UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday July 14, 2022
Place: Department A – Courtroom #11
Fresno, California

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 21-12006-A-13 **IN RE: KRYSTAL WEDEKIND**
FW-2

MOTION TO MODIFY PLAN
5-26-2022 [29]

KRYSTAL WEDEKIND/MV
GABRIEL WADDELL/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

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

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

2. 21-12006-A-13 **IN RE: KRYSTAL WEDEKIND**
MHM-1

CONTINUED MOTION TO DISMISS CASE
5-13-2022 [20]

MICHAEL MEYER/MV
GABRIEL WADDELL/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on July 13, 2022. Doc. #45.

3. 22-10909-A-13 **IN RE: JASON ATHERTON AND GENZZIA DOVIGI-ATHERTON**
JHK-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
6-6-2022 [18]

CARMAX BUSINESS SERVICES, LLC/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
JOHN KIM/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). Debtors Jason Aaron Atherton ("Debtor") and Genzzia Sabrina Dovigi-Atherton ("Joint Debtor") (together, "Debtors") timely filed written opposition on June 30, 2022. Doc. #36. This matter will proceed as scheduled.

As an initial matter, the facts set forth in Debtors' opposition are not supported by any declaration, and the exhibits filed in opposition (Doc. #37) to the motion are not authenticated. The court will permit counsel for Debtors to address these evidentiary deficiencies at the hearing.

The movant, Carmax Business Services, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2) with respect to a 2012 Toyota Sienna ("Vehicle"). Doc. #18.

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 a debtor does not have any equity in such property and such property is not necessary to an effective reorganization.

Movant asserts "cause" exists to lift the stay for several reasons. First, the loan matured on May 6, 2019, and the entire balance of $9,940.71 is in default. Decl. of Maureen Tully, ¶ 6, Doc. #20; Ex. D, Doc. #24. Movant has not received a payment on account of its loan since October 4, 2021. Id. Second, Debtors do not have any equity in the Vehicle. The adjusted clean retail value of the Vehicle is $8,720.00, and the balance owing is $9,940.71, leaving a negative net equity of $1,220.71. Tully Decl., ¶ 7, Doc. #20; Ex. E, Doc. #24. Third, Movant recovered the Vehicle pre-petition on May 17, 2022, due to the delinquency on the account, and the Vehicle is being held pending relief from stay. Tully Decl., ¶ 8, Doc. #20. Fourth, Movant has not been provided with proof of insurance on the Vehicle. Id. at ¶ 9.

In addition, this is Debtors' fourth bankruptcy case that has included the Vehicle. Debtors' first bankruptcy case, Case No. 16-10778 (Bankr. E.D. Cal.),

was dismissed on June 3, 2016, for the failure of Debtors to make the required chapter 13 plan payments. Decl. of John Eng, ¶ 2, Doc. #21; Ex. F, Doc. #24. On July 27, 2016, Debtors filed their second bankruptcy case, Case No. 16-12713 (Bankr. E.D. Cal.), that was dismissed on November 15, 2019, for the failure of Debtors to make the required chapter 13 plan payments. Eng Decl., ¶ 3, Doc. #21; Ex. G, Doc. #24. On January 9, 2021, Debtors filed their third bankruptcy case, Case No. 21-10047 (Bankr. E.D. Cal.), that was dismissed on April 25, 2022, for the failure of Debtors to make the required chapter 13 plan payments. Eng Decl., ¶ 4, Doc. #21; Ex. H, Doc. #24. Debtors filed this bankruptcy case, their fourth, on May 28, 2022. Doc. #1.

Movant also asserts that relief from stay is warranted under (d)(2) because Debtors have no equity in the Vehicle, and the Vehicle is not necessary for an effective reorganization since Debtors have two other vehicles. Doc. #18.

Movant further requests that the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) be ordered waived because Movant has possession of the Vehicle and this is Debtors' fourth bankruptcy case affecting the Vehicle. Doc. #18.

Debtors first oppose the motion because Debtors have provided Movant with proof that the Vehicle was insured at the time of repossession and remains insured. Ex. A, Doc. #37. Second, Debtors expect their chapter 13 plan to be confirmed soon, and Movant is adequately protected by Debtors' proposed chapter 13 plan. Based on the notice sent by the court, objections to confirmation of the plan were to be filed on or before July 5, 2022. Doc. #15. A review of the docket shows that no objections to confirmation have been timely filed. Debtors will be filing a motion to value the Vehicle, as Debtors have done in previous bankruptcy cases, providing for the payment in full of the secured amount of the Vehicle while the remaining balance is allowed as an unsecured claim. Doc. #36. However, a review of the court's docket shows that a motion to value the Vehicle has not yet been filed, and the hearing on such a motion must be concluded before or in conjunction with confirmation of Debtors' proposed chapter 13 plan. LBR 3015-1(i).

More important, Debtors require the return of the Vehicle in order to reorganize successfully. The Vehicle is used to transport Joint Debtor to her frequent, ongoing doctor's appointments while Debtor is at work. Doc. #36. While Debtors have three vehicles, the Chevy Suburban is not running, as noted on Schedule A/B. Doc. #1. If the motion is granted, Debtors will be left with only one working vehicle. With Debtor's job and Joint Debtor's health issues, two working vehicles are necessary for the household. Doc. #36.

Assuming the evidentiary deficiencies are addressed satisfactorily, the court finds that while Debtors do not have any equity in the Vehicle, the Vehicle is necessary to an effective reorganization, so there is no basis to grant relief from stay under section 362(d)(2).

The court also finds that "cause" does not exist to lift the stay under section 362(d)(1). Debtors have provided proof that the Vehicle is insured. Moreover, it appears that Debtors' chapter 13 plan will be confirmed soon that will provide for payment of Movant's claim, and Debtors are in the process of filing a motion to value Movant's collateral. Further, as this court found with respect to the motion filed the Debtors to extend the automatic stay in this bankruptcy case, Debtors suffered health and financial hardships during their third bankruptcy case, including multiple surgeries, transportation issues, and the resulting missed work, that caused Debtors to miss their plan payments in Debtors' prior bankruptcy case. Civil Minutes, Doc. #33. Debtors' personal and financial affairs have changed since their third bankruptcy case was dismissed,

and Debtors expect to be able to make plan payments in this case. Decl. of Jason Atherton, Doc. #12.

Accordingly, the motion will be denied. Movant shall return the Vehicle to Debtors.

4. 22-11036-A-13 **IN RE: SERENA/COLE BLASINGAME**
BDB-1

MOTION TO EXTEND AUTOMATIC STAY
6-28-2022 [10]

COLE BLASINGAME/MV
BENNY BARCO/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Debtors Serena Lynn Blasingame ("Debtor") and Cole Curtis Blasingame (together, "Debtors") move the court for an order extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). Doc. #10.

Debtors had a chapter 13 case pending within the preceding one-year period that was dismissed, Case No. 21-11758 (Bankr. E.D. Cal.) (the "Prior Case"). The Prior Case was filed on July 15, 2021 and dismissed on March 22, 2022. Under 11 U.S.C. § 362(c)(3)(A), if a debtor had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the current case. Debtors filed this case on June 22, 2022. Petition, Doc. #1. The automatic stay will terminate in the present case on July 22, 2022.

Section 362(c)(3)(B) allows the court to extend the stay "to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]" 11 U.S.C. § 362(c)(3)(B).

Section 362(c)(3)(C)(i) creates a presumption that the case was not filed in good faith if (1) the debtor filed more than one prior case in the preceding year; (2) the debtor failed to file or amend the petition or other documents without substantial excuse, provide adequate protection as ordered by the

court, or perform the terms of a confirmed plan; or (3) the debtor has not had a substantial change in his or her financial or personal affairs since the dismissal, or there is no other reason to believe that the current case will result in a discharge or fully performed plan. 11 U.S.C. § 362(c)(3)(C)(i).

The presumption of bad faith may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). 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.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." 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. 1795 (2019).

In this case, the presumption of bad faith arises. Debtors failed to perform the terms of a confirmed plan in the Prior Case. A review of the court's docket in the Prior Case disclosed a chapter 13 plan was confirmed on September 7, 2021, the chapter 13 trustee ("Trustee") filed a Notice of Default and Intent to Dismiss Case (the "Notice") on February 2, 2022, and the court dismissed the Prior Case upon Trustee's declaration that Debtors failed to address the Notice in the time and manner prescribed by LBR 3015-1(g). See Prior Case, Doc. ##32, 36, 38. Debtors acknowledge that the Prior Case was dismissed for failure to pay plan payments timely. Decl. of Serena Lynn Blasingame, Doc. #12.

To rebut the presumption of bad faith, Debtor explains that Debtors fell behind on plan payments because debtor's father was diagnosed with cancer in October 2021 and Debtor had to care for her father both physically and financially. Blasingame Decl., Doc. #12. Debtor was taking care of her father full time by February 2022, and the stress associated with being a full-time caretaker caused Debtor to miss Debtors' plan payments in the Prior Case. Id. Debtor's father passed away in March 2022 but by this time it was too late for Debtors to catch up on missed payments, and the Prior Case was dismissed. Id. Debtors' Schedules I and J filed in this case list monthly net income of $4,418.00, all of which Debtors propose to apply to plan payments. Schedules I & J, Doc. #1; Plan, Doc. #9.

The court is inclined to find that Debtor's father being unexpectedly diagnosed with cancer, which occurred during the Prior Case and prevented successful plan payments, rebuts the presumption of bad faith that arose from the failure to perform the terms of a confirmed plan in the Prior Case and that Debtors' petition commencing this case was filed in good faith. Moreover, the court recognizes that the fact that Debtor will no longer need to provide full-time care as well as financial assistance to Debtor's father represents a substantial change in Debtors' financial affairs since the dismissal of the Prior Case.

Accordingly, the court is inclined to GRANT the motion and extend the automatic stay for all purposes as to those parties that received notice of Debtors' motion (see Doc. #13), unless terminated by further order of the court.

5. 21-11251-A-13 **IN RE: EDGARDO/TONI LACSINA**
FW-2

MOTION TO MODIFY PLAN
5-24-2022 [48]

TONI LACSINA/MV
GABRIEL WADDELL/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

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

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

6. 21-11251-A-13 **IN RE: EDGARDO/TONI LACSINA**
MHM-1

CONTINUED MOTION TO DISMISS CASE
5-13-2022 [44]

MICHAEL MEYER/MV
GABRIEL WADDELL/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on July 13, 2022. Doc. #65.

7. 21-10856-A-13 **IN RE: MARK/AMELIA CAVE**
MHM-1

MOTION TO DISMISS CASE
6-13-2022 [85]

MICHAEL MEYER/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to August 25, 2022, at 9:30 a.m.

ORDER: The court will issue an order.

The trustee's motion to dismiss will be continued to August 25, 2022, at 9:30 a.m., to be heard with the debtors' motion to modify the Chapter 13 plan.

8. 22-10758-A-13 **IN RE: NELLA MILAM**
MHM-1

MOTION TO DISMISS CASE
6-3-2022 [14]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continue to August 11, 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 after the hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The debtor timely filed written opposition on June 30, 2022. Doc. #21. This matter will proceed as scheduled.

Here, the chapter 13 trustee ("Trustee") asks the court to dismiss this case for unreasonable delay by the debtors that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). Doc. #14. Specifically, Trustee asks the court to dismiss this case for:

(1) Unreasonable delay by the debtor that is prejudicial to creditors pursuant to 11 U.S.C. § 1307(c)(1).

(2) The debtor's failure to provide Trustee with:
(a) Secured loan documents for all debt secured by real or personal property;
(b) Proof of utility expenses;
(c) Pay advices for the six months prior to fling; and
(d) Proof that the Annuity is ERISA qualified.

On June 30, 2022, the debtor responded to the motion indicating that the debtor is elderly and currently in the hospital. Doc. #21. The meeting of creditors was continued to July 26, 2022. The debtor requests that the motion to dismiss be continued to a date after the meeting of creditors is held in order to allow the debtor to comply with the trustee's requests. Doc. #21.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). The debtor explains that she is elderly and currently in the hospital and needs additional time to provide the documents requested by Trustee. Doc. #21.

Based on the current status of this case, the court is inclined to continue the motion to August 11, 2022 at 9:30 a.m. to confirm that the debtor has complied with all outstanding grounds for dismissal. Trustee shall file and serve a status report on or before August 4, 2022 if the motion to dismiss has not been withdrawn by then.

9. 22-10758-A-13 **IN RE: NELLA MILAM**
MHM-2

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
6-30-2022 [18]

TIMOTHY SPRINGER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection 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 sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The debtor filed her chapter 13 plan ("Plan") on May 3, 2022. Doc. #3. The chapter 13 trustee ("Trustee") objects to confirmation of the Plan on the grounds that: (1) the Plan does not provide for the curing of $12,420.56 in pre-petition arrears for home mortgage creditor PennyMac Loan Services, LLC ("PennyMac"), as set forth in PennyMac's proof of claim filed on June 17, 2022 (Claim No. 3-1); (2) Claim No. 3-1 shows a greater monthly mortgage amount than is provided for in the Plan; and (2) the monthly Plan payments will be insufficient to fund the Plan once the arrears on PennyMac's claim are fully provided for. Doc. #18.

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 filed under section 501, is deemed allowed unless a party in interest objects. PennyMac filed its proof of claim on June 17, 2022. Claim 3-1.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #3. The Plan fails to account properly for PennyMac's claim. Claim 3-1; Doc. #3.

Accordingly, pending any opposition at hearing, the objection will be SUSTAINED.

10. 22-10859-A-13 **IN RE: LUZ MORENO**
MHM-1

MOTION TO DISMISS CASE
6-30-2022 [13]

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

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on July 8, 2022. Doc. #17.

11. 22-10777-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
KMB-1

OBJECTION TO CONFIRMATION OF PLAN BY WILMINGTON SAVINGS FUND SOCIETY, FSB
6-13-2022 [17]

WILMINGTON SAVINGS FUND SOCIETY, FSB/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
KELLI BROWN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The debtors filed their chapter 13 plan ("Plan") on May 21, 2022. Doc. #11. Wilmington Savings Fund society, FSB, not in its individual capacity but solely as Owner Trustee of the Aspen Holdings Trust, a Delaware Statutory Trust, its successors and/or assignees ("Creditor") objects to confirmation of the Plan on the grounds that: (1) the Plan does not provide for the curing of pre-petition arrears of $139,243.62 on Creditor's claim; (2) Creditor must receive $2,320.73 per month from the Plan in order to cure the pre-petition arrears; and (3) Creditor's claim will mature on June 30, 2022, so Creditor's claim needs to be paid in full prior to the last payment due under the Plan. Doc. #17.

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 filed under section 501, is deemed allowed unless a party in interest objects. Creditor filed its proof of claim on June 8, 2022. Claim 1. A review of the docket shows that no objection to Creditor's proof of claim has been filed.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #11. The Plan fails to account for Creditor's claim as filed. Claim 1; Doc. #11.

Accordingly, pending any opposition at hearing, the objection will be SUSTAINED.

12. 22-10777-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
MHM-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
6-13-2022 [20]

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

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

Pursuant to the amended schedule C filed on June 30, 2022 (Doc. #27), this matter will be OVERRULED AS MOOT.

13. 22-10777-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
MHM-2

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
6-24-2022 [24]

TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. While opposition can be raised at the hearing, the debtors filed a written response on June 30, 2022. Doc. #30. After consideration of the debtors' response, the court is inclined to sustain the objection.

Debtors Stevens and Constance Ryan (collectively, "Debtors") filed their chapter 13 plan ("Plan") on May 21, 2022. Doc. #11. The chapter 13 trustee ("Trustee") objects to confirmation of the Plan on the grounds that: (1) the Plan does not provide for the proof of claim filed by the second mortgage holder in the amount of $139,243.62, the Plan only schedules the claim at $86,645.92; (2) the Plan does not provide for pre-petition arrears in the amount of $11,549.17 asserted by the first mortgage holder; (3) the first mortgage holder needs to be in Class 1, not Class 4, based on the asserted pre-petition arrears; and (4) Debtors list an automobile expense of $649.00 per month on Schedule J, but no automobile loan is listed in Debtors' schedules, and Debtors testified that they no longer have an automobile loan. Doc. #24. Trustee requests that an amended Schedule J be filed. Doc. #24.

Debtors respond that the Plan does not need to provide for the pre-petition arrears owed to the first mortgage holder because that arrearage is subject to a forbearance agreement, and Debtors will pay that amount in Class 4. Doc. #30. Also, Debtors dispute the amounts claimed by the second mortgage holder and will be filing an objection to its claim. Debtors' written response does not address Trustee's objection regarding the need to file an amended Schedule J. Doc. #30.

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 filed under section 501, is deemed allowed unless a party in interest objects. The second mortgage holder filed its proof of claim on June 8, 2022. Claim 1. The first mortgage holder filed its proof of claim on June 16, 2022, Claim 3-1, and amended it on July 1, 2022, Claim 3-2. A review of the docket shows that no objection to either proof of claim has been filed.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #11. The Plan fails to account for the filed claims of the first mortgage holder and the second mortgage holder.

Claim 1; Claim 3; Doc. #11. Moreover, Debtors have not addressed the need to file an amended Schedule J.

Accordingly, the objection will be SUSTAINED.

14. 22-10782-A-13 **IN RE: THURMAN ROGERS**
MHM-1

MOTION TO DISMISS CASE
6-10-2022 [16]

MICHAEL MEYER/MV

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

DISPOSITION: Granted.

ORDER: The court will issue the order.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the debtor to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the default of the debtor is entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Here, the chapter 13 trustee ("Trustee") asks the court to dismiss this case for unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)), failure to file complete and accurate schedules (11 U.S.C. § 521), and because the debtor has failed to complete a Credit Counseling Certificate timely (11 U.S.C. § 109(h)). Doc. #16. The debtor did not file written opposition. Specifically, Trustee asks the court to dismiss this case for:

(1) Unreasonable delay by the debtor that is prejudicial to creditors. [11 U.S.C. §1307(c)(1)].

(2) Debtor is ineligible to be a debtor in a Chapter 13 [11 U.S.C. §109(h)]. Debtor has failed to file his Counseling certificate.

(3) Failure to file complete and accurate schedules and statements. [11 U.S.C §521] and/or Fed. R. Bankr. P 1007. Debtor filed a previous bankruptcy, Case No. 21-12785, on December 19, 2021. Debtor uses same schedules in this case that were used in the previous bankruptcy. The previous bankruptcy was filed nearly 6 months ago, and Trustee believes that much of the information in the schedules is inaccurate.

Under 11 U.S.C. § 109(h), an individual may not be a debtor unless the debtor received credit counseling within the 180-day period ending on the petition

date. 11 U.S.C. § 109(h)(1). Thurman Leroy Rogers, Jr. ("Debtor") filed for relief under chapter 13 of the Bankruptcy Code on May 9, 2022. Doc. #1. Debtor failed to file a certificate of completion of pre-petition credit counseling. The Bankruptcy Code allows the debtor to request a waiver of the § 109(h)(1) requirement to receive credit counseling pre-petition based on exigent circumstances. 11 U.S.C. § 109(h)(3)(A). However, Debtor has not requested a waiver of the § 109(h)(1) requirements and, because Debtor did not receive credit counseling prior to filing his bankruptcy petition and has not received a waiver of that requirement, Debtor may not be a debtor pursuant to § 109(h).

Further, under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors and under 11 U.S.C. § 109(h) for failing to timely complete credit counseling. Because Debtor may not be a debtor pursuant to § 109(h), dismissal of this bankruptcy case rather than conversion is appropriate.

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

15. 22-10782-A-13 **IN RE: THURMAN ROGERS**
MHM-2

MOTION TO DISMISS CASE
6-30-2022 [23]

MICHAEL MEYER/MV

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

The court is granting the trustee's Motion to Dismiss [MHM-1] matter #14 above, therefore this Motion to Dismiss [MHM-2] will be DENIED AS MOOT.

16. 22-10785-A-13 **IN RE: STUART WONG**
MHM-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
6-10-2022 [21]

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

NO RULING.

17. 22-10785-A-13 **IN RE: STUART WONG**
MHM-3

MOTION TO DISMISS CASE
6-30-2022 [35]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part, the case will be converted.

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

This matter was noticed pursuant to LBR 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the debtor's default and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Here, the chapter 13 trustee ("Trustee") asks the court to dismiss this case for unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1) and (c)(4)). Doc. #35. Specifically, Trustee asks the court to dismiss this case for:

(1) Unreasonable delay by the debtor that is prejudicial to creditors pursuant to 11 U.S.C. § 1307(c)(1).

(2) The debtor's failure to appear at the scheduled § 341 meeting of creditors.

(3) The debtor's payments to the Trustee are not current under the debtor's proposed plan.

(4) The debtor has failed to commence making plan payments.

(5) The debtor's failure to provide Trustee with all requested documents.
(a) Real Property Listing Agreements
(b) Complete bank statements for 6 months prior to filing
(c) Rental Agreements
(d) Completed Profit and Loss
(e) Class 1 Checklist for 1401 E. Kennedy Ave, Madera, CA.
(f) Evidence of Payment to Class 1 Claim.

In addition, based on a review of the Internal Revenue Service's Proof of Claim No. 9-1, filed on June 17, 2022, it appears that the debtor has failed to file federal tax returns for the years 2018, 2019, 2020 and 2021. Similarly, based on a review of the proof of claim filed by Franchise Tax Board on June 21, 2022, the debtor has not filed state tax returns for tax years 2018, 2019, 2020 and 2021. See Claim No. 11-1.

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) and (c)(4) for failure to appear at the 341 meeting of creditors, failure to make plan payments and failure to provide the Trustee with all requested documents. There is also "cause" for dismissal or conversion under 11 U.S.C. § 1307(e) for failure of the debtor to file federal and state tax returns.

A review of the debtor's Schedules A/B and D shows that, as of right now, there is a liquidation amount of $428,358.83, after trustee's compensation. Doc. #11; Decl. of Kelsey A. Seib, ¶ 8, Doc. #37. This liquidation amount is comprised of the value of the debtor's three (3) pieces of real property that are not the debtor's residence. Based on the amount of equity in the debtor's bankruptcy estate, the court finds that conversion rather than dismissal is in the best interests of creditors and the estate.

Unless this motion is adequately opposed at the hearing, or withdrawn, the motion will be GRANTED IN PART, and the case will be converted.

18. 22-10787-A-13 **IN RE: ROSEMARIE FIGUEROA**
CCR-1

OBJECTION TO CONFIRMATION OF PLAN BY LANDMARK COLLECTION SERVICES, INC.
6-21-2022 [16]

LANDMARK COLLECTION SERVICES, INC./MV
ARASTO FARSAD/ATTY. FOR DBT.
CHERYL ROUSE/ATTY. FOR MV.

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

DISPOSITION: Continued to July 28, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

The objection to confirmation of the plan will be continued to July 28, 2022, at 9:30 a.m., to be heard with the trustee's motion to transfer venue.

11:00 AM

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

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

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

NO RULING.

2. 21-11034-A-7 **IN RE: ESPERANZA GONZALEZ**
21-1031 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-26-2021 [1]

ABLP PROPERTIES VISALIA, LLC V. GONZALEZ
DON POOL/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

3. 18-14542-A-7 **IN RE: LARRY SELL**
19-1025 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-15-2019 [1]

THE LEAD CAPITAL, LLC V. SELL
DERRICK COLEMAN/ATTY. FOR PL.
DISMISSED 6/30/22

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This adversary proceeding was dismissed on June 30, 2022. Doc. #81.

4. 22-10074-A-7 **IN RE: MANJINDER SINGH**
22-1012 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT STATUS CONFERENCE
4-26-2022 [1]

BMO HARRIS BANK N.A. V. SINGH
JENNIFER CRASTZ/ATTY. FOR PL.

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

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

ORDER: The court will issue an order.

Due to the granting of Plaintiff's motion for default judgment (matter #5, below), the status conference will be continued to August 11, 2022, at 11:00 a.m. to permit Plaintiff to submit an order granting the motion for default judgment as well as a separate judgment to the court. If a judgment has not been entered on or before August 4, 2022, Plaintiff shall file a unilateral status report not later than August 4, 2022.

5. 22-10074-A-7 **IN RE: MANJINDER SINGH**
22-1012 JWC-1

MOTION FOR ENTRY OF DEFAULT JUDGMENT
6-16-2022 [16]

BMO HARRIS BANK N.A. V. SINGH
JENNIFER CRASTZ/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the defendant to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the default of the defendant is entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As a procedural matter, the Notice of Hearing filed in connection with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice include the names and addresses of persons who must be served with any

opposition. The court encourages counsel to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the local rules. The rules can be accessed on the court's website at http://www.caeb.circ9.dcn/LocalRules.aspx.

Procedural History

BMO Harris Bank N.A., ("Plaintiff") commenced this adversary proceeding by filing a complaint on April 26, 2022 (the "Complaint"). Adv. Proc. No. 22-01012, Doc. #1. By the Complaint, Plaintiff sought a money judgment in the amount of $70,997.00 representing the amount of an insurance check issued to Manjinder Singh ("Defendant") for the loss of a trailer with Vehicle I.D. No. ending in 7212 ("Trailer Two") that was allegedly endorsed with Plaintiff's forged signature. Plaintiff also sought a money judgment in the amount of $58,500.00 for the value of a second trailer with Vehicle I.D. No. ending in 7211 ("Trailer One") that was either wrongfully sold, concealed or disposed of by Defendant with no credible explanation or documentation for the loss of the trailer. Defendant is a chapter 7 bankruptcy debtor whose petition was filed on January 21, 2022. Bankr. Case No. 22-10074, Doc. #1. This court has jurisdiction pursuant to 28 U.S.C. § 157(b)(1).

Defendant failed to respond to the Complaint. On June 2, 2022, Plaintiff filed a request for entry of default. Doc. #10. On June 8, 2022, the United States Bankruptcy Court Clerk filed the Entry of Default. Doc. #12. Plaintiff now moves for default judgment (the "Motion"). Doc. #16. Defendant has not responded to the Motion.

Facts

Defendant was a managing member of STS Trans, LLC ("STS"). Complaint, ¶ 6. STS entered into a written loan and security agreement with Plaintiff to finance two commercial trailers. Decl. of Micki Koepke, ¶ 7, Doc. #18; Ex. 1, Doc. #19. STS breached the terms of the agreement by failing to make the payments pursuant to the agreement before defaulting. Koepke Decl., ¶¶ 8-9, Doc. #18. The terms of the agreement granted Plaintiff security interest in Trailer One and Trailer Two and gave Plaintiff the right to recover both trailers upon default. Id. at ¶ 10; Ex. 2, Doc. #19. As of filing the Complaint, Plaintiff has been unable to recover Trailer One or Trailer Two. Pre-petition, Plaintiff obtained a judgment against STS and Defendant for the balance due on the agreement and for possession of Trailer One since Trailer Two was totaled in an accident. Koepke Decl., ¶ 12, Doc. #18; Ex. 3, Doc. #19.

On February 28, 2022, Defendant was questioned about the trailers at the initial 341 meeting of creditors in this bankruptcy case and claimed both trailers blew up in Nebraska around mid-2020 but did not provide any documentation about the incident. Decl. of Paul N. Andonian, ¶¶ 3-4, Doc. #20. At the continued 341 meeting of creditors held on April 4, 2022, Defendant claimed that the Nebraska incident involving Trailer One actually occurred in 2019 and Trailer Two was involved in an incident in Flagstaff, Arizona in 2019. Id. at ¶ 5. Defendant also claimed that he never received insurance proceeds from the incidents. Id. at ¶ 6. Requested documentation was not provided for either incident. Id. at ¶¶ 4-5.

Based on Plaintiff's record, Defendant notified Plaintiff on June 13, 2018, that Defendant had an insurance claim involving Trailer One, which was totaled in an accident. Koepke Decl., ¶ 15, Doc. #18. On July 26, 2018, Defendant notified Plaintiff that the accident actually involved Trailer Two, not Trailer One. Id. Plaintiff worked with Global Century Insurance Brokers, Inc. ("Global") to provide a buyout quote for Trailer Two on September 6, 2018. Id.

Global subsequently notified Plaintiff that Global issued a two-party check on September 10, 2018 in the amount of $70,997.00 (the "Check") made out to Plaintiff and STS for the loss of Trailer Two. Koepke Decl., ¶ 16, Doc. #18. The Check was delivered to STS in care of Defendant. Id. Plaintiff alleges that along with endorsing the Check on behalf of STS, Defendant forged or caused to be forged Plaintiff's signature on the Check and deposited or cashed the Check without giving Plaintiff its portion. Id.; Ex. 4, Doc. #19. At the 341 meeting of creditors, Defendant claimed that he had not received, endorsed or cashed the Check. Koepke Decl., ¶ 17, Doc. #18. Defendant further claimed that Global filed for bankruptcy and that Defendant never received any money for either trailer accident. Id.

Neither the Check nor proceeds from the Check were delivered to Plaintiff for Trailer Two. Id. at ¶ 16. Plaintiff has not received any credible explanation or supporting documentation for the loss Trailer One. Id. at ¶ 18. Plaintiff has concluded that Defendant sold, concealed or otherwise converted Trailer One for Defendant's own benefit and/or profit. Id. Plaintiff estimates the value of Trailer One to be $58,500.00. Id.

Legal Standard for Default Judgment

"After entry of default, the Court has discretion to grant default judgment on the merits of the case." Andrade v. Arby's Restaurant Group, Inc., 225 F. Supp. 3d 1115, 1127 (N.D. Cal. 2016) (first citing Federal Rule of Civil Procedure ("Rule") 55(b), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055, and then citing Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980)).

Under Rule 55, "the court may require a plaintiff to demonstrate a prima facie case by competent evidence in a prove-up trial to obtain a default judgment." Lu v. Liu (In re Liu), 282 B.R. 904, 907 (Bankr. C.D. Cal. 2002). The court has wide discretion under Rule 55 to consider whether the evidence presented supports a claim and warrants judgment for the plaintiff." Id.; see also, Televideo, 826 F.2d at 917. "Bankruptcy courts frequently exercise their discretion to require that a plaintiff prove up a prima facie case when a plaintiff creditor seeks default judgment against a defendant debtor who has failed to answer a § 523 nondischargeability claim." Liu, 282 B.R. at 907-08 (citations omitted).

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

Claim for Relief Under 11 U.S.C. § 523(a)(4)

"Section 523(a)(4) of the Bankruptcy Code does not allow an individual debtor to discharge a debt incurred by 'fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.'" Transamerica Com. Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991) (quoting 11 U.S.C. § 523(a)(4)). For purposes of § 523(a)(4), a bankruptcy court is not bound by the state law definitions of larceny or embezzlement but, rather, may follow federal common law. See Ormsby v. First Am. Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010) (fraud); Littleton, 942 F.2d at 555 (embezzlement). Fraudulent intent for purposes of § 523(a)(4) can be determined from a totality of the circumstances. Ormsby, 591 F.3d at 1206.

Embezzlement in the context of non-dischargeability requires three elements: (1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which it was entrusted; and (3) circumstances indicating fraud. Littleton, 942 F.2d at 555 (citations and punctuation omitted).

Legal Analysis

Plaintiff argues that Defendant's actions regarding the Check constitutes as embezzlement because Defendant fraudulently signed Plaintiff's name to endorse the Check, cashed the Check and never remitted the funds to Plaintiff. Doc. #16. Plaintiff's evidence supports a finding of embezzlement in the context of 11 U.S.C. § 523(a)(4) because Plaintiff has met the three elements required for such a showing. Plaintiff has shown that Defendant properly received the Check, made out to Plaintiff and STS for the loss of Trailer Two, from Global. Koepke Decl., ¶ 16, Doc. #18. Plaintiff alleges that along with endorsing the Check on behalf of STS, Defendant forged or caused to be forged Plaintiff's signature on the Check and deposited or cashed the Check without giving Plaintiff its portion. Id.; Ex. 4, Doc. #19. Plaintiff has proven a *prima facie* claim under § 523(a)(4) with respect to the Check. Accordingly, a non-dischargeable judgment is properly granted in favor of Plaintiff and against Defendant in the amount of $70,997.00 in the for Defendant's improper cashing of the Check.

Additionally, Plaintiff claims that the unexplained loss of Trailer One is non-dischargeable under 11 U.S.C. § 523(a)(4). In this context, Defendant had possession of Trailer One as the managing member of STS, Plaintiff's borrower. Neither STS nor Defendant have returned Trailer One to Plaintiff, notwithstanding demand from Plaintiff after STS's default as well as entry of a judgment in favor of Plaintiff and against both STS and Defendant for possession of Trailer One. Moreover, Defendant's fraudulent intent with respect to the improper disposition of Trailer One can be inferred from circumstantial evidence presented by Plaintiff. The circumstantial evidence includes Defendant's fraudulent actions and the fraudulent circumstances surrounding the Check, Defendant's unsupported and contradictory testimony regarding the status of Trailer One, and the multiple opportunities given to Defendant to provide documentary support for Defendant's story about the loss of Trailer One and no documentary support has been provided.

Based on the totality of the circumstances, Plaintiff has proven a *prima facie* claim under § 523(a)(4) with respect to Trailer One. Accordingly, a non-dischargeable judgment is properly granted in favor of Plaintiff and against Defendant in the amount of $58,500.00 for the unexplained loss of Trailer One.

Conclusion

The court finds that entry of default judgment is appropriate in this case. The merits of Plaintiff's claim, the sufficiency of the Complaint, and the lack of the possibility of disputes concerning material fact favor entering default judgment.

Accordingly, Plaintiff's Motion for Entry of Default Judgment is GRANTED. A non-dischargeable judgment in the aggregate amount of $129,497.00 shall be entered against Defendant and in favor of Plaintiff.

6. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 CAE-1

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [131]

KODIAK MINING & MINERALS II LLC ET AL V. DON ROSE OIL CO., INC.
VONN CHRISTENSON/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.