

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, July 29, 2021
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 will begin in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

1. [19-10803](#)-A-13 **IN RE: CHRISTY BEELER**
[TCS-7](#)

MOTION TO MODIFY PLAN
6-24-2021 [\[104\]](#)

CHRISTY BEELER/MV
NANCY KLEPAC/ATTY. FOR DBT.
TIMOTHY SPRINGER/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 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. [21-11703](#)-A-13 **IN RE: REYMUNDO GARZA**
[BDB-1](#)

MOTION TO EXTEND AUTOMATIC STAY
7-14-2021 [\[15\]](#)

REYMUNDO GARZA/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.

Reymundo A. Garza ("Debtor"), the chapter 13 debtor, moves the court for an order extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). Doc. #15.

Debtor had a chapter 13 case pending within the preceding one-year period that was dismissed, Case No. 20-10489 (Bankr. E.D. Cal.) (the "Prior Case"). Decl. of Debtor, Doc. #17. The Prior Case was filed on February 11, 2020 and dismissed on March 17, 2021. Decl., Doc. #17. 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. Debtor filed this case on July 2, 2021. Petition, Doc. #1. The automatic stay will terminate in the present case on August 1, 2021.

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. Debtor 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 July 16, 2020, the chapter 13 trustee ("Trustee") filed a Notice of Default and Intent to Dismiss Case (the "Notice") on February 4, 2021, and the court dismissed the Prior Case on March 17, 2021 upon Trustee's declaration that Debtor failed to address the Notice in the time and manner prescribed by LBR 3015-1(g). See Case No. 20-10489, Doc. ##54, 57, 59, 62. Debtor acknowledges that the Prior Case was dismissed for failure to timely pay plan payments. Decl., Doc. #17.

In support of this motion to extend the automatic stay, Debtor declares that he fell behind on his plan payments in the Prior Case and was unable to catch up due to his gambling problem. Decl., Doc. #17. Debtor states that he stopped gambling in February 2021 and enrolled in Gambler's Anonymous in June 2021. Decl., Doc. #17. Debtor has attended six weekly classes for Gambler's Anonymous as of the date of the declaration. Decl., Doc. #17.

Debtor filed a proposed plan on July 13, 2021. Doc. #13. Debtor's Schedules I and J filed in this case list monthly income of \$9,150.39 and expenses of \$5,362.67, resulting in monthly net income of \$3,787.72 of which Debtor proposes to apply \$2,345.31 to plan payments in this case. Schedules I and J, Doc. #12. Debtor's proposed plan payment of \$2,345.31 is higher than the payments of \$2,204.01 called for in the Prior Case. Additionally, Debtor's monthly net income decreased from \$3,801.36 in the Prior Case to \$3,787.72 in this case.

The court is inclined to find that Debtor's gambling problem preventing 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 Debtor's petition commencing this case was filed in good faith. Debtor demonstrated a substantial change in personal affairs when he stopped gambling and enrolled in Gambler's Anonymous. Moreover, the court recognizes that although there is a change in Debtor's financial affairs since the dismissal of the Prior Case, the change is not substantial and Debtor's net monthly income allows for the proposed plan payments.

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 Debtor's motion (see Doc. #18), unless terminated by further order of the court.

3. [20-13804](#)-A-13 **IN RE: EVERETTE DEVAN AND RENEE FLORES-DEVAN**
[TCS-1](#)

MOTION TO MODIFY PLAN
6-22-2021 [\[33\]](#)

RENEE FLORES-DEVAN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
6-28-2021 [\[40\]](#)

MICHAEL MEYER/MV
LEROY AUSTIN/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 motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. This matter will proceed as scheduled to track the chapter 13 trustee's motion to dismiss, matter no. 5 below.

Michael H. Meyer ("Trustee"), the chapter 13 trustee in the bankruptcy case of Marco Antonio Lopez Aguirre and Mayra Margarita Lopez (collectively, "Debtors"), objects to Debtors' claims of exemption in two Wells Fargo checking accounts and a Wells Fargo savings account (together, the "Bank Accounts"). Tr.'s Obj., Doc. #40; see Schedule C, Doc. #1. Debtors claim exemptions in the Bank Accounts under California Code of Civil Procedure ("C.C.P.") § 704.070. Schedule C, Doc. #1. Debtors have not responded to Trustee's objection.

"[T]he debtor, as the exemption claimant, bears the burden of proof which requires her to establish by a preponderance of the evidence that [the property] claimed as exempt in Schedule C is exempt under California Code of Civil Procedure [§ 704.070] and the extent to which the exemption applies." In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015); see Diaz v. Kosmala (In re Diaz), 547 B.R. 329, 337 (B.A.P. 9th Cir. 2016) (concluding "that where a state law exemption statute specifically allocates the burden of proof to the debtor, Rule 4003(c) does not change that allocation.").

C.C.P. § 704.070 allows a debtor to exempt earnings that are either not subject to wage garnishment or have already been subject to an earnings withholding. Doc. #40. Trustee objects to Debtors' claims exemptions in the Bank Accounts because the funds in the Bank Accounts may be subject to a wage garnishment and Debtors have not shown that the funds in the Bank Accounts have already been subject to an earnings withholding. Id. Trustee also objects because the money in the Bank Accounts are not "paid earnings" as defined by C.C.P. § 706.011, which requires the funds be earnings paid within thirty days of the filing of the bankruptcy petition. Doc. #40. Debtors have not responded to Trustee's objection. The court finds that Debtors have not met the burden of establishing why the Bank Accounts claimed as exempt in Schedule C are exempt under C.C.P. § 704.070.

Accordingly, Trustee's objection will be SUSTAINED.

MOTION TO DISMISS CASE
6-29-2021 [\[43\]](#)

MICHAEL MEYER/MV
LEROY AUSTIN/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 set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). In consideration of the recent suspension of the debtors' attorney of record, Ex. B to Doc. #38, this matter will proceed as scheduled. Unless opposition is raised by the debtors at the hearing, the defaults of all non-responding parties will be entered and this motion will be granted.

Michael H. Meyer ("Trustee"), the chapter 13 trustee for the bankruptcy case of Marco Antonio Lopez Aguirre and Mayra Margarita Lopez (collectively, "Debtors"), asks the court to dismiss this case for unreasonable delay by Debtors that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) and because Debtors have failed to set a modified plan for hearing with notice to creditors. Mot., Doc. #43. Lakeview Loan Servicing, LLC, a creditor in this chapter 13 case, objected to Debtors' plan on April 14, 2021 and the objection was sustained on May 28, 2021. Decl. of Elizabeth Roberts, Doc. #45. Debtors have failed to set a modified plan for hearing with notice to creditors. Decl., Doc. #45. Debtors did not oppose Trustee's motion.

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.

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

6. [21-10941](#)-A-13 **IN RE: LINDA HOGAN**
[SAH-1](#)

MOTION TO CONFIRM PLAN
6-14-2021 [[17](#)]

LINDA HOGAN/MV
SUSAN HEMB/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on June 30, 2021. Doc. #29.

7. [20-13554](#)-A-13 **IN RE: CYRUSS/KRISTEN LA MARSNA**
[TCS-1](#)

CONTINUED MOTION TO MODIFY PLAN
5-28-2021 [[30](#)]

KRISTEN LA MARSNA/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

NO RULING.

8. [21-10856](#)-A-13 **IN RE: MARK/AMELIA CAVE**
[SL-2](#)

MOTION TO CONFIRM PLAN
6-14-2021 [[29](#)]

AMELIA CAVE/MV
SCOTT LYONS/ATTY. FOR DBT.
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 at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to confirm the chapter 13 plan. Tr.'s Opp'n, Doc. #39. The debtors filed a written reply on July 15, 2021. Doc. #41. The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore,

the defaults of the non-responding parties in interest are entered. This matter will proceed as scheduled.

Mark David Cave and Amelia Ann Cave (together, "Debtors") filed their chapter 13 plan ("Plan") on June 14, 2021. Doc. #34. Trustee objects to confirmation of the Plan on the grounds that the Plan fails to provide for the submission of all or such portion of future earnings or other income to the supervision and control of the Trustee as is necessary for the execution of the Plan, citing 11 U.S.C. § 1322(a). Trustee also objects to confirmation of the Plan because Debtors will not be able to make all payments under the Plan and comply with the Plan, citing 11 U.S.C. § 1325(a)(6). Doc. #39.

Trustee alleges that Debtors are delinquent on Plan payments. Trustee also sets forth the following claims that were filed with balances greater than what is listed in the Plan, resulting in the Plan failing to fund over 60 months:

Claim Holder & Class	Plan Amount	Claim Amount
Deutsche Bank, Class 1	\$70,564.39	\$76,564.39
Capital One Auto Finance, Class 2(A)	\$24,927.00	\$33,756.68
Internal Revenue Service, Class 2(A)	\$24,079.00	\$28,801.32
Tulare County Tax Collector, Class 2(A)	\$453.00	\$529.99

Section 1325(a)(6) of the Bankruptcy Code requires the court to confirm a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). In this case, the Plan payments proposed by Debtors will not pay allowed claims within the applicable commitment period. Additionally, Debtors are already delinquent in Plan payments.

Debtors' reply first states that Debtors have scheduled payments to become current and will become current or close to current prior to the date of the confirmation hearing. Doc. #41. Debtors also state that they are able to raise the monthly Plan payments to pay the claims, and Debtors consent to raising their Plan payment, although Debtors do not state an amount by which the propose to increase Plan payments. Doc. #41.

Trustee has not withdrawn his opposition to Plan confirmation. At the hearing, Trustee will be asked to verify whether Debtors are current on Plan payments and whether Trustee consents to an increase in the Plan payment amount to be provided for in the confirmation order.

Unless Trustee's opposition is withdrawn or resolved at the hearing, Debtors' motion will be DENIED for the reasons set forth in Trustee's opposition.

MOTION TO APPROVE LOAN MODIFICATION
7-14-2021 [\[33\]](#)

KERRI TYSON/MV
SCOTT LYONS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

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

Christopher James Tyson and Kerri Lynne Tyson (together, "Debtors"), the debtors in this chapter 13 case, seek authorization from this court to enter into a loan modification agreement with Pennymac Loan Services, LLC ("Lender"). Doc. #33.

Lender holds a Deed of Trust against Debtors' residential real property commonly known as 3139 N. Memory Street, Visalia, CA 93291 (the "Property"). Doc. #33. Debtors assert that they will be able to bring their mortgage loan current with the modification, which reduces their ongoing mortgage payment. Decl. of Christopher James Tyson, Doc. #35. The proposed modification includes the following changes:

Current Terms		Proposed Modified Terms	
Current UPB	\$268,453.38	Post-Modification UPB	\$263,636.27
Current Maturity Date	10/01/2047	Post-Modification Maturity Date	06/01/2051
Current Term (months)	360	Post-Modification Terms (months)	360
Current Payment Due Date	First of Month	Post-Modification Due Date	06/01/2021
Current Payment Amount	\$1,722.25	Estimated Post-Modification Amount (with escrow)	\$1,569.48
Current Interest Rate	3.875%	Post-Modification Interest Rate	2.875%

This motion will be GRANTED. Debtors are authorized, but not required, to complete the loan modification with Lender. Debtors shall continue making plan payments in accordance with their confirmed chapter 13 plan. Debtors must modify the plan if the payments under the modified loan prevent them from paying under the plan.

1. [20-13822](#)-A-7 **IN RE: FAUSTO CAMPOS AND VERONICA NAVARRO**
[21-1006](#)

STATUS CONFERENCE RE: AMENDED COMPLAINT
5-6-2021 [[18](#)]

RAMIREZ V. CAMPOS
PAMELA THAKUR/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

2. [19-11430](#)-A-7 **IN RE: VINCENT/CAROL HERNANDEZ**
[20-1055](#)

PRE-TRIAL CONFERENCE RE: COMPLAINT
8-27-2020 [[1](#)]

SALVEN V. HERNANDEZ ET AL
RUSSELL REYNOLDS/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to January 27, 2022, at 11:00 a.m. for further
status conference

ORDER: The court will issue an amended scheduling order.

Pursuant to the joint motion to modify the scheduling order filed on July 23, 2021 ("Joint Motion"), Doc. #43, discovery is reopened as to the plaintiff and defendant Oscar Rios only. The deadline to complete fact discovery between the plaintiff and defendant Oscar Rios is 5:00 p.m. PST on December 17, 2021.

Also pursuant to the Joint Motion, this pre-trial conference is vacated. A further status conference in this adversary proceeding will be set for January 27, 2022, at 11:00 a.m. Not later than January 20, 2022, the plaintiff shall file and serve a status report.

The court will issue an amended scheduling order.

3. [18-14542](#)-A-7 **IN RE: LARRY SELL**
[19-1025](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-15-2019 [\[1\]](#)

THE LEAD CAPITAL, LLC V. SELL
DERRICK COLEMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 18, 2021, at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the joint status conference statement filed on July 23, 2021, Doc. #52, the status conference will be continued to November 18, 2021, at 11:00 a.m.

The parties shall file either joint or unilateral status report(s) not later than November 10, 2021.

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

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

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

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

DISPOSITION: Continued to February 24, 2022, at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the joint status conference statement filed on July 21, 2021, Doc. #89, the status conference will be continued to February 24, 2022, at 11:00 a.m.

The parties shall file either joint or unilateral status report(s) not later than February 17, 2022.

5. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[21-1023](#)

STATUS CONFERENCE RE: COMPLAINT
5-26-2021 [[1](#)]

U.S. TRUSTEE V. NICOLE
JUSTIN VALENCIA/ATTY. FOR PL.

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

DISPOSITION: Continued to August 12, 2021, at 11:00 a.m.

ORDER: The court will issue an order.

This status conference will be continued to August 12, 2021, at 11:00 a.m. to be heard in conjunction with the motion to dismiss scheduled on that date.

6. [17-12389](#)-A-7 **IN RE: DON ROSE OIL CO., INC.**
[17-1086](#)

CONTINUED PRE-TRIAL 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.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Retain jurisdiction over adversary proceeding and set further pre-trial conference.

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

On March 10, 2021, plaintiff and counterclaimant Hellenic Petroleum, LLC ("Hellenic") became subject to an involuntary chapter 7 bankruptcy filed in the Southern District of Florida. Doc. #534. On May 7, 2021, the bankruptcy judge in the involuntary bankruptcy case granted partial relief from stay to permit this court "to conduct proceedings to determine its subject matter jurisdiction over [this adversary proceeding]." Ex. A, Doc. #547.

On June 7, 2021, Hellenic filed a voluntary chapter 11 bankruptcy case in the Southern District of Florida. Doc. #558. On June 21, 2021, the bankruptcy judge in Hellenic's voluntary bankruptcy case granted partial relief from stay to permit this court "to conduct proceedings to determine its subject matter jurisdiction over [this adversary proceeding]." Ex. 1, Doc. #569.

This adversary proceeding commenced on November 17, 2017 by the filing of the original complaint. Doc. #1. The remaining claims in dispute involve determining the rights of various parties in two agreements entered into in or about February 2017. The first agreement is the Settlement Agreement and Release ("Settlement Agreement") dated February 10, 2017. Ex. H to Second Am. Complaint, Doc. #133. The second agreement is the Intercreditor, Subordination and Waterfall Payment Agreement ("Intercreditor Agreement") between Sallyport

Commercial Finance, LLC ("Sallyport") and Hellenic dated February 20, 2017. Ex. I to Second Am. Complaint, Doc. #133. The remaining claims in this adversary proceeding are:

- (a) Count 5 of the second amended complaint filed by Hellenic on September 5, 2018 (Doc. #131) against Sallyport, DRO Barite LLC ("DRO Barite"), and Randell Parker, as the successor chapter 7 trustee in the Don Rose Oil Case ("Trustee");
- (b) Counterclaims 1 and 2 filed by Sallyport on December 12, 2018 (Doc. #211) against Hellenic, Kodiak Mining & Minerals II, LLC ("Kodiak") and Panagiotis Kechagias ("Kechagias"); and
- (c) First amended counterclaims 1, 2, 3, 4, 6, 7 and 8 filed by Trustee on January 9, 2019 (Doc. #228) against Hellenic, Kodiak, Kechagias and Consolidated Resources, Inc. ("CRI"). Sallyport is the successor in interest to Trustee's counterclaims and is the real party in interest as to Trustee's counterclaims. Doc. #519.

Turning to the merits of the question for which partial relief from stay has been granted, this court previously continued the pre-trial conference in this adversary proceeding so the parties could address this court's continued "related to" jurisdiction over this adversary proceeding based on:

- (a) the sale of the bankruptcy estate's claims in this adversary proceeding to Sallyport Commercial Finance, LLC;
- (b) the filing of Trustee's Final Report on January 12, 2021, in the underlying chapter 7 bankruptcy case ("Don Rose Oil Case") (Bankr. Doc. #1192) showing that the Don Rose Oil Case is administratively insolvent at the chapter 7 administrative claim level;
- (c) the imminent closing of the Don Rose Oil Case; and
- (d) the request of the chapter 7 trustee in the Don Rose Oil Case to be dismissed as a party to this adversary proceeding.

The court has considered the pleadings filed by the parties and cases cited herein. Upon due consideration and for the reasons set forth below, the court determines that:

- (1) In the Ninth Circuit, subject matter jurisdiction over this adversary proceeding is determined as of the date that the complaint or counterclaim was filed.
- (2) Under applicable authority, this court continues to retain jurisdiction over "arising under" or "arising in" claims notwithstanding the status of the Don Rose Oil Case.
- (3) Under applicable authority and based upon considerations of judicial economy, fairness, convenience, and comity, this court should continue to exercise its "related to" jurisdiction over any remaining claims in this adversary proceeding notwithstanding the status of the Don Rose Oil Case.

The subject matter jurisdiction of a bankruptcy court originates with 28 U.S.C. § 1334. Section 1334(a) grants original jurisdiction to the district court over all bankruptcy cases, and § 1334(b) grants original but non-exclusive jurisdiction to the district court over all civil proceedings that

arise under title 11, arise in title 11, or relate to cases under title 11.
28 U.S.C. § 1334.

The subject matter jurisdiction of a bankruptcy court in an adversary proceeding is determined as of the date the complaint or counterclaim is filed. Fietz v. Great Western Savings (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988). Events that occur after the complaint or counterclaim are filed, even if such events create or cure jurisdiction defects, generally do not dictate a bankruptcy court's subject matter jurisdiction. Id. This court has previously determined that it has jurisdiction over this adversary proceeding. Scheduling Order dated May 3, 2019, Doc. #304.

A bankruptcy court retains jurisdiction over civil proceedings arising under title 11 or arising in title 11 after dismissal or final administration of the underlying bankruptcy case. Brookview Apts., L.L.C. v. Hoer (In re Know Weigh, L.L.C.), 576 B.R. 189, 203 (Bankr. C.D. Cal. 2017). Consequently, to the extent that the remaining claims arise under or arise in title 11, this court retains subject matter jurisdiction over those claims notwithstanding final administration of the Don Rose Oil Case.

Likewise, dismissal or final administration of the underlying bankruptcy case does not automatically terminate the bankruptcy court's jurisdiction over civil proceedings related to title 11. Linkway Inv. Co. v. Olsen (In re Casamont Investors), 196 B.R. 517, 522 (B.A.P. 9th Cir. 1996). Rather, "[t]he bankruptcy court may retain jurisdiction over a related proceeding subject to considerations of judicial economy, fairness, convenience and comity." Id. Here, the court finds that considerations of judicial economy, fairness, convenience and comity support this court retaining subject matter jurisdiction over all "related to" claims in this adversary proceeding.

1. Judicial Economy

The judicial economy factor requires "consideration of the efficiency of judicial resources[.]" Know Weigh, 576 B.R. at 202. Where related proceedings have been pending for several years and the bankruptcy court and parties have substantially litigated the action, the judicial economy factor favors the bankruptcy court retaining jurisdiction over the related proceedings. Casamont Investors, 196 B.R. at 524.

This adversary proceeding commenced on November 17, 2017, and has been pending for nearly four years in this court. Doc. #1. A scheduling order setting disclosure and discovery deadlines, a deadline to file dispositive motions and a pre-trial conference was filed on May 3, 2019. Doc. #304. This court has determined previously that this adversary proceeding is a mix of core and noncore claims. Scheduling Order dated May 3, 2019, Doc. #304. Specifically, with respect to the remaining claims, this court has determined that:

- (a) Count 5 of the second amended complaint [declaratory relief] is core based on 11 U.S.C. §§ 510, 726;
- (b) Count 1 of Sallyport's counterclaim [breach of the Intercreditor Agreement] is noncore;
- (c) Count 2 of Sallyport's counterclaim [declaratory relief] is core based on 11 U.S.C. §§ 510, 726;
- (d) Count 1 of Trustee's counterclaim [avoidance of the settlement payment under 11 U.S.C. § 547] is core based on In re Miskowicz, 513 B.R. 553, 557 (Bankr. N.D. Ill. 2014);

- (e) Count 2 of Trustee's counterclaim [avoidance of the settlement payment under 11 U.S.C. § 548(a)(1)(B)] is noncore;
- (f) Count 3 of Trustee's counterclaim [trustee's rights as a perfected lien creditor under 11 U.S.C. § 544] is core;
- (g) Count 4 of Trustee's counterclaim [damages under 11 U.S.C. § 303] is noncore;
- (h) Count 6 of Trustee's counterclaim is [declaratory relief] noncore;
- (i) Count 7 of Trustee's counterclaim is core [recovery of avoided transfer of the settlement payment under 11 U.S.C. § 550]; and
- (j) Count 8 of Trustee's counterclaim is core [disallowance of claims under 11 U.S.C. § 502].

Scheduling Order dated May 3, 2019, Doc. #304.

Sallyport and Kechagias do not consent to the entry of final orders and judgment by the bankruptcy court in noncore matters. Id. Based on the parties involved in counterclaims previously determined to be noncore, the three counterclaims for which consent to this court entering a final order is lacking are: (a) Count 1 of Sallyport's counterclaim; (b) Count 4 of Trustee's counterclaim; and (c) Count 6 of Trustee's counterclaim. Even though this court may not be able to enter final judgment on all remaining claims for relief, this court can try all remaining claims and issue proposed findings of fact and conclusions of law with respect to the noncore matters for which there is no consent to entry of final judgment by this court.

Cross motions for summary judgment were filed in August 2020 and October 2020. Doc. ##435-454, 456-473, 475-480, 482-487, 490-492. After extensive briefing and oral argument, the cross-summary judgment motions were taken under submission. Court audio, Doc. #493; Doc. ##496, 497. In lengthy oral decisions read into the record on December 30, 2020, partial summary judgment was granted by this court with respect to one motion and the other motion was denied. Court audio, Doc. ##505, 506; Doc. ##507, 508. At the request of the parties prior to learning that an involuntary bankruptcy petition had been filed against Hellenic, this court had reserved two weeks in August 2021 to try this adversary proceeding. Court audio, Doc. #531. It would not be a serious inconvenience for or substantial strain on this court's resources to dedicate the estimated two weeks needed to try the remaining claims in this adversary proceeding or issue the final judgment and proposed findings of fact and conclusions of law for those remaining claims for which there is no consent to this court entering final judgment.

Based on the status of the litigation before this court, including the fact that this adversary proceeding was set for trial in this court, this court finds that the judicial economy factor favors this court retaining subject matter jurisdiction retention over the adversary proceeding notwithstanding the status of the Don Rose Oil Case.

2. Convenience

The convenience factor requires "consideration of the parties' litigation efforts and access to alternative forums[.]" Know Weigh, 576 B.R. at 202.

Not all claims in this adversary proceeding could be re-filed and pursued in state court. For example, count 4 of Trustee's counterclaim is based on damages arising from the alleged bad faith filing of the involuntary petition against Debtor. The Ninth Circuit Court of Appeals has held that "11 U.S.C. § 303 completely preempts state law tort actions for damages predicated upon the filing of an involuntary bankruptcy petition." Miles v. Okun (In re Miles), 430 F.3d 1083, 1092 (9th Cir. 2005). Thus, if this court did not retain subject matter jurisdiction over this adversary proceeding, Sallyport, as assignee of Trustee's counterclaims, could not pursue count 4 of Trustee's counterclaim. Likewise, count 1 of Trustee's counterclaim under 11 U.S.C. § 547 likely would face a statute of limitations defense if claims in this adversary proceeding had to be re-filed.

Based on the fact that this adversary proceeding is ready to be tried in this court and not all remaining claims could be filed in an alternative forum, the convenience factor favors this court retaining subject matter jurisdiction over this adversary proceeding notwithstanding the status of the Don Rose Oil Case.

3. Fairness

The fairness factor requires "consideration of the equity and circumstances of a particular case[.]" Know Weigh, 576 B.R. at 202.

Here, requiring the parties to start litigating the claims remaining in this adversary proceeding in another forum would be unfair. Moreover, based on the extensive cross-motions for summary judgment and the fact that this adversary proceeding is ready for trial, not retaining jurisdiction over this adversary proceedings would significantly delay adjudication of the remaining claims. The fairness factor favors this court retaining subject matter jurisdiction over this adversary proceeding notwithstanding the status of the Don Rose Oil Case.

4. Comity

The comity factor requires "consideration of whether the state laws involved are complex such that they ought to be construed by state trial courts and reviewed by state appellate courts." Know Weigh, 576 B.R. at 202.

Here, the parties agree that determination of Hellenic's asserted rights to the barite mining claims and rights under the Settlement Agreement will draw upon California law, including California statute of frauds, California's recording statutes, and California's equitable lien theory. In addition, Sallyport asserts that the Intercreditor Agreement is governed by Texas law. Trustee's counterclaims largely involve federal bankruptcy law.

While Hellenic, Kodiak, Kechagias and CRI assert that the California state law issues are quite complex, this court finds that the legal issues underlying the remaining claims in this adversary proceeding are not so complex that the remaining claims ought to be construed by state trial courts and reviewed by state appellate courts. Accordingly, the comity factor favors this court retaining subject matter jurisdiction over this adversary proceeding notwithstanding the status of the Don Rose Oil Case.

Accordingly, based on considerations of judicial economy, fairness, convenience and comity, the court is inclined to retain subject matter jurisdiction over this adversary proceeding notwithstanding the status of the Don Rose Oil Case.