

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, May 12, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

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. [19-12308](#)-A-13 **IN RE: ELI/ELENITA MALICSI**
[SLL-2](#)

MOTION FOR COMPENSATION FOR STEPHEN LABIAK, DEBTORS ATTORNEY(S)
4-4-2022 [[55](#)]

ELI MALICSI/MV
STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 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.

Stephen L. Labiak ("Movant"), counsel for Eli Malicsi and Elenita Malicsi (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of final compensation in the amount of \$3,155 and reimbursement for expenses in the amount of \$182 for services rendered August 29, 2019 through case closing. Doc. #55. Debtors' confirmed plan provides for \$9,700.00 in attorney's fees to be paid through the plan, in addition to \$300 paid prior to the filing of the case. Plan, Doc. #9, 30. One prior fee application has been granted, allowing interim compensation and reimbursement for expenses to Movant pursuant to 11 U.S.C. § 331 in the amount of \$6,197.00. Order, Doc. #40. Debtors reviewed the fee application and have no objection. Doc. #55.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) claim administration and objections; (2) defending against relief from the automatic stay; and (3) preparation for discharge and case closing. Doc. #59. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on a final basis.

This motion is GRANTED. The court finds all fees and expenses of Movant previously allowed on an interim basis are reasonable and necessary. The court allows on a final basis all fees and expenses previously allowed to Movant on an interim bases, in addition to compensation requested by this motion in the amount of \$3,155 and reimbursement for expenses in the amount of \$182 to be paid in a manner consistent with the terms of the confirmed plan.

2. [21-12815](#)-A-13 **IN RE: GUADALUPE SUAREZ**
[JDW-1](#)

MOTION TO VALUE COLLATERAL OF ONEMAIN FINANCIAL
4-27-2022 [\[22\]](#)

GUADALUPE SUAREZ/MV
JOEL WINTER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date 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.

Guadalupe Suarez ("Debtor"), the debtor in this chapter 13 case, moves the court for an order valuing Debtor's 2007 Chevrolet Avalanche LT Sport ("Vehicle"), which is the collateral of Onemain Financial Group LLC ("Creditor"). Doc. #22. Debtor and Creditor have stipulated to the value of the Vehicle. Doc. #31.

Section 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." While § 1325(a)(*) (the hanging paragraph) restricts a chapter 13 debtor's ability to limit a secured creditor's claim secured by a motor vehicle if the loan was a purchase money security interest secured by the property, the loan was not a purchase money security interest secured by the Vehicle and the restrictions in the hanging paragraph of § 1325(a) do not apply. See Plan, Doc. #3; Creditor's Proof of Claim, Claim 4.

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).

Debtor asserts a replacement value of the Vehicle of \$5,301.00 and asks the court for an order valuing the Vehicle at \$5,301.00. Doc. #24. Debtor is competent to testify as to the value of the Vehicle. Creditor filed a proof of claim on January 5, 2022, which asserted a secured claim of \$9,000. Claim 4. Since then, Creditor and Debtor have stipulated to value the Vehicle at \$5,301. Doc. #31.

The motion is GRANTED. Creditor's secured claim will be fixed at \$5,301.00. 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.

3. [21-12815](#)-A-13 **IN RE: GUADALUPE SUAREZ**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
3-28-2022 [\[18\]](#)

MICHAEL MEYER/MV
JOEL WINTER/ATTY. FOR DBT.

NO RULING.

4. [18-13030](#)-A-13 **IN RE: JESUS PORTILLO-VAQUERO AND ELSA GONZALEZ-PORTILLO**
[EAT-2](#)

MOTION FOR ENTRY OF ORDER APPROVING STIPULATION RE: MODIFICATION OF THE
AUTOMATIC STAY
4-28-2022 [\[178\]](#)

AJAX MORTGAGE LOAN TRUST 2021-C, MORTGAGE-BACKED
PATRICK KAVANAGH/ATTY. FOR DBT.
REILLY WILKINSON/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date 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.

The movant, Ajax Mortgage Loan Trust 2021-C, Mortgage-Backed Securities, Series 2021-C, by U.S. Bank National Association, as Indenture Trustee ("Movant"), seeks an order approving a stipulation modifying the automatic stay to permit Movant to pay the balance of insurance monies in the amount of \$5,993.96 to the debtors. Doc. #178.

Section 362(d)(1) of the Bankruptcy Code allows the court to modify 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 modify the stay. Movant, the debtors, and the chapter 13 trustee have stipulated to allow Movant to disburse the balance of insurance monies in the amount of \$5,993.96 payable jointly to Jesus Portillo and Elsa Portillo, subject to bankruptcy court approval. Ex. A, Doc. #180. The balance to be paid to the debtors is the remainder of insurance proceeds covering real property that sustained damage. Id. Movant requires the stipulation to be approved by the court. Id.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to disburse the balance of insurance monies in a manner consistent with the stipulation filed as Ex. A, Docket no. 180. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because the modification of the automatic stay has been stipulated to by the debtors, the chapter 13 trustee, and Movant.

5. [21-10840](#)-A-13 **IN RE: HECTOR/DESIREE FLORES**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
2-18-2022 [\[39\]](#)

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

NO RULING.

6. [21-10840](#)-A-13 **IN RE: HECTOR/DESIREE FLORES**
[TCS-2](#)

CONTINUED MOTION TO MODIFY PLAN
3-7-2022 [\[43\]](#)

HECTOR FLORES/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
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. The Moving Party shall submit a proposed order after the hearing.

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 chapter 13 trustee ("Trustee")

timely opposed this motion. Doc. #56. The hearing was continued to May 12, 2022 so that the debtors could file amended Schedules I and J demonstrating an ability to pay increased plan payments. Doc. #62. The debtors filed amended schedules on April 28, 2022, and on May 5, 2022, Trustee filed a reply indicating that the opposition would be withdrawn if the debtors agreed to provide for an increased plan payment in the order confirming the plan. Doc. #66. 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). Therefore, the defaults of the nonresponding parties in interest are entered.

The court is inclined to GRANT this motion. At the initial hearing on April 21, 2022, the debtors stated that they are agreeable to an increased plan payment provided in the order confirming the plan. Court Audio, Doc. #58. The debtors filed amended Schedules I and J demonstrating an ability to make the increased payments. Doc. #65. The confirmation order shall provide for the increased plan payment.

7. [19-12243](#)-A-13 **IN RE: VALERIE JACQUES**
[JDR-5](#)

MOTION TO MODIFY PLAN
4-4-2022 [[89](#)]

VALERIE JACQUES/MV
JEFFREY ROWE/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

On May 10, 2022, Movant withdrew the second modified plan filed on April 4, 2022. Doc. #99.

8. [22-10158](#)-A-13 **IN RE: GUILLERMO/VERONICA PRADO**
[MHM-2](#)

MOTION TO DISMISS CASE
4-11-2022 [[51](#)]

MICHAEL MEYER/MV
JASON VOGELPOHL/ATTY. FOR DBT.
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. The court will issue an order after the hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The debtors timely filed written opposition on April 12, 2022. Doc. #55. 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). Therefore, the defaults of the non-responding parties in interest are entered.

Here, the chapter 13 trustee ("Trustee") asks the court to dismiss this case for unreasonable delay by the debtors that is prejudicial to creditors pursuant to 11 U.S.C. § 1307(c)(1) and because the debtors have failed to provide documentation required by 11 U.S.C. § 521(a). Doc. #51. Guillermo Prado and Veronica G. Prado (together, "Debtors") oppose Trustee's motion. Doc. #55. Debtors' response, not supported by declaration testimony, contends that Debtors have produced the requested documents to their bankruptcy counsel, who is currently reviewing the documents and will provide the documents to Trustee eventually. Doc. #55. Debtors argue that dismissal will prejudice creditors and request a continuance of the hearing on Trustee's motion to dismiss to allow Debtors the time to produce documents to Trustee and confirm a modified chapter 13 plan. Doc. #55.

A review of the docket shows that on May 3, 2022, Debtors filed a motion to confirm the first amended chapter 13 plan filed March 28, 2022, at Docket No. 43, and set the hearing date for June 16, 2022 at 9:30 a.m. Doc. #60. However, it also appears that Debtors filed a different chapter 13 plan on April 28, 2022, at Docket No. 56.

In any event, the bankruptcy court is bound by the Bankruptcy Code and Debtors' case must be dismissed. Section 521(i) of the Bankruptcy Code mandates the automatic dismissal of a chapter 13 case if the debtor "fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition[.]" 11 U.S.C. § 521(i)(1). The court may allow an additional period of time for the debtor to submit the required information if the debtor requests an extension within 45 days after the petition date. 11 U.S.C. § 521(i)(3). Alternatively, if the trustee moves to dismiss before the expiration of the 45-day period, the court can deny the motion to dismiss in some cases. 11 U.S.C. § 521(i)(4).

Debtors filed the bankruptcy petition on February 4, 2022. Doc. #1. Forty-five days from February 4, 2022 was March 21, 2022. By Debtors' response, Debtors had not filed the required documentation as of April 12, 2022. Doc. #55. Absent a timely request for an extension or motion by Trustee, § 521(i)(1) mandates automatic dismissal of Debtors' case. Debtors did not timely request an extension of time, and Trustee's motion to dismiss was not filed within the 45-day period. Debtors' case must be dismissed.

Accordingly, this motion will be GRANTED. The case will be dismissed.

9. [22-10378](#)-A-13 **IN RE: FRANCES HOLGUIN**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
4-15-2022 [\[13\]](#)

SCOTT LYONS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

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

ORDER: The court will issue an order.

This matter will proceed as scheduled. 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 OSC.

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.

10. [20-12881](#)-A-13 **IN RE: NANCY MORENO**
[TCS-2](#)

MOTION TO MODIFY PLAN
4-6-2022 [\[32\]](#)

NANCY MORENO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
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. The Moving Party shall submit a proposed
order after the hearing.

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 chapter 13 trustee ("Trustee") timely opposed this motion. Doc. #39. 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). Therefore, the defaults of the nonresponding parties in interest are entered.

The court is inclined to GRANT this motion if counsel for the debtor agrees to reduce the amount of attorney's fees to be paid through the plan. Trustee's opposition states that if the debtor's counsel seeks to be paid \$8,465.81 through the plan, the plan funds in over 43.57 months, not the remaining 42 months. Doc. #39. Trustee requests clarification on what the debtor's

counsel seeks for attorney's fees prior to the court confirming the proposed modified plan. Id.

If the debtor's counsel and Trustee resolve the issue and provide for an adjustment in the order confirming the plan, the court is inclined to GRANT this motion. The confirmation order shall provide for change in attorney's fees and shall include the docket control number of the motion and reference the plan by the date it was filed.

11. [20-13554](#)-A-13 **IN RE: CYRUSS/KRISTEN LA MARSNA**
[TCS-3](#)

MOTION TO VACATE DISMISSAL OF CASE
5-2-2022 [\[67\]](#)

KRISTEN LA MARSNA/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
OST 5/3/22

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted if the record is supplemented at the hearing.

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

On May 3, 2020, the court granted the debtors' ex parte Motion for Order Shortening Time to hear the debtors' Motion to Vacate the Dismissal Order. Doc. #70. This motion was set for hearing on May 12, 2022 at 9:30 a.m. pursuant to Local Rule of Practice ("LBR") 9014-1(f)(3). Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and deny 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.

There are several preliminary matters to be addressed before the court turns to the substance of the motion. First, the motion, though captioned correctly, identifies the debtors as Donald and Stephanie Salkin, who are not the debtors in this case. Doc. #67. Second, Exhibit A to this motion contains sensitive, personally identifiable information. LBR 9037-1(a)(1) states "[t]he responsibility for redacting personally identifiable information (as defined in [Rule] 9037) rests solely with counsel, parties in interest and non-parties." Counsel is advised to review the procedure in LBR 9037-1(b) for redacting personally identifiable information in the exhibits and promptly redact the same. Third, to the extent that Exhibit C is a declaration, exhibits and declarations must be filed as separate documents. LBR 9004-2(d). However, the purported declaration of Kristen La Marsna contains no oath, does not establish the declarant's personal knowledge, does not show that the declarant is competent to testify on the matters stated, and contains no signature. See Fed. R. Civ. P. 43 & 56; LBR 9004-1(c). Based on the pleadings filed with the motion, the motion is not supported by any admissible evidence.

Cyruss Bryndt La Marsna and Kristen Elizabeth La Marsna (together, "Debtors") move the court for an order vacating the April 22, 2022 order dismissing Debtors' bankruptcy case. Mot., Doc. #64; Order, Doc. #63. Debtors move under

Federal Rule of Civil Procedure ("Rule") 60(b), incorporated to this proceeding by Federal Rule of Bankruptcy Procedure 9024. Doc. #67.

Debtors filed the voluntary chapter 13 petition on November 9, 2020. Doc. #1. On August 5, 2021, the court confirmed Debtors' First Modified Chapter 13 Plan filed May 28, 2021 (the "Plan"). Order, Doc. #51; Plan, Doc. #31. The chapter 13 trustee ("Trustee") and Debtors filed a joint ex parte application under Rule 60(a) to amend the confirmation order to include language subjecting Debtors' bankruptcy case to an annual review for the duration of the case to be conducted by Trustee. Doc. #52. The court granted the joint ex parte request and amended the confirmation order. Doc. #54. Consequently, the Order Confirming First Modified Plan was amended to include the following language:

This case shall be subject to an annual review, by the Chapter 13 Trustee, commencing February 1, 2022, and continuing for the duration of the case. If employed, Joint Debtor shall provide a declaration to the Trustee with supporting evidence, including copies of all paystubs for all employment since the last declaration regarding employment, copies of the most recent tax returns, and Amended Schedules I and J. If unemployed, Joint Debtor must provide a declaration indicating the reasons for continued unemployment and provide most recent tax returns.

Doc. #54.

On March 11, 2022, Trustee moved to dismiss Debtors' chapter 13 case for Debtors' failure to comply with the annual review requirements. Doc. #56, 58. Trustee set the motion for hearing on April 21, 2022 and required written opposition to be filed at least 14 days prior to the hearing. Doc. #57. Debtors did not respond to Trustee's motion to dismiss, the court entered their default and granted the motion. Order, Doc. #63. On April 22, 2022, the clerk submitted the Notice of Entry of Order of Dismissal and served it upon Debtors and their counsel. Doc. #64, 65. Ten days later, Debtors filed the ex parte application to shorten time and the instant motion to vacate the dismissal order.

By the motion, Debtors contend that Trustee was provided with tax forms, pay stubs, and other documents showing Debtors' employment status, which Debtors believed to have resolved Trustee's motion to dismiss. Doc. #67. Debtors never filed a written response to Trustee's motion. Debtors expected Trustee to withdraw the motion to dismiss, but Trustee did not.

Debtors move under Rule 60(b)(1) and (b)(6). Rule 60(b) permits the court to grant relief from a final order for, *inter alia*, mistake, inadvertence, surprise, excusable neglect, or any other reason that justifies relief. Rule 60(b)(1), (6); Doc. #67.). A motion to reconsider an order is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters. v. Estate of Bishop, 299 F.3d 877, 890 (9th Cir. 2000); see also Berman v. Freedom Fin. Network, LLC, 30 F.4th 849 (9th Cir. 2022) (applying the standard to Rule 60(b)).

This determination is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993). The factors to consider include:

1. Danger of prejudice to the debtor;
2. Length of delay and potential impact on judicial proceedings;

3. Reason for the delay, including whether it was in the movant's control; and
4. Whether the party acted in good faith.

Id. However, as stated above, there is no admissible evidence filed in support of Debtors' motion to vacate the dismissal order.

Assuming appropriate facts supported by an offer of proof at the hearing, the court is inclined to grant the motion and vacate the dismissal order based on a consideration of the factors set forth in Pioneer.

With respect to the first Pioneer factor, denying the motion to vacate the dismissal order would cause prejudice to Debtors. At the time of dismissal, Debtors had been in bankruptcy for one year, were current on their plan payments, and intended to complete the Plan. Debtors are financially capable of performing under the terms of the Plan. However, dismissal of the case has resulted in the lifting of the automatic stay, thereby permitting creditors to enforce their rights and remedies under state law. Reinstating the bankruptcy case by vacating the dismissal would reimpose the automatic stay and halt any enforcement actions that may have been resumed based on the dismissal of the case. However, there is no indication that any creditor has acted in reliance on the dismissal. This factor favors vacating the dismissal order.

With respect to the second Pioneer factor, the delay between dismissal and Debtors' Rule 60(b) motion is nominal. The order dismissing Debtors' case was entered April 22, 2022, and Debtors submitted the ex parte application to shorten time on May 2, 2022, ten days later. There would also be minimal impact on judicial proceedings, since a review of the docket reveals no outstanding motions were interrupted and there are no related adversary proceedings. After the court confirmed the Plan in August 2021, the only activity on Debtors' bankruptcy docket prior to the instant motion was Trustee's motion to dismiss filed on March 11, 2022. This factor favors vacating the dismissal order.

With respect to the third and fourth Pioneer factors, Debtors contend that they provided Trustee with the required documentation prior to entry of the dismissal order and believed Trustee's motion would be withdrawn, although Debtors do not state the date on which the documents were provided to Trustee. Debtors' motion further states that Debtors' counsel did not ensure that Trustee's motion to dismiss was withdrawn and is deeply apologetic. That is, the reason for dismissal was entirely in Debtors' control. However, Debtors were otherwise performing under the terms of the Plan and there is no evidence of bad faith. The court is hesitant to punish Debtors for their attorney's oversight. The third factor weighs against granting the motion while the fourth factor favors granting the motion.

Accordingly, pending Debtors' offer of proof at the hearing, the court will GRANT the motion. The Order filed April 22, 2022 dismissing Debtors' bankruptcy case will be VACATED.

1. [21-12729](#)-A-7 **IN RE: JOSE MESTRES**
[22-1006](#) [PVR-2](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH
DEFENDANT JOSE M. MESTRES
4-4-2022 [[11](#)]

SCHOOLSFIRST FEDERAL CREDIT UNION V. MESTRES
PAUL REZA/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 failure of the defendant to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. 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 not done here. This matter will proceed as scheduled.

Jose M. Mestres ("Defendant") is a chapter 7 debtor and the defendant in this adversary proceeding. Schools First Federal Credit Union ("Plaintiff") initiated this adversary proceeding by filing a complaint seeking a determination that certain credit card debt owed by Defendant to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), by way of § 523(a)(2)(C). Section 523(a)(2)(C) provides a presumption of non-dischargeability when the debt owed stems from cash advances aggregating more than \$1,000 that are extensions of consumer credit under an open-end credit plan and the cash advances occurred within 70 days of the filing of the bankruptcy petition. 11 U.S.C. § 523(a)(2)(C)(II). Complaint, Doc. #1. Plaintiff alleges that Defendant took out a total of \$3,450 in cash advances pursuant to a credit card agreement on November 2 and 10, 2021. Doc. #1. Defendant filed a voluntary chapter 7 petition on November 29, 2021. *See* E.D. Cal. Bankr. Case No. 21-12729.

On April 4, 2022, Plaintiff filed a Motion to Approve Settlement Agreement of Complaint to Determine Discharge (the "Motion"). Doc. #11. Filed as a single document, the Motion includes the Declaration of Alexa Martinez, an employee of Plaintiff, and the proposed settlement agreement signed by Plaintiff, Defendant, and their respective counsel. Doc. #11. As a procedural matter, the motion fails to comply with the Local Rules of Practice. The motion, declaration and supporting exhibits are each to be filed as separate documents. LBR 9004-2(c)(1). In addition, exhibits must be filed as a separate document from the document to which it relates and must include an exhibit index. LBR 9004-2(d).

The court is inclined to DENY the motion because the request for relief is not clear, there is no legal authority justifying the relief requested, and the proposed settlement agreement does not clearly reflect the requests made in the Motion.

Federal Rule of Bankruptcy Procedure 9019 requires notice and a hearing on the proposed settlement of an adversary proceeding where the settlement will affect the bankruptcy estate. "Some settlements do not have an effect on the bankruptcy estate and thus do not require notice and hearing before obtaining court approval." March, Ahart & Shapiro, *Cal. Prac. Guide: Bankruptcy* (The Rutter Group 2021) [20:286] (emphasis in original). "For example, where a creditor sues to have a particular debt held nondischargeable in a Chapter 7 case, and the parties agree a portion of the debt will be non-dischargeable and the debtor will pay that amount to the creditor over time from the debtor's postpetition personal earnings (which are not estate property), the settlement does not use estate property or affect the bankruptcy estate. In this situation, most bankruptcy judges permit the debtor and creditor to file a stipulation memorializing the settlement terms (signed by the parties) that is subsequently approved by the court." Id. Because the proposed settlement agreement settles a non-dischargeability complaint and does not use estate property or affect the bankruptcy estate, no motion to approve the settlement agreement is needed.

The settlement agreement attached to the Motion defines Defendant Jose M. Mestres as "Mestres". Doc. #11. However, the paragraph numbered 1 in the settlement agreement states that Ruiz, not Mestres, "shall pay" Id. The settlement agreement does not state who Ruiz is and what relation he, she or it may have to Defendant. Additionally, the proposed settlement agreement alternatively uses "Debtor", "Plaintiff", and "Defendant" but does not define those terms anywhere in the settlement agreement. Id.

In the Motion, Plaintiff asks the court to enter an order determining Defendant's debt to Plaintiff be declared nondischargeable. Doc. #11. However, nowhere in the plain language of the settlement agreement do the parties agree to stipulate to a judgment determining the debt owed by Defendant to Plaintiff under the settlement agreement to be nondischargeable. Id.

Plaintiff also asks the court to approve the settlement agreement and retain jurisdiction in the event of a default of the settlement agreement. Id. However, paragraph numbered 10 provides that the venue of all litigation arising out of the settlement agreement be the Superior Court of California, County of Orange, not the bankruptcy court. It is unclear to this court exactly what jurisdiction this court is to retain after approving the settlement agreement.

Finally, Plaintiff asks the court to enter a judgment in favor of Plaintiff against Defendant in the amount of \$4,000, less payments submitted, in the event Defendant defaults on the settlement agreement. Id. However, assuming 24 payments of \$167 each, the total amount of payments to be made under the settlement agreement equals \$4,008, not \$4,000. It is unclear to the court which monthly payments are to be less than \$167.

If Plaintiff and Defendant seek to resolve this adversary proceeding on a consensual basis, they are free to do so subject to court approval. However, the proposed settlement agreement filed with the court does not support the relief requested by Plaintiff in the Motion.

Accordingly, the Motion will be DENIED.

MOTION TO REOPEN DISCOVERY AND CONTINUE DISCOVERY CUT-OFF DATE
4-4-2022 [\[45\]](#)

DE CASTAING ET AL V. MALDONADO-RAMIREZ ET AL
ROBERT RODRIGUEZ/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The 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 failure of any party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the nonresponding parties in interest are entered. 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.

The motion is scheduled to be heard simultaneously with the defendants' motion to dismiss. Because the court, pursuant to the tentative ruling posted at Matter No. 3 below, is inclined to dismiss some, but not all, of the plaintiffs, the court will call the defendants' motion to dismiss (DCN JRL-1) first. After ruling on the motion to dismiss, the court will hear this matter. Therefore, for the purposes of this tentative ruling, "Plaintiffs" will mean, collectively, Claudia Torres Caratachea, Maria A. Garcia Diaz, Analine Martinez Elorza, Gabriel Torres Garcia, and Martha Guevara.

Plaintiffs move to amend the scheduling order to reopen discovery and extend discovery deadlines. Doc. #45. Ma Elena Maldonado-Ramirez and Martin Leon-Morales (together, "Defendants") are the chapter 7 debtors and defendants in this adversary proceeding. Complaint, Doc. #1. Defendants did not file written opposition to the motion.

Federal Rule of Civil Procedure ("Rule") 16 is incorporated into this adversary proceeding by Federal Rule of Bankruptcy Procedure 7016. Rule 16 provides, in part, that the bankruptcy court must issue a scheduling order limiting the time to complete discovery, and such schedule may be modified only for good cause and with the judge's consent. Rule 16(b).

This court issued the scheduling order ("Scheduling Order") on August 26, 2020, setting the close of fact discovery for February 26, 2021 and close of expert discovery for May 26, 2021. Doc. #9. The Scheduling Order also required Plaintiffs' pre-trial statement to be filed no later than July 29, 2021, Defendants' pre-trial statement to be filed no later than August 5, 2021, and set a pre-trial conference for August 12, 2021. Id.

Plaintiffs never filed a pre-trial statement. Defendants' pre-trial statement, timely filed August 4, 2021, stated that Plaintiffs had not made any discovery requests on Defendants. Doc. #12. It also stated that Plaintiffs' counsel, Mr. Rodriguez, emailed Defendants' counsel on April 26, 2021 indicating that Mr. Rodriguez would be moving to substitute out of the case, which was followed up with a notice to Defendants' counsel in early June 2021 that Mr. Rodriguez was ineligible to practice law in California. Doc. #12.

At the pre-trial conference on August 12, 2021, co-plaintiffs Maria A. Garcia Diaz, Analine Martinez Elorza, and Martha Ofelia Guevara made appearances by phone through an interpreter and without the assistance of counsel. Doc. #17. Defendants appeared through counsel. Id. After the pre-trial conference, the court issued an order continuing the pre-trial conference to November 18, 2021 and extended the deadline for Plaintiffs to file a pre-trial statement to November 4, 2021. Order, Doc. #18.

On November 4, 2021, co-plaintiffs Maria A. Garcia Diaz and Claudia Torres Caratachea submitted a pre-trial statement requesting a 120-day continuance so that Plaintiffs could hire legal counsel and, upon hiring legal counsel, Plaintiffs intended to file an amended complaint and reopen and propound discovery. Doc. ##20, 22. Maria A. Garcia Diaz was the only co-plaintiff to appear at the continued pre-trial conference on November 18, 2021. Doc. #25. The court continued the pre-trial conference to March 10, 2022 and required supplemental pre-trial statements to be filed no later than March 3, 2022. Order, Doc. #26.

On November 23, 2021, an order was entered assigning the adversary proceeding to the Bankruptcy Dispute Resolution Program ("BDRP"). Doc. #28. The BDRP conference was held February 24, 2022. Doc. #30. Fewer than all of the plaintiffs attended the BDRP conference and a settlement was not reached. Doc. ##29, 30. However, Henry Nunez did appear at the BDRP conference with Claudia Torres Caratachea, Maria Garcia Diaz, and possibly one additional unnamed co-plaintiff. Decl. of Jerry R. Lowe, Doc. #43. Plaintiffs engaged Mr. Nunez as their current attorney on or about January 13, 2022. Decl. of Henry D. Nunez, Doc. #49.

On March 2, 2022, Henry Nunez, as purported attorney for Plaintiffs, filed an Ex Parte Application to Reopen Discovery and Continue Discovery Cut-Off Date. Doc. #31. The court rejected that request as the matter required a noticed motion and no notice of hearing was filed. Doc. #38. Additionally, no substitution of counsel on behalf of Plaintiffs had been filed with the court at that time. Doc. #38. The ex parte application was served on Defendants' counsel. Doc. #34.

Neither Plaintiffs individually nor through counsel appeared at the continued pre-trial conference held March 10, 2022. Doc. #39; Decl. of Henry D. Nunez, Doc. #49. The court issued an Order to Show Cause Regarding Dismissal of Adversary Proceeding for Failure to Prosecute (the "OSC"). Doc. #38. The OSC required Plaintiffs or their prospective new counsel to appear on April 21, 2022 and show cause why the adversary proceeding should not be dismissed. Id.

Shortly thereafter, on March 17, 2022, Defendants moved to dismiss the adversary proceeding for failure to prosecute and for sanctions against Plaintiffs. Doc. #41. Plaintiffs filed written opposition on April 7, 2022. Doc. #54.

On April 4, 2022, Plaintiffs filed and set for hearing the instant Motion to Reopen Discovery and Continue Discovery Cut-Off Date. Doc. #45. Defendants never filed written opposition to the Motion.

On April 20, 2022, Henry Nunez submitted a Substitution of Attorney form indicating that Plaintiffs Claudia Torres Caratachea, Maria A. Garcia Diaz, Analine Martinez Elorza, Gabriel Torres Garcia, and Martha Guevara consented to the substitution. Doc. #58.

The court vacated the OSC on April 25, 2022. Doc. #63. Defendants' motion to dismiss and for sanctions, as well as Plaintiffs' motion to reopen discovery, are scheduled to be heard on May 12, 2022 at 11:00 a.m.

153 days elapsed between the November 18, 2021 pre-trial conference extending the deadline for Plaintiffs to obtain new counsel and the filing of the Substitution of Attorney submitted by Henry Nunez.

When ruling on a motion to amend a Rule 16 scheduling order to reopen discovery, the court is to consider the following factors:

(1) whether trial is imminent, (2) whether the request is opposed, (3) whether the non-moving party would be prejudiced, (4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, (5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the [trial] court, and (6) the likelihood that the discovery will lead to relevant evidence.

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1526 (9th Cir. 1995), vacated on other grounds, 520 U.S. 939 (1997). First among these is the diligence of the moving party. Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th Cir. 1992).

Here, this court initially scheduled ample time to conduct discovery: six months for fact discovery and nine months for expert discovery. Doc. #9. However, trial is not imminent and the request is unopposed. It is likely that discovery will lead to relevant evidence, particularly considering that no discovery has yet occurred. Defendants would suffer some prejudice if discovery were re-opened and the close of discovery extended, since such a result would allow the case to proceed against them. However, Defendants took no action to do away with this adversary proceeding by filing a Rule 12 motion to dismiss or moving for summary judgment prior to filing the motion to dismiss, and the motion to dismiss was filed only three weeks before the instant motion. See Doc. #41; Doc. #45. Additionally, although Plaintiffs' first attempt to reopen discovery by ex parte application failed for lack of notice and a hearing, the ex parte application was served on Defendants' counsel on March 2, 2022, prior to the filing of Defendants' motion to dismiss. Defendants were on some notice that Plaintiffs would seek to reopen discovery at that time, and there would not be undue prejudice to Defendants in granting the request to reopen discovery.

Regarding diligence, although there was some delay with respect to Plaintiffs obtaining legal counsel after their first attorney became disbarred, the court finds that Plaintiffs were diligent in this case. Plaintiffs missed the first pre-trial statement filing date due to the failure of their then-attorney Mr. Rodriguez, who had been disbarred by the time the pre-trial conference occurred, but some co-plaintiffs did appear at the pre-trial conference. Plaintiffs, without legal counsel, timely filed a subsequent pre-trial statement in which they requested a 120-day continuance to hire legal counsel. Doc. #22. In that pre-trial statement, Plaintiffs stated that upon hiring new counsel "the plaintiffs intend to file an amended complaint and to reopen and propound discovery therefor." Doc. #22. Plaintiffs kept the court and Defendants apprised of their plans. Plaintiffs engaged their current attorney

on or about January 13, 2022, and Plaintiffs' current attorney attended the BDRP conference. Plaintiffs did fail to appear at the pre-trial conference on March 10, 2022. However, prior to the court issuing the OSC, Plaintiffs' new counsel filed a motion to reopen discovery that was denied for procedural defects. Since that time, Plaintiffs have been active in this case. Plaintiffs filed the instant motion and filed written opposition to Defendants' motion to dismiss.

In conclusion, the court finds good cause to amend the Scheduling Order and extend the deadline to complete discovery. However, the court is also aware that this case has been pending since June of 2020. Pursuant to this court's inherent authority to manage its docket and broad discretion in supervising the pretrial phase of litigation, the court will reopen fact discovery for a limited period of 90 days from the hearing date and expert discovery for an additional 44 days.

Accordingly, this motion is GRANTED. The Scheduling Order will be amended to show the close of fact discovery as August 10, 2022, and close of expert discovery as September 23, 2022. A new pre-trial conference will be scheduled for October 20, 2022 at 11:00 a.m., with Plaintiffs' pre-trial statement due October 6, 2022, and Defendants' pre-trial statement due October 13, 2022.

3. [20-11147](#)-A-7 **IN RE: MARTIN LEON-MORALES AND MA ELENA MALDONADO-RAMIREZ**
[20-1040](#) [JRL-1](#)

CONTINUED MOTION TO DISMISS CASE, AND/OR MOTION FOR SANCTIONS
3-17-2022 [\[41\]](#)

DE CASTAING ET AL V. MALDONADO-RAMIREZ ET AL
JERRY LOWE/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part, Denied in part.

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). Written opposition was timely filed on April 7, 2022 on behalf of some co-plaintiffs. Doc. #54. The failure of any party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the nonresponding plaintiffs are entered. This matter will proceed as scheduled.

Ma Elena Maldonado-Ramirez and Martin Leon-Morales (together, "Defendants") are the chapter 7 debtors and defendants in this adversary proceeding. Complaint, Doc. #1. Defendants move to dismiss this case for the plaintiffs' failure to prosecute pursuant to Federal Rule of Civil Procedure ("Rule") 41(b) and for attorney's fees as sanctions pursuant to Rule 16(f). Doc. #41. Rules 41 and 16 are made applicable to this adversary proceeding by Federal Rules of Bankruptcy Procedure 7041 and 7016, respectively.

The court is inclined to GRANT IN PART Defendants' motion and dismiss co-plaintiffs Sonia Pena De Castaing ("Castaing") and Antonia Martinez Elorza (hereafter, "Antonia") (while no disrespect is intended, Antonia will be identified as such to avoid confusion with a co-plaintiff with the same surname). It is unclear to the court whether Gabriel Torres Garcia is represented by counsel. Compare Mot. for Substitution, Doc. #58 with named plaintiffs in Opp'n to Mot. to Dismiss, Doc. #54. The court is inclined to DENY IN PART Defendants' motion with respect to co-plaintiffs Claudia Torres Caratachea ("Caratachea"), Maria A. Garcia Diaz ("Diaz"), Analine Martinez Elorza ("Analine") (while no disrespect is intended, Analine will be identified as such to avoid confusion with a co-plaintiff with the same surname), Gabriel Torres Garcia ("Garcia"), and Martha Guevara ("Guevara"). The court will DENY Defendants' request for sanctions.

Through counsel, on June 26, 2020, Castaing, Caratachea, Diaz, Analine, Antonia, Guevara, and Garcia as co-plaintiffs filed a complaint against Defendants and initiated this adversary proceeding. Doc. #1. Defendants answered on July 26, 2020. Doc. #6. The court held a status conference on August 26, 2020 at which only counsel for the co-plaintiffs appeared. Doc #8.

On August 26, 2020, this court issued the scheduling order ("Scheduling Order") setting the close of fact discovery for February 26, 2021 and close of expert discovery for May 26, 2021. Doc. #9. The Scheduling Order also required Plaintiffs' pre-trial statement to be filed no later than July 29, 2021, Defendants' pre-trial statement to be filed no later than August 5, 2021, and set a pre-trial conference for August 12, 2021. Id.

No plaintiffs, either individually or through counsel, filed a pre-trial statement. Defendants' pre-trial statement, timely filed August 4, 2021, stated that there had been no discovery requests propounded on Defendants. Doc. #12. It also stated that the plaintiffs' counsel of record at the time, Mr. Rodriguez, emailed Defendants' counsel on April 26, 2021 indicating that Mr. Rodriguez would be moving to substitute out of the case, which was followed up with a notice to Defendants' counsel in early June 2021 that Mr. Rodriguez was ineligible to practice law in California. Doc. #12.

At the pre-trial conference on August 12, 2021, co-plaintiffs Diaz, Analine, and Guevara appeared by phone through an interpreter and without the assistance of counsel. Doc. #17. Defendants appeared through counsel. Id. After the pre-trial conference, the court issued an order continuing the pre-trial conference to November 18, 2021 and extended the deadline for the plaintiffs to file a pre-trial statement to November 4, 2021. Order, Doc. #18.

On November 4, 2021, co-plaintiffs Diaz and Caratachea submitted a pre-trial statement requesting a 120-day continuance so that the plaintiffs could hire new legal counsel and, upon hiring legal counsel the plaintiffs, intended to file an amended complaint and reopen and propound discovery. Doc. ##20, 22. Diaz was the only co-plaintiff to appear at the continued pre-trial conference on November 18, 2021. Doc. #25. The court continued the pre-trial conference to March 10, 2022 and required supplemental pre-trial statements be filed no later than March 3, 2022. Order, Doc. #26.

On November 23, 2021, an order was entered assigning the adversary proceeding to the Bankruptcy Dispute Resolution Program ("BDRP"). Doc. #28. The BDRP conference was held February 24, 2022. Doc. #30. Fewer than all of the plaintiffs attended the BDRP conference and a settlement was not reached. Doc. ##29, 30. However, Henry Nunez did appear at the BDRP conference with Caratachea and Diaz, and one additional unnamed co-plaintiff. Decl. of Jerry R.

Lowe, Doc. #43. Mr. Nunez testifies that some of the plaintiffs engaged him as their attorney on or about January 13, 2022. Decl. of Henry D. Nunez, Doc. #49.

On March 2, 2022, Henry Nunez, as purported attorney for the plaintiffs, filed an Ex Parte Application to Reopen Discovery and Continue Discovery Cut-Off Date. Doc. #31. The court rejected that request as the matter required a noticed motion and no notice of hearing was filed. Doc. #38. Additionally, no substitution of counsel on behalf of the plaintiffs had been filed with the court at that time. Doc. #38.

Neither the plaintiffs individually nor through counsel appeared at the continued pre-trial conference held March 10, 2022. Doc. #39; Decl. of Henry D. Nunez, Doc. #49. The court issued an Order to Show Cause Regarding Dismissal of Adversary Proceeding for Failure to Prosecute (the "OSC"). Doc. #38. The OSC required the plaintiffs or their prospective new counsel to appear on April 21, 2022 and show cause why the adversary proceeding should not be dismissed. Id.

Shortly thereafter, on March 17, 2022, Defendants filed the instant motion to dismiss the adversary proceeding for failure to prosecute and for sanctions. Doc. #41. Written opposition was filed on April 7, 2022 by Mr. Nunez, as attorney for the plaintiffs, though the opposition only identifies Caratachea, Diaz, Analine, and Guevara as the opposing plaintiffs. Doc. #54.

On April 4, 2022, the plaintiffs filed and set for hearing a Motion to Reopen Discovery and Continue Discovery Cut-Off Date. Doc. #45. That motion identifies the moving plaintiffs as Caratachea, Diaz, Analine, Antonia, Guevara, and Garcia (named in the motion as Gabriel Garcia Torres). Doc. #45. The caption of the motion states that Mr. Nunez is the attorney only for Caratachea, Diaz, Analine, and Guevara. Doc. #45. Defendants never filed written opposition.

On April 20, 2022, Henry Nunez submitted a Substitution of Attorney form indicating that co-plaintiffs Caratachea, Diaz, Analine, Garcia, and Guevara consented to the substitution. Doc. #58.

The court vacated the OSC on April 25, 2022. Doc. #63. 153 days elapsed between the November 18, 2021 pre-trial conference extending the deadline for the plaintiffs to obtain new counsel and the filing of the Substitution of Attorney submitted by Henry Nunez. No discovery has occurred, and there has yet to be filed a pre-trial statement acknowledged by all plaintiffs.

Dismissal under Rule 41(b)

Rule 41(b) provides that a defendant may move to dismiss an action against it if the plaintiff "fails to prosecute or to comply with the[Rules] or a court order" In deciding whether to dismiss an action for lack of prosecution under Rule 41(b), the court weighs five factors:

- (1) the public's interest in expeditious resolution of litigation;
- (2) the court's need to manage its docket;
- (3) the risk of prejudice to the defendants;
- (4) the public policy favoring disposition of cases on their merits; and
- (5) the availability of less drastic sanctions.

George v. City of Morro Bay (In re George), 322 F.3d 586, 591 (9th Cir. 2002) (am. Mar. 6, 2003); Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). "A dismissal for lack of prosecution must be supported by a showing of unreasonable delay." Henderson, 779 F.2d at 1423. In determining whether a defendant has been prejudiced, a court should consider whether the plaintiff's actions impaired the defendant's ability to go to trial or threaten the

rightful decision of the case. Tenorio v. Osinga (In re Osinga), 91 B.R. 893, 894 (B.A.P. 9th Cir. 1988).

The court is inclined to find that unreasonable delay justifying dismissal is present in this case with respect to only two of the plaintiffs: Castaing and Antonia. Neither Castaing nor Antonia signed the Substitution of Attorney form filed April 20, 2022. Henry Nunez testifies that he is the attorney of record for Caratachea, Diaz, Analine, Garcia, and Guevara. Decl. of Henry Nunez, Doc. #55. Notably absent from that list are Castaing and Antonia. Neither Castaing nor Antonia appeared at any of the pre-trial conferences or signed off on any of the pre-trial statements. No opposition to Defendants' motion has been filed by Castaing or Antonia. The failure of Castaing and Antonia to participate in any manner in this adversary proceeding constitutes unreasonable delay and is against the public's interest in expeditious resolution of this litigation and the court's need to manage its docket. The other co-plaintiffs have at least appeared at hearings, signed pre-trial statements, appeared at the BDRP conference, or agreed to be represented in this proceeding by Mr. Nunez. Delaying this adversary proceeding any longer would prejudice Defendants, and there is no mechanism for less drastic sanctions since Castaing and Antonia appear to have abandoned this adversary proceeding.

Regarding the remaining plaintiffs (Caratachea, Diaz, Analine, Garcia, and Guevara), Defendants would suffer some prejudice if this case were not dismissed, since such a result would permit the remaining plaintiffs to engage in discovery and proceed in this adversary proceeding against Defendants. However, this prejudice is mitigated by the fact that Defendants took no action to do away with this adversary proceeding before filing the instant motion to dismiss, which was filed after Defendants were on notice that at least some co-plaintiffs had retained counsel, appeared at the BDRP conference, and had submitted a procedurally defective motion to reopen discovery and amend scheduling deadlines. True, the plaintiffs have not propounded any discovery on Defendants, but Defendants also never moved to dismiss this adversary proceeding under Rule 12 or moved for summary judgment under Rule 56. The result being that Defendants would not suffer significant prejudice if the case proceeds, as they are in substantially the same position they were as when the Scheduling Order issued.

Further, the plaintiffs missed the first pre-trial statement filing date due to the failure of their then-attorney Mr. Rodriguez, who had been disbarred by the time the pre-trial conference occurred. Diaz, Analine, and Guevara nonetheless appeared at the pre-trial conference. Diaz and Caratachea, without legal counsel, timely filed a subsequent pre-trial statement in which they requested a 120-day continuance to hire legal counsel for all co-plaintiffs. In that pre-trial statement, Diaz and Caratachea stated that upon hiring new counsel "the plaintiffs intend to file an amended complaint and to reopen and propound discovery therefor." Doc. #22. The court and Defendants were made aware that at least some of the plaintiffs would prosecute the case when new counsel was hired, and adequately explained the cause of the delay. The remaining plaintiffs engaged their current attorney on or about January 13, 2022, and have since attended the BDRP conference, objected to Defendants' motion to dismiss, and moved to reopen discovery and extend deadlines.

Therefore, Defendants' motion to dismiss will be DENIED with respect to Caratachea, Diaz, Analine, Garcia, and Guevara. There has been no unreasonable delay by these plaintiffs, and there will be no significant prejudice to Defendants. Further, a disposition of this adversary proceeding on its merits is desirable. Caratachea, Diaz, Analine, Garcia, and Guevara are on notice that failure to comply with further scheduling orders, orders of the court, or other requirements of the Rules may result in sanctions under Rule 41(b).

Sanctions under Rule 16(f)

Defendants also move for an order imposing sanctions pursuant to Rule 16(f). Doc. #41. Defendants ask the court to impose attorney's fees as sanctions for the plaintiffs' failure to comply with the Scheduling Order. Id. Rule 16(f) permits the court to "issue any just orders" if a party fails to appear at a pre-trial conference, does not participate in the conference, or fails to obey a scheduling or other pre-trial order. Rule 16(f)(1). It is the court's duty and power under Rule 16(f) to impose sanctions designed to solve problems related to noncompliance of scheduling orders. Martin Family Trust v. NECO/Nostalgia Enters. Co., 186 F.R.D. 601, 602-03 (E.D. Cal. 1999). The courts have very broad discretion to use sanctions where necessary. Id.

The court has already explained its intention to dismiss the claims of Castaing and Antonia, and the court sees no need, and has been offered no argument, to impose additional sanctions in the form of attorney's fees against those co-plaintiffs. As far as the court is aware, Defendants have not incurred any attorney's fees specific to Castaing or Antonia's conduct.

With respect to the remaining plaintiffs, and for the reasons stated with respect to Defendants' motion to dismiss, the court will DENY without prejudice Defendants' request for sanctions. However, Caratachea, Diaz, Analine, Garcia, and Guevara are hereby on notice that any failure to prosecute this adversary proceeding in a prompt and diligent manner may be cause to impose sanctions at a later date.

Conclusion

In conclusion, the court finds that Castaing and Antonia have failed to prosecute their claims against Defendants and failed to comply with the Scheduling Order, and the claims of Castaing and Antonia will be DISMISSED.

The court will DENY Defendants' motion to dismiss with respect to Caratachea, Diaz, Analine, Garcia, and Guevara.

The court, having dismissed the claims of Castaing and Antonia, will DENY Defendants' request to impose sanctions against Castaing and Antonia.

The court will DENY WITHOUT PREJUDICE Defendants' request to impose sanctions with respect to the remaining plaintiffs Caratachea, Diaz, Analine, Garcia, and Guevara.

4. [17-13776](#)-A-7 **IN RE: JESSICA GREER**
[18-1017](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-23-2018 [\[1\]](#)

SALVEN V. CALIFORNIA DEPARTMENT OF FOOD & AGRICULTURE
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued April 27, 2023, at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the joint status report filed on May 5, 2022 (Doc. #99), the status conference will be continued to April 23, 2023, at 11:00 a.m.

The parties shall file either joint or unilateral status report(s) not later than April 20, 2023.