UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, June 1, 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. 19-10808-B-13 **IN RE: MALER ATTAREB**
MHM-3

MOTION TO DISMISS CASE
4-21-2022 [60]

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN 05/31/2022

Since posting the original pre-hearing dispositions, the court has changed its intended ruling on this matter.

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

DISPOSITION: Withdrawn; dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 trustee Michael H. Meyer withdrew this motion on May 31, 2022. Doc. #68. Accordingly, the hearing on this motion will be dismissed and DROPPED FROM CALENDAR.

2. 22-10109-B-13 **IN RE: JULIE MARTINEZ**
MHM-1

MOTION TO DISMISS CASE
4-22-2022 [22]

MICHAEL MEYER/MV
STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors and (c)(4) for failure to make timely payments due under the Plan. Doc #22. Debtor did not oppose.

Unless the trustee's motion is withdrawn before the hearing, the motion will be GRANTED without oral argument for cause shown.

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

The record shows that there has been unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)), and the debtor has failed to make all payments due under the plan (11 U.S.C. § 1307(c)(4)). Debtor is delinquent in the amount of $2,230.00. Doc. #24. Before this hearing, another two payments in that same amount will also come due.

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

In addition, the trustee has reviewed the schedules and determined that the debtor has a nominal amount of non-exempt equity which is of no benefit to the estate and requests dismissal rather than conversion of the case. Doc. #22.

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

3. 22-10109-B-13 **IN RE: JULIE MARTINEZ**
SLL-2

MOTION FOR COMPENSATION FOR STEPHEN LABIAK, DEBTORS ATTORNEY(S)
5-2-2022 [31]

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.

Stephen L. Labiak ("Applicant"), attorney for Julie Ann Martinez ("Debtor"), seeks interim compensation in the sum of $5,245.73. Doc. #31. This amount consists of $5,186.00 in fees as reasonable compensation and $59.73 in reimbursement for actual, necessary expenses from January 19, 2022 through April 26, 2022.[1] *Id.*

Debtor executed a statement dated April 27, 2022 indicating that Debtor has reviewed the fee application and has no objections. *Id.*, § 9(7). Debtor also filed a separate declaration affirming the same. Doc. #35.

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.

As a preliminary matter, the motion does not procedurally comply with the local rules. 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. Here, a copy of Applicant's time records is attached to the motion in violation of LBR 9004-2(d)(1). Doc. #31. The court notes that Applicant's separate exhibit document did properly contain an index and consecutively numbered pages. Doc. #33.

Debtor filed bankruptcy on January 28, 2022. Doc. #1. The *Chapter 13 Plan* dated January 28, 2022 is the operative plan in this case. Doc. #27. Section 3.05 provides that Applicant was paid $687.00 prior to filing the case and, subject to court approval, an additional $9,000.00 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, and *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys*, Form EDC 3-096, echo the same Applicant was paid $687.00 pre-petition and $9,000 will be paid through the plan. Docs. #1; #5.

This is Applicant's first interim request for compensation. The source of funds for payment of the award will be approximately $4,558.73 after application of the $687.00 in pre-filing fees.

Applicant requests only **$5,186.00** in fees even though his firm provided 20.0 hours of legal services at the following rates, totaling $5,873.00:

Professional	**Rate**	**Hours**	**Total**
Stephen L. Labiak	$350	15.10	$5,285.00
Linda Fellner	$120	4.90	$588.00
Total Hours & Fees		20.00	$5,873.00

Doc. #33, *Exs. B*, *C*. Applicant also incurred **$59.73** in expenses as follows:

Postage	$36.43
PACER	+ $0.80
Court Call	+ $22.50
Total Costs	= **$59.73**

Id., *Ex. C*. The combined requested fees and expenses total **$5,245.73.**

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) gathering and reviewing information and documents, and preparing the petition, schedules, statements, and chapter 13 plan; (3) preparing and sending § 341 meeting of creditor documents to the trustee and attending the meeting; (4) preparing, prosecuting, and prevailing on a motion to extend the automatic stay (SL-1) (5) confirming a chapter 13 plan; and (6) filing this fee application (SLL-2). Debtor has consented to payment of the requested fees. Docs. #31, § 9(7); #34. 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 $5,186.00 in fees and $59.73 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 $687.00, the chapter 13 trustee is authorized, in his discretion, to pay Applicant $4,558.73 in accordance with the chapter 13 plan for services rendered and expenses incurred from January 19, 2022 through April 26, 2022.

---

[1] The court notes that Applicant's declaration says that the application covers services and costs totaling $3,337.00 incurred between August 29, 2019 and December 1, 2022. Docs. #33, *Ex. A*; #36. This appears to be a typographical error based on the motion, Debtor's declaration, and the time records. Docs. #31; #33, *Exs. B-C*; #35.

4. 17-10236-B-13 **IN RE: PAUL/KATHLEEN LANGSTON**
FW-15

MOTION TO DETERMINE AMOUNT OF PRIORITY CLAIM PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE
5-4-2022 [237]

KATHLEEN LANGSTON/MV
PETER FEAR/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.

Paul Dayton Langston and Kathleen Louise Langston ("Debtors") request an order determining the priority amount of the claim of Victoria Geesman ("Creditor") under Federal Rule of Bankruptcy Procedure ("Rule") 3012.[2] Doc. #237.

Neither Creditor nor any other party in interest timely filed written opposition.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of Creditor, other 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.

Debtors filed chapter 13 bankruptcy on January 25, 2017. Doc. #1. At the time of filing, joint debtor Paul Langston owed a domestic support obligation ("DSO") with an arrearage entitled to priority under 11 U.S.C. § 507(a)(1)(A). Debtors' proposed and confirmed chapter 13 plans proposed to cure the arrearage owed on this claim. *See* Docs. #51; #134; #163. Since the claim was being paid by plan payments and a garnishment from a portion of the joint debtor's retirement income, calculating how the payment of the claim was difficult. Doc. #239. As result of these payments, Debtors paid off the DSO arrearage owed in full. *Id.*

Thereafter, Debtors then sought and obtained a determination from the San Diego County Superior Court acknowledging that the arrearage had been paid in full, which was entered on March 24, 2022. *See* Doc. #240, *Exs. A, B*. Therefore, no further amount entitled to priority remains owing on Creditor's DSO claim.

The operative *Fifth Modified Plan* dated August 30, 2018 requires Creditor to file a *Notice of Satisfaction of Claim* within 10 calendar days after the priority claim has been paid in full. Docs. #163, § 7.07(7); #179. No such notice has been filed. Since Creditor did not file any notice that the DSO has been paid, Debtors requests a determination that the amount currently owing on the priority claim is $0.00. Doc. #237.

Rule 3012 permits, on motion of a party in interest and after notice and a hearing, the court to determine the amount of a claim entitled to priority under § 507.

Based on the moving papers and the record, Debtors appear to have cured the DSO arrearage owed to Creditor. Docs. ##239-40, *Exs. A, B*. Creditor did not object.

Accordingly, this motion will be GRANTED. The court will order that the amount currently owing on account of Creditor Victoria's priority claim is $0.00.

---

[2] Debtors complied with Rules 3012(b) and 7004(b)(1) by serving Creditor at the name and address listed in Creditor's proof of claim, as well as Creditor's attorney, via first class mail on May 4, 2022. Doc. #241; *cf.* Proof of Claim No. 12-1.

5. 19-10752-B-13 **IN RE: STEVEN CHAVEZ**
MHM-2

MOTION TO DISMISS CASE
4-21-2022 [146]

MICHAEL MEYER/MV
SHARLENE ROBERTS-CAUDLE/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN 05/27/2022

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

DISPOSITION: Withdrawn; dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 trustee Michael H. Meyer withdrew this motion on May 27, 2022. Doc. #155. Accordingly, the hearing on this motion will be dismissed and DROPPED FROM CALENDAR.

6. 22-10190-B-13 **IN RE: SAUL IBARRA**
HDN-1

MOTION TO CONFIRM PLAN
4-27-2022 [20]
SAUL IBARRA/MV
HENRY NUNEZ/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.

Saul P Ibarra ("Debtor") requests an order confirming the *First Modified Chapter 13 Plan* dated April 4, 2022 ("Plan"). Doc. #20. The Plan provides for 60 monthly payments of $1,200.00, plus monthly payments of $600.00 and $2,106.42 to two Class 4 creditors on account of real property. Doc. #19. The Plan also provides for an 8% dividend to be paid to allowed, non-priority, unsecured claims. Debtor's *Schedules I* and *J* indicate that Debtor has $1,200.00 in monthly net income after payment of expenses. Doc. #8. No plan has been confirmed in this case and no party 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.

11:00 AM

1. 20-10809-B-11 **IN RE: STEPHEN SLOAN**
22-1007 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-1-2022 [1]

SLOAN V. SLOAN
PETER SAUER/ATTY. FOR PL.

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

DISPOSITION: Continued to August 31, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court is in receipt of Debtor Stephen William Sloan's ("Plaintiff") *Status Report* dated May 25, 2022. Doc. #20. Plaintiff has been provided evidence that William Brett Sloan, as Trustee of the Brett Sloan Irrevocable Trust and of the Grace Sloan Irrevocable Trust ("Defendant") recorded deeds of reconveyance in favor of Plaintiff in Merced and Calaveras Counties for the real property that is the subject this lawsuit. To ensure there are no outstanding issues and so Plaintiff can seek confirmation from the Mariposa County Recorder, Plaintiff requests a further continuance to August 31, 2022. *Id.* Accordingly, this status conference will be CONTINUED to August 31, 2022 at 11:00 a.m. If the adversary proceeding has not been dismissed before then, Plaintiff shall file a joint or unilateral status conference statement not later than seven days before the hearing.

2. 17-11028-B-11 **IN RE: PACE DIVERSIFIED CORPORATION**
18-1006

OBJECTION TO THE ADMISSIBILITY OF PLAINTIFFS' TRIAL EXHIBIT PX-1
5-18-2022 [221]

PACE DIVERSIFIED CORPORATION
ET AL V. MACPHERSON OIL
BRIAN BECKER/ATTY. FOR PL.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will be called as scheduled.

DISPOSITION: Overruled.

ORDER: The court will issue an order.

Defendant and counter-claimant Macpherson Oil Company ("Defendant") objects to the admissibility of Plaintiffs and Counter-Defendants Pace Diversified Corporation's and Dark Rock, LLC's ("Defendants") exhibit PX-1. Doc. #221. Defendant contends that the exhibit should be excluded under Federal Rule of Bankruptcy Procedure ("Civ. Rule") 37(c)(1), *incorporated by* Federal Rule of Bankruptcy Procedure ("Rule") 7037, because (1) it was not produced until nearly five months after discovery concluded, and (2) the document was not dated, notarized, or recorded, and therefore lacks authentication and foundation. *Id.*

Plaintiffs timely responded. Docs. #225; #233. Plaintiffs argue that sufficient evidence has been presented to demonstrate more than a rational basis for its claim that PX-1 contains an authentic signature. Further, PX-1 is an ancient document under Fed. R. Evid. 901(b) ("FRE"), so exclusion is not warranted. Additionally, Plaintiffs say that Defendant will not be prejudiced or surprised and the trial will not be disrupted, so the failure to disclose the identity of the document or persons with knowledge of facts pertaining to the document was harmless. *Id.*

Defendant timely replied. Doc. #238.

This objection will be called and proceed as scheduled. Defendant's objection was initially lodged on the first day of the parties' trial on May 17, 2022, and formally filed May 18, 2022. Docs. #221; #230. Plaintiffs filed a response that same day. Doc. #225. At the conclusion of trial, Plaintiffs' attorney was directed to either withdraw its initial response or file an amended brief not later than May 23 2022, and Defendant's attorney ordered to file a response not later than May 26, 2022. Doc. #231. Plaintiffs' amended brief was properly filed on May 23 2022 and Defendant responded May 26, 2022. Docs. #233; #238.

Defendant's case-in-chief claims that it holds legal and record title as lessee to a 6.25% mineral interest between the Board of Trustees of Leland Stanford Junior University ("Stanford") as lessor, and Maverick Petroleum, Inc. ("Maverick"), as lessee. This lease was recorded on January 23, 2017, and later conveyed from Maverick to Defendant by assignment recorded June 13, 2017 ("Stanford Lease").

September 28, 2018 was the discovery cut-off date. On February 11, 2019, Plaintiffs produced a signature page filed here as "PX-1." PX-1 is identified as a "01/29/2019 – Letter from Les Pierce to Pace, enclosing the Pace Olcese Lease signed by Doris E. Alexander, as Trustee." Ms. Alexander had been appointed testamentary trustee of the trust back in 1989 and remained so through March 30, 1998 when a probate court ordered the distribution of the Simonson trust's assets to Stanford, effectively terminating the Simonson trust.

PX-1 contains a signature page that is allegedly signed by Ms. Alexander as Trustee of the Elsa A. Simonson Trust, but the signature

page is not dated, notarized, or recorded. Doc. #223, *Ex. 1*. The signature page reflects that Ms. Alexander, as testamentary trustee of the Elsa A. Simonson trust, executed the Pace Olcese Lease with respect to Stanford's interest in Section 17. The effective date of the Pace Olcese Lease was July 1, 1999, so this is the earliest date that Ms. Alexander could have signed the lease. But there is no date for Ms. Alexander's signature on the exhibit, so when she signed the document is speculative.

Defendant argues that PX-1 is inadmissible under Civ. Rule 37(c)(1) because it was not produced until five months after the close of discovery in violation of Civ. Rule 26. Doc. #221. Defendant has now conceded authentication and foundation for admission of the exhibit.

Civ. Rule 26(a)(1)(A)(ii) (*incorporated by* Rule 7026) places an affirmative duty on litigants to provide a copy, or description of category and location, of all documents that the disclosing party has in its possession, custody, or control and may use to support claims or defenses. Failure to provide information or identify a witness pursuant to Civ. Rule 26(a) precludes the use of that information or witness to supply evidence at a trial unless the failure was substantially justified or is harmless. Civ. Rule 37(c)(1). The burden of proving that an untimely disclosure was substantially justified or is harmless is on the party making the late disclosure. *Melczer v. Unum Life Ins. Co. of Am.*, 259 F.R.D. 433, 435 (D. Ariz. 2009), citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001).

This court has "particularly wide" discretion when it comes to excluding witnesses under Rule 37(c)(1). *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 863 (9th Cir. 2014) *See also Sali v. Corona Reg'l Med. Ctr.*, 884 F.3d 1218, 1221 (9th Cir. 2018) (admission or exclusion of evidence under Rule 37(c)(1) is reviewed for abuse of discretion.)

Defendant argues that the late disclosure of the document was not substantially justified or harmless. Doc. #221. Since Plaintiffs are relying on the document to support its argument that Ms. Alexander signed the Pace Olcese Lease, Defendant had notice of the same, and Plaintiffs' rights are superior to the Stanford Lease, and thus Plaintiffs were required to produce the document without waiting for a discovery request and before the close of discovery under Civ. Rule 26(a)(1)(A). *Id.* When Defendant requested Plaintiffs to admit that Defendant holds title to the 6.25% mineral interest in the Stanford Lease, Plaintiffs denied the request and stated that "[t]here is a break in the chain of title. There is no record of any transfer by Doris E. Alexander to [Stanford] . . ." Doc. #223, *Exs. 3*, *4*. This denial appears to be based upon knowledge of the existence of PX-1, but Plaintiffs did not provide any explanation as to why PX-1 was not produced or identified to Defendant until after the close of discovery.

In response, Plaintiffs claim that they did not receive PX-1 until after expiration of the discovery cutoff deadline, PX-1 is sufficiently authenticated with sufficient foundation, and therefore PX-1 should be admitted. Doc. #233. Plaintiffs assert multiple examples that can be used to satisfy their burden of authenticating PX-1. Namely:

(1) Testimony of a Witness with Knowledge [FRE 901(b)(1)]: Dwayne Roach, Pace's CEO, is a witness with knowledge and can testify that the document is what it is claimed to be;
(2) Nonexpert Opinion About Handwriting [FRE 901(b)(2)]: Dwayne Roach is a nonexpert who can testify that the handwriting in PX-1 is genuine based on his familiarity with it that was not acquired for the current litigation;
(3) Comparison by an Expert Witness or the Trier of Fact [FRE 901(b)(3)]: A trier of fact may determine PX-1 is authentic by comparing the signature with an authentic specimen of Ms. Alexander's signature;
(4) Distinctive Characteristics and the Like [FRE 901(b)(4)]: PX-1 may be authenticated by considering the appearance, contents, substance, internal patterns, or other distinctive characteristics, taken together with all of the circumstances.
(5) Ancient Document [FRE 901(b)(8)]: Since PX-1 may be authenticated because it (A) is in a condition that creates no suspicion about its authenticity; (B) was in Les Pierce's business records for Pace Diversified Corporation, which is a place where, if authentic, it would likely be; and (C) PX-1 is at least 20 years old.

True enough, Plaintiffs appear to have satisfied their burden that PX-1 is authentic under FRE 901(b)(1), (b)(2), (b)(3), and (b)(4) and laid the foundation such that it would otherwise be admissible. The same is true as to FRE 901(b)(8) because PX-1 is an ancient document in a condition that creates no suspicion as to its authenticity and has remained in Les Pierce's possession since 2001. Defendant is not pursuing the authentication or foundational challenges.

However, it is still problematic that PX-1, information about it, or an identity of a witness with knowledge of it, was not produced by Plaintiffs during discovery as required by Civ. Rule 26(a) and (e). Such failure precludes use of PX-1 unless the failure was substantially justified or harmless.

Though little argument is presented as to substantial justification, Plaintiffs claim that their failure to disclose PX-1, information about it, or an identity of a witness with knowledge of it was harmless. In considering the harmlessness of a failure to disclose, courts should consider the following factors: (a) bad faith or willingness involved in failing to comply with disclosure rules; (b) prejudice or surprise to the party against whom the evidence is offered; (c) the ability to cure prejudice; (d) the likelihood of disruption to trial; and (e) the importance of the evidence to the

proffering party's case. *In re Mercedes-Benz Anti-Trust Litig.*, 225 F.R.D. 498, 506 (D.N.J. 2005) (District Court admitted documents and evidence despite late disclosure because, among other things, the opponent did not ask the court for appropriate assistance when the disclosure occurred).

Plaintiffs' Bad Faith or Willfulness

Plaintiffs argue that there was no bad faith or willfulness in failure to disclose PX-1 because Les Pierce mailed the document to Plaintiffs on January 29, 2019, which was received February 1, 2019. Doc. #223, *Ex. 1*. Upon receiving it, Plaintiffs promptly produced PX-1 to Defendant on February 11, 2019. *Id.*, *Ex. 2*; Doc. #234.

Plaintiffs distinguish themselves from the delinquent party in *Melczer* by noting that the party in that case failed to disclose the document until almost 10 months after receiving them, even though they had obtained the documents prior to the close of discovery. Doc. #233. But as Defendant correctly indicates, the existence of the evidence in *Melczer* was orally disclosed to the opposing party before the discovery deadline passed. Doc. #238.

In reply, Defendant cites to Mr. Roach's testimony that:

1. Mr. Roach's job duties as secretary of Pace Western included acquiring property interests for Pace Western, including the Stanford mineral interest;
2. Mr. Roach communicated with Doris Alexander by telephone and by letters in connection with executing the Pace Olcese Lease and leasing the Stanford interest to Pace Western, such that he is familiar with her signature;
3. Ms. Alexander held herself out as being the Trustee of the Elsa A. Simonson's estate with the authority to lease the Stanford interest;
4. After the Pace Olcese Lease was assigned to Pace Diversified, Pace Diversified made royalty payments beginning in 2003; and
5. Les Pierce of Pace Western has maintained Pace Western's documents since 2001, including PX-1.

Although PX-1 was not produced until February 2019, Mr. Roach's testimony indicates that he had knowledge of Ms. Alexander's execution of the Pace Olcese Lease with respect to the Stanford interest for many years. So, when Plaintiffs denied that Defendant holds title to the 6.25% mineral interest in the Stanford Lease and cited a "break in the chain of title," Plaintiffs should have disclosed PX-1, its existence, or the name, address, and telephone number of Les Pierce as the individual likely to have PX-1. But Plaintiffs did not do so. This factor weighs in favor of sustaining the objection.

Prejudice or Surprise to Defendant, the Ability to Cure Prejudice, and Likelihood of Disruption at Trial

Defendant argues that it was harmed by the late disclosure. Doc. #221. Defendant did not investigate PX-1 because it was not produced until after discovery had ended.

But Plaintiffs contend that Defendant will not be surprised or prejudiced despite the non-disclosure. Doc. #233. The parties agreed to reopen discovery after February 2019, which could have included discovery related to PX-1. It did not. Instead, the parties stipulated only to reopening discovery related to the Braucht family interest. Doc. #123. This interest differs from the Simonson/Stanford interest at issue here. Since Defendant could have cured any prejudice by communicating a desire to include PX-1 in the reopening of discovery and did not, Plaintiffs argue that Defendant should be able to argue that they will be harmed now. Doc. #233. Defendant had the opportunity to include PX-1 in the reopening of discovery but did not. Had such reopened discovery included PX-1, there would not have been any disruption at trial. Plaintiffs characterize Defendant's failure to include PX-1 in the reopened discovery as a strategic decision.

In reply, Defendant argues that it was prejudiced by the failure to disclose PX-1 because it was foreclosed from conducting discovery as to that document. Doc. #238. Defendant maintains it had no obligation to incur increased costs by attempting to reopen discovery. Although the parties "agreed" to re-open discovery, such agreement was very limited in scope. Defendant opposed more extensive discovery sought with respect to the Braucht family interest, and Defendant was not required to undertake the costly and time-consuming process of seeking to reopen discovery. Additionally, the reopened discovery involved conveyances that were created after the close of discovery, so such rationale to reopen did not apply to PX-1.

True, but it has been nearly three years since discovery was reopened. Further, Defendant has had knowledge of PX-1 since at least February 2019. At any time since then, Defendant could have investigated further or moved to reopen discovery. Further, Defendant had an opportunity to question Mr. Roach regarding PX-1 at the trial.

Also, Defendant could have requested the court's assistance years ago. It is possible any cost (and perhaps some fees) incurred in deposing Mr. Roach further could have been awarded by the court. This factor appears to weigh in favor of overruling the objection and admitting PX-1 into evidence.

Importance of the Evidence

Lastly, Plaintiffs claim that PX-1 is essential to their claim and to their case-in-chief. Doc. #233.

Conclusion

Under Civ. Rule 26, Plaintiffs were required to provide this information. Plaintiffs did not do so. Plaintiff did not even identify

the document in response to interrogatories or in supplemental responses. This failure appears to be willful when considered with Plaintiffs' other contentions regarding the Stanford interest. Plaintiffs had knowledge of the existence of PX-1, as well as knowledge about individuals likely to have discoverable information about it.

Defendants may have suffered prejudice with respect to the tardy discovery. This prejudice could have been cured in the reopening of discovery with Plaintiffs bearing the expense. It was not. Though reopening of discovery that happened here encompassed different interests for conveyances that occurred after discovery closed and Defendant was not required to incur additional expense to cure Plaintiffs' discovery failure, Defendants have had ample time—more than three years—to cure any prejudice resulting from Plaintiffs' willful failure.

Therefore, although the court finds Plaintiffs' failure to disclose PX-1 was not substantially justified, such failure here is harmless. This court may rely on finding either substantial justification or harmlessness to allow the admission of the evidence. *Yeti*, 259 F.3d at 1107. Accordingly, this objection will be OVERRULED. PX-1 is admitted into evidence.

3. 13-11337-B-13 **IN RE: GREGORY/KARAN CARVER**
22-1001 CAE-1

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

CARVER ET AL V. SETERUS INC.
ET AL
NANCY KLEPAC/ATTY. FOR PL.

NO RULING.

4. 21-11674-B-7 **IN RE: JULIO ARELLANO**
22-1010 CAE-1

STATUS CONFERENCE RE: COMPLAINT
4-5-2022 [1]

DIVERSIFIED FINANCIAL
SERVICES, LLC V. ARELLANO, SR.
NICHOLAS KOHLMEYER/ATTY. FOR PL.
REISSUED SUMMONS: 05/19/22

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

DISPOSITION: Continued to June 29, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court is in receipt of Diversified Financial Services, LLC's ("Plaintiff") *Status Conference Statement* dated May 24, 2022. Doc. #13. Plaintiff sought and obtained a *Reissued Summons and Notice of Status Conference in an Adversary Proceeding* on May 16, 2022, which set June 29, 2022 as the date for a status conference in this proceeding. Doc. #10. The reissued summons and complaint were served on Julio Arellano, Sr. ("Debtor") and Debtor's attorney on May 17, 2022. Accordingly, Debtor requests that this status conference be continued to June 29, 2022 to be heard in connection with the status conference set pursuant to the reissued summons. Accordingly, this status conference will be continued to June 29, 2022 at 11:00 a.m.