

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, May 25, 2022
Place: Department B – Courtroom #13
Fresno, California

The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click [here](#).

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. [22-10005](#)-B-7 **IN RE: PATRICIA TESSENDORE**
[MHM-4](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE
MICHAEL H. MEYER
3-24-2022 [[31](#)]

TIMOTHY SPRINGER/ATTY. FOR DBT.
CONVERTED TO CH. 7 ON 4/26/22

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") objected to confirmation of Patricia Marie Tessendore's ("Debtor") *Chapter 13 Plan* dated January 15, 2022 pursuant to 11 U.S.C. § 1325(a)(1) because the plan fails to comply with applicable provisions of the Bankruptcy Code and § 1325(a)(6) because the Debtor will not be able to make all payments under and comply with the plan. Doc. #31.

The objection was originally heard on April 7, 2022 and continued to May 25, 2022 so that Debtor could file and serve a response not later than May 11, 2022, or file and serve a modified plan in lieu of a response not later than May 18, 2022. Docs. ##37-38.

On April 22, 2022, the court heard Trustee's motion to dismiss for unreasonable delay and failure to commence making plan payments. Doc. #46. Since Debtor did not respond, and because the case had a liquidation value of approximately \$44,993.61, the court denied the motion in part as to dismissal, granted in part as to conversion, and the case was converted to chapter 7. *Id.*; Doc. #47.

Accordingly, this objection will be OVERRULED AS MOOT because the case has been converted to chapter 7.

2. [21-12008](#)-B-13 **IN RE: CELESTE MURILLO**
[JNV-4](#)

MOTION TO CONFIRM PLAN
4-12-2022 [\[50\]](#)

CELESTE MURILLO/MV
JASON VOGELPOHL/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.

Celeste Lucia Murillo ("Debtor") seeks an order confirming the *Third Amended Chapter 13 Plan* dated December 20, 2021 ("Plan"). Doc. #50. The Plan provides that Debtor shall pay \$899.00 for 1 month, \$1,357.00 for 1 month, and \$1,509.00 per month for 58 months with a 100% dividend to allowed, non-priority unsecured claims. Doc. #35, § 7. Debtor's amended schedules indicate a monthly net income of \$1,833.17 per month, which is sufficient to fund the Plan. Doc. #34, *Am. Schedules I, J*. No plan has been confirmed in this case. No party in interest timely filed written opposition.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

3. [21-12814](#)-B-13 **IN RE: DUSTIN DUTRA**
[SL-1](#)

MOTION TO MODIFY PLAN
4-6-2022 [[21](#)]

DUSTIN DUTRA/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Dustin Anthony Dutra ("Debtor") seeks an order confirming the *First Modified Chapter 13 Plan* dated April 6, 2022 ("Plan"). Doc. #21.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected because the Plan proposes for payments to creditors for a period longer than five years in violation of 11 U.S.C. §§ 1322(d) and 1329(c). Doc. #34.

The Plan proposes to extend the duration of payments to 84 months under the COVID-19 Bankruptcy Relief Extension Act of 2021 ("CBREA"). Doc. #26. However, as Trustee points out, CBREA's amendment to § 1329(d) that allowed for an extension of a plan term to 84 months sunset effective March 27, 2022. See 117 P.L. 5, 135 Stat. 249; cf. 116 P.L. 136, 134 Stat. 281. Therefore, 11 U.S.C. § 1329 has reverted to its original language and subsections (d) and (e) have been deleted. Under 11 U.S.C. § 1329(c), the court may not approve a plan with a period that expires after five years from the time that the first payment under the original confirmed plan was due.

Accordingly, this motion will be DENIED WITHOUT PREJUDICE to filing a plan with a commitment period not exceeding 60 months.

4. [21-12814](#)-B-13 **IN RE: DUSTIN DUTRA**
[SL-2](#)

MOTION FOR COMPENSATION FOR SCOTT LYONS, DEBTORS ATTORNEY(S)
4-6-2022 [\[30\]](#)

SCOTT LYONS/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.

Scott Lyons ("Applicant"), attorney for Dustin Anthony Dutra ("Debtor"), seeks interim compensation in the sum of \$7,686.34. Doc. #30. This amount consists of \$6,940.50 in fees as reasonable compensation and \$745.84 in reimbursement for actual, necessary expenses from February 24, 2020 through April 5, 2022. *Id.*

Debtor executed a statement dated April 5, 2022 indicating that Debtor has reviewed the fee application and has no objections. *Id.*, § 9(7).

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and Fed. R. Bankr. P. ("Rule") 2002(a)(6). The failure of the creditors, the UST, 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 Sys., 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.

Debtor filed chapter 13 bankruptcy on December 17, 2021.¹ Doc. #1. The *Chapter 13 Plan* dated December 17, 2021 is the operative plan in this case. Docs. #3; #15. Section 3.05 provides that Applicant was paid \$1,463.00 prior to filing the case and, subject to court approval, an additional \$10,537.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, and Rule

2002, 2016, and 2017. Doc. #3. The *Disclosure of Compensation of Attorney for Debtor(s)* Form, 2030, indicates that Applicant was paid \$1,500.00 pre-petition.² Doc. #1.

This is Applicant's first interim request for compensation. The source of funds for payment of the award will be \$6,186.34 from the chapter 13 trustee in conformance with the plan and after application of the \$1,500.00 pre-petition payment.

Applicant's firm provided 46.38 hours of legal services (billing for 45.88) at the following rates, totaling **\$6,940.50** in fees:

Professional	Rate	Hours	Billed	Total
Scott Lyons	\$400.00	1.50	1.00	\$400.00
Louis Lyons	\$350.00	8.21	8.21	\$2,873.50
Sylvia Gutierrez	\$100.00	36.67	36.67	\$3,667.00
Total Fees & Hours		46.38	45.88	\$6,940.50

Doc. #32, Ex. B. Applicant also incurred **\$745.84** in expenses:

Credit Report Fee	\$37.00
Motion to Confirm Postage	+ \$472.56
Fee Application Postage	+ \$236.28
Total Costs	= \$745.84

These combined fees and expenses total **\$7,686.34**.

11 U.S.C. § 330(a)(1)(A) and (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person, or attorney" and "reimbursement for actual, necessary expenses." In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, considering all relevant factors, including those enumerated in subsections (a)(3)(A) through (E). § 330(a)(3).

Applicant's services included, without limitation: (1) advising Debtor about bankruptcy and non-bankruptcy alternatives; (2) reviewing Debtor's financial information, the effects of exemptions, and value of assets; (3) gathering information and documents to prepare the petition, and preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting of creditor documents to the trustee and attending the meeting; (5) confirming a chapter 13 plan; (6) preparing and filing a modified plan (SL-1); and (7) filing and serving this fee application (SL-2). Doc. #32, Exs. A, B. As noted above, Debtor has consented to payment of the requested fees. Doc. #30, § 9(7). The court finds the services and expenses actual, reasonable, and necessary.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Applicant will be awarded \$6,940.50 in fees and \$745.84 in expenses on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to § 330. After application of the pre-petition payment of \$1,500.00, the chapter 13 trustee is authorized, in his discretion, to pay Applicant \$6,186.34 in accordance with the chapter 13 plan for services rendered and expenses incurred from February 24, 2020 through April 5, 2022.

¹ Though the starting date of the requested fees greatly precedes the petition date, it appears that Debtor obtained a free initial consultation on February 24, 2020. Doc. #32, *Ex. B*. Legal services then resumed with charges of \$12.00 on June 29, 2021, and then continued from November 17, 2021 thereafter. *Id.*

² The \$37.00 discrepancy appears to be the result of deducting this amount as a credit report expense on November 17, 2021. *Id.*

5. [22-10721](#)-B-13 **IN RE: STEPHANIE FOREMAN**
[DMG-1](#)

MOTION TO EXTEND AUTOMATIC STAY
5-4-2022 [\[9\]](#)

STEPHANIE FOREMAN/MV
D. GARDNER/ATTY. FOR DBT.

NO RULING.

Stephanie Maryann Foreman ("Debtor") requests an order extending the automatic stay under 11 U.S.C. § 362(c) (3). Doc. #9.

Written opposition was not required and may be presented at the hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f) (2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will set a briefing schedule and final hearing unless there is no need to develop the record further. The court will issue an order if a further hearing is necessary.

Under 11 U.S.C. § 362(c) (3) (A), if the debtor has had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay under subsection (a) shall terminate on the 30th day after the latter case is filed. Debtor had one case pending within the preceding one-year period that was dismissed: Case No. 20-13965-B-13. That case was filed on December 31, 2020 and voluntarily dismissed by *ex parte* motion on April 7, 2022 because defeat in a motion to avoid lien necessitated an increased plan payment, which

Debtor could not afford. This case was filed on April 29, 2022.
Doc. #1. The automatic stay will expire on May 29, 2022.

11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor demonstrates that the filing of the latter case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. § 362(c)(3)(C). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288, n.11 (B.A.P. 9th Cir. 2016) (citations omitted) (vacated and remanded on other grounds by *Taggart v. Lorenzen*, 139 S. Ct. 1785 (2019)).

In this case, the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith as to all creditors because Debtor has more than one previous case under chapter 13 that was pending within the preceding one-year period. 11 U.S.C. § 362(c)(3)(C)(i)(III).

Debtor declares that, in the prior case, she sought to avoid the judicial lien of George Foreman as result of Inyo County Superior Court, case no. SICVFL 17-61665. Doc. #11. Debtor was not successful, and the motion was denied on October 27, 2021. After the denial, Debtor attempted to obtain additional income to file a modified plan and pay off the judgment lien to Mr. Foreman. While continuing to make payments under the plan, Debtor obtained a part-time job as a waitress in Bishop, California to supplement her disability retirement income. *Id.* Debtor also attempted to refinance the loan securing her residence but was not successful due to the pending bankruptcy.

Debtor filed this case to focus all of her disposable income on satisfying Mr. Foreman's claim in full. *Id.* However, Debtor needs a full 60-month term to both accomplish this goal and keep her residence, thus requiring dismissal of her original case. *Id.* Debtor has continued to work at the restaurant where she is employed and anticipates transitioning to a full-time salaried position with sufficient income to pay Mr. Foreman in full. *Id.* Debtor also applied to refinance the claim but has been unable to qualify. Notwithstanding refinance denial, Debtor has assurances from her employer that her future salary will increase. COVID has been a factor in the restaurant's profitability. Since pandemic restrictions have lifted, the restaurant may be able to employ more people, including Debtor on a full-time basis. However, the assurances from Debtor's employer are

hearsay and speculative. There is no guarantee that Debtor will in fact be offered such a full-time position.

The *Chapter 13 Plan* dated May 4, 2020 proposes to pay Mr. Foreman's lien and a vehicle in full. Doc. #13. The court notes that Debtor's mortgagee, El Dorado Savings Bank, is not provided for in the plan. *Cf.* Doc. #1, *Sched. D*. The plan provides for 60 monthly payments of \$806.00 with a 0% dividend to allowed unsecured claims. Doc. #13.

Debtor's updated *Schedules I* and *J* show that she receives \$2,277.68 in income and incurs \$1,799.40 in expenses per month, leaving a monthly net income of \$478.28. Doc. #1, *Scheds. I, J*. Debtor's monthly disposable income appears to be insufficient to afford the proposed plan payment, so the proposed plan does not appear to be feasible.

In the previous case, Debtor was receiving \$1,482.32 in monthly income and incurring \$1,079.00 in monthly expenses, leaving \$403.32 in monthly net income. True enough, Debtor's financial condition and circumstances have changed due to an increase in monthly income as the result of her waitressing job.

Additionally, Debtor declares that this case was filed in good faith and Debtor intends to perform the chapter 13 plan to completion and pay Mr. Foreman's claim at a fair interest rate. Doc. #11.

Based on the moving parties, the presumption appears to have been rebutted by clear and convincing evidence because Debtor's financial condition and circumstances have materially changed. Although the petition appears to have been filed in good faith, the proposed plan does not appear to be feasible on its face. At the outset, Debtor's success in this case is dependent upon speculative hearsay that Debtor's employer will promote her to a full-time salaried position.

This matter will be called and proceed as scheduled. 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).

6. [21-12029](#)-B-13 **IN RE: FRANK/MARIA VALLES**
[PBB-2](#)

MOTION TO MODIFY PLAN
4-12-2022 [\[28\]](#)

MARIA VALLES/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Frank Lucero Valles, Jr., and Maria Guadalupe Valles ("Debtors") request an order confirming the *First Modified Chapter 13 Plan* dated April 12, 2022 ("Plan"). Doc. #28. The Plan proposes that Debtor shall pay 38 monthly payments of \$550.00 with a 26% dividend distributed to allowed non-priority, unsecured claims. Doc. #33. Debtors' *Amended Schedules I and J* indicate that they receive monthly net income of \$550.92. Doc. #35.

Meanwhile, the operative *Chapter 13 Plan* dated August 20, 2021 provides for the same 38 monthly payments of \$550.00, but with a 49% dividend distributed to allowed non-priority, unsecured claims. Docs. #3; #23. The claims bar date has passed, and the proofs of claim filed in this case exceed the amounts anticipated under the original plan. Docs. ##31-32. Therefore, the current plan is not feasible and must be modified to account for the higher amounts of unsecured claims than expected. No party in interest timely filed written opposition.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

7. [21-12031](#)-B-13 **IN RE: JUAN FAJARDO**
[SL-3](#)

MOTION TO MODIFY PLAN
4-15-2022 [[67](#)]

JUAN FAJARDO/MV
SCOTT LYONS/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.

Juan Fajardo ("Debtor") seeks an order confirming *Debtor's First Modified Chapter 13 Plan* dated April 15, 2022 ("Plan"). Doc. #67. The Plan provides that Debtor shall make 60 monthly payments of \$800.00 with a 100% dividend for allowed non-priority, unsecured claims. Doc. #69. Nonstandard Provision 7.01 and 7.02 clarify that Debtor shall make payments totaling \$730.00 through April 25, 2022, and the payment shall increase to \$800.00 per month for months 3 through 60. *Id.* Debtor's *Amended Schedules I and J* indicate that Debtor receives \$806.61 in monthly net income. Doc. #65.

No plan has been confirmed in this case. Debtor converted from chapter 7 to chapter 13 on February 3, 2022. Doc. #49. No attempt was made to confirm the original *Chapter 13 Plan* dated February 15, 2022. Doc. #54.

On May 10, 2022, Debtor, through attorney Scott Lyons, and chapter 13 trustee Michael H. Meyer ("Trustee"), through attorney Kelsey A. Seib, stipulated to modifying the plan by: (a) reducing attorney's fees by \$4,000.00; (b) changing Section 3.05's attorney's fees to be paid through the plan to \$6,500.00; (c) keeping Debtor's payment at \$800.00 per month because the current version would take 63 months to fund; and (d) the above changes will be reflected in the order confirming plan. Doc. #74. No party in interest timely filed written opposition.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, Trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not

materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion, reference the Plan by the date it was filed, include the terms of the stipulation, and be approved as to form by Trustee.

8. [18-14454](#)-B-13 **IN RE: ESEQUIEL/ROXANNE PEREZ**
[MAZ-3](#)

MOTION TO APPROVE LOAN MODIFICATION
4-22-2022 [[67](#)]

ROXANNE PEREZ/MV
MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Esequiel Perez and Roxanne D. Perez ("Debtors") request "an order allowing them permission to enter into a loan modification of their mortgage secured by their mortgage for the reasons set forth in the declaration of Debtors filed concurrently herewith." Doc. #67.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule") and Local Rules of Practice ("LBR"). The motion fails to state the factual and legal grounds upon which the requested relief is sought with sufficient particularity. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Therefore, Debtors have failed to make a *prima facie* showing of entitlement to the relief sought.

Rule 9013 requires a request for an order to be by written motion, unless made during a hearing. "The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Rule 9013 (emphasis added).

The particularity requirement is restated in the local rules:

The application, motion, contested matter, or other request for relief shall set forth the relief or order sought and *shall state with particularity the factual and legal grounds therefor*. Legal grounds for the relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability.

LBR 9014-1(d)(3)(A).

Here, the motion provides no legal or factual bases for the requested relief.

LBR 3015-1(h)(1)(C) allows a debtor, *ex parte* and with court approval, to refinance existing debts encumbering the debtor's residence if the written consent of the chapter 13 trustee is filed with or as part of the motion. The trustee's approval is certification to the court that: (i) all chapter 13 plan payments are current; (ii) the chapter 13 plan is not in default; (iii) the debtor has demonstrated an ability to pay all future plan payments, projected living expenses, and the refinanced debt; (iv) the new debt is a single loan incurred only to refinance existing debt encumbering the debtor's residence; (v) the only security for the new debt is the debtor's existing residence; (vi) all creditors with liens and security interests encumbering the debtor's residence will be paid in full from the proceeds of the new debt and in a manner consistent with the plan; and (vii) the monthly payment will not exceed the greater of the debtor's current monthly payments on the existing debt, or \$2,500.

If the trustee will not give consent, or if a debtor wishes to incur new debt on terms and conditions not authorized by subsection (h)(1)(C), the debtor may still seek court approval under LBR 3015-1(h)(1)(E) by filing and serving a motion on the notice required by Rule 2002 and LBR 9014-1.

Though Debtors' declaration does cover these elements (Doc. #70), this is insufficient. The factual and legal grounds should have been included in the motion.

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

9. [22-10060](#)-B-13 **IN RE: CURTIS/CHARTOTTE ALLEN**
[TCS-1](#)

CONTINUED MOTION TO CONFIRM PLAN
2-25-2022 [[17](#)]

CHARTOTTE ALLEN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Curtis James Allen and Charlotte Yvette Allen ("Debtors") seek an order confirming the *First Modified Chapter 13 Plan* dated February 25, 2022 ("Plan"). Doc. #17. The Plan proposes that Debtors shall pay 60 monthly payments of \$1,900.16 with a 7% dividend to allowed non-priority, unsecured claims. Doc. #22.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Doc. #33. The court continued the matter because the § 341 meeting of creditors had not concluded. *Id.* Written opposition was due within 14-days of the continued hearing date. Doc. #35. No plan has been confirmed in this case. No party in interest timely filed written opposition.

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

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

10. [21-10976](#)-B-13 **IN RE: MARK HALL AND LOUISE JURACEK HALL**
[PK-9](#)

MOTION TO SELL
5-6-2022 [\[105\]](#)

LOUISE JURACEK HALL/MV
PATRICK KAVANAGH/ATTY. FOR DBT.
OST 5/11/22

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 hearing.

Mark Stephen Hall and Louise Clara Juracek Hall ("Debtors") seek authorization to (i) sell real property located at 7800 Westfield, Unit 11, Bakersfield, California 93309-6467 ("Property") to Edwardo Perez ("Proposed Buyer") for \$200,000.00, subject to higher and better bids at the hearing; and (ii) pay brokers' commission to the buyer's and seller's brokers. Doc. #105. Debtors also request waiver of the 14-day stay under Fed. R. Bankr. P. ("Rule") 6004. *Id.*

This motion was filed with an *Order Shortening Time* ("OST") to permit the sale to occur with less than 21 days' notice under Fed. R. Bankr. P. 2002(a)(2). Doc. #116. In compliance with the OST, Debtors served and notified all parties in interest on May 6, 2022. Doc. #111.

Consequently, no parties in interest were required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. In the absence of opposition, the court is inclined to GRANT the motion and solicit higher and better bids.

This motion affects the proposed disposition and the brokers. Under Fed. R. Civ. P. ("Civ. Rule") 21 (Rule 7021, *incorporated under* Rule 9014(c)), the court will exercise its discretion and allow the relief requested by Debtors here as to the brokers' commission and use the court's discretion to add parties under Civ. Rule 21. Compensation is separate from the sale.

Since this relief and compensating the brokers are separate claims, the court will allow their joinder in this motion under Civ. Rule 18 (Rule 7018) because it is economical to handle this motion in this manner absent any objection. This rule is not incorporated in contested matters absent court order under Rule 9014(c) and affected

parties are entitled to notice. Debtors, having requested this relief, are deemed to have notice. Unless any party opposes at the hearing, defaulted parties will be deemed to have consented to application of this rule.

11 U.S.C. § 363(b)(1) allows the trustee to "sell or lease, other than in the ordinary course of business, property of the estate."

11 U.S.C. § 1303 states that the "debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections . . . 363(b) . . . of this title." 11 U.S.C. § 1302(b)(1) excludes from a chapter 13 trustee's duties the collection of estate property and reduction of estate assets to money. Therefore, the debtor has the authority to sell property of the estate under § 363(b).

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners v. Colony GFP Partners, Ltd. P'Ship (In re 240 N. Brand Partners)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enters., Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference." *Id.*, citing *In re Psychometric Sys.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887, citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016). This sale is to Proposed Buyer. There is nothing in the record suggesting that Proposed Buyer is an insider. Proposed Buyer is neither listed in the original and amended master address lists, nor in the original and amended schedules. Docs. #1; #5; #22; #44; #45.

Property is listed in the petition with a value of \$150,000.00. Doc. #22, *Sched. A/B*. Property is encumbered by a deed of trust in favor of Bank of America in the approximate amount of \$53,482.49. Doc. #45, *Am. Sched. D*. Debtors claimed a \$0.00 exemption in Property under Cal Code Civ. Proc. § 703.140(b)(1). Doc. #22, *Sched. C*.

Debtors received an offer from Proposed Buyer to purchase Property for \$200,000.00. Docs. ##107-08. Proposed Buyer has paid a \$2,000.00 deposit to escrow. *Id.* Debtors accepted the offer subject to court approval and believe the sale is in the best interests of creditors. *Id.*

Joint debtor Mark Stephen Hall, an accountant, has estimated that federal income taxes from the sale will range between \$35,000 to \$38,000, and state taxes between \$18,000 to \$20,000. Doc. #107. The sale is subject to an IRS tax lien, who has consented to the sale provided that it is paid from the proceeds. For this reason, Debtors request that the Trustee pay the IRS \$38,000, and pay the State of California \$20,000 from the sale proceeds. *Id.*

The motion also says that the deed of trust in favor of Bank of America has an approximate balance of \$49,000.00, which will be paid from escrow. Doc. #105.

Additionally, the motion proposes to make the following closing cost and mortgage payments in connection with the sale, as well as allow Trustee to pay taxes from the net proceeds:

Sale price	\$200,000.00
Title fees, including homeowner's title policy	- \$1,029.00
Escrow Fee - Bakersfield Office	- \$437.50
Natural Hazard Disclosure	- \$100.00
Notary Fee	- \$150.00
Transfer Tax	- \$220.00
Calfirpta Processing Fee	- \$45.00
Miscellaneous Fee	- \$1,000.00
Interest	- \$154.99
HOA Transfer Fee	- \$500.00
HOA Monthly Fee	- \$460.00
Tenant Refund Deposit	- \$1,295.00
Broker Fee	- \$7,320.00
Bank of America Deed of Trust (approx.)	- \$49,000.00
Estimated net to estate (pre-tax)	= \$138,288.51
IRS (estimate; paid by Trustee)	- \$38,000.00
State Taxes (estimate; paid by Trustee)	- \$20,000.00
Estimated net proceeds	= \$80,288.51

Id. The sale appears to be in the best interests of creditors and the estate, for a fair and reasonable price, supported by a valid exercise of Debtor's business judgment, and proposed in good faith. The sale subject to higher and better bids will maximize estate recovery and yield the best results. There is no opposition to the sale. The sale will pay off the mortgage, taxes, and provide liquidity to the estate. Debtors' business judgment appears to be reasonable and will be given deference.

Lastly, the sale will involve broker commissions. Joint debtor Louise Clara Juracek Hall is a real estate agent employed by Open Door Real

Estate ("Open Door"). Docs. #107; #109, *Ex. A*, at 20. Debtors request payment of commissions as follows: (1) Open Door will receive a commission of \$1,320.00, which is a 0.66% commission. Doc. #107. Debtors will not receive any part of this. *Id.* (2) If Proposed Buyer is the prevailing bidder, Proposed Buyer's agent, Felix C. Diaz of Executive Realtors, will receive a 3% commission – \$6,000.00. *Id.*; Doc. #109, *Ex. A*, at 20. If granted, the court will allow the commission to be paid as prayed.

This matter will be called as scheduled to inquire whether party in interest opposes the sale. In the absence of opposition at the hearing, this motion will be GRANTED and proceed for higher and better bids. If opposition is presented, this matter will be continued and proceed as a scheduling conference.

If Proposed Buyer is the successful bidder, the court will order the 14-day stay under Rule 6004(h) waived because Proposed Buyer needs the sale to close in May, so time is of the essence. *Paladino v. S. Coast Oil Corp. (In re S. Coast Oil Corp.)*, 566 F. App'x 594, 595 (9th Cir. 2014) (affirming waiver of 14-day stay because time was of the essence due to regulatory deadlines); *In re Ormet Corp.*, 2014 LEXIS 3071 (Bankr. D. Del. July 17, 2014) (finding cause to lift 14-day stay because the buyer required closing before the stay would expire).

Any party wishing to overbid must appear at the hearing and acknowledge that no warranties or representations are included with the property; it is being sold "as-is, where-is."

11. [22-10377](#)-B-7 **IN RE: MARCELLA MARQUEZ**
[ELP-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR
RELIEF FROM CO-DEBTOR STAY
4-25-2022 [\[31\]](#)

U.S. BANK TRUST NATIONAL
ASSOCIATION/MV
ERICA LOFTIS/ATTY. FOR MV.
CONVERTED TO CH. 7 ON 4/29/22

NO RULING.

U.S. Bank Trust National Association as Trustee of the Chalet Series IV Trust ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2) as to real property commonly known as 3708 Sue Lin Way, Bakersfield, CA 93309 ("Property"). Doc. #31. Movant also requests this order to be binding and effective under § 362(d)(4) in any other bankruptcy purporting to affect Property for a period of two years after entry of the order. *Id.*

Marcella Marquez ("Debtor"), *pro se*, did not oppose. However, Debtor converted the case from chapter 13 to chapter 7 on April 29, 2022. Doc. #42. Chapter 7 trustee Jeffrey M. Vetter ("Trustee") was appointed as interim trustee on April 29, 2022 but was not served because he was appointed after the motion was filed. Doc. #40.

Since Debtor is not represented by counsel and Trustee Vetter was not served, this matter will be called and proceed as scheduled. If Trustee appears at the hearing and consents to termination of the stay, the court will GRANT the motion at the hearing. Otherwise, this matter may be continued to allow for service on Trustee Vetter.

This motion was set for hearing on 28 days' notice as required by LBR 9014-1(f)(1). The failure of the creditors, the Debtor, the U.S. Trustee, or any other party in interest except the chapter 7 trustee 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 except the chapter 7 trustee are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., 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.

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.

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.*

After review of the included evidence, the court finds “cause” exists to lift the stay. Movant is the holder of a note executed by Alan L. Babb³ and dated October 6, 2003 in the amount of \$65,000.00 and secured by a deed of trust encumbering Property. Docs. #33; #34, *Exs. 1-3.*

Babb executed an unauthorized grant deed on October 19, 2018, which conveyed an interest in Property to Debtor and a third party named Michelle Valencia. *Id.*, *Ex. 4.* Babb and Valencia subsequently filed the following bankruptcies:

Case No.	Name	Filed	Closed	Result
10-63437	Alan Lee Babb	11/19/2010	03/25/2011	Discharge
17-11868	Allan L Babb	05/12/2017	10/11/2017	Dismissed
17-10851	Allan L Babb	03/10/2017	05/10/2017	Dismissed
18-10499	Allan L Babb	02/16/2018	07/12/2018	Dismissed
18-12467	Allan L Babb	06/19/2018	11/13/2018	Dismissed
21-11929	Michelle Valencia	08/02/2021	12/13/2021	Dismissed
21-12816	Michelle Valencia	12/17/2021	03/11/2022	Dismissed

Id., *Exs. 5-11.* During this time, Babb missed the following payments and incurred a \$55,922.87 delinquency:

Delinquent Payments	Amount
5 payments (10/2017-02/2018)	\$2,074.85
4 payments (03/2018-06/2018)	\$1,767.44
16 payments (07/2018-10/2019)	\$7,703.44
22 payments (11/2019-08/2021)	\$10,142.66
7 payments (09/2021-03/2022)	\$3,464.51
1 payment (04/2022)	\$499.47
Late charges	\$63.98
Attorney fees	\$2,056.48
Foreclosure expenses	\$2,423.09
Payment setup fee	\$15.00
Prior Servicer Corporate Advance	\$6,732.62
Prior Servicer Late Charges	\$109.66
NSF Fees	\$75.00
Escrow Deficiency for funds advanced	\$15,383.83
Projected Escrow Shortage	\$2,172.76
Bankruptcy Attorney Fee	\$1,050.00
Bankruptcy Filing Fee	\$188.00
Total Delinquencies	\$55,922.87

Doc. #33. Based on the moving papers and the record, Babb has failed to make at least fifty-five (55) payments. Doc. #33. Movant has produced evidence that Babb is delinquent at least \$75,455.09. *Id.* Further, Debtor's interest in Property was obtained through an unauthorized grant deed with third party Valencia. Babb, Valencia, and Debtor altogether have filed eight bankruptcies. Thus, the court finds that Debtor's filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved the transfer of all or some part of ownership in the subject real property without the consent of the secured creditor. Further, the court finds that multiple parties have filed multiple bankruptcies purporting to affect Property in a relatively short amount of time.

This matter will be called and proceed as scheduled. If Trustee appears and consents to termination of the automatic stay, the court intends to enter the above findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy Procedure ("Rule") 7052.

If Trustee consents to termination of the stay, this motion will be GRANTED, and the court will order termination of the automatic stay with respect to Property for cause under § 362(d)(1). Since it is unclear whether Debtor has an equity interest in Property because the debt owed to Movant does not exceed the scheduled value of Property, and because the court is already granting relief under § 362(d)(1), the request under § 362(d)(2) will be DENIED AS MOOT.

With Trustee's consent, the court intends to further order, pursuant to § 362(d)(4), that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either transfer of all or part ownership of, or other interest in, the aforesaid real property without the consent of the secured creditor, and multiple bankruptcy filing affecting such real property. 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.

Based on Debtor's apparent bad faith and the likelihood that another petition purporting to affect Property will be filed soon, cause exists to waive the 14-day stay of Rule 4001(a)(3).

If Trustee Vetter does not appear at the hearing or does not consent to termination of the stay, this matter may be continued to allow for service on the Trustee or further briefing.

³ The unauthorized grant deed and some of the bankruptcy state "Alan L. Babb," while others are for "Allan L. Babb." Doc. #34, *Exs. 1-9*.

12. [22-10083](#)-B-13 **IN RE: JOSE/ERMELINDA MONTALVO**
[ALG-1](#)

MOTION TO CONFIRM PLAN
3-31-2022 [\[15\]](#)

ERMELINDA MONTALVO/MV
JANINE ESQUIVEL OJI/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.

Jose Montalvo and Ermelinda Rachel Montalvo ("Debtors") seek an order confirming the *First Modified Chapter 13 Plan* dated March 31, 2022 ("Plan"). Doc. #15. The Plan provides that Debtors shall make payments totaling \$2,160.00 through March 2022 (months 1-2), and then make payments of \$950.00 per month for months 3 to 36, plus a \$2,178.38 payment to Class 4 Creditor Shellpoint Mortgage Servicing for their residence. Doc. #17. The Plan includes a 4.95% dividend distributed to allowed non-priority, unsecured claims. *Id.* Debtors' *Amended Schedules I* and *J* indicate that they receive \$952.06 in monthly net income. Doc. #21, *Am. Scheds. I, J*. No plan has been confirmed in this case. No party in interest timely filed written opposition to this motion.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

13. [22-10285](#)-B-13 **IN RE: JAMES WESTRA**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
5-9-2022 [\[14\]](#)

STEPHEN LABIAK/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to June 29, 2022 at 9:30 a.m.

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

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to the confirmation of James E. Westra's ("Debtor") *Chapter 13 Plan* dated February 28, 2022 ("Plan") pursuant to 11 U.S.C. § 1325(a)(6) because the debtor will not be able to make all payments under the plan and comply with the plan. Doc. #14.

Trustee objects because the Plan as proposed will not fund in 36 months. *Id.* Debtor provided copies of the 2021 federal and state tax returns, which indicate that there is a federal tax liability of \$1,256.00 for tax year 2021. This liability is considered a priority debt and will be required to be paid. Currently, the Plan as proposed with payment of this tax liability takes approximately 47.46 months to fund. *Id.*

If Debtor wants to complete the Plan in 36 months, Debtor will need to increase the Plan payment to \$157.84. Alternatively, if Debtor wants to keep the current \$119.73 payment, the payment period will need to increase to 48 months.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4). Since this objection appears to be resolvable in the order confirming plan, this motion will be called and proceed as scheduled. Opposition may be presented at the hearing. If the objection cannot be resolved at the hearing, the court will CONTINUE the hearing to June 29, 2022 at 9:30 a.m.

If continued, and unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's objection is withdrawn, Debtor shall file and serve a written response not later than June 15, 2022. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support Debtor's position. Trustee shall file and serve a reply, if any, by June 22, 2022.

If Debtor elects to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than June 22, 2022. If Debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the opposition without a further hearing.

14. [22-10387](#)-B-13 **IN RE: MATTHEW/MARGARET TORRES**
[JCW-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY FEDERAL HOME LOAN MORTGAGE CORPORATION
4-7-2022 [\[25\]](#)

FEDERAL HOME LOAN MORTGAGE CORPORATION/MV
GABRIEL WADDELL/ATTY. FOR DBT.
JENNIFER WONG/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

Federal Home Loan Mortgage Corporation, as Trustee for the benefit of the Freddie Mac Seasoned Loans Structured Transaction Trust, Series 2018-2, by and through its servicing agent Select Portfolio Servicing, Inc. ("Creditor"), objects to Matthew Torres' and Margaret Rose Torres' ("Debtors") *Chapter 13 Plan* dated March 11, 2022 ("Plan") because the Plan does not provide for curing the arrearages owed to Creditor as required by 11 U.S.C. §§ 1322(b)(2), (b)(5), and 1325(a)(5)(B). Doc. #25. Creditor is the holder of a deed of trust secured by real property located at 654 Stanislaus Street, Parlier, CA 93648 ("Property"). See Proof of Claim No. 8-1. Creditor claims that the Plan must pay a minimum of \$89.20 per month to cure the pre-petition arrearages owed by Debtors in the amount of \$5,352.02 within 60 months. Doc. #25.

Though not required, Debtors filed opposition on May 9, 2022. Doc. #36. As stated in their *Statement of Financial Affairs*, Debtors sold Property to Big Holding LLC in August 2021 for approximately \$142,000.00, netting approximately \$1,900.00 from the sale. Doc. #37; cf. Doc. #1. Joint debtor Margaret Rose Torres claims that the buyer took the Property subject to Creditor's lien and Debtors have not obtained information as to whether the buyer has paid or satisfied the mortgage on the Property. Doc. #37. As result of the pre-petition sale, Debtors did not list Property in the schedules, or in their Plan, but did list Creditor for notice purposes only. *Id.*

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4). This matter will be called and proceed as scheduled to inquire about Creditor's response to Debtors' contentions. Opposition may be presented at the hearing. 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.

15. [22-10387](#)-B-13 **IN RE: MATTHEW/MARGARET TORRES**
[PD-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK MELLON
5-3-2022 [[31](#)]

THE BANK OF NEW YORK MELLON/MV
GABRIEL WADDELL/ATTY. FOR DBT.
BRYAN FAIRMAN/ATTY. FOR MV.

NO RULING.

The Bank of New York Mellon f/k/a The Bank of New York as Trustee for CWHEQ Home Equity Loan Asset Backed Certificates, Series 2006-S6 ("Creditor") objects to Matthew Torres' and Margert Rose Torres' ("Debtors") *Chapter 13 Plan* dated March 11, 2022 ("Plan"). Doc. #31. Creditor contends: (1) the Plan incorrectly understates the amount owing under the note owned by Creditor; and (2) the interest rate proposed by the Plan is not fair and equitable and fails to implement the prime-plus formula outlined in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). *Id.*; *cf.* Proof of Claim No. 24-1.

The court intends to determine the proper "formula" discount rate to pay Creditor's claim at a later evidentiary hearing. This matter will proceed as a scheduling conference for that issue only.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Opposition may be presented at the hearing. 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.

Creditor objects because the Plan understates the amount owed to Creditor and proposes an unfair, inequitable reduction from 7.0% to 4.25% interest paid on a loan solely secured by Debtors' residence at 616 East Jefferson Avenue, Reedley, CA 93654 ("Property"). Doc. #31.

Debtors filed chapter 13 bankruptcy on March 11, 2022. Doc. #1. The proposed Plan provides for 60 monthly payments of \$1,930.00 with a 100% dividend to be distributed to allowed non-priority, unsecured claims. Doc. #3. The Plan places Mr. Cooper (which appears to be Creditor's mortgage servicer per Claim 24) in Class 2(A) with a \$25,442.26 claim not reduced based on the value of the collateral. The Plan proposes to pay Creditor's claim a monthly dividend of \$471.43

with a 4.25% interest on the claim. *Id.*, § 3.08. Over 60 months, Creditor would be paid approximately \$28,285.80.

Federal Rule of Bankruptcy Procedure 3001(f) provides that “[a] proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim.” 11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof of claim under § 501, is deemed allowed unless a party in interest objects. Creditor filed Claim 24-1 on May 11, 2022 in the fully secured amount of \$24,976.46 with an interest rate of 7.0%. No party has objected to Claim 24.

Section 3.02 of the Plan provides that it is the proof of claim, not the Plan itself, that determines the amount that will be repaid under the Plan. Doc. #3. Creditor’s proof of claim is for \$24,976.46 and classified in Class 2(A) – paid by the chapter 13 trustee, but modified by the Plan, or matured or will mature before the Plan is completed. Section 3.08(c) states that the amount of a Class 2 claim is determined by non-bankruptcy law, but those claims may be reduced to the value of the collateral securing it by filing, serving, setting for hearing, and prevailing on a motion to determine the value of the collateral. Creditor is in Class 2(A), which is for claims that cannot be reduced based on the value of the collateral.

As to the Plan understating the amount owed on account of the claim, the court intends to OVERRULE THE OBJECTION IN PART because the proof of claim controls the amount that will be repaid under the Plan, not the amount listed in the Plan itself.

Next, § 3.08(c)(3) provides that “[e]xcept as permitted by 11 U.S.C. § 1322(c), Debtor is prohibited from modifying the rights of a holder of a claim secured only by Debtor’s principal residence.” *Id.* (emphasis added).

Section 1322(b)(2) is subject to subsections (a) and (c). Subsection (c) provides:

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor’s principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor’s principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title[.]

Here, the exhibits attached to Claim 24 indicates the original maturity date for the loan was September 1, 2021. Claim 24, at 7. There is no evidence that Debtors have entered into any loan modification agreements. So, Creditor's claim is a default with respect to a lien on Debtors' principal residence and this is a case in which the last payment on the original payment schedule for a claim secured by Debtors' residence was due before the date on which the final payment under the plan is due. Accordingly, § 1322(c)(2) is applicable.

Section 1322(c)(2) "carves out an exception to the anti-modification rule against home mortgages, allowing modification if the last payment on the original payment schedule for the mortgage is due prior to the date on which the final plan payment is due." *Palacios v. Upside Invs. LP (In re Palacios)*, No. CC-12-1502-KiPaTa, 2013 Bankr. LEXIS 3943, at *11 (B.A.P. 9th Cir. Apr. 15, 2013) (emphasis in original), citing *In re Jones*, 188 B.R. 281, 282 (Bankr. D. Or. 1995); accord. *In re Bagne*, 219 B.R. 272, 277 (Bankr. E.D. Cal. 1998) ("Plainly, this language [in § 1322(c)(2)] instructs the court to disregard § 1322(b)(2)."). The provisions of § 1325(a)(5) are therefore applicable.

Under § 1325(a)(5)(B), secured creditors may be treated one of three ways: (1) convince the claimholder to accept the plan [(a)(5)(A)]; (2) provide in the plan that the holder of the secured claim retains its lien and will be paid not less than the present value of the allowed amount of its secured claim [(a)(5)(B)(i) and (ii)]; or (3) surrender the collateral [(a)(5)(C)]. § 1325(a)(5)(B); see also *In re Young*, 199 B.R. 643, 648 (Bankr. E.D. Tenn. 1996).

Regardless of whether the value of the collateral may be reduced, the interest paid on the claim may be modified under § 1325(a)(5)(B)(ii). In *Till*, the Supreme Court determined that the appropriate interest rate for a secured claim should be determined by the 'formula approach,' which requires the court to take the national prime interest rate and adjust it to compensate for an increased risk of default. *Till*, 124 U.S. 465, 471 (2004). Such factors include (1) circumstances of the estate, (2) the nature of the security, and (3) duration and feasibility of the reorganization plan. *Id.*, at 476-77.

As of the petition date, March 11, 2022, the national bank prime interest rate was 3.25%.⁴ It increased to 3.5% on March 17, 2022, and 4.0% on May 5, 2022, where it remains now.⁵ Creditor argues that the interest rate should be higher, such as the 7.0% contractual interest rate. Creditor argues that under the *Till* factors, the interest rate proposed under the Plan is inequitable.

The Plan may modify Creditor's claim under the exception outlined in § 1322(c)(2), but Creditor is entitled to the "prime-plus" rate based on the state of financial markets, the circumstances of the estate, and the characteristics of the loan. This prime-plus rate is open for determination. *Till*, 124 U.S. at 480 (noting that other courts have

generally approved adjustments to the prime rate of 1% to 3%) (citing *GMAC v. Valenti (In re Valenti)*, 105 F.3d 55, 64 (2d Cir. 1997); *Assocs. Commer. Corp. v. Rash*, 520 U.S. 953 (1997)).

Accordingly, this matter will be called and proceed as a scheduling conference. The court intends to OVERRULE THE OBJECTION IN PART as to the Plan understanding the claim amount because the proof of claim, not the Plan, determines the amount that will be repaid under the Plan. The court will set an evidentiary hearing to determine the appropriate interest rate under the Plan.

⁴ See *Federal Reserve Selected Interest Rates*, Data Download, Series H15/H15/RIFSPBLP_N.D, historical bank prime loan rates (03/11/2022-05/23/2022), <https://www.federalreserve.gov/releases/H15/default.htm> (visited May 23, 2022). The court may take judicial notice *sua sponte* of information published on government websites. Fed. R. Evid. 201(c)(1); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

⁵ The prime rate was 3.5% on May 3, 2022 when this motion was filed. *Id.*

11:00 AM

1. [19-15103](#)-B-7 **IN RE: NATHAN/AMY PERRY**
[20-1017](#) [CAE-1](#)

FURTHER STATUS CONFERENCE RE: COMPLAINT
3-15-2020 [1]

RICHNER ET AL V. PERRY
RICHARD FREEMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

The court previously vacated its *Order to Show Cause Regarding Dismissal of Adversary Proceeding for Failure to Prosecute* (Doc. #51) based on the representations of Plaintiffs' attorney, Richard W. Freeman, Jr., at the hearing. Doc. #55. The court continued the status conference to May 25, 2022 and ordered Plaintiffs to file and serve a status report not later than May 18, 2022. Doc. #56. No such status report has been filed. This status conference will be called and proceed as scheduled.

2. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[FW-3](#)

CONTINUED FURTHER STATUS CONFERENCE RE: MOTION FOR SUMMARY
JUDGMENT
9-14-2021 [[115](#)]

GABRIEL WADDELL/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022 in the related adversary proceeding. Adv. Proc. No. 20-01035 ("AP"), Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. AP Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. AP Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be global as to all parties and claims in this case and the adversary proceeding. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this status conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral scheduling conference statement not later than 7 days before the continued hearing.

3. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[TAT-2](#)

CONTINUED PRE-TRIAL CONFERENCE RE: MOTION FOR RELIEF FROM
AUTOMATIC STAY
11-12-2020 [\[76\]](#)

SANDRA WARD/MV
GABRIEL WADDELL/ATTY. FOR DBT.
THOMAS TRAPANI/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022 in the related adversary proceeding. Adv. Proc. No. 20-01035 ("AP"), Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. AP Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. AP Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be

global as to all parties and claims in this case and the adversary proceeding. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this pre-trial conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral pre-trial conference statement not later than 7 days before the continued hearing.

4. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#)

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
12-23-2020 [\[92\]](#)

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022. Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be global as to all parties and claims in this adversary proceeding and the bankruptcy case. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this pre-trial conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral pre-

trial conference statement not later than 7 days before the continued hearing.

5. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: THIRD-PARTY COMPLAINT
1-25-2022 [[246](#)]

NATERA V. BARNES ET AL
WILLIAM WINFIELD/ATTY. FOR PL.

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022. Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be global as to all parties and claims in this adversary proceeding and the bankruptcy case. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this status conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral status conference statement not later than 7 days before the continued hearing.

6. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#) [FW-6](#)

CONTINUED SCHEDULING CONFERENCE RE: MOTION FOR SUMMARY
ADJUDICATION
9-14-2021 [[138](#)]

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022. Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be global as to all parties and claims in this adversary proceeding and the bankruptcy case. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this scheduling conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral scheduling conference statement not later than 7 days before the continued hearing.

7. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#) [TAT-3](#)

CONTINUED SCHEDULING CONFERENCE RE: MOTION FOR SUMMARY
JUDGMENT
9-1-2021 [[124](#)]

NATERA V. BARNES ET AL
THOMAS TRAPANI/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 27, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The parties filed a *Joint Status Report* dated May 18, 2022. Doc. #288. On May 12, 2022, the court granted in part and denied in part Third-Party Defendant WFG National Title Company's motion to dismiss the third-party complaint. Doc. #286. As part of the ruling, the court dismissed two causes of action with leave to amend within 14 days. *Id.* The deadline for the Defendants and Third-Party Plaintiffs to amend the complaint is May 26, 2022. Therefore, the pleadings are not yet settled.

The status report also anticipates that discovery will be necessary in the third-party complaint. In consideration of the above, the parties jointly have requested a 60-day continuance. Doc. #288.

Additionally, Defendants' and Third-Party Plaintiffs' counsel has suggested that the parties engage in mediation provided that it be global as to all parties and claims in this adversary proceeding and the bankruptcy case. Plaintiff Armando Natera concurs and offers to include the parties' respective positions as to their willingness to mediate and a schedule for mediation in the parties' next joint status report.

Since the pleadings are not settled and additional discovery is necessary, this scheduling conference will be CONTINUED to July 27, 2022 at 11:00 a.m. The parties may file a joint or unilateral scheduling conference statement not later than 7 days before the continued hearing.

8. [18-11651](#)-B-11 **IN RE: GREGORY TE VELDE**
[19-1033](#) [DCT-1](#)

MOTION FOR SUMMARY JUDGMENT
4-8-2022 [[343](#)]

SUGARMAN V. IRZ CONSULTING,
LLC ET AL
DUNCAN TURNER/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

Third-Party Defendant Dari-Tech, Inc. ("Dari-Tech") moves for summary judgment against Defendant and Third-Party Plaintiff IRZ Consulting, LLC ("IRZ"). Doc. #343. Dari-Tech contends that IRZ has failed to identify any aspect of Dari-Tech's work that was faulty or that was a proximate cause of damages claimed by the chapter 11 trustee in its underlying adversary complaint against IRZ. Therefore, Dari-Tech insists that it is entitled to a judgment of dismissal under Civ. Rule 56, *as incorporated by Rule 7056*.⁶ *Id.*

IRZ timely filed opposition and evidentiary objections. Docs. #362; #366. This is a "very straightforward" case, claims IRZ: Dari-Tech created and installed a wastewater management system designed to flush dairy waste, the wastewater management system failed resulting in waste backup and overflow, and monetary damages were suffered as a result. Doc. #362. Since Dari-Tech created the system, created the plans for the system, installed the system, and the system failed, IRZ argues that this motion for summary judgment must be denied. *Id.*

Dari-Tech replied to both the opposition and the evidentiary objections and filed its own evidentiary objections. Docs. ##369-71. Dari-Tech summarizes the allegations against it as relating only to the design of its portion of the waste management system. Doc. #371. Since no competent evidence suggesting that the design of the system was faulty, or that Dari-Tech's work was the proximate cause of damages, it claims that this motion should be granted. *Id.*

As a preliminary matter, this motion does not comply with the local rules.

First, *Dari-Tech's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment* is both a motion and a memorandum of points and authorities. Doc. #343. LBR 9004-2(c)(1) requires motions, memoranda of points and authorities, and other specified pleadings to be filed as separate documents. LBR 9014-1(d)(4) does permit the motion and memorandum of points and authorities to be combined into one document provided that the document does not exceed six (6) pages in length. Here, the combined motion and points and authorities is fifteen (15) pages long, so a motion should have been filed separately from the memorandum of points of authorities.

Second, Dari-Tech's original notice set May 20, 2022 as the date of the hearing on this motion, which is not a date this court held regularly scheduled hearings. Doc. #344. As result, the Clerk of the Bankruptcy Court issued a memorandum directing Dari-Tech to submit an amended notice of hearing. Doc. #359. Dari-Tech filed an amended notice on April 11, 2022 – still within the 42-day notice window required by LBR 7056-1. Doc. #360. However, it does not appear that this notice of hearing was ever served on IRZ because no corresponding certificate of service was filed in connection with it. Failure to prove service does not affect the validity of service and the court may permit the proof of service to be amended. Civ. Rule 4(1)(3), incorporated by Rule 7004(a)(1). However, LBR 9014-1(e) requires service of all pleadings and documents filed in support of a motion to be made on or before the day those documents are filed with the court, with proof of service in the form of a certificate of service to be filed with the Clerk concurrently with the pleadings or documents served, or not more than three days after the documents are filed. LBR 9014-1(e)(1), (e)(2). But since IRZ filed opposition, it has waived any potential service or notice defect.

Third, Dari-Tech's exhibits do not contain an exhibit index and do not have consecutively numbered pages. LBR 9004-2(d)(1)-(3) require exhibits to be filed as a separate document, include an exhibit index at the start of the document identifying by exhibit number or letter each exhibit with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets. Although Dari-Tech's exhibits were all filed separately, they each omitted an exhibit index and lacked consecutively numbered pages in violation of LBR 9004-2(d)(2) and (d)(3). Docs. ##346-48; ##350-53; ##355-57; ##373-75; #381. The court notes that separate exhibits may be filed with exhibits which relate to another document, or all of the exhibits may be filed in one document. LBR 9004-2(d)(1).

Because IRZ replied, the court will overlook these procedural deficiencies in this instance. Counsel is advised to review the local rules and ensure procedural compliance in subsequent matters.

This motion for summary judgment was filed on 42 days' notice as required by LBR 7056-1 and in conformance with Rule 7056 and Civ. Rule 56. This matter will be called and proceed as scheduled. The court intends to issue findings and a recommendation for *de novo* consideration by the District Court as to Dari-Tech's motion for summary judgment.

⁶ Unless otherwise indicated, references to: (i) "Civ. Rule" will be to the Federal Rules of Civil Procedure; (ii) "Rule" will be to the Federal Rules of Bankruptcy Procedure; (iii) "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; and (iv)

all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

9. [20-12269](#)-B-7 **IN RE: ANTHONY VILLA**
[20-1054](#) [TCS-4](#)

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICES OF
TIMOTHY C SPRINGER DEFENDANTS ATTORNEY(S)
4-21-2022 [[105](#)]

VOKSHORI LAW GROUP V. VILLA
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The court will prepare the order.

Debtor-Defendant Anthony Villa ("Anthony") asks for an award of attorney's fees against Plaintiff Vokshori Law Group ("VLG") in the amount of \$38,020.00 and costs of \$54.80 under 11 U.S.C. § 523 (d). VLG opposes the motion.

Because VLG's prosecution of this adversary proceeding was substantially justified, the court intends to DENY the motion.

I.

VLG sued Anthony contesting the dischargeability of Anthony's (and his former spouse Maria's) debt for services related to a successful loan modification. VLG's legal theory was the debt (approximately \$15,000.00) was non-dischargeable under § 523(a)(2)(A) (fraud). Anthony filed a counterclaim for attorney's fees under § 523(d). Anthony also filed a motion to dismiss VLG's complaint which was granted in part and denied in part. Doc. #12. The motion was denied as to the fraud claim. *Id.*

The trial occurred on March 31, 2022. The court issued a Memorandum Decision and Judgment on April 7, 2022 (Docs. 100, 101) in favor of Anthony and ruling Anthony's debt to VLG was dischargeable. *Id.* The court also ruled the counterclaim would be determined by motion. This motion timely followed.

Anthony argues that VLG knew the risk in proceeding to trial because VLG practices bankruptcy law. Doc. #105. Anthony supports the claim by stating that over two months before the trial, Anthony's counsel "warned" VLG and offered a settlement that would be a "mutual walk away." Doc. #105, at 2-3. Anthony also claims VLG's pre-trial tactics increased fees. Further, Anthony contends VLG should have consulted a

bankruptcy attorney before bringing the matter to trial since a creditor holding a "righteous belief" in the legitimacy of the debt does not mean the debt is non-dischargeable. *Id.*, at 4.

VLG argues that prosecuting the action was substantially justified because the motion to dismiss was denied as to the fraud claim. Doc. #109. VLG bolsters this argument by noting its claim was adjudicated after a full bench trial. *Id.* VLG also argues the claim was not frivolous in the ninth circuit based on *First Card v. Hunt (In re Hunt)*, 238 F.3d 1098, 1103 (9th Cir., 2001). VLG further urges that it was substantially justified because of its favorable experience in a similar case before the bankruptcy court in the Central District of California.⁷ VLG finally contends the fees sought are unreasonable since the amount at issue was less than half the fee claim and exceeded VLG's fees by a factor of three. *Id.*

II.

To prevail on a claim for attorney's fees under § 523(d) the debtor must prove (1) the creditor requested a determination of dischargeability of the debt under § 523(a)(2); (2) the debt was a consumer debt; and (3) the debt was discharged. *Stine v. Flynn (In re Stine)*, 254 B.R. 244, 249 (B.A.P. 9th Cir., 2000). Anthony has established these elements. The action was pursued as a claim under § 523(a)(2); the parties stipulated that the debt is "a consumer debt;" and the debtors prevailed in the action.

Since the elements have been proven, the burden shifts to VLG under § 523(d) to establish substantial justification. *Id.* In *Hunt*, the ninth circuit adopted the standard for "substantial justification" as requiring the claim to have a reasonable basis both in law and in fact. *Hunt*, 238 F.3d at 1103. This is the standard under the Equal Access to Justice Act as established by the Supreme Court. *See, Pierce v. Underwood*, 487 U.S. 552 (1988).⁸

Substantial justification "is not present when a creditor proceeds past the point where it knew or should have known that it could not carry its burden of proof [citation omitted]." *Tomey v. Dizinno (In re: Dizinno)*, 559 B.R. 400, 409 (Bankr. M.D. Pa. 2016). But the substantial justification requirement "should not be read to raise a presumption that the creditor was not substantially justified because it lost." *Heritage Pac. Fin. LLC v. Machuca (In re Machuca)*, 483 B.R. 726, 735 (B.A.P. 9th Cir., 2012), quoting *First Card v. Carolan (In re Carolan)*, 204 B.R. 980 (B.A.P. 9th Cir., 1996). The court does not agree with Anthony's generalization that because VLG practices bankruptcy law it should have predicted that it would not prevail in this action. There are at least five reasons the court finds the prosecution of the claim substantially justified.

First, the memorandum decision noted that the court was not persuaded that VLG had met its burden of proof on intent to deceive and justifiable reliance. Doc. #100, at 10. The decision notes the court's

duty to strictly construe discharge exceptions and was specific why the burden of proof was not met. *Id.*, at 11-13. The fact the court was unpersuaded by VLG's evidence does not mean a lack of substantial justification in pursuing the claim.

Second, Anthony paid nothing on the claim. There was also evidence that Anthony purchased a vehicle after the loan modification was finalized. These facts also suggest substantial justification for the action. The court was not persuaded by these facts because of other facts noted in the memorandum including the Villa's payments under the trial modification and Anthony's change in marital and living status late in the relationship with VLG.

Third, Anthony had filed previous bankruptcies before retaining VLG. He filed a bankruptcy in the Northern District of California about five months after his loan modification was approved here. VLG filed a non-dischargeability action in that case, but the underlying case was dismissed. Though the court was unpersuaded that this factor demonstrated intent to deceive here, it was some evidence of intent. Thus, it was appropriate for VLG to consider these facts before filing this adversary proceeding.

Fourth, there were periods of difficult or lack of communication between VLG and Anthony during their relationship. In the first quarter of 2018 Anthony was very concerned about his and Maria's home and was aggressive with VLG in being certain his rights were protected. That fall, communication between Anthony and VLG ended. These facts were indicative of a potential intent to deceive VLG. The court did not make that inference in this case for reasons set forth in the memorandum. Doc. #100. But there was objective evidence justifying pursuit of the claim.

Fifth, settlement discussions suggest that both sides had doubts about their respective positions. VLG submitted emails predating Anthony's counsel's email which was two months before trial. These earlier emails almost one year before trial show Anthony's counsel making offers and VLG responding. Docs. ##110-11. The Supreme Court considers this evidence of substantial justification under the EAJA. *Pierce*, 487 U.S. at 568. Anthony participating in settlement efforts suggests from even his perspective there was some risk.

In sum, the court is persuaded that VLG was substantially justified in filing and prosecuting this non-dischargeability action. Anthony presented no evidence or authority that at any moment during the prosecution of the claim, VLG knew or should have known it would not prevail. In retrospect, both sides would have been better off settling this matter a long time ago. But some cases need to be tried for a resolution. The fact VLG did not prevail does not mean they were not substantially justified in pursuing their rights.

Because the court finds VLG's prosecution of this adversary proceeding was substantially justified, the court will not consider or rule on the reasonableness of fees.

III.

For the foregoing reasons the court intends to DENY the motion.

The court will enter an amended judgment providing Anthony Villa will take nothing by reason of the counterclaim and both parties will pay their own costs and fees.

⁷ *VLG v. Henriquez (In re Henriquez)*, 6:16-bk-11051-MW, Adv. Proc. 6:16-ap-01074 (Bankr. C.D. Cal., Oct. 19, 2016). Other than the case obviously having no precedential value here, there are many distinguishing factors. Those include an unsuccessful modification, the debtor's dubious credibility, and the holding seemed to center around the lack of any guaranty of success.

⁸ Notably in *Hunt* there was no evidence before the trial court of the debtor's intent not to pay the debt and file bankruptcy. *Hunt*, 238 F.3d at 1103-04.