UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Thursday, April 8, 2021
Place: Department B – Courtroom #13
Fresno, California

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

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 21-10124-B-13 **IN RE: KIRK/JAYCEE KILLIAN**
MAZ-1

MOTION TO VACATE DISMISSAL OF CASE
3-2-2021 [28]

JAYCEE KILLIAN/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
DISMISSED 3/3/21. RESPONSIVE PLEADING.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. Order preparation determined at the hearing.

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

There are procedural problems with the motion.

The motion (Doc. #28) was attached to the notice of hearing and included a post-it note on the first page of the notice. LBR 9004-2(c)(1) requires motions, notices, and other specified pleadings to be filed as separate documents. A duplicate notice (Doc. #34) was filed separately, and the copy attached to the motion with a post-it note appears to be in error. Typically, this error would result in the motion being denied without prejudice. LBR 1001-1(f) allows the court *sua sponte* to suspend provisions of the LBR not inconsistent with the Federal Rules of Bankruptcy Procedure to accommodate the needs of a particular case or proceeding.

According to the debtors' reply, the debtors are only seeking to modify the dismissal order so that the case be dismissed without prejudice. In the interests of a just and speedy adjudication, the court will overlook this procedural deficiency under LBR 1001-1(f). Future violations of the local rules may result in the motion being denied. The court now examines the merits.

Kirk P. Killian and Jaycee M. Killian ("Debtors") ask this court to vacate the order (Doc. #36) dismissing this case with prejudice on March 3, 2021. Doc. #28. In their reply, Debtors ask the order to be modified to a dismissal without prejudice. Chapter 13 trustee Michael H. Meyer ("Trustee") timely responded. Doc. #38.

Trustee originally moved to dismiss this case with prejudice under 11 U.S.C. §§ 1307(c) and 109(h) because Debtors filed two doctored certificates of credit counseling on January 20, 2021. Doc. #11. Based on the evidence, it appeared that Debtors modified the certificates obtained in their previous dismissed bankruptcy case by altering the dates the certificates were issued and signed. Doc. #27. That motion was filed on 28 days' notice and opposition was due not later than 14 days before the hearing. Doc. #12. Debtors did not file opposition to the Trustee's dismissal motion. The motion was granted, and the case was dismissed with prejudice.

Additionally, the United States Trustee ("UST") filed an adversary proceeding on February 9, 2021 seeking to enjoin Debtors from filing another bankruptcy case in this district for a minimum of two years unless Debtors first obtain the written consent of the Chief Judge of the Eastern District of California Bankruptcy Court. *See U.S. Trustee v. Killian et al*, case no. 21-01005.

Both Debtors filed declarations under penalty of perjury stating that they did not alter the dates on the credit counseling certificates and were not aware of Trustee's motion to dismiss until February 20, 2021, just four days before the hearing. Docs. ##29-30.

Mark A. Zimmerman, Debtors' attorney, filed a declaration in support of the motion. Doc. #31. Mr. Zimmerman states that the day before the hearing, he was informed by his employee, Karina Ayala, that she had altered the dates on the credit counseling certificates. Ms. Ayala provided Mr. Zimmerman with the motion to dismiss that was set for hearing the next day along with the UST's adversary complaint against Debtors. According to Mr. Zimmerman, "[t]his was the first time [he] was made aware of and/or saw the Motion to Dismiss and the Adversary Complaint." *Id.*

Mr. Zimmerman describes his procedure for mail and states that he cannot explain how he failed to obtain copies of Trustee's motion earlier. *Id.* Mr. Zimmerman states that he contacted the UST and Trustee immediately to avoid the initial dismissal with prejudice. Next, Mr. Zimmerman called court chambers seeking to appear at the hearing to explain the situation, but he was informed that the matter had already been pre-disposed and would not be called. *Id.*

Karina Ayala also filed a declaration with the motion under penalty of perjury. Doc. #32. Ms. Ayala has worked for Mr. Zimmerman for over five years. Her duties are to prepare documents and correspondence and file and serve documents. Ms. Ayala states that she had knowledge of the requirements and procedures for the credit counseling and the financial management certificates. *Id.* Ms. Ayala states that she provided Mr. Zimmerman with a copy of the motion to dismiss on February 23, 2021 and informed him that she had altered the dates on the certificates filed January 20, 2021. *Id.*

Trustee timely responded stating that he is agreeable to the case remaining dismissed without prejudice if the court finds that Debtors satisfied the requirements of Fed. R. Civ. P. 60(b)(1), (2), or (6) due to Debtors having no knowledge of the alteration of their

credit counseling certificates by Ms. Ayala. Doc. #38. Trustee argues that the case must remain dismissed because Debtors are and were ineligible to be Debtors under 11 U.S.C. § 109(e) because they did not receive an approved credit counseling briefing during the 180-day period before the date of filing the petition. *Id.*

Debtors replied to clarify that they neither had knowledge of nor consented to Ms. Ayala altering the dates on the credit counseling certificates. Doc. #41. Debtors concurrently declared under penalty of perjury that they had no knowledge of, or consent to, the alteration of the dates by Ms. Ayala on the credit counseling certificates. Docs. ##42-43.

Since this motion was filed less than 14 days after entry of the dismissal order—in fact it was filed one day before entry of the order but after the hearing—the court will treat the motion as one under Civil Rule 59 (Bankruptcy Rule 9023). Although Civil Rule 59 (e) permits a bankruptcy court to reconsider and amend a previous order, the rule offers an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F. 3d 877, 890 (9th Cir. 2000). "Indeed, a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the [bankruptcy] court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id.*

The newly discovered evidence offered here is Ms. Ayala's statements that she alone altered the counseling certificates for these debtors. Debtors testified they had no knowledge of either the doctored certificates or the Trustee's dismissal motion until very late. This came to counsel's attention one day before the hearing on the dismissal motion. That was two weeks after opposition was due.

Based on the evidence presented, the court can exercise its discretion and amend the order dismissing this Chapter 13 case.

In the absence of further opposition by the UST, the court is inclined to GRANT the motion. The order dismissing the case with prejudice will be modified so that the dismissal is without prejudice. The case shall remain dismissed because Debtors were not eligible to be chapter 13 debtors at the time the case was filed. They had not received an approved credit counseling briefing in the 180 days leading up to the petition as required by law.

2. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**

MOTION TO VALUE COLLATERAL OF FORD MOTOR CREDIT COMPANY
2-24-2021 [52]

MARIA CEJA/MV
ADELE SCHNEIDEREIT/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Miguel Rodriguez-Cisneros and Maria De Jesus Ceja ("Debtors") ask the court for an order valuing a 2014 Ford F150. This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

First, LBR 9004-2(a)(6), (b)(5), (b)(6), & (e) and LBR 9014-1(c) & (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN.

Here, the motion document was not filed with a DCN. Doc. #52. The court notes that the proof of service (Doc. #52, at 8-9) that is incorrectly attached to the motion and notice documents (discussed below) contains DCN EPE-1. The notice (Doc. #56, at 1-2) also contains EPE-1.

The motion to confirm the first amended plan also filed under DCN EPE-1 on December 30, 2020. Doc. #21. That motion was denied on February 10, 2021. The second amended plan (Doc. #53) and its related motion (Doc. #54) are also filed under EPE-1 in matter #3 below.

Each new matter must have a different DCN. The motion to confirm the first amended plan was filed under EPE-1, so the second amended plan and its motion documents should have been filed under EPE-2, or something else other than EPE-1. Since this motion is a completely separate matter, it should have a different DCN, such as EPE-3 or any other DCN that is not already in use in this case.

Second, LBR 9004-2(c)(1) requires motions, notices, exhibits, proofs of service, and other specified pleadings to be filed as separate documents. LBR 9014-1(d)(1) requires every motion or other request for an order to be comprised of a motion, notice, evidence, and a certificate of service. LBR 9014-1(d)(4) requires each document specified in (d)(1), other than a motion and a memorandum of points and authorities when not exceeding six pages in length, to be filed as separate documents.

LBR 9004-2(e) requires the proof of service itself to be a separate document and provides that "[c]opies of the pleadings and documents

served SHALL NOT be attached to the proof of service filed with the court." LBR 9004-2(e)(2). LBR 9004-2(e)(3) allows multiple documents and pleadings related to papers with the same DCN to be included in one proof of service, but documents and pleadings related to papers with a different DCN "SHALL NOT be included in the same proof of service."

Here, the motion document (Doc. #52) includes a motion, exhibit, and proof of service combined into one document. All three of these separate documents should be filed separately.

The notice document (Doc. #56) includes a notice, a copy of the motion, a copy of the exhibit, and a proof of service for the notice combined into one document.

The court notes that under LBR 9004-2(e)(3), Debtors may file one proof of service for all motion documents so long as it complies with all other requirements. *See* LBR 9004-2(e), 9014-1(e).

Third, LBR 9004-2(d) requires that exhibits shall be filed as a separate document, contain an index, and have exhibit pages that are consecutively numbered. In this instance, the exhibits were not filed separately, there was no index, and the exhibit pages were not consecutively numbered. Docs. #52; #56.

Fourth, as noted above, LBR 9014-1(d)(1) requires every motion to be comprised of a motion, notice, evidence, and proof of service. Here, the Debtors rely on "Exhibit A: Edmunds Car Valuation" as their evidence in support of this motion. But Debtors have not established themselves as experts and cannot rely on Edmunds as a reliable method of determining the vehicle's value. *See* Fed. R. Evid. 702; *see also In re DaRosa*, 442 B.R. 173, 175 (Bankr. D. Mass. 2010); *Young v. Camelot Homes, Inc. (In re Young)*, 390 B.R. 480, 493 (Bankr. D. Me. 2008) ("[B]ecause [the debtor] used Kelley trade-in listings as the starting point of his analysis, his opinions will not be taken as convincing evidence of replacement value.").

As owners, Debtors are competent to testify as to the value of the vehicle. In the absence of contrary evidence, the Debtors' opinion of value may be conclusive. *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). However, Debtors have not testified as to the vehicle's value or filed any signed declarations evidencing the same. Upon refiling, Debtors should include admissible evidence in support of the motion, such as a declaration from at least one joint debtor.

Debtors should also be mindful that 11 U.S.C. § 506(a)(2) requires the valuation to be "replacement value," not "fair market value" or "dealer's price." *Cf.* Doc. #52. Valuations that are not "replacement value" are irrelevant for the purposes of this motion.

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

3. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**
EPE-1

MOTION TO CONFIRM PLAN
2-24-2021 [54]

MARIA CEJA/MV
ADELE SCHNEIDEREIT/ATTY. FOR DBT.
RESPONSIVE PLEADING. PLAN WITHDRAWN.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

The debtors withdrew the plan on March 9, 2021. Doc. #60. Accordingly, this matter will be dropped from calendar.

4. 20-13358-B-13 **IN RE: JENNIFER WELLS**
MAZ-1

MOTION TO CONFIRM PLAN
2-25-2021 [37]

JENNIFER WELLS/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

The debtor withdrew the plan on March 22, 2021. Doc. #50. Accordingly, this matter will be dropped from calendar.

5. 20-11959-B-13 **IN RE: IGNACIO/LISA CORTEZ**
AP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-2-2021 [25]

WELLS FARGO BANK, N.A/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
WENDY LOCKE/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 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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.

Wells Fargo Bank, N.A., d/b/a Wells Fargo Auto ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (2) with respect to a 2007 Sundance RLS ("Vehicle"). Doc. #25. Ignacio Cortez a/k/a Nacho Cortez and Lisa B. Cortez ("Debtors") filed non-opposition on March 17, 2021. Doc. #32.

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 seven pre-petition and seven post-petition payments. Movant has produced evidence that debtor is delinquent at least $5,709.94. Doc.

#27; #29; #30. Movant states that the Vehicle was surrendered pre-petition. Doc. #25. Debtors intend to surrender possession of Vehicle to Movant. Doc. #32.

The court also finds that Debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization. Movant has valued the Vehicle at $9,500.00. The amount owed to Movant is $27,013.01. Doc. #27; #30.

Accordingly, the motion will be GRANTED pursuant to 11 U.S.C. §§ 362(d)(1) and (2) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Debtor has failed to make at least seven pre-petition and seven post-petition payments to Movant, the property is a depreciating vehicle, Debtors intend to surrender the property, and the vehicle was surrendered pre-petition.

6. 20-13572-B-13 **IN RE: WARD TATE**
MHM-1

MOTION TO DISMISS CASE
3-8-2021 [14]

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

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Trustee withdrew the motion on March 31, 2021. Doc. #19. Accordingly, the hearing will be dropped from calendar.

7. 20-12691-B-13 **IN RE: SAMUEL/ANA LOPEZ**
AVN-3

MOTION TO CONFIRM PLAN
2-25-2021 [68]

ANA LOPEZ/MV
ANH NGUYEN/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.

The certificate of service indicates that the moving papers were not properly served on the United States Trustee ("UST") at the correct address in Fresno, California. Doc. #72. The debtors served the UST at "2500 Tulare Street, Fifth Floor[,] Fresno, California 93729[.]" *Id.* Both the zip-code and the suite/floor location are incorrect.

The debtors' last motion was denied because the UST was served at the address for its Sacramento division. Doc. #67. As noted in our prior ruling denying that motion, the UST should have been served at **2500 Tulare Street, Suite 1401, Fresno, CA 93721**. *See* Doc. #65; *see also* www.justice.gov/ust-regions-r17/region-17-eastern-district-california-fresno-division.

For the above reason, the motion will be DENIED WITHOUT PREJUDICE.

8. 20-12691-B-13 **IN RE: SAMUEL/ANA LOPEZ**
MHM-4

CONTINUED MOTION TO DISMISS CASE
3-2-2021 [73]

MICHAEL MEYER/MV
ANH NGUYEN/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case for failure to confirm a chapter 13 plan and unreasonable delay by the debtors that is prejudicial to creditors.

Samuel Alexander Lopez and Ana Miriam Lopez ("Debtors") timely responded stating that their previous motion to confirm plan had been denied and a new plan is scheduled to be heard April 8, 2021. Doc. #77. Debtors asked that the Trustee's motion be denied, or alternatively continued to April 8, 2021.

The court continued the motion so that it could be heard in connection with the motion to confirm chapter 13 plan, which is set for hearing in matter #7 above (AVN-3). Doc. #78.

The court is DENYING the motion to confirm chapter 13 plan in matter #7 above because Debtors neglected to use the correct address for the UST, which was listed in the previous motion's pre-hearing disposition and the minutes (Doc. #65).

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).

The court finds that dismissal would be in the best interests of creditors and the estate. Trustee states that the case is over six months old and Debtors still have not confirmed a chapter 13 plan. Doc. #75. This case was filed on August 14, 2020. Doc. #1. As of the date of this hearing, seven months and 25 days have passed and still no plan has been confirmed.

The court has looked at the Schedules and it appears that Debtors have approximately $97,405.00 in personal property assets and approximately $57,522.00 in claimed exemptions. Doc. #15, Schedules A/B, C. By this court's estimate, that leaves approximately $39,883.00 in non-exempt assets. However, Debtors own three vehicles that are all encumbered by secured creditors with claims totaling $65,381.00. Therefore, there are no non-exempt or unencumbered assets in the estate to be administered for the benefit of unsecured claims. The court is inclined to GRANT the motion and dismiss the case.

This matter will be called as scheduled to inquire about the parties' respective positions. If Debtors do not appear at the hearing, this motion will be GRANTED and the case will be dismissed. If Debtors do appear at the hearing, the court may continue the matter further if Trustee is amenable to continuance.

10:00 AM

1. 21-10201-B-7 **IN RE: SCOTT MUNSTER**
APN-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-5-2021 [11]

NISSAN-INFINITI LT/MV
JUSTIN HARRIS/ATTY. FOR DBT.
AUSTIN NAGEL/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 January 28, 2021 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.

Since there is no opposition from the debtor, the court is unaware if debtor exercised his option to assume the lease under § 365(p)(2).

Accordingly, 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 will be granted.

2. 20-13883-B-7 **IN RE: ANNETTE BUCK**
JFL-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-4-2021 [15]

CARRINGTON MORTGAGE SERVICES, LLC/MV
R. BELL/ATTY. FOR DBT.
JAMES LEWIN/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 amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The movant, Carrington Mortgage Services, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to real property located at 96598 Johns Pl, Brookings, OR 97415 ("Property"). Doc. #15.

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 debtor has failed to make at least 19 complete pre- and post-petition payments. The movant has produced evidence that debtor is delinquent at least $25,309.14. Doc. #19.

The court also finds that the debtor does not have any equity in the Property and the Property is not necessary to an effective reorganization because debtor is in chapter 7. The property is valued at $249,285.00 and debtor owes $268,883.67. Doc. #15.

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 request of the Moving Party, at its option, to provide and enter into any potential forbearance agreement, loan modification, refinance agreement or other loan workout/loss mitigation agreement as allowed by state law will be denied. The court is granting stay relief to movant to exercise its rights and remedies under applicable bankruptcy law. No more, no less.

The request for attorney's fees will be denied pursuant to 11 U.S.C. §506(b). Debtor has no equity in the property and movant must separately file and set for hearing a motion for compensation in compliance with the LBR and Federal Rules of Bankruptcy Procedure.

The order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtor has failed to make at least 19 payments, both pre- and post-petition to Movant.

10:30 AM

1. 21-10181-B-7 **IN RE: TRAVIS/HEATHER GARRETT**

PRO SE REAFFIRMATION AGREEMENT WITH TRUIST BANK
3-15-2021 [26]

MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: Dropped.

ORDER: The court will issue an order.

The form of the Reaffirmation Agreement does not appear to comply with 11 U.S.C. §524(c)(2) and 524(k). Not all pages of the reaffirmation agreement have been filed with the court. There are no signatures by the debtors. Debtors were represented by counsel when they entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), if the debtor is represented by counsel, the agreement must be accompanied by an affidavit of the debtor's attorney attesting to the referenced items before the agreement will have legal effect. *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). The reaffirmation agreement, in the absence of a declaration by debtors' counsel, does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable. The court will issue an order deeming the Reaffirmation Agreement to be non-compliant with the Bankruptcy Code and non-binding on the parties.

11:00 AM

1. 21-10163-B-12 **IN RE: LUIS/ANGELA OLIVEIRA**
RDW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY , MOTION FOR ADEQUATE PROTECTION
3-5-2021 [26]

ACM INVESTOR SERVICES, INC./MV
MICHAEL WARDA/ATTY. FOR DBT.
REILLY WILKINSON/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 amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

ACM Investor Services, Inc. ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(4) with respect to real properties commonly known as 20096 & 20104 3rd Avenue, Stevenson, CA 95374 ("3rd Avenue Property") and 25469 & 25471 Hearst Road, Gustine, CA 95322 ("Hearst Property"). No party in interest timely filed written opposition.

This motion will be GRANTED.

Background

On October 3, 2005, Luis M. Oliveira, Sr., and Angela C. Oliveira ("Debtors") obtained a $850,000.00 loan ("First Loan") from Movant evidenced by a note and secured by a first priority deed of trust on 28399 West Hussman Road, Gustine, CA 95322 ("Hussman Property") and 3rd Avenue Property. Doc. #31, Exs. 1-3. On January 30, 2007, Debtors obtained a second loan from Movant in the amount of

$200,000.00 ("Second Loan") evidenced by a note and secured by a second priority deed of trust on Hussman Property and 805 Magnolia, Modesto, CA ("Magnolia Property"). *Id.*, Ex. 4.

The First Loan matured on November 1, 2010 and a large balloon payment became due. Doc. #30. On or around that same date, Debtors executed a loan modification agreement extending the maturity date until June 1, 2011 and temporarily reducing the interest rate in exchange for additional security in Hearst Property. Doc. #31, Exs. 5-7. Debtors also executed a loan modification for the Second Loan that added Hearst Property and 3rd Avenue Property as additional security for Movant. *Id.*, Exs. 8-10. Movant contends that Debtors failed to pay the First or Second Loan upon the maturity date. Doc. #30. As result, Movant commenced foreclosure proceedings against Hearst, 3rd Avenue, and Hussman Properties. Doc. #30.

First Bankruptcy

Debtors subsequently filed chapter 11 bankruptcy on September 17, 2012 in the Eastern District of California, case no. 12-17910. *Id.* While the bankruptcy was pending, Debtors and Movant negotiated a Debt Restructure and Forbearance Agreement wherein Debtors agreed to sell Hussman Property to pay down the loans in exchange for a reduced interest rate of 9% amortized payments over 15 years with the maturity date extended until April 1, 2016. Hussman Property was sold pursuant to this agreement on June 5, 2013. The first bankruptcy was terminated on June 24, 2013 and Movant contends that Debtors failed to pay it in full upon the maturity date as required. *Id.; see also* Doc. #31, Ex. 12.

Second Bankruptcy

Movant states that it refrained from commencing foreclosure based on Debtors' representation that they would sell or refinance the Hearst and/or the 3rd Avenue Property to pay the claims in full. Doc. #30. Movant waited several months for payments. Meanwhile, FCI Lender Services, Inc. ("FCI"), a senior lienholder to Movant, scheduled a foreclosure sale. *Id.* Prior to the foreclosure sale, Debtors filed chapter 12 bankruptcy in the Eastern District of California, case no. 17-10427. Debtors filed a chapter 12 plan on May 30, 2017, which provided for a three-year term that proposed to impair and modify Movant's claim as follows:

- Movant's Second Loan would be fixed at $202,000 as of the petition date to be paid at 6% amortized over 30 years, all due in 36 months following 60 days after the effective date of the plan.
- Movant's First Loan would be fixed at $330,000 as of the petition date to be paid at 7% amortized over 30 years, all due in 36 months following 60 days after the effective date.

Id. The plan did not provide for any default provisions and implied that Debtors would be able to pay the loans in full at that time. *Id.*

Movant objected to the plan and, after extensive negotiations, Debtors and Movant eventually agreed to temporarily reduce the

interest rate on both loans—to increase .5% each year—and extended the maturity date to May 31, 2020. *Id.* These terms were stated in the order confirming plan. Doc. #31, Ex. 13. Additionally, Debtors agreed "they will not refile bankruptcy sooner than 180 days after July 31, 2020" which is January 27, 2021. *Id.*

Movant states that Debtors failed to pay off the loans by the extended maturity date and Movant filed Notices of Termination of the Automatic Stay on both loans on June 26, 2020. *Id.*, Exs. 14-15. Debtors obtained a discharge on November 5, 2020. *Id.*, Ex. 16. The second bankruptcy was subsequently closed on December 21, 2020.

Third Bankruptcy

On December 8, 2020, Debtors filed another chapter 12 bankruptcy on the eve of foreclosure in the Eastern District of California, case no. 20-90783. *Id.*, Ex. 17. This was 130 days after the July 31, 2020, 180-day restriction imposed by Movant and Debtors' agreement. Debtors failed to file necessary documents and requested additional time to file their schedules on December 22, 2020. The court granted that motion on December 23, 2020. On January 16, 2021, Debtors filed a voluntary motion to dismiss the third bankruptcy, which was granted on January 19, 2021. *Id.*, Ex. 18.

Fourth Bankruptcy

On January 27, 2021, eight days after the court granted Debtors' motion to voluntarily dismiss the third bankruptcy and on the 180th day after July 31, 2020, Debtors filed this chapter 12 bankruptcy. Doc. #1. Debtors filed another skeletal petition and sought another 14-day extension (Doc. #13) to file documents, which this court granted on February 10, 2021. Doc. #18.

Default and Delinquency

Movant states that Debtors have defaulted on both loans. The First Loan has a total delinquency of $424,760.60, which consists of $382,354.84 in unpaid principal, $22,709.80 in unpaid interest, $2,218.56 in accrued late charges, $13,477.40 in attorney's fees, and $4,000 as the "[b]ack end of loan from calculation error[.]" Doc. #30, ¶ 19. Movant indicates that the First Loan matured on May 31, 2020 under the second maturity extension date provided in the order confirming the plan in the second bankruptcy case.

Meanwhile, the Second Loan has a total delinquency of $248,482.18, which consists of $197,552.19 in unpaid principal, $10,999.89 in unpaid interest, $960.26 in accrued late charges, $29,982.79 in attorney's fees, and $8,987.05 in foreclosure fees. *Ibid.* The Second Loan also matured on May 31, 2020 under the order confirming plan in the second bankruptcy case.

Movant requests authority to commence or complete foreclosure proceedings for the Hearst and 3rd Avenue Properties because it continues to be prevented from doing so by repeated filings of bankruptcy petitions. Movant had a foreclosure sale scheduled for December 9, 2020, which was postponed to January 27, 2021. But as

noted above, Debtors' fourth bankruptcy was on that same date. The foreclosure sale was last scheduled for March 3, 2021. *Id.* Movant states that it has received no payments since the filing of the current bankruptcy.

Debtors' Schedule D reflects the first deed of trust on the Hearst Property in favor of FCI. The balance of that deed of trust is approximately $838,069.79. *See also* Claim #1-1. Movant has been unable to verify whether FCI's loan is delinquent. Additionally, Debtors are delinquent to the Merced County Tax Collector on property taxes in the amounts of $826.00 and $1,471.48 on 3rd Avenue Property. Doc. #31, Exs. 20-21. Debtors are also delinquent to the Merced County Tax Collector on property taxes in the amounts of $4,234.79, $1,159.31, $429.43, and $878.55. *Id.*, Exs. 22-25.

Discussion

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).

An order entered under § 362(d)(4) is binding in any other bankruptcy case purporting to affect such real property filed not later than two years after the date of entry of the order.

To obtain relief under § 362(d)(4), Movant must show and the court must affirmatively find the following three elements: (1) the debtor's' bankruptcy filing must have been part of a scheme; (2) the object of the scheme must have been to delay, hinder, or defraud creditors, and (3) the scheme must have involved either the transfer of some interest in the real property without the secured creditor's consent or court approval, or multiple bankruptcy filings affecting the property. *First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC (In re First Yorkshire Holdings, Inc.)*, 470 B.R. 864, 870 (B.A.P. 9th Cir. 2012).

A scheme is an intentional construct - it does not happen by misadventure or negligence. *In re Duncan & Forbes Dev., Inc.*, 368 B.R. 27, 32 (Bankr. C.D. Cal. 2007). A § 362(d)(4)(A) scheme is an "intentional artful plot or plan to delay, hinder or defraud creditors." *Id.* It is not common to have direct evidence of an artful plot or plan to deceive others - the court must infer the existence and contents of a scheme from circumstantial evidence. *Id.* Movant must present evidence sufficient for the trier of fact to infer the existence and content of the scheme. *Id.*

Movant alleges bad faith because this is Debtors' fourth bankruptcy affecting the Properties. Doc. #29. Moreover, in the Second Bankruptcy, which was prosecuted through discharge and closing of the case, Debtors agreed not to refile another bankruptcy within 180 days after July 31, 2020. This bar on re-filing was self-imposed by Debtors in their order confirming plan. The third bankruptcy was filed before that self-imposed deadline expired on the eve of Movant's foreclosure. That case was then voluntarily dismissed,

whereupon Debtors filed this bankruptcy just eight days later as soon as the 180-day bar terminated.

After review of the included evidence, the court finds that "cause" exists to lift the stay because Debtors are delinquent $424,760.60 on the First Loan and $248,482.18 on the Second Loan. Doc. #30, ¶ 19. Movant has produced evidence that Debtors are delinquent at least $673,242.78. *Ibid.*; Doc. #28.

The court finds that Debtors' filing of the petition was part of a scheme to delay, hinder, or defraud creditors by repeatedly filing four bankruptcies. As noted above, the second bankruptcy was prosecuted through discharge and completion of the case. As part of the order confirming the plan, Debtors agreed to a self-imposed 180-day bar on refiling after July 27, 2020. Debtors filed their third bankruptcy within that 180-day window solely to prevent Movant's foreclosure sale. Debtors sought an extension of time to delay until the 180-day bar was nearly expired, voluntarily dismissed their case, and then subsequently refiled 8 days later on the 180th day and on the same day as another scheduled foreclosure sale.

While the early filings appeared to be in good faith, after receiving a discharge from the second bankruptcy, Debtors' third and fourth bankruptcies appear to have been solely to delay, hinder, and defraud Movant from enforcing its rights and remedies under applicable law.

The court having rendered findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy Procedure 7052:

IT WILL BE ORDERED pursuant to 11 U.S.C. § 362(d)(4), that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filing affecting 3rd Avenue and Hearst Properties. The order shall be binding in any other case under Title 11 of the United States Code purporting to affect the real property described in the motion not later than two years after the date of entry of the order.

For the foregoing reasons the motion will also be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim.

The request for attorney's fees will be DENIED. Based on the motion, Movant is over-secured under 11 U.S.C. § 506(b). Movant must separately file and set for hearing a motion for compensation in compliance with the LBR and Federal Rules of Bankruptcy Procedure. If Movant does, then the court will consider that motion on its merits at the appropriate time.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived in light of Debtors' bad faith and Movant's routinely rescheduled foreclosure sales, the last of which was scheduled for March 3, 2021.