UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Thursday, August 23, 2018
Place: Department B – Courtroom #13
Fresno, California

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. 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. 17-10327-B-12 **IN RE: EDWARD/LISA UMADA**
FW-11

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER L. FEAR, DEBTORS ATTORNEY(S)
7-23-2018 [325]

PETER FEAR

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 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 amount of damages). Televideo Systems, 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 motion will be GRANTED. Debtor's bankruptcy counsel, Fear Waddell, P.C., requests fees of $100,780.00 and costs of $2,298.16 for a total of $103,078.16 for services rendered as debtor's counsel from July 1, 2017 through June 30, 2018.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) Litigating relief from stay proceedings regarding the sale of two

parcels of agricultural land, (2) Preparing plans and disclosure statements, (3) Financing and advising debtor's principals about the use of cash collateral, (4) Preparing fee and employment applications, and (5) Analyzing and working on asset disposal. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded fees of $100,780.00 and costs of $2,298.16.

2. 17-10327-B-12 **IN RE: EDWARD/LISA UMADA**
FW-14

CONTINUED MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER A. SAUER, DEBTORS ATTORNEY(S)
3-29-2018 [279]

PETER FEAR
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion. Doc. #336.

3. 18-11166-B-11 **IN RE: JOSE/MARY VALADAO**
DS-1

MOTION FOR COMPENSATION FOR SOUSA AND COMPANY, ACCOUNTANT(S)
7-26-2018 [145]

SOUSA & COMPANY, LLP/MV
RILEY WALTER

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 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 amount of damages).

Televideo Systems, 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.

Movant shall be awarded fees of $6,039.85.

4. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
WW-43

MOTION TO EXTEND TIME
7-26-2018 [612]

TULARE LOCAL HEALTHCARE DISTRICT/MV
RILEY WALTER

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 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 amount of damages). Televideo Systems, 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 is GRANTED. Pursuant to 11 U.S.C. § 365(d)(4)(B)(ii), the deadline to assume or reject nonresidential real property leases is extended from August 27, 2018 to November 25, 2018. If an unexpired lease has not been assumed on or before that date, the lease shall be deemed rejected.

1:30 PM

1. 18-12702-B-13 **IN RE: YANET CASARRUBIAS**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-6-2018 [14]

THOMAS GILLIS

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fee in the amount of $80.00 was paid on August 13, 2018. Therefore, the OSC will be vacated.

The order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

2. 18-12205-B-13 **IN RE: DEQUAN/ALEXIS KELSEY**
MHM-3

MOTION TO DISMISS CASE
7-23-2018 [22]

MICHAEL MEYER/MV
JOEL WINTER

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

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

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). 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 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 the debtors have failed to make all payments due under the plan. 11 U.S.C. § 1307(c)(1) and/or (c)(4). Accordingly, the case will be dismissed.

3. 18-13105-B-13 **IN RE: MATTHEW ESCALANTE**
DMG-2

MOTION TO EXTEND AUTOMATIC STAY
8-2-2018 [10]

MATTHEW ESCALANTE/MV
D. GARDNER

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 the order.

This Motion to Extend the Automatic Stay was properly set for hearing on the notice required by LBR 9014-1(f)(2). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Under 11 U.S.C. § 362(c)(3)(A), the automatic stay under subsection (a) of this section 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 later case.

This case was filed on July 30, 2018 and the automatic stay will expire on August 29, 2018. 11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction

that the thrust 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 [the non-moving party] offered in opposition." Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 (9th Cir. BAP 2016) (citations omitted).

In this case the presumption of bad faith arises. The debtor's previous case was dismissed February 9, 2018. The subsequently filed case is presumed to be filed in bad faith because the prior case was dismissed on the grounds that the debtor failed to perform the terms of a plan confirmed by the court. 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc).

However, based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the presumption has been rebutted, the debtors' petition was filed in good faith, and it intends to grant the motion to extend the automatic stay as to all creditors.

Debtor previously filed chapter 7 on December 14, 2016, and was converted to chapter 13 on May 16, 2017. A plan was confirmed on November 8, 2017 but the case was dismissed on February 9, 2018 for failure to make plan payments. Debtor faced a number of health problems that made it difficult to maintain chapter 13 plan payments. However, debtor's brother and extended family have been and will continue to support him, and his health has improved, making consistent employment easier.

The motion will be granted and the automatic stay extended for all purposes as to all parties who received notice, unless terminated by further order of this court. 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.

4. 14-14711-B-13 **IN RE: JEFFREY/LORI DOWNUM**
JRL-1

MOTION TO SUBSTITUTE DEBTOR AS SUCCESSOR TO CO-DEBTOR, TO CONTINUE ADMINISTRATION OF CASE, FOR EXEMPTION FROM FINANCIAL MANAGEMENT COURSE, FOR WAIVER OF THE CERTIFICATION REQUIREMENTS FOR ENTRY OF DISCHARGE FOR JOINT DEBTOR, LORI LEIGH DOWNUM
7-20-2018 [24]

JEFFREY DOWNUM/MV
JERRY LOWE

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 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 amount of damages). Televideo Systems, 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 is GRANTED. Jeffrey Downum shall be substituted as Co-debtor to Lori Downum, and the court waives the post-petition education requirement and the certification requirements for entry of discharge as to Co-debtor. The court finds that under FRBP 1016 further administration of the case is possible. The death of Ms. Downum did not result in a plan default, or if one occurred, it has been remedied. Mr. Downum has maintained payments even after Ms. Downum's demise. The court also finds continuing the case is in the best interest of the parties. There are only two Plan payments left. Dismissal will not benefit anyone.

5. 16-12421-B-13 **IN RE: INEZ SEARS**
TCS-3

CONTINUED MOTION TO MODIFY PLAN
6-12-2018 [56]

INEZ SEARS/MV
TIMOTHY SPRINGER
RESPONSIVE PLEADING

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion is DENIED AS MOOT. Debtor has filed another modified plan, set for confirmation hearing on September 13, 2018. Doc. #69 (TCS-4).

6. 18-10222-B-13 **IN RE: DOMINIC BURRIEL**
AP-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY CALIFORNIA FIELD IRONWORKERS TRUST FUNDS
3-13-2018 [29]

BOARD OF TRUSTEES OF THE
CALIFORNIA IRONWORKERS FIELD
PETER FEAR
CHRISTOPHER MCDERMOTT/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. Debtor withdrew the plan (doc. #114) and filed a modified plan (doc. #109).

7. 18-10222-B-13 **IN RE: DOMINIC BURRIEL**
MHM-4

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY MICHAEL H. MEYER
7-17-2018 [84]

MICHAEL MEYER/MV
PETER FEAR
RESPONSIVE PLEADING

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. Debtor withdrew the plan (doc. #114) and filed a modified plan (doc. #109).

8. 18-10222-B-13 **IN RE: DOMINIC BURRIEL**
RMP-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY CREDITOR DITECH FINANCIAL LLC
2-28-2018 [18]

DITECH FINANCIAL LLC/MV
PETER FEAR
JAMES LEWIN/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. Debtor withdrew the plan (doc. #114) and filed a modified plan (doc. #109).

9. 17-13530-B-13 **IN RE: JAI LEE**
FW-1

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL FOR PETER L. FEAR, DEBTORS ATTORNEY(S)
7-9-2018 [22]

PETER FEAR

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 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 amount of damages). Televideo Systems, 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.

Movant is awarded attorney's fees of $2,734.96 and costs of $379.46.

The court reminds counsel of LBR 9004-2(c)(1), which requires that motions, exhibits, *inter alia*, to be filed as separate documents. Here, the motion and exhibits were combined into one document and not filed separately.

10. 17-13832-B-13 **IN RE: DAVID BISHOP AND TIESHA GILL**
FW-2

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER L. FEAR, DEBTORS ATTORNEY(S)
7-9-2018 [51]

PETER FEAR

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 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 amount of damages). Televideo Systems, 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.

Movant is awarded attorney's fees of $3,830.50 and costs of $364.91.

The court reminds counsel of LBR 9004-2(c)(1), which requires that motions, exhibits, *inter alia*, to be filed as separate documents. Here, the motion and exhibits were combined into one document and not filed separately.

11. 17-10236-B-13 **IN RE: PAUL/KATHLEEN LANGSTON**
FW-7

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
7-23-2018 [151]

PETER FEAR

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 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 amount of damages). Televideo Systems, 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 motion will be GRANTED. Debtor's bankruptcy counsel, Gabriel Waddell, requests fees of $39,863.50 and costs of $1,426.09 for a total of $41,289.59 for services rendered as debtor's counsel from August 8, 2016 through June 30, 2018.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) Preparing and filing the bankruptcy petition and schedules, (2) Preparing and filing the first chapter 13 plan and two modified chapter 13 plans, (3) Litigating a motion to value, (4) Administering claims, and (5) preparing and filing fee applications. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded fees of $39,863.50 and costs of $1,426.09.

The court reminds counsel of LBR 9004-2(c)(1), which requires that motions, exhibits, *inter alia*, to be filed as separate documents. Here, the motion and exhibits were combined into one document and not filed separately.

12. 17-13248-B-13 **IN RE: JEANETTE HUMECKY**
MHM-1

OBJECTION TO CLAIM OF CAVALRY SPV I, LLC, CLAIM NUMBER 5
7-2-2018 [49]

MICHAEL MEYER/MV
ROBERT WILLIAMS

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

DISPOSITION: Sustained.

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

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(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 amount of damages). Televideo Systems, 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 objection is SUSTAINED.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states 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. If a party objects to a proof of claim, the burden of proof is on the objecting party. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. BAP 2000).

Here, the movant has established that the statute of limitations in California bars a creditor's action to recover on a contract, obligation, or liability founded on an oral contract after two years and a contract founded on a written instrument after four years. *See* California Code of Civil Procedure §§ 312, 337(1), and 339. A claim that is unenforceable under state law is also not allowed under 11 U.S.C. § 502(b)(1) once objected to. In re GI Indust., Inc., 204 F.3d 1276, 1281 (9th Cir. 2000). Regardless of whether the contract was written or oral, the last transaction on the account according

to the evidence was in July of 2012, which is well past the two and four year mark under the pertinent statutes of limitations.

Claim no. 5 filed by Cavalry SPV I, LLC is disallowed in its entirety.

13. 17-13150-B-13 **IN RE: GERARDO CORONA AND GUADALUPE SERRATO**
MHM-2

OBJECTION TO CLAIM OF CAVALRY SPV I LLC, CLAIM NUMBER 10
7-2-2018 [59]

MICHAEL MEYER/MV
THOMAS GILLIS

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

DISPOSITION: Sustained.

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

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(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 amount of damages). Televideo Systems, 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 objection is SUSTAINED.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states 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. If a party objects to a proof of claim, the burden of proof is on the objecting party. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. BAP 2000).

Here, the movant has established that the statute of limitations in California bars a creditor's action to recover on a contract,

obligation, or liability founded on an oral contract after two years and a contract founded on a written instrument after four years. *See* California Code of Civil Procedure §§ 312, 337(1), and 339. A claim that is unenforceable under state law is also not allowed under 11 U.S.C. § 502(b)(1) once objected to. In re GI Indust., Inc., 204 F.3d 1276, 1281 (9th Cir. 2000). Regardless of whether the contract was written or oral, the last transaction on the account according to the evidence was in July of 2009, which is well past the two and four year mark in the statutes of limitations.

Claim no. 10 filed by Cavalry SPV I, LLC is disallowed in its entirety.

14. 18-12050-B-13 **IN RE: GENEVIEVE SANTOS**
MHM-3

MOTION TO DISMISS CASE
7-19-2018 [36]

MICHAEL MEYER/MV
JANINE ESQUIVEL
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion. Doc. #47.

15. 18-12357-B-13 **IN RE: ANGEL RODRIGUEZ**
AP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY
7-24-2018 [18]

BANK OF AMERICA, N.A./MV
SCOTT LYONS
WENDY LOCKE/ATTY. FOR MV.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion. Doc. #34.

16. 18-12260-B-13 **IN RE: ALVINA FISCHER**
JFL-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DITECH FINANCIAL LLC
6-14-2018 [8]

DITECH FINANCIAL LLC/MV
RABIN POURNAZARIAN
JAMES LEWIN/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

17. 18-12265-B-13 **IN RE: ROBERTO JAUREGUI**
TOG-2

MOTION TO CONFIRM PLAN
7-12-2018 [28]

ROBERTO JAUREGUI/MV
THOMAS GILLIS
DISMISSED

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order dismissing the case has already been entered. Doc. #42.

18. 17-13168-B-13 **IN RE: DIEGO/KAROL ROSPIGLIOSI**
FW-2

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR GABRIEL J. WADDELL, DEFENDANTS ATTORNEY(S)
7-23-2018 [30]

GABRIEL WADDELL

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 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 amount of damages). Televideo Systems, 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.

Movant is awarded attorney's fees of $2,837.00 and costs of $349.14.

The court reminds counsel of LBR 9004-2(c)(1), which requires that motions, exhibits, *inter alia*, to be filed as separate documents. Here, the motion and exhibits were combined into one document and not filed separately.

19. 18-10973-B-13 **IN RE: GLENN BEVER**
GWB-1

SECOND AMENDED OBJECTION TO CLAIM OF CITIMORTGAGE, INC., CLAIM NUMBER 1
7-31-2018 [73]

GLENN BEVER/MV
NANCY KLEPAC
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Overruled.

ORDER: The court will issue the order.

This objection is OVERRULED.

This objection is overruled for both procedural and substantive reasons.

Local Rule of Practice 9004-2(c)(1) requires that motions, exhibits, *inter alia*, be filed as separate documents. Here, the motion, exhibits, and proof of service were combined into one document and not filed separately.

Substantively, debtor makes several arguments in this objection.

The arguments raised by the objector mirror almost exactly those arguments made in opposition to claimant's motion under FRCP 12 (b)(6) to dismiss an adversary proceeding (No. 18-01034) in which objector is a plaintiff. The court granted that motion as to all claims raised by objector here without leave to amend. (Adv. Proc. doc. # 33). The court incorporates the ruling here.

First, debtor argues that the proof of claim "fails to set forth any documentation demonstrating that the filer of the claim is the holder of a secured loan on debtor's property or that CitiMortgage, Inc. ("Creditor") has a valid interest therein." Doc. #73.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states 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. If a party objects to a proof of claim, the burden of proof is on the objecting party. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. BAP 2000).

To overcome the presumption of validity, "the objector must come forward with sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the proofs of claim themselves.'" Lundell at pg. 1039 (citing Wright v. Holm (In re

Holm), 931 F. 2d 620, 623 (9th Cir. 1991)). The presumption is rebuttable. Litton Loan Servicing, LP v. Garvida (In re Garvida), 347 B.R. 697, 706 (9th Cir. BAP 2006) "If the objector produces sufficient evidence to negate on or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." Id. (quoting Ashford v. Consol. Pioneer Mortg. (In re Consol. Pioneer Mortg.), 178 B.R. 222, 226 (9th Cir. BAP 1995)).

There is no dispute that claimant properly prepared signed and filed the proof of claim in accord with the Federal Rules of Bankruptcy Procedure. Objector therefore has the burden to show with evidence that the claim is somehow legally challenged. Other than the argument we have dispensed with dealing with the documentation of the security interest, objector's arguments have all been litigated before the bankruptcy case and courts have decided the issues against objector. The claim allowance process does not permit casting aside prior rulings between the parties or their privies.

Not only does the court find that Creditor included sufficient documents supporting the proof of claim to show their security interest, but, the debtor has not met his burden of proof to show that this objection should be sustained.

Second, debtor argues the Deed of Trust included with the proof of claim states that First Pacific Financial, Inc. ("FPF") is the Lender and Mortgage Electronic Registration Systems, Inc. ("MERS") is acting only as nominee for FPF. Doc. #73. The Allonge to the Note is "endorsed in blank by [Citi], and can only be enforced by one in possession. *Id*. However, the Note is void and unenforceable" says the debor, because he rescinded the loan transaction pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635(f) on May 6, 2004 by mailing notice to FPF. *Id*. The recission was not contested and therefore, the debtor claims, the note and deed of trust became void pursuant to 15 U.S.C. § 1635(b). *Id*.

This objection is overruled because it is barred by res judicata.

"Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or *could* have been raised in the prior action." W. Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (emphasis added). Res judicata applies whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *Id*. at 1192.

Before this bankruptcy case, the debtor sued claimant, Citi Mortgage twice.

He first sued claimant on September 20, 2011, just one week before a scheduled foreclosure sale, ("First Lawsuit") in the District Court for the Eastern District of California. After four years of litigation, judgment was entered in favor of claimant and MERS (doc. #76) and affirmed by the Ninth Circuit Court of Appeals (*id.)*.

The debtor again sued claimant on January 19, 2016 ("Second Lawsuit"). *Id.* That complaint asserted three causes of action: violation of the FDCPA, 15 U.S.C. § 1629(e)(5) (against Quality Loan Service Corporation only), violation of the Rosenthal Fair Debt Collection Practices Act (against claimant only), and declaratory relief (against claimant only). The complaint, like this objection, was reliant upon the allegation that the debtor sent a notice of recission to the original lender on May 6, 2004. *Id*. The court granted claimant's motion to dismiss, concluding that the debtor's claims were precluded by res judicata, stating that

> [P]laintiffs [debtor here] could have raised this claim in the prior action. The prior action dealt with the same loan and addressed the lender's authority to foreclose on the Tenaya Property. Whether the loan had been rescinded prior to [Defendant's] attempted foreclosure upon the property would naturally have fallen within the scope of that action. *Id*.

Debtor appealed, and the Ninth Circuit again affirmed.

Judgment in the First Lawsuit was entered in favor of claimant with regard to debtor's claims based on the loan's origination and claimant's authority to enforce the deed of trust and initiate foreclosure. Judgment in the Second Lawsuit was entered in favor of claimant with regard to debtor's claims based on alleged recission of the loan were barred by res judicata and in any event, failed as a matter of law. *Id*.

In this objection, all the elements of res judicata as to all of debtor's arguments to the extent they are based on alleged voidness of the deed of trust are satisfied.

First, there is an identity of claims. Debtor asserts the exact same theory that was rejected in his second lawsuit, namely, that debtor's notice of recission essentially withdrew the authority of Creditor to act on the note or deed of trust.

Second, these arguments were finally adjudicated on their merits. The District Court for the Eastern District of California entered judgment in favor of Creditor in both lawsuits. The Ninth Circuit Court of Appeals also affirmed the District Court's rulings.

Third, there is identity and privity between the parties because debtor prosecuted the previous lawsuits.

This "voidness" objection fails not only because of res judicata, but on independent grounds. Any action to enforce the recission or seek damages for failure to accept recission must be filed within one year of the creditor's refusal to accept recission. Gilbert v. Residential Funding LLC, 678 F.3d 271, 278-79 (4th Cir. 2012). If the creditor does not respond to the borrower's notice of recission, the one-year statute of limitations begins to run 20 days after the request for recission, when creditor's response was due. *Id.*; 15 U.S.C. § 1635(f). Here, debtor allegedly provided notice on May 6, 2004, so the time to enforce the recission is untimely, and their

claim under TILA has expired. The date debtor allegedly provided notice was May 6, 2004. The one year statute of limitations expired near the end of May 2005. It is implausible the dates can be considered incorrect by thirteen (13) years.

Third, debtor argues in his claim objection the assignment of the deed of trust recorded May 27, 2011 is void on its face because the deed of trust became void on May 6, 2004 so MERS had nothing to assign and the assignment "purports to assign unidentifiable mortgage records in Fresno County." Doc. #73.

As explained above, the deed of trust did not become void on May 6, 2004, and the assignment from MERS does describe the documents as "executed by GLENN W. BENER AND KAREN L. BEVER, HUSBAND AND WIFE AS JOINT TENANTS dated 06/4/2003 filed 06/20/2003 and recorded in Official Records INS-2003-0141929." Doc. #73.

Fourth, debtor argues that MERS is a nominee, and could not have assigned the note and deed of trust because by the time it purported to assign them, FPF ceased to exist.

But debtor, with his wife, executed the deed of trust, which, in part, approved MERS' role as a beneficiary under the deed of trust. *Id.* California courts have consistently upheld MERS as a beneficiary in the capacity of a nominee for the lender and its sucessors and assigns. *See* Calvo v. HSBC Bank USA, N.A., 199 Cal. App. 4th 118, 130 Cal. Rptr. 3d 815 (2011); Lane v. Vitek Real Estate Indus. Grp., 713 F. Supp. 2d 1092 (E.D. Cal. 2010); and Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 273 129 Cal. Rptr. 3d 467 (2011) (overruled on other grounds in Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919 (2016). California courts have also found that one of the powers MERS has is to assign the deed of trust. *See* California Civil Code § 2934; Herrera v. Fed. Nat'l Mortg. Ass'n, 205 Cal.App.4th 1495, 1506 (2012) (disapproved on other grounds in Yvanova v. New Century Mortg. Corp., 62 Cal. 4th 919 (2016)).

Fifth, debtor argues that the response he received from Citi dated February 28, 2012 failed to reflect Citi's purported interest and "lack[ed] the endorsements shown on the Allonge that is attached to its proof of claim," and that therefore shows that Citi acted with unclean hands. Doc. #73.

Debtor cites no legal authority in support of this argument. And the Eastern District of California has already dealt with this issue, stating "[m]erely raising a question based on a copy from a file obtained in discovery in another case does not establish a likelihood of prevailing on the issue that there is not an allonge documenting the transfer of the Note to Deutsche Bank." Macklin v. Deutsche Bank Nat'l Tr. Co. (In re Macklin), Nos. 10-44610-E-7, 11-2024, 2011 Bankr. LEXIS 1877, at *24 (Bankr. E.D. Cal. May 19, 2011). This argument is not persuasive.

To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) "that the plaintiff's conduct is inequitable;" and (2)"that the conduct relates to the subject matter of [the plaintiff's] claims."

Fuddruckers, Inc v. Doc's B.R. Others, Inc., 826 F. 2d 837, 847 (9th Cir. 1987) (citing CIBA-GEIGY Corp. v. Bolar Pharm., 747 F. 2d 844, 855 (3d Cir. 1984)); see also Trafficschool.com, Inc. v. Edriver, Inc., 653 F. 3d 820, 833 (9th Cir. 2011) (holding that a defendant must demonstrate that an unclean hands defense applies with "clear and convincing evidence"). The first element requires a showing of wrongfulness, willfulness, bad faith or gross negligence. Pfizer, Inc. v. Int'l Rectifier Corp., 685 F. 2d 357, 359 (9th Cir. 1982). Debtor here shows none of that by either "clear and convincing" evidence or a preponderance. The debtor's only repeat the same arguments that have been previously litigated. Besides, no evidence is presented that any bad acts or intentional omissions of the claimant caused a lack of allonge endorsements on the pertinent documents.

Proof of the second element is also absent. "The [unclean hands] defense should only be applied 'where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.'" POM Wonderful LLC v. Coca Cola Co., 166 F. Supp. 3d 1085, 1091 (C.D. Cal. 2016) quoting U-Haul International Inc. v. Jartran, Inc., 522 F. Supp. 1238, 1254 (D. Ariz. 1981), aff'd 681 F. 2d 1159 (9th Cir. 1982) (citing Ames Publ'g Co. v. Walker-Davis Publ'ns, Inc., 372 F. Supp. 1, 13-15 (E.D. Pa. 1974). Objector provides no evidence of any act of claimant related to the claim asserted. Instead objector simply raises the challenge without providing evidence supporting the objection. Nothing alleged by objector amounts to any unconscionable activity by CitiMortgage enforcing its rights. The court has looked at these issues before (indeed three other courts have as well) and no wrongful activity has been found on the part of claimant.

Sixth, debtor argues that the assignment of deed of trust recorded October 8, 2015 only assigns the deed, and not the note, and not only for reasons mentioned above that have been dispensed with, but because assigning a deed of trust without the note is "a nullity," Citi does not have a security interest in the home. Doc. #73.

Debtor cites Carpenter v. Longan, 83 U.S. 271 (1872) in support of their argument. Carpenter stated that "assignment of the [mortgage] alone is a nullity." *Id.* at 274. However, at least two District Courts have distinguished Carpenter in cases where the mortgage was in default. *See* Calvino v. Conseco Fin. Servicing Corp., 2013 U.S. Dist. LEXIS 124343 at 20 (W.D. Tex. 2013). The court finds that like the Western District of Texas, Carpenter can be distinguished from the facts of this case because Carpenter analyzed federal common law and Colorado Territory law, which California does not consider in interpreting state law. Additionally, the way in which deeds of trust and mortgages are handled in 2018 are completely different than in 1872, when Carpenter was decided.

Not only are all of debtor's arguments barred by res judicata because they could have been brought prior to this bankruptcy case and meet all the requirements of res judicata, but they each fail on independent grounds. There is no evidence the debtor has been denied a full and fair opportunity to be heard in the courts that have

previously looked at these issues. The claim objection is, at bottom, a collateral attack on the judgments rendered by those courts without factual or legal basis. Because the debtor's arguments are legally invalid, this objection is OVERRULED.

20. 18-10973-B-13 **IN RE: GLENN BEVER**
KLB-1

AMENDED OBJECTION TO CLAIM OF CITIMORTGAGE, INC., CLAIM NUMBER 1
7-31-2018 [71]

KAREN BEVER/MV
NANCY KLEPAC
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Overruled.

ORDER: The court will issue the order.

This objection is OVERRULED.

This matter and matters 19 and 21 on this calendar were filed on the same day and raise the same objections. 11 U.S.C. § 502(a) permits "parties in interest" to object. The court incorporates its ruling on matter 19 here. Objector is the debtor's spouse. She claims an interest in the real property encumbered by claimant's lien.

21. 18-10973-B-13 **IN RE: GLENN BEVER**
SHL-1

AMENDED OBJECTION TO CLAIM OF CITIMORTGAGE, INC., CLAIM NUMBER 1
7-31-2018 [72]

STEVEN LUCORE, SR./MV
NANCY KLEPAC
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Overruled.

ORDER: The court will issue the order.

This objection is OVERRULED.

This matter and matters 19 and 20 on this calendar were filed on the same day and raise the same objections. 11 U.S.C. § 502(a) permits "parties in interest" to object. The court incorporates its ruling on matter 19 here. Objector here is a co-owner of the property encumbered by claimant's lien.

22. 18-10973-B-13 **IN RE: GLENN BEVER**
TCS-3

CONTINUED MOTION TO CONFIRM PLAN
5-7-2018 [38]

GLENN BEVER/MV
NANCY KLEPAC
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 the order.

This motion is DENIED. Constitutional due process requires that the movant make a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

This motion was continued to be heard in conjunction with trustee's motion to dismiss and three objections to proof of claim.

The three objections are all tentatively overruled (GWB-1, KLB-1, and SHL-1, matters ## 19, 20, and 21). Because the objections are tentatively overruled, debtor's proposed chapter 13 plan cannot be approved. Debtor lacks the ability to pay arrearages owed to CitiMortgage, Inc. in the amount of time prescribed under the Bankruptcy Code.

Therefore, this motion is DENIED.

23. 18-10973-B-13 **IN RE: GLENN BEVER**
MHM-1

CONTINUED MOTION TO DISMISS CASE
5-4-2018 [34]

MICHAEL MEYER/MV
NANCY KLEPAC
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was continued to be heard in conjunction with three objections to proof of claim and debtor's continued motion to confirm a chapter 13 plan.

The three objections are all tentatively overruled (GWB-1, KLB-1, and SHL-1, matters ## 19, 20, and 21). Because the objections to claim are tentatively overruled, the motion to confirm plan (TCS-3, matter #24) is tentatively denied. Because the motion to confirm plan is tentatively denied, this motion to dismiss is tentatively granted on the grounds stated in the motion, namely that there has been prejudice to the creditor, especially CitiMortgage, Inc., caused by an unreasonable delay by the debtor for failure to confirm a chapter 13 plan. This case was filed over five months ago and its primary purpose is apparently to challenge Citi Mortgage's claim. Those objections have been overruled.

Therefore, this motion is GRANTED.

24. 16-10080-B-13 **IN RE: MARY MIGLIORE**
GEG-4

MOTION FOR COMPENSATION BY THE LAW OFFICE OF GATES LAW GROUP FOR GLEN E. GATES, DEBTORS ATTORNEY(S)
7-20-2018 [64]

GLEN GATES

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 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 amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a Movant and debtor make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Movant is awarded attorney's fees of $7,215.00.

25. 18-12186-B-13 **IN RE: GAVINO/OLGA CANO**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
8-6-2018 [41]

MARK ZIMMERMAN
DISMISSED

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED. An order dismissing the case was entered on August 3, 2018. Doc. # 42.

26. 18-11094-B-13 **IN RE: ESMERALDA ROCHA**
TGM-1

OBJECTION TO CLAIM OF EUGENIO MEDINA, JR., CLAIM NUMBER 7 (AMENDED)
7-10-2018 [29]

ESMERALDA ROCHA/MV
TRUDI MANFREDO
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 hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 3007-1(b) (1) and will proceed as scheduled. The court notes

that Claimant did not comply with LBR 9004-2(c) (1) requires that motions, exhibits, *inter alia*, be filed as separate documents. Here, the opposition and exhibits were combined into one document and not filed separately. Additionally, it does not appear that Claimant served the opposition and exhibits on Debtor, as the court has not seen a proof of service evidencing such.

To overcome the presumption of validity of a proof of claim that is properly signed and filed, "the objector must come forward with sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the proofs of claim themselves.'" Lundell at pg. 1039 (citing Wright v. Holm (In re Holm), 931 F. 2d 620, 623 (9th Cir. 1991). The presumption is rebuttable. Litton Loan Servicing, LP v. Garvida (In re Garvida), 347 B.R. 697, 706 (9th Cir. BAP 2006) "If the objector produces sufficient evidence to negate on or more of the sworn facts in the proof of claim, the burden reverts to the Claimant to prove the validity of the claim by a preponderance of the evidence." Id. (quoting Ashford v. Consol. Pioneer Mortg. (In re Consol. Pioneer Mortg.), 178 B.R. 222, 226 (9th Cir. BAP 1995).

Debtor objects to the claim of Eugenio Medina, Jr. ("Claimant"). Claimant is Debtor's former spouse. Doc. #31. Claimant filed his claim, claim number 7, on May 9, 2018, in the amount of $25,000.00. Claimant's basis is that he is owed money from a domestic support order. Claimant also states that his claim is entitled to priority under 11 U.S.C. § 507(a).

Debtor objects to this claim on the grounds that it is not entitled to priority status and should be disallowed as a priority claim and allowed as a general unsecured claim. Doc. #29. Debtor states the claim is based on Debtor's and Claimant's "Judgment of Marital Dissolution," ("JMD") which states:

> To equalize the division of property Wife shall pay Husband the sum of $25,000.00 at the rate of $500.00 a month commencing April 1, 2014. However, this equalization payment is stayed until and unless Wife files a request to modify child support. In the event Wife does not file a moton [sic] to modify child support, the equalization payment will be deemed satisfied when Emily Medina emancipates [our youngest child]. [Judgment page 5, lines 24-26, page 6 lines 1-4].

Debtor did eventually file a motion for child support in March 2016, which was granted in May 2017. Doc. #32. Debtor states that Claimant is currently over $10,000.00 in arrears on child support. Doc. #31. According to the JMD, the child support order triggers the Debtor's obligation for the equalization payment.

Claimant timely opposed, arguing that his claim should not be discharged. Doc. #35. However, the relief Debtor is seeking is not to discharge or erase Claimant's claim, but to change its status from priority to general unsecured. Additionally, determining the

dischargeability of a debt can only be done in an adversary proceeding, not in an objection to claim. *See* Federal Rule of Bankruptcy Procedure, 7001(6).

11 U.S.C. § 507 lists the kinds of expenses and claims have priority, and lists them in the order of priority. The first priority is for allowed unsecured claims for domestic support orders.

11 U.S.C. § 101(14A) defines a "domestic support obligation" as a:

> debt that accrues before, on, or after the date of the order for relief…owed to…a…former spouse…in the nature of alimony, maintenance, or support of such…former spouse…without regard to whether such debt is expressly so designated…established…before, on, or after the date of the order for relief…by reason of applicable provisions of…a separation agreement, divorce decree, or property settlement agreement, an order of a court of record, or a determination made in accordance with applicable nonbankruptcy law by a governmental unit….

The question this court must answer then is whether the $25,000.00 claim is a domestic support obligation as defined by the Bankruptcy Code.

The JMD states that "the issue of spousal support is reserved to both parties." Doc. #32. The claim stems from the language in section "J" of the JMD, which states that "to equalize the division of property [Debtor] shall pay [Claimant] the sum of $25,000.00 at the rate of $500.00 a month commencing 4/1/2014." *Id.* The payment, however, was stayed until and unless Debtor filed a request to modify child support.

The court finds that Debtor does owe Claimant a debt that accrued before this bankruptcy case and that the debt is owed to Claimant, Debtor's former spouse, but the court does not find that the debt is "in the nature of alimony, maintenance, or support" of Claimant.

First, the $25,000.00 amount is described under the section of the JMD describing an equalization of "the division of property." This strongly suggests that when the parties entered into the JMD which was eventually ordered, the parties contemplated that the Debtor would owe her ex-spouse a payment primarily to equalize the property division relating to the marital residence.

Second, the $500 per month payment was stayed unless and until the Debtor here sought to modify child support. This suggests that support was a negotiated issue between the parties at the time of the dissolution. Because of the state court's stay order, the suspension of payments until the Debtor made a request to modify child support, evidences that Claimant was not requiring the $500 per month payment for his own maintenance and support.

Third, looking beyond the labels given to payments by the parties in the JMD does not support Claimant's position that the equalization payment should be a priority claim. Generally, the intent of the parties at the time of the marital agreement is dispositive on the issue of whether a payment is in the nature of support. Friedkin v. Sternberg (In re Sternberg), 85 F. 3d 1400, 1405 (9th Cir. 1996) cits. omitted overruled on other grounds, Murray v. Bammer (In re Bammer) 131 F. 3d 788, 792 (9th Cir. 1997).

While a monthly $500.00 payment may seem like it is "in the nature of alimony, maintenance, or support," because it was conditionally stayed, that does not support a finding of a domestic support obligation. Also, the issue of spousal support was "reserved to both parties," suggesting to this court that the JMD really does not address that issue at all. In addition, Claimant's declaration states that the Debtor "wanted the house" (Doc. # 35) but could not afford to "buy out" Claimant's equity. He also states he would have "preferred" the $500 per month for various reasons (id.). That does not evidence a need for support but rather a preference for a payment stream. No other facts suggest to the court that the equalization payment was meant to be in the nature of support.

The court understands that this means Claimant will be left with the dividend unsecured creditors receive under the confirmed plan (11%). But Claimant has rights under 11 U.S.C. § 1329 to, under certain circumstances, seek to have the plan modified.

Therefore, this objection is SUSTAINED. Claim number 7 shall be disallowed as a priority claim and allowed as a general unsecured claim in the amount of $25,000.00.

27. 18-13218-B-13 **IN RE: VAN LAI**

MOTION TO EXTEND AUTOMATIC STAY
8-15-2018 [12]

VAN LAI/MV
OST 8/16/18

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 the order.

This Motion to Extend the Automatic Stay was set for hearing on the notice required by LBR 9014-1 (f) (3) and an order shortening time (doc. #13). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these

potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Under 11 U.S.C. § 362(c)(3)(A), the automatic stay under subsection (a) of this section 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 latter case.

This case was filed on August 6, 2018 and the automatic stay will expire on September 5, 2018. 11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest demonstrates that the filing of the latter case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c) (3) (C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the thrust 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 [the non-moving party] offered in opposition." Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 (9th Cir. BAP 2016) (citations omitted).

In this case the presumption of bad faith does arise for two reasons. First, there has not been established a substantial change in the debtor's financial affairs since the dismissal of the last case. Second, the creditor secured by the debtor's real property at 1521 S. 7th St. in Los Banos, Merced County California, T2M Investments LLC, received stay relief in the previous case.

The debtor filed no declaration in support of this motion. There is no competent evidence for the court to assess any change in the financial condition of the debtor. In the immediately preceding case, the chapter 13 trustee filed a motion to convert the case on the grounds of bad faith. There was evidence the debtor did not list all assets in her previous bankruptcy schedules including real estate with equity located in Las Vegas, Nevada. There was also evidence this debtor's alias transferred that real property to this debtor who in turn transferred it to her daughter by deed recorded after the previous case was filed. The debtor voluntarily dismissed the previous case rendering the motion moot. But, the debtor does not reveal any of those facts in this motion or an explanation for those facts.

What is more, the debtor alleges, without evidence that she is in the process of selling her residence "to pay off creditors." Even if the court were to accept the unverified allegation as an offer of proof, it proves nothing. There is no evidence whether the residence is in escrow, when a sale will be consummated or what creditors are going to be paid. The debtor has asked for and received an extension to file schedules but based on the limited number of creditors listed in her master address list, there is little reason for the case other than delay.

T2M has filed a stay relief motion (SSA-1) and an application for attorneys' fees under 11 U.S.C. § 506(b) (SSA-2) in this case. The court has taken judicial notice of those documents under FRE 201. It appears there is a dispute between the debtor and T2M about the debtor's compliance with a settlement agreement entered into after T2M had stay relief in the last case to accommodate the debtor's sale of the Los Banos property. There is no explanation from the debtor about that either. If true, the evidence supporting the stay relief motion further establishes the debtor is not changing her financial situation.

Finally, T2M filed a motion and obtained stay relief in the earlier case on May 24, 2018. The movant here must overcome the presumption of bad faith as to this creditor specifically. 11 U.S.C. § 362 (c) (3) (C) (ii). There is no evidence why filing this case is anything other than bad faith as to this creditor. The debtor offers nothing explaining why the court should not find bad faith as to this creditor's interests.

The motion is DENIED. The court will issue an order.