**UNITED STATES BANKRUPTCY COURT**
**Eastern District of California**
**Honorable Jennifer E. Niemann**
**Hearing Date: Thursday, January 26,2023**
**Department A – Courtroom #11**
**Fresno, California**

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## INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

**Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered.** The court may continue the hearing on the matter, set a briefing schedule, or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

**Final Ruling:** Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

**Orders:** Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

**THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.**

1. 22-11610-A-13 **IN RE: JESSINA HUNTER**
MHM-2

MOTION TO DISMISS CASE
12-29-2022 [50]

MICHAEL MEYER/MV
DISMISSED 1/12/23

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

On January 12, 2023, the court entered an order dismissing the debtor's bankruptcy case. Doc. #55. Therefore, this motion to dismiss is DENIED AS MOOT.

2. 22-11116-A-13 **IN RE: THEDFORD JONES**
MHM-1

MOTION TO DISMISS CASE
12-19-2022 [112]

MICHAEL MEYER/MV

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 debtor 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 default of the debtor is 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 a movant 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 the debtor that is prejudicial to creditors. Doc. #112. Specifically, the trustee asks the court to dismiss

this case for the debtor's failure to confirm a chapter 13 plan. Doc. #112. The debtor did not oppose.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtor that is prejudicial to creditors because the debtor has failed to confirm a chapter 13 plan.

A review of the debtor's Schedules A/B and D shows that the debtor's significant assets, vehicles and real property, are over encumbered. The debtor claims exemptions in the remaining assets. Because there is no equity to be realized for the benefit of the estate, dismissal, rather than conversion to chapter 7, is in the best interests of creditors and the estate. Doc. #112.

Accordingly, the motion will be GRANTED, and the case dismissed.

3. 22-11622-A-13 **IN RE: GREGORY BIRD**
RAS-1

MOTION FOR RELIEF FROM AUTOMATIC STAY, MOTION/APPLICATION FOR RELIEF FROM CO-DEBTOR STAY
12-22-2022 [26]

U.S. BANK NATIONAL ASSOCIATION/MV
PETER BUNTING/ATTY. FOR DBT.
FANNY WAN/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As a procedural matter, the Notice of Hearing filed in connection with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice

to include the names and addresses of persons who must be served with any opposition. The court encourages counsel to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the local rules.

As an informative matter, the movant incorrectly completed Section 6 of the court's mandatory Certificate of Service form. In Section 6, the declarant marked that service was effectuated by Rule 5 and Rules 7005, 9036 Service. Doc. #32. However, Federal Rules of Bankruptcy Procedure 4001(a)(1) and 9014 require service of a motion for relief from stay to be made pursuant to Federal Rule of Bankruptcy Procedure 7004, which was done. In Section 6, the declarant should have checked the appropriate box under Section 6A, not Section 6B.

As a further informative matter, the certificate of service filed in connection with this motion to dismiss (Doc. #32) used an older version of the court's Official Certificate of Service form (EDC Form 7-005, New 09/2022) instead of the most updated version of the court's Official Certificate of Service form (EDC Form 7-005, Rev. 10/22). The correct form can be accessed on the court's website at http://www.caeb.uscourts.gov/Forms/FormsAndPublications.

The movant, U.S. Bank National Association ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) with respect to a 2009 Euro Cruiser Euro 5290 ET, VIN 1GBKG31U171223308 ("Vehicle"). Doc. #26. Movant also seeks relief from the codebtor stay under 11 U.S.C. § 1301(c). Doc. #26. Gregory Norman Bird ("Debtor") and Michelle Robin Bird ("Codebtor") executed a written contractual agreement in 2018 for the purchase of the Vehicle. Decl. of Gabriel Deanda, Doc. #28. Under the terms of the agreement, both Debtor and Codebtor are obligated to Movant. Id.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause. "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 at least one pre-petition payment and two complete post-petition payments. Ex. D, Doc. #30-31. Movant's allowed secured claim is not provided for by Debtor's chapter 13 plan. Plan, Doc. #9; Claim 8. Debtor indicated in his plan that he intends to surrender the Vehicle but, as of November 1, 2022, Debtor has failed to surrender the Vehicle. Doc. #26. On December 27, 2022, Debtor filed a non-opposition to the motion. Doc. #33.

Section 1301 of the Bankruptcy Code provides for a codebtor stay that prohibits a creditor from acting to collect any part of a consumer debt from an individual that is liable on the debt with the bankruptcy debtor. 11 U.S.C. § 1301(a). Relief from the codebtor stay must be granted if "the plan filed by the debtor proposes not to pay such claim." 11 U.S.C. § 1301(c)(2); see In re Williams, 374 B.R. 713, 715-16 (Bankr. W.D. Mo. 2007). Here, Debtor's confirmed chapter 13 plan does not provide for Movant's allowed secured claim and does not propose to pay such claim. Plan, Doc. #9.

Accordingly, the motion will be granted as to Debtor pursuant to 11 U.S.C. § 362(d)(1) and as to Codebtor pursuant to 11 U.S.C. § 1301(c) to permit 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.

4. 22-11623-A-13 **IN RE: AMANDA BEAM**
TCS-1

MOTION TO CONFIRM PLAN
12-12-2022 [29]

AMANDA BEAM/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
DISMISSED 12/15/22

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was entered on December 15, 2022. Doc. #37. Therefore, this motion will be DENIED AS MOOT.

5. 22-10545-A-13 **IN RE: AMY LOCKWOOD**
MHM-2

MOTION TO DISMISS CASE
12-21-2022 [63]

MICHAEL MEYER/MV
MICHAEL MOORE/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 debtor 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 default of the debtor is 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 a movant 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 the debtor that is prejudicial to creditors. Doc. #63. Specifically, the trustee asks the court to dismiss this case for the debtor's failure to confirm a chapter 13 plan and failure to file complete and accurate documents. Doc. #63. The debtor did not oppose.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtor that is prejudicial to creditors because the debtor has failed to confirm a chapter 13 plan and has failed to provide the trustee with all of the documentation required by 11 U.S.C. § 521(a)(3) and (4).

A review of the debtor's Schedules A/B and D shows that the debtor's significant assets, vehicles and real property, are over encumbered. The debtor claims exemptions in the remaining assets. Because there is no equity to be realized for the benefit of the estate, dismissal, rather than conversion to chapter 7, is in the best interests of creditors and the estate. Doc. #63.

Accordingly, the motion will be GRANTED, and the case dismissed.

6. 22-11952-A-13 **IN RE: HERNAN CORTEZ**

CONTINUED ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
12-22-2022 [24]

SCOTT LYONS/ATTY. FOR DBT.

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

DISPOSITION: The order to show cause will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid.

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

7. 22-11952-A-13 **IN RE: HERNAN CORTEZ**
SKI-1

OBJECTION TO CONFIRMATION OF PLAN BY EXETER FINANCE LLC
12-7-2022 [17]

EXETER FINANCE LLC/MV
SCOTT LYONS/ATTY. FOR DBT.
SHERYL ITH/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

8. 22-12053-A-13 **IN RE: NICHOLAS/MISTY CARRILLO**
PBB-1

MOTION TO VALUE COLLATERAL OF KIA MOTORS FINANCE
12-15-2022 [8]

MISTY CARRILLO/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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As an informative matter, the movant incorrectly completed Section 6 of the court's mandatory Certificate of Service form. In Section 6, the declarant marked that service was effectuated by Rule 5 and Rules 7005, 9036 Service. Doc. #12. However, Federal Rule of Bankruptcy Procedure 9014 requires service of a motion in a contested matter be made pursuant to Federal Rule of Bankruptcy Procedure 7004, which was done. Accordingly, service is proper notwithstanding the improperly completed certificate of service.

As further informative matter, the certificate of service filed in connection with this motion to modify plan (Doc. #12) used an older version of the court's Official Certificate of Service form (EDC Form 7-005, New 09/2022) instead of the most updated version of the court's Official Certificate of Service form (EDC Form 7-005, Rev. 10/22). The correct form can be accessed on the court's website at http://www.caeb.uscourts.gov/Forms/FormsAndPublications.

Nicholas J. Carrillo, Jr., and Misty Dawn Carrillo (collectively "Debtors"), the debtors in this chapter 13 case, move the court for an order valuing the Debtors' 2020 Kia Sorento L ("Vehicle"), which is the collateral of Kia Motors Finance ("Creditor"). Doc. #8.

11 U.S.C. § 1325(a)(*) (the hanging paragraph) permits the debtor to value a motor vehicle acquired for the personal use of the debtor at its current value, as opposed to the amount due on the loan, if the loan was a purchase money security interest secured by the property and the debt was not incurred within the 910-day period preceding the date of filing. 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." Section 506(a)(2) of the Bankruptcy Code states that the value of personal property securing an allowed claim shall be determined based on the replacement value of such property as of the petition filing date. "Replacement value" where the personal property is "acquired for personal, family, or household purposes" means "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." 11 U.S.C. § 506(a)(2).

Debtors assert the Vehicle was purchased with a purchase money loan incurred more than 910 days before the filing of this case. Decl. of Nicholas J. Carrillo, Jr., Doc. #10. Debtors assert a replacement value of the Vehicle of $19,084.00 and ask the court for an order valuing the Vehicle at $19,084.00. Doc. #8. Debtors are competent to testify as to the value of the Vehicle. Creditor did not file a proof of claim. Debtors' Schedule A/B lists the replacement value of Debtors' Vehicle as $19,084.00. Schedule A/B, Doc. #1. Given the absence of contrary evidence, Debtors' opinion of value may be conclusive. Enewally v. Wash. Mut. Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

The motion is GRANTED. Creditor's secured claim will be fixed at $19,084.00. 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.

9. 19-10558-A-13 **IN RE: GWENDOLYN BROWN**
FW-2

MOTION TO MODIFY PLAN
11-18-2022 [105]

GWENDOLYN BROWN/MV
GABRIEL WADDELL/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 at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have done here.

As an informative matter, the certificate of service filed in connection with this motion to modify plan (Doc. #111) used an older version of the court's Official Certificate of Service form (EDC Form 7-005, New 09/2022) instead of the most updated version of the court's Official Certificate of Service form (EDC Form 7-005, Rev. 10/22). The correct form can be accessed on the court's website at http://www.caeb.uscourts.gov/Forms/FormsAndPublications.

This motion is 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.

10. 20-12069-A-13 **IN RE: SCOTT/SARINA DUTEY**
MHM-1

MOTION TO DISMISS CASE
12-23-2022 [110]

MICHAEL MEYER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

11. 22-10777-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
MHM-5

MOTION TO DISMISS CASE
12-23-2022 [90]

MICHAEL MEYER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

12. 22-11884-A-13 **IN RE: COSTEL FUIOREA**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
1-9-2023 [30]

TENTATIVE RULING: This matter will proceed as scheduled.

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

ORDER: The court will issue an order.

This matter will proceed as scheduled. If the fees due at the time of the hearing have not been paid prior to the hearing, the case will be dismissed on the grounds stated in the order to show cause.

If the installment fees due at the time of hearing are paid before the hearing, the order permitting the payment of filing fees in installments will be

modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

13. 22-11884-A-13 **IN RE: COSTEL FUIOREA**
MHM-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
12-16-2022 [23]

MICHAEL MEYER/MV

NO RULING.

**11:00 AM**

1. 22-10113-A-7 **IN RE: ANTHONY LOPEZ**
22-1013 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-6-2022 [1]

THE GOLDEN 1 CREDIT UNION V. LOPEZ
KAREL ROCHA/ATTY. FOR PL.

NO RULING.

2. 22-10113-A-7 **IN RE: ANTHONY LOPEZ**
22-1013 KR-2

MOTION FOR ENTRY OF DEFAULT JUDGMENT
12-29-2022 [50]

THE GOLDEN 1 CREDIT UNION V. LOPEZ
KAREL ROCHA/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The Golden 1 Credit Union ("Plaintiff") moves for entry of default judgment against defendant Anthony Lopez ("Defendant") pursuant to Federal Rule of Civil Procedure ("Rule") 55, made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure 7055. Doc. #50. Plaintiff seeks default judgment against Defendant under 11 U.S.C. § 523(a)(2)(A) on the ground that Defendant knowingly and intentionally misrepresented that he would make monthly payments for the purchase of a 2017 Ram 1500 ("Vehicle") pursuant to a written Retail Installment Sale Contract ("Contract") that secured a loan from Plaintiff to purchase the Vehicle. Id. By the motion, Plaintiff seeks a default judgment in the amount of $32,049.35, plus interest, costs, and reasonable attorney's fees. Id. For the reasons set forth below, the court is inclined to DENY Plaintiff's motion for entry of default judgment.

The court entered Defendant's default on July 21, 2022. Doc. #17. Because Defendant's default has been entered, the court will take the factual allegations of the complaint, except those relating to the amount of damages, as true. See Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-918 (9th Cir. 1987).

Facts

As alleged in the complaint and motion, on or about April 26, 2020, Defendant and a third party Lucas Baker ("Baker"), for valuable consideration, made,

executed, and delivered the Contract to Porterville Chrysler Jeep Dodge. Complaint ¶ 5, Doc. #1; Motion, Doc. #50. Plaintiff is the current holder of the Contract. Complaint ¶ 8, Doc. #1. Pursuant to the Contract, Defendant and Baker agreed to pay for the Vehicle by making monthly payments to Plaintiff until the Vehicle was paid in full. Ex. 1, Doc. #52. On or about June 10, 2020, and continuing thereafter, Defendant defaulted in the terms, conditions, and covenants of the Contract by failing to make the monthly payments due and owing. Decl. of Karl Williams ¶ 19, Doc. #53. Plaintiff believes and alleges that Defendant intended to effectuate a fraud when Defendant made the loan application. Complaint ¶ 27, Doc. #1. After entry of Defendant's default, Defendant submitted a declaration on August 30, 2022 in which Defendant claimed to be a victim of identity theft perpetrated by Baker. Ex. 4, Doc. #52.

Legal Standard for Default Judgment

"After entry of default, the Court has discretion to grant default judgment on the merits of the case." Andrade v. Arby's Restaurant Group, Inc., 225 F. Supp. 3d 1115, 1127 (N.D. Cal. 2016) (first citing Rule 55(b); and then citing Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980)).

Under Rule 55, "the court may require a plaintiff to demonstrate a *prima facie* case by competent evidence in a prove-up trial to obtain a default judgment." Lu v. Liu (In re Liu), 282 B.R. 904, 907 (Bankr. C.D. Cal. 2002). The court has wide discretion under Rule 55 to consider whether the evidence presented supports a claim and warrants judgment for the plaintiff." Id.; see also, Televideo, 826 F.2d at 917.

"Bankruptcy courts frequently exercise their discretion to require that a plaintiff prove up a *prima facie* case when a plaintiff creditor seeks default judgment against a defendant debtor who has failed to answer a § 523 non-dischargeability claim." Liu, 282 B.R. at 907-08 (citations omitted). "A bankruptcy court's consideration of the evidence required to establish the 'truth of any averment' under Fed. R. Civ. P. 55 necessarily includes evidence regarding issues of intent in a § 523(a)(2)(A) context." Beltran v. Beltran (In re Beltran), 182 B.R. 820, 824 (B.A.P. 9th Cir. 1995); e.g., Cashco Fin. Servs. v. McGee (In re McGee), 359 B.R. 764 (B.A.P. 9th Cir. 2006).

"In a non-dischargeability action under § 523(a), the creditor has the burden of proving all the elements of its claim by a preponderance of the evidence. Exceptions to discharge are strictly construed against an objecting creditor and in favor of the debtor to effectuate the fresh start policies under the Bankruptcy Code." Cardenas v. Shannon (In re Shannon), 553 B.R. 380, 388 (B.A.P. 9th Cir. 2016).

Claims for Relief Under 11 U.S.C. § 523(a)(2)(A)

Plaintiff asserts that Defendant intended to defraud Plaintiff when Defendant secured a loan to purchase the Vehicle, failed to make a single payment on the loan, filed for bankruptcy thereafter, and then failed to respond to this adversary proceeding. Doc. #50. However, after reviewing the evidence submitted by Plaintiff, the court finds that Plaintiff has not presented sufficient evidence to support the *prima facie* § 523(a)(2) claim and entry of default judgment is not warranted.

"A creditor seeking to except a debt from discharge under § 523(a)(2)(A) based on false representations bears the burden of proving by a preponderance of the evidence five elements: (1) misrepresentation(s), fraudulent omission(s), or deceptive conduct; (2) knowledge of the falsity or deceptiveness of such

representation(s), omission(s), or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor; and (5) damage to the creditor proximately caused by its reliance." Cardenas v. Shannon (In re Shannon), 553 B.R. 380, 388 (B.A.P. 9th Cir. 2016) (first citing Ghomeshi v. Sabban (In re Sabban), 600 F. 3d 1219, 1222 (9th Cir. 2010); and then citing Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (B.A.P. 9th Cir. 2009)).

The intent to deceive requirement may be established by showing "either actual knowledge of the falsity of a statement, or reckless disregard for its truth." In re Grabau, 151 B.R. 227, 234 (N.D. Cal. 1993) (quoting In re Houtman, 568 F.2d 651, 656 (9th Cir. 1978)). Intent to deceive can be inferred from the totality of the surrounding circumstances. See In re Dakota, 284 B.R. 711, 721 (Bankr. N.D. Cal. 2002) (citing to Anastas v. Am. Sav. Bank (In re Anastas), 94 F.3d 1280, 1282 (9th Cir.1996)). Intent to deceive also can be inferred from surrounding circumstances or inferences from a course of conduct. See Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997).

For a representation regarding future performance to be actionable under § 523(a)(2)(A), a debtor must lack an intent to perform when the promise was made. See Donaldson v. Hayes (In re Hayes), 315 B.R. 579, 587 (Bankr. C.D. Cal. 2004) (citing Anastas, 94 F.3d at 1285). A mere failure to fulfill a promise to pay a debt is not fraudulent as to render the debt non-dischargeable, absent proof that the promise was made with the intent not to pay or knowing that payment would be impossible. See Citibank (S.D.) N.A. v. Lee (In re Lee), 186 B.R. 695, 699 (B.A.P. 9th Cir. 1995).

Plaintiff's evidence does not demonstrate that Defendant intended to deceive Plaintiff. In In re Dakota, 284 B.R. 711, 721 (Bankr. N.D. Cal. 2002), cited by Plaintiff, the bankruptcy court did not find intent to deceive when a debtor, who was an officer and director of a corporation, failed to disclose his plans to start a competing business once he left that corporation's employment. The bankruptcy court held that the debtor's failure to disclose information was not fraudulent concealment of material facts since the debtor's non-disclosure was not harmful to the corporation and there was no evidence that the debtor purposely concealed his plans to start his own business. Dakota, 284 B.R. at 723. Similarly, in Hayes, the bankruptcy court did not find an intent to deceive when a debtor entered into a contract to purchase a business for a sum of $250,000 and agreed to make a series of payments to the former owner over an 83-month term, but then failed to make all the payments as promised under the agreement. Hayes, 315 B.R. at 587. The Hayes court aptly stated that "a mere failure to fulfill a promise to pay a debt is not fraudulent as to render the debt non-dischargeable, absent proof that the promise was made with the intent not to pay or knowing that payment would be impossible" Id. at 587 (citing Lee, 186 B.R. at 699).

In Anastas, the Ninth Circuit did not find that a debtor had the intent to deceive a bank by not paying his credit card bill when there was no evidence of his intent not to repay the bank, aside from his hopeless financial condition. Anastas, 94 F.3d at 1287. The Ninth Circuit relied on the debtor's testimony that he always possessed the intent to pay his credit card bill, but he had a gambling addiction that led him into unexpected financial circumstances. Id. The Ninth Circuit also relied on the fact that the debtor incurred the credit card charges at issue over a six-month period during which the debtor always made his monthly payments and contacted the bank to work out alternative arrangement for repaying his credit card debt. Id.

In Kennedy, the Ninth Circuit found that a debtor who was a real estate broker intended to deceive home purchasers based on the totality of circumstances where there was evidence that the debtor made several representations to home

purchasers that their home would be a showplace, but that construction foreman and workers employed by the debtor were not qualified for the construction job. Kennedy, 108 F.3d at 1018. The Ninth Circuit found the testimony of a construction foreman reliable where the construction foreman stated that he and "the other two workers ... were not qualified for the construction job and that the work was 'trash' compared to other custom homes." Id.

In this case, the only evidence presented by Plaintiff in support of Defendant's intent to deceive is that Defendant signed the Contract and, to date, Defendant has not made a single payment on the Contract. Unlike the cases relied on by Plaintiff, there is no additional supporting circumstantial evidence of Defendant's intent to deceive Plaintiff at the time Defendant signed the Contract other than Defendant's subsequent default on the loan. The mere failure by Defendant to fulfill a promise to pay a debt is not fraudulent as to render the debt non-dischargeable, absent proof that, at the time that the promise was made, the promise was made with the intent not to pay or knowledge that payment would be impossible. Lee, 186 B.R. at 699.

Based on the evidence presented in the motion, the court finds that Plaintiff has not met its burden of showing a *prima facie* case for entry of default judgment against Defendant. Plaintiff's request for default judgment against Defendant pursuant to 11 U.S.C. § 523(a)(2)(A) is denied.

3. 19-11628-A-12 **IN RE: MIKAL JONES**
19-1081 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-28-2019 [1]

DILDAY ET AL V. JONES
RILEY WALTER/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

4. 22-11042-A-7 **IN RE: TIFFINI HUGHES**
22-1019 DMG-2

MOTION TO DISMISS CAUSE(S) OF ACTION FROM AMENDED COMPLAINT
12-15-2022 [25]

LABOR COMMISSIONER OF THE STATE OF CALIFORNIA V. HUGHES
D. GARDNER/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.