Rule 9036 governs notice and service generally, and provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consented to in writing. In either of these events, service or notice is complete upon filing or sending but it is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.

[2] Unless otherwise indicated, references to "Rules" will be to the Federal Rules of Bankruptcy Procedure; and "Civil Rule" will be to the Federal Rules of Civil Procedure.

Rule 9036. Meanwhile, Rule 3012(b) provides:

> [A] request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or chapter 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion after a claim is filed or in a claim objection.

Rule 3012(b). Rule 9014(b) requires motions in contested matters to be served as provided by Rule 7004. Rule 7004 allows service in the United States by first class mail by "mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business" and "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rules 7004(b)(1), (b)(3). If the United States trustee is sued or otherwise a party to litigation unrelated to its capacity as a trustee, then the requirements of Rule 7004(b)(5) also apply. *See* 10 Collier on Bankruptcy App. 7004, at ¶ 3 (16th 2020).

Here, the certificate of service indicates that both the chapter 13 trustee ("Trustee") and United States Trustee ("UST") were served via email. Doc. #40. Rule 7004, which is applicable for motions to determine the amount of a secured claim under Rule 3012, is specifically precluded from electronic service pursuant to Rule 9036. This service requirement is not subject to waiver under Civil Rule 5(d). Rule 7004(a)(1). Debtors must serve UST and Trustee in conformance with Rule 7004.

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

10. 19-10949-B-13 **IN RE: OLGA LLAMAS**
RSW-3

MOTION TO MODIFY PLAN
11-13-2020 [55]

OLGA LLAMAS/MV
ROBERT WILLIAMS/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 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.

Olga Llamas ("Debtor") filed a declaration indicating that she fell behind on her plan payments after sustaining an injury requiring surgery on October 14, 2020. Doc. #57, ¶ 4. As result, Debtor now seeks modification to bring her plan payments current. *Ibid.* Currently, Debtor states that her only source of income is disability insurance at $303.00 per month. *Id.*, ¶ 5. Debtor expects to return to work in February 2021. *Id.*, ¶ 4. Robert Williams, Debtor's attorney, filed a declaration stating that the plan complies with all applicable provisions of § 1325(a). Doc. #58.

Upon request by the chapter 13 trustee, Debtor shall amend Schedule I and J to reflect her restored income after returning to work. If Debtor is otherwise 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 docket control number of the motion and it shall reference the plan by the date it was filed.

11. 19-15053-B-13 **IN RE: YASMIN APRESA**
RSW-4

MOTION TO MODIFY PLAN
11-13-2020 [56]

YASMIN APRESA/MV
ROBERT WILLIAMS/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 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. 18-11964-B-13 **IN RE: PAUL/MICHELLE ESPARZA**
RSW-3

MOTION TO VACATE DISMISSAL OF CASE
12-23-2020 [59]

PAUL ESPARZA/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
DISMISSED 12/22/2020

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.

Paul Esparza and Michelle Esparza ("Debtors") filed this motion asking this court to vacate the dismissal of their chapter 13 case. Doc. #59.

This motion will be GRANTED. Federal Rule of Civil Procedure 60(b) (made applicable by Federal Rule of Bankruptcy Procedure 9024) states that, "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceedings for the following reasons: mistake, inadvertence, surprise, or excusable neglect. . . any other reason that justifies relief."

In this case, Debtors' plan was confirmed approximately two months after filing the petition in May 2018. On December 22, 2020, this case was dismissed for delinquency in plan payments. Doc. #38. Debtors signed and served by mail documents to modify their plan on December 16, 2020, but due to a secretarial error, the documents were not filed until December 22, 2020. Doc. #61; *see also* RSW-2. Debtors claim that they served all necessary parties with the documents required to modify the plan despite not filing such documents. Debtors also filed amended Schedules I and J, which shows a good faith effort to proceed in their chapter 13 case. *See* Doc. #64.

The court finds excusable neglect sufficient to grant the requested relief and grant the motion. Debtor made good faith efforts to modify the plan to avoid dismissal. If no opposition is presented at the hearing, then the court intends to GRANT this motion.

10:00 AM

1. 20-13420-B-7 **IN RE: CHRISTOPHER MARTENS**
JHW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-25-2020 [12]

MERCEDES-BENZ FINANCIAL
SERVICES USA LLC/MV
PETER FEAR/ATTY. FOR DBT.
JENNIFER WANG/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 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, Mercedes-Benz Financial Services USA LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) with respect to a 2014 Mercedes-Benz E350W ("Vehicle"). Doc. #12.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtor has failed to make 1 pre-petition payment and at least one post-petition payment. The movant has produced evidence that debtor is delinquent at least $1,285.00. Doc. #15, #17.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded. According to the debtor's Statement of Intention, the Vehicle will be surrendered.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtor has failed to make one pre-petition payment and at least one post-petition payment to Movant and the Vehicle is a depreciating asset.

2. 20-11334-B-7 **IN RE: RICK/LINDA MILLER**
JHW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-8-2020 [60]

ACAR LEASING LTD/MV
D. GARDNER/ATTY. FOR DBT.
JENNIFER WANG/ATTY. FOR MV.

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

DISPOSITION: Denied as moot.

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

This motion relates to an executory contract or lease of personal property. The case was filed on April 6, 2020 and the lease was not assumed by the chapter 7 trustee within the time prescribed in 11 U.S.C. § 365(d)(1). Pursuant to § 365 (p)(1), the leased property is no longer property of the estate and the automatic stay under § 362(a) has already terminated by operation of law. The court notes that the Debtors' discharge was entered on July 28, 2020. Doc. #55.

Movant may submit an order denying the motion and confirming that the automatic stay has already terminated on the grounds set forth above. No other relief is granted.

3. 20-12851-B-7 **IN RE: DANIEL GARCIA MARTINEZ**
APN-2

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-11-2020 [24]

NISSAN MOTOR ACCEPTANCE
CORPORATION/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Nissan Motor Acceptance Corporation ("Creditor") filed this motion on less than 28 days' notice pursuant to Local Rule of Practice[3] 9014-1(f)(2). This matter will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure.

Rule 9036 governs notice and service generally, and provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consenting to in writing. In either of these events, service or notice is complete upon filing or sending but it is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004.

Rule 9036. Meanwhile, Rule 4001(a)(1) requires motions for relief from the automatic stay to be "made in accordance with Rule 9014[.]" Rule 9014(b) requires the motion be served in the manner provided for service of a summons and complaint by Rule 7004. Rule 7004 allows service in the United States by first class mail by "mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business" and "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rules 7004(b)(1), (b)(3). If the United States trustee is sued or otherwise a party to litigation unrelated to its capacity as a trustee, then the requirements of

[3] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" will be to the Federal Rules of Bankruptcy Procedure; and "Civil Rule" will be to the Federal Rules of Civil Procedure.

Rule 7004(b)(5) also apply. *See* 10 Collier on Bankruptcy App. 7004, at ¶ 3 (16th 2020).

Here, the certificate of service indicates that UST was served "by the Court via Notification of Electronic Filing[.]" Doc. #29. While LBR 7005-1 does allow service by electronic means pursuant to Civil Rule 5(b)(2)(E), as made applicable by Rule 7005, this only applies to pleadings filed after the original complaint, pleadings, and other papers specified in Civil Rule 5(a)(1). But even if this were a pleading or "other paper," the proof of service still does not comply with LBR 7005-1(d). LBR 7005-1(d) states, in relevant part:

> 1) *Upon Those Parties Consenting to Service by Electronic Means.* Service by electronic means pursuant to Fed. R. P. 5(b)(2)(E) shall be accomplished by transmitting an email which includes as a PDF attachment the document(s) served. The subject line of the email shall include the words "Service Pursuant to Fed. R. Civ. P. 5," and the first line of the email shall include the case or proceeding name and number and the title(s) of the document(s) served.
>
> . . .
>
> 3) *Certificate of Service.* The certificate of service shall include all parties served, whether by electronic or conventional means. Where service was accomplished by electronic means, the certificate of service shall include the email addresses to which the document(s) were transmitted, and the party, if any, whom the recipient represents.

LBR 7005-1(d)(1) & (3). But even if this motion were governed by Civil Rule 5, which it is not, Creditor's certificate of service does not comply with LBR 7005-1(a)(3) because it does not include UST's email address. Doc. #29.

This motion's service requirements are controlled by Rule 7004, not Rule 7005. *See* Rule 4001(a); Rule 9014(b). LBR 7005-1(d) does not apply and thus this motion cannot be served by electronically. Debtor must serve UST in conformance with Rule 7004. Rule 9036.

Therefore, this motion will be DENIED WITHOUT PREJUDICE.

The court notes that this motion was an improvement over the last two motions, which were previously denied for combining multiple documents into one filing and reusing a duplicate DCN. *See* APN-1.

4. 20-10465-B-7 **IN RE: JASPREET DHILLON**
WLA-1

MOTION FOR EXAMINATION
12-9-2020 [32]

VIRGINIA LEE ATCHLEY,
SUCCESSOR TRUSTEE OF THE
PHILLIP GILLET/ATTY. FOR DBT.
WILLIAM ALEXANDER/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Virginia Lee Atchley, as Successor Trustee of the Atchley Living Trust ("Creditor") filed this motion on more than 28 days' notice under Local Rule of Practice ("LBR") 9014-1(f)(1) seeking to conduct a Federal Rule of Bankruptcy Procedure ("Rule") 2004 examination of Harjeet Randhawa, the ex-wife of Jaspreet Dhillon ("Debtor"). Doc. #32.

This motion will be denied without prejudice for failure to comply with the local rules, though the court notes that this motion was an improvement over Creditor's previous countermotion for examination in the related adversary proceeding as discussed below. *See Atchley et al v. Dhillon*, adv. no. 20-01059, Doc. #25.

First, LBR 9004-2(e)(1) provides that proofs of service shall be filed as separate documents. LBR 9014-1(e)(2) requires such 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 were filed. LBR 9004-2(e)(2) states that copies of the pleadings served "SHALL NOT be attached to the proof of service filed with the court." Here, each motion document included an attached certificate of service in violation of LBR 9004-2(e)(2). *See* Doc. ##32-35. Moreover, those certificates were not filed separately as required by LBR 9004-2(e)(1). The court notes that only one certificate of service is needed if it includes all motion documents required to be served. *See* LBR 9004-2(e)(3).

Second, LBR 9004-2(d) provides that exhibits shall be filed as a separate document, requires an index, and that exhibit pages be consecutively numbered. In this instance, the exhibit was filed with a declaration rather than separately, there was no index, and the exhibit pages were not consecutively numbered. Doc. #35.

As noted above, the procedural errors from the last motion were corrected. This was an improvement because it contained an unused docket control number, was filed on 28 days' notice, and properly included LBR 9014-1(f)(1) notice language. However, the motion is still defective. For the foregoing reasons, this motion will be

DENIED WITHOUT PREJUDICE.

5. 20-13266-B-7 **IN RE: BRIAN/JACQUELYN CRAIG**
JHW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-10-2020 [12]

FORD MOTOR CREDIT COMPANY
LLC/MV
NEIL SCHWARTZ/ATTY. FOR DBT.
JENNIFER WANG/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 debtors, 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, Ford Motor Credit Company LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to a 2018 Ford Explorer ("Vehicle"). Doc. #12.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtors have failed to make at least

one post-petition payment. The movant has produced evidence that debtors are delinquent at least $785.66. Doc. #15, #18.

The court also finds that the debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because debtors are in chapter 7. *Id.* The Vehicle is valued at $27,400.00 and debtors owe $42,773.54. Doc. #12.

Accordingly, the motion will be granted pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtors surrendered the Vehicle to Movant on October 16, 2020 and the Vehicle is a depreciating asset.

6. 12-11969-B-7 **IN RE: DAMON SMOTHERS**
RSW-2

MOTION TO AVOID LIEN OF MISSION BANK
12-5-2020 [49]

DAMON SMOTHERS/MV
ROBERT WILLIAMS/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.[4]

First, LBR 9004-2(d) provides that exhibits shall be filed as a separate document, requires an index, and that exhibit pages be consecutively numbered. In this instance, the exhibits were filed with the motion rather than separately, there was no index, and the exhibit pages were not consecutively numbered. Doc. #49.

Second, Rule 9036 governs notice and service generally, and provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be

[4] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" will be to the Federal Rules of Bankruptcy Procedure; and "Civil Rule" will be to the Federal Rules of Civil Procedure.

> sent to any person by other electronic means that the person consenting to in writing. In either of these events, service or notice is complete upon filing or sending but it is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004

Rule 9036. Meanwhile, Rule 4003(d) provides:

> A proceeding under § 522(f) to avoid a lien . . . of property exempt under the Code shall be commenced by motion in the same manner provided by Rule 9014, or by serving a chapter 12 or chapter 13 plan on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint.

Rule 4003(d). Rule 9014(b) requires the motion to be served as provided by Rule 7004. Thus, the United States trustee and chapter 7 trustee must be served in accordance with Rule 7004. Rule 7004 allows service in the United States by first class mail by "mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business" and "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rules 7004(b)(1), (b)(3). If the United States trustee is sued or otherwise a party to litigation unrelated to its capacity as a trustee, then the requirements of Rule 7004(b)(5) also apply. *See* 10 Collier on Bankruptcy App. 7004, at ¶ 3 (16th 2020).

Here, the certificate of service indicates that both the chapter 7 trustee ("Trustee") and United States Trustee ("UST") were served via email. Doc. #52. Rule 7004, which is applicable for lien avoidance motions under Rules 4003(d) and 9014(b), does not allow for electronic service. Pursuant to Rule 9014(b), electronic service under Civil Rule 5(b) is only applicable for papers served after the motion. This service requirement is not subject to waiver under Civil Rule 4(d).

This case was closed August 10, 2012 and reopened December 2, 2020. *See* Doc. #36. No chapter 7 trustee was appointed after the case was reopened. Doc. #43. Thus, only UST needs to be served in conformance with Rule 7004.

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

7. 12-11969-B-7 **IN RE: DAMON SMOTHERS**
RSW-3

MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB
12-5-2020 [53]

DAMON SMOTHERS/MV
ROBERT WILLIAMS/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.[5]

First, LBR 9004-2(d) provides that exhibits shall be filed as a separate document, requires an index, and that exhibit pages be consecutively numbered. In this instance, the exhibits were filed with the motion rather than separately, there was no index, and the exhibit pages were not consecutively numbered. Doc. #53.

Second, Rule 9036 governs notice and service generally, and provides:

> Whenever these rules require or permit sending a notice or serving a paper by mail, the clerk, or some other person as the court or these rules may direct, may send the notice to—or serve the paper on—a registered user by filing it with the court's electronic-filing system. Or it may be sent to any person by other electronic means that the person consenting to in writing. In either of these events, service or notice is complete upon filing or sending but it is not effective if the filer or sender receives notice that it did not reach the person to be served. This rule does not apply to any pleading or other paper required to be served in accordance with Rule 7004

Rule 9036. Meanwhile, Rule 4003(d) provides:

> A proceeding under § 522(f) to avoid a lien . . . of property exempt under the Code shall be commenced by motion in the same manner provided by Rule 9014, or by serving a chapter 12 or chapter 13 plan on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint.

[5] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" will be to the Federal Rules of Bankruptcy Procedure; and "Civil Rule" will be to the Federal Rules of Civil Procedure.

Rule 4003(d). Rule 9014(b) requires the motion to be served as provided by Rule 7004. Thus, the United States trustee and chapter 7 trustee must be served in accordance with Rule 7004. Rule 7004 allows service in the United States by first class mail by "mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business" and "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Rules 7004(b)(1), (b)(3). If the United States trustee is sued or otherwise a party to litigation unrelated to its capacity as a trustee, then the requirements of Rule 7004(b)(5) also apply. *See* 10 Collier on Bankruptcy App. 7004, at ¶ 3 (16th 2020).

Here, the certificate of service indicates that both the chapter 7 trustee ("Trustee") and United States Trustee ("UST") were served via email. Doc. #56. Rule 7004, which is applicable for lien avoidance motions under Rules 4003(d) and 9014(b), does not allow for electronic service. Pursuant to Rule 9014(b), electronic service under Civil Rule 5(b) is only applicable for papers served after the motion. This service requirement is not subject to waiver under Civil Rule 4(d). Rule 7004(a)(1).

This case was closed August 10, 2012 and reopened December 2, 2020. *See* Doc. #36. No chapter 7 trustee was appointed after the case was reopened. Doc. #43. Thus, only UST needs to be served in conformance with Rule 7004.

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

10:30 AM

1. 20-12642-B-11 **IN RE: 3MB, LLC**

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
8-11-2020 [1]

LEONARD WELSH/ATTY. FOR DBT.

NO RULING.

2. 20-12642-B-11 **IN RE: 3MB, LLC**
AG-3

MOTION FOR RELIEF FROM AUTOMATIC STAY
12-9-2020 [128]

U.S. BANK NATIONAL ASSOCIATION/MV
LEONARD WELSH/ATTY. FOR DBT.
AMIR GAMLIEL/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Denied without prejudice to filing a motion conforming with the local rules.

ORDER: The court will issue the order.

U.S. Bank National Association, as Trustee, as successor in interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Bear Stearns Commercial Mortgage Securities Inc. Commercial Mortgage Pass-Through Certificates, Series 2007-PWR16 ("USB") filed this stay relief motion asking the court to terminate the automatic stay to permit USB to exercise its remedies under state law. USB has a claim secured by debtor-in-possession 3MB, LLC's ("3MB") single asset: Village Towne Center, a shopping center located at 1201 24th St., Bakersfield, CA 93301.

USB claims grounds exist to terminate the automatic stay under 11 U.S.C. § 362(d)(1) ["cause" including lack of adequate protection], (d)(2) [3MB has no equity in the shopping center and the shopping center is not necessary to an effective reorganization] and (d)(3) [the debtor has neither filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time or made sufficient monthly payments]. 3MB opposes the motion and USB has filed a reply.

The court will DENY THE MOTION WITHOUT PREJUDICE for procedural reasons.

First, the length of the motion and points and authorities exceeds the permissible length for a combined document. Under LBR 9014-1(d)(4) a motion, notice, points and authorities and declarations must be filed as separate documents. A motion and points and authorities may be combined into one document when the document does not exceed six (6) pages in length. *Id.* The motion here is accompanied by 28 pages of points and authorities in a single document which does not comply with the local rules of practice.

Second, the notice is insufficient because it does not include the names and addresses of persons who must be served with any opposition. See LBR 9014-1(d)(3)(B)(i).

Third, the notice is ambiguous about hearing location. The body of the notice references the address for the Fresno courthouse. That is not where the hearing is scheduled. The caption contains the correct location for the hearing, the Bakersfield courthouse. This last issue is probably *de minimis* presently because all hearings are telephonic. But the court brings this to movant's attention for future motions.

LBR 9014-1(l) provides that violation of the rule is grounds for denial of the motion.

The motion will be DENIED WITHOUT PREJUDICE.

3. 20-12642-B-11 **IN RE: 3MB, LLC**
LKW-6

CHAPTER 11 DISCLOSURE STATEMENT FILED BY DEBTOR 3MB, LLC
11-10-2020 [94]

LEONARD WELSH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The Disclosure Statement is not approved.

ORDER: The court will issue the order.

Debtor-in-possession 3MB, LLC ("3MB") asks the court to approve its Disclosure Statement for the proposed Plan of Reorganization dated November 10, 2020. ("DS") U.S. Bank National Association, as Trustee, as successor in interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank National Association, as Trustee, for the registered holders of Bear Stearns Commercial Mortgage Securities Inc. Commercial Mortgage Pass-Through Certificates, Series 2007-PWR16 ("USB") objects to the DS.

USB has two basic objections: first, that the proposed Plan is patently unconfirmable and so, the court should use its discretion

and deny approval of the DS. Second, there are numerous inadequacies in the DS that USB contends preclude approval.

Section 1125(b) conditions solicitation of votes on a proposed plan on the court approving the disclosure statement as containing "adequate information." "Adequate information" is defined as a kind, and in sufficient detail "in light of the nature and history of the debtor and the condition of the debtor's books and records. . . that would enable a hypothetical investor typical of the holders of claims or interests in the relevant class that would enable [that] investor to make an informed judgment about the plan. . . ." § 1125(a)(1).

At the threshold, the court does not agree the Plan as proposed is "patently unconfirmable." USB first asserts that its' proposed treatment under the Plan is not "fair and equitable" under § 1129(b)(1) and (2). Though USB references its' stay relief motion (item 2 above) there is no explanation why the Plan's treatment of USB could not be found "fair and equitable." So, the Plan cannot be patently unconfirmable on this record. Perhaps discovery will reveal facts suggesting whether the plan is "fair and equitable."

In its stay relief motion, USB claims that 3MB cannot satisfy any of the provisions of § 1129(b)(2)(A). Even if consideration of the stay relief motion (which has been denied without prejudice for procedural reasons) is appropriate, the analysis does not add up to a patently unconfirmable plan at this stage. First, there is no evidence the proposed interest rate under the Plan of 4.75% for the balance of USB's claim is not "at least the value" of USB's interest in the shopping center.

Second, whether USB will credit bid on the proposed pad sales is entirely speculative. It seems unlikely USB will credit bid a large amount of its claim when and if the "Starbucks" and "Western Dental" pads are sold. The Plan proposes USB's lien (which is uncontested) will follow the proceeds.

Third, on this record, the court cannot find that the proposed Plan does not give USB the "indubitable equivalent" of its' claim. The concept is amorphous as conceded by USB in its motion. But there is no evidence suggesting the proposed treatment does not satisfy the requirement. So, at this stage there is no basis to find the Plan is legally unconfirmable. USB may oppose confirmation which means 3MB will have to meet the cramdown requirements even if 3MB can prove plan feasibility.

USB also claimed in its stay relief motion the Plan is not feasible. The court agrees 3MB has many hurdles to overcome, not the least of which is a projected cash flow that is unsupported by the Monthly Operating Reports filed by 3MB in this case. *See* Doc. #107 (rents barely enough to service payment to USB under cash collateral stipulation); Doc. #127 (net cash decrease of almost $23,000 after payment of secured debt and professional fees even though there was a 13% increase in cash from October to November). Also, average rent collected for the full months reported is about $46,000 per month

which is much less than projected under the plan before the pads are sold. (Doc. #96).

All the same, these are issues which can be fully litigated in a confirmation setting. The court cannot say, at this time, that on this record the Plan is not feasible. That is not to say the court finds that it is. There is an insufficient record to find without further evidence the Plan is "patently not feasible."

Additionally, the cases USB cites are either distinguishable or support deferring a finding that the plan is unconfirmable at the DS stage. *In re Arnold*, 471 B.R. 578, 585-6 (Bankr. C.D. Cal. 2012) [plan violates absolute priority rule and "impossible to discern" from Disclosure Statement debtor's intentions and lacks information about New Value contribution]; *In re American Capital Equip., LLC*, 688 F. 3d 145, 156 (3d Cir. 2012) [Disclosure Statement disapproved on plan feasibility grounds because plan depended on outcome of "wholly speculative litigation" and debtor's inherent conflict of interest in pending and future litigation]; *In re Quigley Co.*, 377 B.R. 110, 119 (Bankr. S.D.N.Y. 2007) [Disclosure Statement approved as having adequate information though the plan had "confirmation issues that require an evidentiary hearing."]

USB also contends there are numerous inadequacies in the information contained in the DS. At any rate, the "nature and history of the debtor" (§ 1125 (a) (1)) must inform consideration of the DS. USB has a secured claim of about $9.6 million. The only other secured claim is asserted by the Kern County Treasurer and Tax Collector ("KCTTC") in the amount of $284,000.

As for unsecured claims, other than 3MB's principals' claims, there are two disputed personal injury claims (one allegedly covered by insurance and the other for which debtor expects full indemnification), one filed claim by Wells Fargo Bank (about $9,600), and a claim for no amount by the IRS. All unsecured claimants either have counsel or are sophisticated creditors. The only objection to the DS is by USB. USB likely has all the information it needs or can obtain whatever more it requires using the panoply of discovery devices.

That said, there are certain information gaps that need filling before the DS can be approved:

i. The Plan calls for sales of two pads ("Starbucks" and "Western Dental") within a year of confirmation for an expected $4.15 million. No basis for that valuation is provided. Also, there is no real estate broker hired to sell the pads. The debtor's efforts to sell must be clearly stated.

ii. Opposition to the stay relief motion and other evidence has been submitted to the court by 3MB concerning future reorganization. (Doc. #141). Mr. Bell states he has met with buyers and investors. But 3MB provides no specifics as to who, when, terms, timing of binding commitment, etc. USB claims its requests for information have been met with resistance. 3MB risks the fact finder making an adverse inference if information available to 3MB to not revealed.

See, *In re Osborne*, 257 B.R. 14 (Bankr. C.D. Cal. 2000). A more complete discussion in the DS is needed.[6]

iii. 3MB claims there are over $187,000 of accounts receivable. No discussion of the collectability of the receivables is in the DS. This should be discussed.

iv. The only evidence supporting the value of the center is apparently the opinion of a principal, Mr. Bell. Though perhaps competent evidence, USB's appraisal is far less. Some support for 3MB's opinion of value is needed.

v. The same deficiency is present concerning the proposed sale price for the "Starbucks" and "Western Dental" pads.

vi. The DS states that further leasing of vacant space at the center will occur after sale of the pads. Why do those efforts have to wait until then?

vii. What are the consequences if the pads are not sold in one year? As stated above, the Operating Reports do not support the rental income assumptions under girding the projections.

viii. There are risks that the debtor will not be fully indemnified from the pending litigation for which there is no insurance. What are the facts underlying the assumption the debtor will be indemnified? Is there no risk of a claim arising as a result of indemnification?

The court has received and reviewed 3MB's response filed December 23, 2020 (Doc. #145). The court understands 3MB's difficulty in responding to USB's objections given the holiday season. But 3MB and its counsel controlled the scheduling of the hearing on the DS. The hearing could have been scheduled on the Fresno calendar or set on another Chapter 11 hearing date.

That said, virtually all the points raised by 3MB's reply and the court's concerns with the adequacy of the DS are discussed above.

For the forgoing reasons, the DS is not approved.

4. 20-12642-B-11 **IN RE: 3MB, LLC**
LKW-8

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICE OF LEONARD K. WELSH FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S)
12-15-2020 [133]

LEONARD WELSH/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.

[6] Notably in opposition to an earlier motion to dismiss, 3MB advised the court that they were in negotiation with the Bhangoo family for a capital infusion or purchase of the center. No mention of this is in the DS.

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 is a request for compensation or reimbursement of expenses exceeding $1,000.00, and therefore it was properly set for hearing on at least 21 days' notice as required by Fed. R. Bankr. P. 2002(a)(6).

The motion will be GRANTED.

Leonard K. Welsh of the Law Office of Leonard K. Welsh ("Movant"), as counsel for the debtor-in-possession 3MB, LLC ("DIP"), requests approval of fees of $9,030.00 and costs of $99.70 for a total of $9,129.70 for services rendered from November 1, 2020 through November 30, 2020. Doc. #133; #134. DIP's authorized representative, Mr. Robert Bell, filed a declaration stating that DIP has no objection to this court authorizing it to pay $9,129.70 to Movant. Doc. #135.

This is Movant's second fee application.

Movant's employment was authorized on September 3, 2020. Doc. #29. The order specified that DIP was authorized to employ Movant pursuant to 11 U.S.C. § 328(a), subject to applicable terms and conditions of §§ 327, 329-331. *Id.* Compensation was set at the "lodestar rate" applicable at the time services are rendered per the Ninth Circuit decision in *In re Manoa Finance Co.*, 853 F.2d 687 (9th Cir. 1988). *Id.* at ¶ 3. The order further stated that monthly applications for interim compensation pursuant to § 331 would be entertained. *Id.* at ¶ 5.

Form B2030, *Disclosure of Compensation of Attorney for Debtor(s)*, indicates that Movant was paid $6,717.00 by DIP prior to the filing of the petition. Of that pre-petition payment, Movant applied $1,717.00 to costs incurred before the filing of the chapter 11 case. Doc. #1, Form B2030. All fees and costs after August 4, 2020 will be paid by application as approved by this court. *Id.*

On December 3, 2020, this court authorized DIP to pay Movant $13,682.55 plus withdrawal a $5,000.00 retainer for payment of fees and expenses of $18,682.55 incurred from August 1, 2020 through October 31, 2020. Doc. #123.

Movant indicates that the requested fees will be paid directly by DIP from income generated from the operation of its business. Doc. #133 at ¶ 17. Movant additionally contends that his office as provided 25.80 hours of legal services. *Id.*, ¶ 11; #136, Ex. B. Based on Movant and DIP's legal agreement dated June 15, 2020, DIP has agreed to pay Movant an hourly rate of $350.00 per hour and his legal assistant $125.00 per hour. Doc. #136, Ex. C at 2. Lastly,

Movant seeks reimbursement of $99.70 in expenses, which consists of $19.00 in WebPACER charges and $80.70 in postage. Doc. #133, ¶ 14.

Secured Creditor U.S. Bank, N.A., as Trustee, as successor-in-interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank, N.A., as Trustee for the registered holders of Bear Stearns Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-PWR16 ("US Bank"), previously filed a notice of non-consent to use of cash collateral. Doc. #10. US Bank holds a first priority lien and assignment of rents on all of DIPs personal and real property, including but not limited to any rents, income, or proceeds generated by the use of DIP's shopping center. *Id.* However, on November 13, 2020, US Bank filed a stipulation regarding the use of cash collateral, which was approved on November 16, 2020. Doc. #108, #110. US Bank was also served all motion documents pursuant to its request for special notice and may oppose this motion at the hearing. *See* Doc. #139.

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) advising DIP about its duties and administration of the chapter 11 case; (2) reviewing US Bank's motion to conduct a Rule 2004 Examination of Mr. bell and Dr. Mark Thomas (AG-2); (3) preparing and filing DIP's October 2020 monthly operating report (Doc. #107) and status conference statement (LKW-5); (4) advising DIP about the sale of part or all of its shopping center, retaining a marketing and sales agent to assist DIP in the sale of some or all of this shopping center, and communicating with Hilco Real Estate about the case and a potential sale; (5) preparing and filing the first fee application, which was approved on December 3, 2020 (LKW-7); (6) stipulating to use of cash collateral with US Bank, which was approved on November 16, 2020 (Doc. #108, #110); (7) communicating with DIP and US Bank regarding adequate protection payments; (8) preparing and filing Debtor's disclosure statement, which is set for hearing on January 6, 2021 in matter #3 above (LKW-6); (9) seeking approval to compromise a controversy with the City of Bakersfield regarding imminent domain lawsuits, which was granted on November 17, 2020 (LKW-4). The court finds the services reasonable and necessary and the expenses requested actual and necessary.

In the absence of opposition, Movant will be awarded $9,030.00 in fees and $99.70 in costs. DIP will be authorized to pay $9,129.70 to Movant provided payment is consistent with DIP's and US Bank's agreement for use of cash collateral.

11:00 AM

1. 19-14513-B-7 **IN RE: NAYLAN BENDER**
   20-1003

   PRE-TRIAL CONFERENCE RE: COMPLAINT
   1-21-2020 [1]

   LRS REALTY & MANAGEMENT, INC.
   V. BENDER, III
   JEREMY FAITH/ATTY. FOR PL.
   RESPONSIVE PLEADING

NO RULING.

2. 19-14513-B-7 **IN RE: NAYLAN BENDER**
   20-1003 MF-1

   MOTION TO EXTEND TIME
   12-21-2020 [44]

   LRS REALTY & MANAGEMENT, INC.
   V. BENDER, III
   JEREMY FAITH/ATTY. FOR MV.
   OST ORDER #49. OST WAS REQUIRED PER LBR 9014-1(F)(2)(A).

NO RULING.

11:30 AM

1. 20-12597-B-7 **IN RE: GILBERTO/INES RODRIGUEZ**

REAFFIRMATION AGREEMENT WITH AMERICAN HONDA FINANCE CORP.
12-3-2020 [16]

SUSAN SALEHI/ATTY. FOR DBT.

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

DISPOSITION: Dropped.

ORDER: The court will issue an order.

Debtors' counsel will inform debtors that no appearance is necessary.

The court is not approving or denying approval of the reaffirmation agreement. The agreement was filed without the creditor's signature. It appears that a second reaffirmation agreement was filed on the docket on the same day (Doc. #17) that has the creditor's signature. Therefore, this reaffirmation agreement will be dropped from calendar as it is not enforceable.