UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, September 1, 2021
Place: Department B – Courtroom #13
Fresno, California

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 21-11100-B-13 **IN RE: JULIE OSEJO**
SLL-1

MOTION TO MODIFY PLAN
7-26-2021 [21]

JULIE OSEJO/MV
STEPHEN LABIAK/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied or continued for a modified Plan.

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

Julie Osejo ("Debtor") seeks confirmation of her First Modified Chapter 13 Plan. Doc. #21.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected under 11 U.S.C. § 1325(a)(6) because the debtor will not be able to make all payments under the plan and comply with the plan. Doc. #36. The court notes that Trustee's opposition to this motion was filed under the wrong docket control number ("DCN"), SLL-2, which is the DCN for a fee application in matter #2 below. The objection should have been filed under DCN SLL-1.

Debtor responded on August 26, 2021. Doc. #38.

This matter will be called as scheduled. The court is inclined to deny or continue this motion.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest except Trustee to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except Trustee are entered.

Trustee states that the plan is not feasible as proposed because the Internal Revenue Service filed amended Proof of Claim No. 3-2 on

August 16, 2021. Doc. #36. As result, the plan will take longer than 60 months to fund, but there are only 58 months remaining on the plan. Trustee contends that Debtor would need to increase the plan payment to $992.00 per month to fund the plan as currently proposed. *Id.*

Trustee also states that Section 6.01 is unclear because it provides that property shall both revest and not revest in the Debtor upon confirmation of the plan. In communications with Debtor's counsel, Trustee was informed that Debtor wishes to have property revest in herself upon confirmation. Trustee states that this change may be reflected in the order confirming plan. *Id.*

Debtor filed a response agreeing to increase her plan payments to $992.00 for the remaining 52 months (sic) of the plan, including the August 2021 plan payment. Doc. #38. Debtor prays for the court to overrule Trustee's opposition. However, since this case was filed April 30, 2021, the August payment should be the fourth month of the plan, meaning that there would be 57 months of $992 plan payments if Debtor began paying that amount in August 2021.

Further, Amended Schedules I and J indicate that Debtor has $932.63 in monthly net income. Doc. #19, *Am. Sched. J*, ¶ 23c. This suggests the Plan is not feasible and should not be confirmed under § 1325(a)(6).

This matter will be called as scheduled. The court may continue the matter or deny confirmation.

2. 21-11100-B-13 **IN RE: JULIE OSEJO**
SLL-2

MOTION FOR COMPENSATION FOR STEPHEN L. LABIAK, DEBTORS ATTORNEY(S)
7-26-2021 [27]

STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

Stephen L. Labiak ("Applicant"), attorney for Julie Osejo ("Debtor"), requests interim compensation in the sum of $6,404.75 under 11 U.S.C. §§ 330, 331. Doc. #27. This amount consists of $6,360.00 for reasonable compensation and $44.75 for reimbursement of actual, necessary expenses for services rendered from March 22, 2021 through July 20, 2021. In light of Applicant's retainer of $287, Applicant requests payment of $6,117.75.

Debtor signed a statement of consent on July 26, 2021 indicating that she has read the fee application and has no objection. *Id.*, § 9(7). Further, Debtor filed a declaration stating that she has reviewed the fee application and determined that it reflects the services rendered and costs advanced by Applicant. Doc. #29.

No party in interest timely filed written opposition.[1] This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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.

Debtor filed bankruptcy on April 30, 2021. Doc. #1. The initial chapter 13 plan said that Applicant was paid $287.00 prior to filing the case and additional fees of $8,000.00 shall be paid through the plan by filing a motion in accordance with §§ 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #3. Form EDC 3-096 and Debtor's proposed First Modified Plan both provide for the same fee payment structure. Docs. #4; #25. The First Modified Plan is set for hearing in matter #1 above, but the court intends to deny or continue that motion. SLL-1.

This is Applicant's first interim fee application. The source of funds will be from the chapter 13 trustee in accordance with the chapter 13 plan after it is confirmed.

Applicant's office provided 23.10 billable hours of legal services totaling **$6,360.00** as follows:

Professional	**Rate**	**Hours**	**Amount**
Stephen L. Labiak	$350.00	16.20	$5,670.00
Linda Fellner	$100.00	6.90	$690.00
Total Hours & Fees		**23.10**	**$6,360.00**

Doc. #32, Ex. B. Applicant also incurred costs of **$44.75**:

[1] The chapter 13 trustee filed an objection under the docket control number ("DCN") for this motion (SLL-2), but the use of that DCN appears to be a clerical error. That objection is to Debtor's motion to modify plan in matter #1 above. *See* SLL-1.

Copies (295 @ $0.15)	+ $44.25
Postage (1 @ $0.50)	+ $0.50
Total Costs	**= $44.75**

Id., Ex. D. These combined fees and expenses total **$6,404.75.** 11 U.S.C. § 330(a)(1)(A) and (B) permits approval of "reasonable compensation for actual, necessary services rendered by . . .[a] professional person, or attorney" and "reimbursement for actual, necessary.

Applicant's services included, without limitation: (1) pre-petition consulting with Debtor and fact gathering; (2) independently verifying information; (3) preparing and filing the petition, schedules, plan and other forms; (4) amending the petition and schedules; (5) seeking confirmation of the original plan; (6) preparing for and appearing at the 341 meeting of creditors; (7) preparing the first modified plan and seeking confirmation; (8) claims administration and objections; and (9) preparing this fee application. Doc. #32, Ex. C. The court finds the services and expenses reasonable, actual, and necessary.

No party in interest timely filed written opposition. As noted above, Debtor has consented to this fee application. Doc. #29. This motion will be GRANTED. Applicant will be awarded $6,404.75, consisting of fees of $6,360.00 and costs of $44.75, on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to 11 U.S.C. § 330. After deducting Applicant's $287 retainer, Trustee will be authorized, in his discretion, to pay Applicant $6,117.75 upon confirmation of the chapter 13 plan for services rendered and costs incurred from March 22, 2021 through July 20, 2021.

3. 19-13111-B-13 **IN RE: DALE/MICHELLE SEAMONS**
TCS-4

MOTION TO MODIFY PLAN
7-28-2021 [64]

MICHELLE SEAMONS/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Dale Gorden Seamons and Michelle Ann Seamons ("Debtors") seek confirmation of their Third Modified Chapter 13 Plan. Doc. #64. Debtors wish to extend the duration of their plan from 60 months to 71 months under 11 U.S.C. § 1329(d) and the COVID-19 Bankruptcy Relief Extension Act of 2021. 117 P.L. 5, 135 Stat. 249.

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

Under 11 U.S.C. § 1329(d), a plan can be extended to not more than 7 years after the time that the first payment under the original confirmed plan was due if the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the COVID-19 pandemic. Section 1329(d)(1) requires the plan to have been confirmed prior to enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021 (March 27, 2021).

Here, Debtors have faced financial difficulties as result of the COVID-19 pandemic. Doc. #68. Joint debtor Michelle Seamons declares that her 88-year-old father and his wife both contracted COVID-19, and his wife passed away. *Id.* Ms. Seamons' father moved into Debtors' home and has required 24-hour care, which has materially impacted Debtors' finances. *Id.* Thus, Debtors have experienced material financial hardship either directly or indirectly caused by the COVID-19 pandemic. Moreover, Debtors previous plan was confirmed on May 11, 2020, which is before the Bankruptcy Relief Extension Act was enacted on March 27, 2021. Doc. #47. Accordingly, Debtors satisfy the requirements to extend their plan beyond 60 months under § 1329(d).

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

4. 20-13727-B-13 **IN RE: ADOLFO/AURELIA HERNANDEZ**
ETW-3

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
7-2-2021 [61]

PELICAN HOLDINGS, LLC/MV
SCOTT LYONS/ATTY. FOR DBT.
EDWARD WEBER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

Pelican Holdings, LLC ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(2) so it can seek remedies with respect to its security interest in real property located at 14744 Avenue 112, Pixley, CA 93256 ("Property"). Doc. #61.

Adolfo Hernandez and Aurelia Hernandez ("Debtors") timely opposed. Doc. #79.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The matter was previously continued to be heard in connection with Debtors' chapter 13 plan confirmation in matter #6 below. Doc. #90. The court entered the defaults of all non-responding parties in interest except Trustee. Doc. #89. The court also found "good cause" under 11 U.S.C. § 362(e)(2)(B)(ii) to extend the automatic stay until the resolution of this motion because a plan confirmation was in prospect and the continued hearing date is only one day beyond the 60-day limit. *Id.*

Movant contends that "cause" exists to terminate the automatic stay under 11 U.S.C. § 362(d)(2) because Debtors do not have any equity in the Property and no feasible plan is in prospect. Doc. #61. Movant states that the amount due on the loan is $310,040.57, but Property had a value of $314,501.00 on the petition date and is also encumbered by a tax lien in the amount of $4,988.57. Doc. #63. Thus, the total encumbrances affecting Property total $315,029.14 and Debtors' equity is -$528.14. Movant also states that Debtors have not provided proof of insurance as required by the note and deed of trust. *Id.*

In response, Debtors contend that their First Modified Chapter 13 Plan is set for confirmation hearing on September 1, 2021 in matter #6 below, and confirmation will satisfy Movant's claim in full. Doc. #79; SL-3.

If the last payment on an original payment schedule for a claim secured only by debtors' principal residence is due before the date on which the final payment under the plan is due, 11 U.S.C.

§ 1322(c)(2) permits the plan to provide for the payment of a claim throughout the term of the plan as modified under § 1325(a)(5). Movant's $310,040.57 payoff demand is based on a balloon payment of $24,800 as liquidation damages upon maturity of the loan on May 1, 2020. Doc. #64, Ex. A, at 1-2; *cf.* Ex. C. Under § 1322(c)(2), Debtors may stretch out repayment of the balloon payment over the course of the plan. So, although Debtors may not have equity in the Property, it is necessary for an effective reorganization. Further, Debtors will likely have equity upon plan confirmation when the chapter 13 trustee begins tendering payments to Movant.

Debtors also claim that they have maintained and continue to maintain homeowner's insurance upon Property. Doc. #80. Debtors included a page entitled "Evidence of Insurance for Mortgagee/Other Interests" that was printed from the Farmers' Insurance website. Doc. #81, Ex. A. But this document is hearsay. Fed. R. Evid. ("FRE") 801-802. Adolfo Hernandez's declaration states that this is a true and correct copy of their proof of insurance, but they have not laid any other foundation that the document satisfies an exception to the rule against hearsay. FRE 803.

Arguably, the proof of insurance could be a record of a regularly conducted activity as a record of an act, event, or condition. FRE 803(6). But Debtors have not established when or by whom the record was made, whether it was kept in the course of a regularly conducted activity of a business or organization, or whether making the record was a regular practice of that activity. These conditions were not shown by the testimony of the custodian or another qualified witness in accordance with FRE 902(11) or (12), or with a statute permitting certification.

The proof of insurance also could fall under the residual hearsay exception, which states that a hearsay statement is not excluded by the rule against hearsay even if it is not admissible under an exception under FRE 803 or 804. FRE 807. Under FRE 807, the statement must be supported by sufficient guarantees of trustworthiness after considering the totality of the circumstances under which it was made and evidence corroborating the statement. The evidence also must be "more probative on the point under which it was made and evidence, if any, corroborating the statement." FRE 807(a)(2). Lastly, the party against whom the statement is offered against must be afforded reasonable notice that the proponent intends to offer the statement, its substance, and the declarant's name into evidence. FRE 807(c). The notice must be provided in writing before the trial or hearing, or in any form during the trial or hearing, unless the court, for good causes, excuses lack of earlier notice. *Ibid.*

Here, Debtors included the proof of insurance as an exhibit in support of their opposition filed July 16, 2021. Doc. #81, Ex. A. Mr. Hernandez's declaration states that this is a true and correct copy of their proof of insurance. Doc. #80. It appears to be a print-out from the Farmers' Insurance website and shows that insurance is effective with respect to Property from October 9, 2020 through October 9, 2021. The policy is signed by an authorized

representative of Farmers' Insurance, but the signature is not legible, and the representative is not identified.

When considering the totality of the circumstances, the proof of insurance is probative as to whether Debtors have maintained their homeowner's insurance. The proof of insurance appears to be authentic, and Debtors' declaration corroborates that it is a true and correct copy of proof of their insurance policy. Though Movant not afforded explicit notice that the statement was being offered into evidence, it was filed and served on Movant's attorney on July 16, 2021. Movant did not object to the proffered proof of insurance or otherwise object to its authenticity. Good cause exists to excuse lack of earlier notice because Movant received a copy of the proof of insurance and did not object to its admissibility.

Even though Movant is slightly under-secured and Debtors do not have any equity in the Property, it appears to be necessary for an effective reorganization. Debtors have also maintained proof of insurance.

This matter will be called as scheduled. The court will likely DENY this motion on the merits and because Debtors' chapter 13 plan confirmation will satisfy Creditor's claim.

5. 20-13727-B-13 **IN RE: ADOLFO/AURELIA HERNANDEZ**
MHM-1

CONTINUED MOTION TO DISMISS CASE
7-7-2021 [67]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Conditionally denied.

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

Chapter 13 trustee Michael H. Meyer ("Trustee") moves to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtors that is prejudicial to creditors and failure to confirm a chapter 13 plan Doc. #67. Trustee declares that the debtors' motion to confirm their First Modified Chapter 13 Plan was denied on May 26, 2021 and now it has been six months since filing without confirming a plan. Doc. #69; *see also* SL-2.

Adolfo Hernandez and Aurelia Hernandez ("Debtors") timely responded. Doc. #86. Debtors state that an updated motion to confirm the First Modified Chapter 13 Plan was filed and set for hearing on September 1, 2021. Doc. #73; SL-3. Scott Lyons, Debtors' attorney, declares that the original plan was denied for procedural reasons. Doc. #87.

He did not immediately file a new motion "due "solely to a calendaring error" on his part and he accepts full responsibility. *Id.*

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The matter was previously continued to be heard in connection with Debtors' chapter 13 plan confirmation in matter #6 below. Doc. #97. At the last hearing, the court entered the defaults of all non-responding parties in interest except Trustee. Doc. #96.

This matter will be called as scheduled. The court will DENY this motion if Debtors' motion to confirm plan is granted in matter #6 below.

6. 20-13727-B-13 **IN RE: ADOLFO/AURELIA HERNANDEZ**
SL-3

MOTION TO CONFIRM PLAN
7-16-2021 [73]

AURELIA HERNANDEZ/MV
SCOTT LYONS/ATTY. FOR DBT.
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 Moving Party shall submit a proposed order after hearing.

Adolfo Hernandez and Aurelia Hernandez ("Debtors") seek confirmation of their First Modified Chapter 13 Plan. Doc. #73.

Pelican Holdings, LLC ("Creditor") timely objected. Doc. #83.

Debtors replied. Doc. #92.

This matter will proceed as scheduled. The court is inclined to GRANT the motion and OVERRULE the objection.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest except Pelican Holdings, LLC, to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except Pelican Holdings, LLC, are entered.

Creditor holds the deed of trust encumbering real property located at 14744 Avenue 112, Pixley, CA 93256 ("Property"). Doc. #83.

Creditor filed Proof of Claim No. 6 on December 3, 2020 in the amount of $290,710.57. Claim #6-1. The note became due and payable as of May 1, 2020. Creditor claims that Debtors have neither the ability nor the intent to reorganize and are using this chapter 13 bankruptcy as a "holding place" to "buy time" while they look to sell or refinance Property. Doc. #83. Creditor essentially has accused Debtors of filing the petition in bad faith.

Creditor's claim is listed in Class 2. Creditor objects because it is purportedly listed as a purchase money security and the amount due is incorrect. Doc. #83. Creditor claims that the plan states that $247,821.06 is due and provides for a monthly payment of $6,465.23. *Id.*; *cf.* Doc. #94, Ex. A. Instead, Creditor contends that it should be paid $290,710.57 at 11.99% interest. Doc. #83. Creditor objects because the proposed plan fails to provide the proper "formula" discount rate in conformance with 11 U.S.C. § 1325(a)(5)(B)(ii) and *Till v. SCS Credit Corp.*, 124 S. Ct. 1951 (2004). Since these changes will increase the plan payment, Creditor insists that the plan is not feasible because Debtors have insufficient income to fund this plan, or any other plan.

In response, Debtors state that they are not engaging in any kind of stall tactic by filing chapter 13 bankruptcy. Doc. #92. Debtors argue the plan is per se feasible with a payment of $7,330.00 compared to their net disposable income of $7,759.69. Debtors note that the plan does list Creditor's claim of $290,710.57, not the amount cited by Creditor, and that it is not listed as a purchase money security interest. *See* Doc. #94, Ex. A.

Further, Debtors insist that the interest rate of 4.25% is sufficient under *Till*. This rate is based on the risk-free prime interest rate of 3.25% at the time of filing the petition. Debtors are paying the "prime-plus" rate of 4.25%, which is derived by adding an additional 1% interest to the prime interest rate and consistent with *Till*. *Id.*

In *Till*, the Supreme Court determined that the appropriate interest rate for a secured claim should be determined by the 'formula approach,' which requires the court to take the national prime interest rate and adjust it to compensate for an increased risk of default. *Till*, 124 S. Ct. at 1957. Such factors include (1) circumstances of the estate, (2) the nature of the security, and (3) duration and feasibility of the reorganization plan. *Id.* at 1960.

Here, Creditor has the burden of proof that the interest rate should be further adjusted, but Creditor has not presented any additional evidence in support of its claim that a 4.25% interest rate is insufficient.

This matter will be called as scheduled. The court is inclined to OVERRULE Creditor's objection and GRANT the motion. Any confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

7. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**
AMS-4

MOTION TO VALUE COLLATERAL OF FORD MOTOR CREDIT COMPANY
7-29-2021 [118]

MARIA CEJA/MV
ADELE SCHNEIDEREIT/ATTY. FOR DBT.

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Miguel Rodriguez-Cisneros and Maria De Jesus Ceja ("Debtors") seek an order valuing a 2014 Ford F150 ("Vehicle") at $22,131.00. Doc. #118. The Vehicle is encumbered by a security interest in favor of Ford Motor Credit Company ("Creditor") in the amount of approximately $65,000.00. Doc. #1, *Sched. D*; Claim #9.

Debtors have complied with Federal Rule of Bankruptcy Procedure 7004(b)(3) by serving Marion Harris, Creditor's CEO, at Creditor's main office address on July 29, 2021. Doc. #128.

This motion will be DENIED because Debtors have failed to make a *prima facie* showing that they are entitled to the relief sought.

11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described in that paragraph if (1) the creditor has a purchase money security interest securing the debt that is the subject of the claim, (2) the debt was incurred within 910 days preceding the filing of the petition, and (3) the collateral is a motor vehicle acquired for the personal use of the debtor.

Debtors claim that Vehicle was purchased more than 910 days from the petition date. Doc. #118. Included as two separate exhibits is the original contract showing that Vehicle was purchased on or about July 5 or 6, 2015, which is more than 910 days before the petition. Docs. #123, Ex. D; #124, Ex. A. The elements of § 1325(a)(*) are not met and § 506 is applicable.

11 U.S.C. § 506(a)(1) limits a secured creditor's claim "to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

11 U.S.C. § 506(a)(2) states that the value of personal property securing an allowed claim shall be determined based on the replacement value of such property as of the petition filing date. "Replacement value" means "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."

Joint Debtor Miguel Rodriguez-Cisneros' declaration is unclear. Doc. #122, Ex. C. Mr. Rodriguez-Cisneros states that he obtained the replacement value from Edmunds.com after considering the Vehicle's year, make, model, mileage, options, and condition. Said Edmunds Valuation is attached twice. *See* Doc. #120, Ex. A; Doc. #126, Ex. C. It provides for three sets of values: trade-in, private party, and dealer retail value. Each of these is further delineated by vehicle condition: outstanding, clean, average, and rough.

Mr. Rodriguez-Cisneros states that he "selected rough" as the Vehicle's condition and the reasons for doing so. Then, he states "Factoring in all the above, the Edmunds Valuation is (Edmunds Replacement Value)." *Id.*, ¶ 10. This does not make sense. Then, he states that he obtained an appraisal from Carvana that provided an offer of $22,900 based on the current condition of the vehicle, and that the Carvana appraisal and the Edmunds valuation are the appropriate replacement value of the Vehicle. The declaration is also not signed by the debtor.

Based on the motion seeking a valuation of $22,131, it seems Mr. Rodriguez-Cisneros was attempting to incorporate the "Rough" "Dealer Retail" value from Edmunds, which provides for that same valuation.

This is the fourth attempt at valuing this vehicle. *See* Docs. #67; #91; #116. Most were denied for procedural reasons, but the court has raised other concerns such as failure to provide adequate evidence that the Debtors have satisfied the requirements of §§ 506 and 1325(a)(*). The issues documented in the last denial were resolved – namely, the incorrect notice language and the failure to plead that the vehicle was acquired more than 910 days before the petition date. *See* Doc. #116. However, as noted in the second ruling denying this motion, the court is looking for a declaration unequivocally stating Debtors' opinion as to the replacement value of the Vehicle. Doc. #91.

This motion is an improvement because the words "replacement value" are used, but nowhere in the declaration does the debtor state his opinion of replacement value. In fact, the only time Mr. Rodriguez-Cisneros states "$22,131.00" – the amount to which the motion seeks to set Vehicle's value - is in paragraph 5: "As of November 11, 2021, the Vehicle is subject to a single lien from Ford Motor Credit ("Debtors") for 22,131.00." Doc. #122, ¶ 5. Except that the lien encumbering Vehicle is approximately $65,000, not $22,131. Claim #9. And then later, he states that Carvana offered him $22,900 to purchase Vehicle, which appears to contradict the motion. If Carvana is willing to purchase the vehicle from Debtors for $22,900, does this imply that a retail merchant would charge more than $22,900 for a vehicle of that kind with similar age and condition?

The Debtors have the burden of proof on this issue. *See In re Serda*, 395 B.R. 450, 454 (Bankr. E.D. Cal. 2008); *Enewally v. Wash. Mut. Bank*, 368 F.3d 1165, 1173 (9th Cir. 2004). References to Edmunds and Carvana are not convincing evidence of the vehicle's replacement value. *In re DaRosa*, 442 B.R. 172, 175 (Bankr. D. Mass. 2010); *Young v. Camelot Homes, Inc. (In re Young)*, 390 B.R. 480, 493 (Bankr. D. Me. 2008) ("[B]ecause [the debtor] used Kelley trade-in listings as

the starting point of his analysis, his opinion will not be taken as convincing evidence of replacement value.").

Debtors are competent to testify as to the replacement value of Vehicle as its owners. *Enewally*, at 1173. But the Debtors have not done so in this motion. This motion will be DENIED.

8. 18-13354-B-13 **IN RE: DAHNE FRAKER**
TCS-6

MOTION TO INCUR DEBT
7-21-2021 [76]

DAHNE FRAKER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

NO RULING.

Dahne Nichole Fraker ("Debtor") seeks authorization to incur $25,000.00 in new debt to be paid over 72 months at 15.4% interest to purchase a vehicle. Doc. #76.

No party in interest timely filed written opposition. This matter will proceed as scheduled. The court is inclined to DENY the motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the chapter 13 trustee, the U.S. trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the 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.

LBR 3015-1(h)(1)(A) allows the debtor, *ex parte* and with court approval, to finance the purchase of a motor vehicle if written consent of the chapter 13 trustee is filed with or as part of the motion. The trustee's approval is a certification to the court that: (i) all chapter 13 plan payments are current; (ii) the chapter 13 plan is not in default; (iii) the debtor has demonstrated an ability to pay all future plan payments, projected living expenses, and the new debt; (iv) the new debt is a single loan incurred to purchase a vehicle that is reasonably necessary for the maintenance or support of the debtor, or necessary for the continuation, preservation, and operation of the debtor's business; (v) the only security for the new debt will be the vehicle purchased by debtor; and (vi) the new debt does not exceed $20,000.00.

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

Debtor asks the court for authority to borrow up to $25,000 from NewRoadsAutoLoans ("Creditor") to purchase a vehicle. The loan will be secured by the vehicle and include the following terms:

Maximum Amount Financed:	$25,000.00
Annual Percentage Rate:	15.40%
Maximum Monthly Payment:	$550.00
Maximum Loan Term:	72 months

Doc. #79, Ex. C-1. Debtor acknowledges that she is not current on her plan payments, but she will be brought current by a modified plan that the court intends to grant in matter #9 below. TCS-7. Moreover, Debtor filed bankruptcy on August 17, 2018, her original chapter 13 plan was confirmed on December 12, 2018, and her first modified plan was confirmed on November 2, 2020. Docs. #1; #40; #75. All of her plans, including the second modified plan, provided for a 36-month plan term. Debtor will complete her payments under the plan before payments commence on the new auto loan.

Debtor declares that she wants to purchase a new vehicle to rebuild her credit. Doc. #78. Since she will not need to make any more plan payments, she believes that she can afford the maximum $550 auto loan payment. *Id.* Included as an exhibit is a proposed amended Schedules I and J that show her income and expenses if she were to incur the loan. Doc. #79, Ex. B-5. Under the proposed amendment with the same income, Debtor will have $41.00 in monthly disposable income. *Id.*

Debtor's current Schedules I and J show that she has approximately $341.00 in monthly disposable income. Though her income remains the same, her expenses have changed as follows:

CURRENT SCHEDULE J COMPARED WITH PROPOSED SCHEDULE J

Category	Current	Proposed	Net Change
Home maint., repair, and upkeep	$250.00	$100.00	- $150.00
Food and housekeeping supplies	$765.00	$700.00	- $ 65.00
Clothing, laundry, and dry cleaning	$85.00	$75.00	- $ 10.00
Transportation	$500.00	$425.00	- $ 75.00
Vehicle Insurance	$95.00	$145.00	+ $ 50.00
Car payments for Vehicle 2	$0.00	$550.00	+ $550.00
Net increase to expenses:			**+ $300.00**

Compare Doc. #82 *with* Doc. #79, Ex. B-5. Debtor's net expenses will increase $300.00. This is achieved by reducing her expenses for (a) home maintenance, repair, and upkeep, (b) food and housekeeping supplies; (c) clothing, laundry, and dry cleaning; and (d) transportation (not including car payment).

The court is concerned with the large interest rate, loan amount, and loan term. Debtor has not made any showing that the vehicle is reasonably necessary for her maintenance or support. In fact, the proposed Schedule J amendment even includes the current $672.00 car payment she is already paying, which suggests that she intends to retain it.

This matter will be called as scheduled. The court is inclined to DENY the motion.

9. 18-13354-B-13 **IN RE: DAHNE FRAKER**
TCS-7

MOTION TO MODIFY PLAN
7-21-2021 [81]

DAHNE FRAKER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Dahne Nichole Fraker ("Debtor") seeks confirmation of this Second Modified Chapter 13 Plan. Doc. #81.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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 will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

10. 21-11254-B-13 **IN RE: JENNIE CABAN**
PBB-2

MOTION TO AVOID LIEN OF CAPITAL ONE BANK (USA), N.A.
7-28-2021 [27]

JENNIE CABAN/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Jennie Caban ("Debtor") seeks to avoid a judicial lien in favor of Capital One Bank (USA), National Association ("Creditor"), in the amount of $2,824.74 and encumbering residential real property located at 4391 North Van Dyke Avenue, Fresno, CA 93705 ("Property"). Doc. #27.

Creditor is a National Bank insured by the Federal Deposit Insurance Corporation ("FDIC"), which makes it an insured depository institution. 11 U.S.C. § 101(35)(A); 12 U.S.C. § 1813(c)(2) ("insured depository institution" means any bank insured by the FDIC). Debtor complied with Federal Rule of Bankruptcy Procedure 7004(h) by serving Jory A. Berson, Creditor's Chief Human Resources Officer, by certified mail at Creditor's main office address on July 28, 2021. Doc. #31.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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.

First, the court notes that the Notice of Hearing (Doc. #28) filed with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice to include the names and addresses of persons who must be served with any opposition. Counsel is advised to review

the local rules to ensure procedural compliance in subsequent motions. Future violations of the local rules may result in the matter being denied without prejudice.

To avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd*, 24 F.3d 247 (9th Cir. 1994)).

Here, a judgment was entered against Debtor in favor of Creditor in the sum of $2,824.74 on March 13, 2019. Doc. #30, Ex. D. The abstract of judgment was issued on April 9, 2019 and recorded in Fresno County on April 23, 2019. *Id.* That lien attached to Debtor's interest in Property. Doc. #29. Debtor estimates that the balance of the lien on the petition date was $3,417.94. *Id.*

As of the petition date, Property had an approximate value of $320,000.00. Doc. #1, *Sched. A/B*. The unavoidable liens totaled $116,806.96 on that same date, consisting of a deed of trust in favor of Chase Bank. *Id.*, *Sched. D*. Chase Bank filed Proof of Claim No. 13 on July 26, 2021 in the amount of $113,180.23. Claim #13-1. Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $300,000.00. Doc. #1, *Sched. C*. Property's encumbrances can be illustrated as follows:

Fair Market Value of Property		$320,000.00
Total amount of unavoidable liens	-	$113,180.23
Remaining available equity	=	$206,819.77
Debtor's "homestead" exemption	-	$300,000.00
Creditor's judicial lien	-	$3,417.94
Extent Debtor's exemption is impaired	=	($96,598.17)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is insufficient equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

No party in interest timely filed written opposition to this motion. Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

11. 21-11254-B-13 **IN RE: JENNIE CABAN**
PBB-3

MOTION TO AVOID LIEN OF LOS FLORES APARTMENTS
7-28-2021 [32]

JENNIE CABAN/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Jennie Caban ("Debtor") seeks to avoid a judicial lien in favor of Las Flores Apartments and assigned to Collectibles Management Resources, Inc. ("Creditor"), in the amount of $4,718.42 and encumbering residential real property located at 4391 North Van Dyke Avenue, Fresno, CA 93705 ("Property"). Doc. #32.

Creditor is a corporation. Debtor complied with Federal Rule of Bankruptcy Procedure 7004(b)(3) by serving Patricia E. Wallace, Creditor's CEO and agent, mail at Creditor's main office address on July 28, 2021. Doc. #36.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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.

To avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir.

2003) (quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd*, 24 F.3d 247 (9th Cir. 1994)).

Here, a judgment was entered against Debtor in favor of Las Flores Apartments in the sum of $4,718.42 on August 15, 2008 and renewed on May 25, 2018. Doc. #35, Ex. D. The renewed abstract of judgment was issued on August 20, 2018 and recorded in Fresno County on August 28, 2018. *Id.* That lien attached to Debtor's interest in Property and was assigned to Creditor. Doc. #29. Debtor estimates that the balance of the lien on the petition date was $6,490.44. *Id.*

As of the petition date, Property had an approximate value of $320,000.00. Doc. #1, *Sched. A/B*. The unavoidable liens totaled $116,806.96 on that same date, consisting of a deed of trust in favor of Chase Bank. *Id.*, *Sched. D*. Chase Bank filed Proof of Claim No. 13 on July 26, 2021 in the amount of $113,180.23. Claim #13-1. Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $300,000.00. Doc. #1, *Sched. C*. Property's encumbrances can be illustrated as follows:

Fair Market Value of Property		$320,000.00
Total amount of unavoidable liens	-	$113,180.23
Remaining available equity	=	$206,819.77
Debtor's "homestead" exemption	-	$300,000.00
Creditor's judicial lien	-	$6,490.44
Extent Debtor's exemption is impaired	=	($99,670.67)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is insufficient equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

No party in interest timely filed written opposition to this motion. Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

12. 21-10061-B-13 **IN RE: JACINTO/KAREN FRONTERAS**
NSC-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-5-2021 [93]

THE GOLDEN 1 CREDIT UNION/MV
GLEN GATES/ATTY. FOR DBT.
NICHOLAS COUCHOT/ATTY. FOR MV.

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 will submit a proposed order after hearing.

The Golden 1 Credit Union ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (2) with respect to a 2017 Subaru BRZ ("Vehicle"). Doc. #97.

Jacinto Fronteras and Karen Jo Fronteras ("Debtors") filed non-opposition on August 24, 2021. Doc. #116.

Written opposition was not required and may be presented at the hearing. In the absence of further opposition, the court is inclined to GRANT this motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will 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.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

After review of the included evidence, the court finds that "cause" exists to lift the stay because Debtors are delinquent at least $27,983.59. Docs. #95; #96, Exs. C-D; #97.

The court also finds that the Debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization. Movant has valued the Vehicle at $21,442.00. The amount owed to Movant is $27,983.59. Doc. #97; *see also* Claim #21.

Moreover, Debtors do not oppose stay relief. Doc. #116. Creditor is listed in Class 3 — which consists of claims satisfied by the surrender of collateral — in the pending chapter 13 plan. The hearing on confirmation is continued to October 13, 2021. Doc. #50; RAS-1, RAS-2.

Accordingly, the motion will be GRANTED pursuant to 11 U.S.C. § 362(d)(1) and (2) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Vehicle is a depreciating asset and Debtors do not oppose stay relief and intend to surrender possession of Vehicle to Creditor.

11:00 AM

1. 21-10124-B-13 **IN RE: KIRK/JAYCEE KILLIAN**
21-1005

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KIRK P. KILLIAN AND JAYCEE M. KILLIAN
8-3-2021 [22]

U.S. TRUSTEE V. KILLIAN ET AL
JUSTIN VALENCIA/ATTY. FOR MV.
RESPONSIVE PLEADING

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.

The motion does not comply with the local rules and should be denied.[2] **Plaintiff's counsel is advised to review the local rules at http://www.caeb.uscourts.gov/LocalRules.aspx. Future violations of the local rules shall result in denial without prejudice.**

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e)(3), and LBR 9014-1(c), (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN. The motion and supporting documents do not have a DCN here. This alone warrants denial.

Second, the notice (Doc. #23) does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice to include the names and addresses of persons who must be served with any opposition.

These procedural errors should result in the motion being denied without prejudice. The only reason the court is not denying this motion is because the Defendants will be prejudiced by further delay in entering an order approving the settlement agreement. Moreover, the settlement agreement provides that "should the Court reject this stipulation for *any reason*, the Parties shall be free to proceed litigating the merits of this adversary proceeding initiated by Plaintiff." Doc. #24, Ex. A (emphasis added).

Plaintiff had exclusive control of this motion and Defendants are not at fault for Plaintiff's failure to comply with certain procedural requirements. LBR 1001-1(f) allows the court *sua sponte*

[2] Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rule" will be to the Federal Rules of Bankruptcy Procedure; "Civil Rule" will be to the Federal Rules of Civil Procedure; and all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

to suspend provisions of the LBR not inconsistent with the Federal Rules of Bankruptcy Procedure to accommodate the needs of a particular case or proceeding. The court will overlook these procedural deficiencies here under LBR 1001-1(f) only because Defendants would be harmed otherwise.

Tracy Hope Davis, the United States Trustee for Region 17 of the Eastern District of California ("Plaintiff"), requests an order authorizing a settlement with debtors Kirk P. Killian and Jaycee M. Killian ("Defendants") in this adversary proceeding under Rules 2002 and 9019.

No party in interest timely filed written opposition to this motion. All creditors from the underlying bankruptcy case were served with the motion documents. Doc. #26. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by LBR 9014-1(f)(1). The failure of the creditors, the debtors, the chapter 13 trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo 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 court takes judicial notice of all documents and pleadings filed in Defendants' two bankruptcy cases filed in this district, Case Nos. 20-10886 and 21-10124. Fed. R. Evid. 201.

Defendants filed chapter 13 bankruptcy on March 6, 2020. *See* Bankr. Case No. 20-10886 ("First Bankr.") Doc. #1. Defendants were represented by Attorney Mark Zimmerman. In their petition, Defendants signed under penalty of perjury that they each completed a briefing from an approved credit counseling agency and received a certificate of completion on February 15 and 17, 2020, respectively. *Id.* Defendants confirmed a chapter 13 plan, but the case was dismissed on November 17, 2020 pursuant to chapter 13 trustee Michael H. Meyer's ("Trustee") motion to dismiss for failure to make plan payments. First Bankr. Doc. #78.

Defendants' second bankruptcy case was filed on January 20, 2021, again represented by Attorney Zimmerman. Bankr. Case No. 21-10124 ("Second Bankr.") Doc. #1. Defendants signed under penalty of perjury that they each completed a briefing from an approved credit counseling agency and received a certificate of completion on January 15, 2021. *Id.* Attorney Zimmerman certified that he had no

knowledge after an inquiry that information in the petition was incorrect.

However, the certificates of completion filed with the second bankruptcy petition were doctored versions of those filed in the first bankruptcy:

Case	Debtor	Cert. No.	Date/Time Completed
20-10886	Kirk P. Killian	34101128	02/17/2020 / 8:51 AM PST
21-10124	Kirk P. Killian	34101128	01/15/2021 / 8:51 AM PST
20-10886	Jaycee M. Killian	34096913	02/15/2020 / 4:32 PM PST
21-10124	Jaycee M. Killian	34096913	01/15/2021 / 4:32 PM PST

Id. The certificates bore the same certificate numbers, timestamps, and purported signatures of the Cricket Debt Counseling Agents who certified to Defendants' completion of the counseling. The only difference between the two certificates were the dates that counseling was completed, which had been altered to January 15, 2021. Their original certificates were issued in February 2020, more than 180 days before the second bankruptcy was filed in January 2021, so Defendants were not eligible to be debtors under § 109(h).

The court granted Trustee's motion to dismiss, the case was dismissed with prejudice on March 3, 2021, and the court retained jurisdiction over this adversary proceeding seeking to enjoin Defendants from filing a bankruptcy petition in this district for two years without written permission from the Chief Bankruptcy Judge. Second Bankr. Doc. #35.

The Defendants sought to modify the order dismissing the case so that the case will be dismissed without prejudice. Second Bankr. Doc. #28. Both Defendants filed declarations under penalty of perjury stating that they did not alter the dates on the credit counseling certificates and were not aware of Trustee's motion to dismiss until February 20, 2021, just four days before it was heard. Second Bankr. Docs. ##29-30. Attorney Zimmerman declared that the day before the hearing, he was informed by his employee, Karina Ayala, that she had altered the dates on the credit counseling certificates. Second Bankr. Doc. #31.

Ayala also filed a declaration with the motion under penalty of perjury. Second Bankr. Doc. #32. Ayala has worked for Attorney Zimmerman for over five years and her duties are to prepare documents and correspondence and file and serve documents. Ayala stated that she had knowledge of the requirements and procedures for the credit counseling and the financial management certificates. *Id.* Ayala stated that she provided Attorney Zimmerman with a copy of the motion to dismiss on February 23, 2021 and informed him that she had altered the dates on the certificates filed January 20, 2021. *Id.*

Trustee was agreeable to the case remaining dismissed without prejudice if Defendants had no knowledge of Ayala's alteration of their credit counseling certificates. Second Bankr. Doc. #38. Since Defendants were ineligible to be bankruptcy debtors under § 109(e),

he argued that the case should remain dismissed without prejudice. *Id.*

At the hearing on Defendants' motion to vacate, Plaintiff appeared and opposed vacatur since this adversary proceeding was pending. Second Bankr. Docs. #45; #49. The court consolidated that motion with this proceeding and issued a scheduling order. Doc. #17; Second Bankr. Doc. #56. The parties have now stipulated to resolve the motion to vacate and this adversary proceeding.

Under the terms of the agreement:

1. Defendants will be enjoined from filing any bankruptcy in this district for a period of **one year** from the date of entry of the order without first obtaining permission from the Chief Bankruptcy Judge.

2. Attorney Zimmerman shall reimburse Defendants $1,500 in pre-petition funds that were paid by Defendants to counsel prior to filing the second bankruptcy. Attorney Zimmerman shall receive no compensation from Defendants for filing the second bankruptcy or representing defendants in this adversary proceeding, or from any third parties on their behalf.

3. Defendants shall file a declaration in the adversary proceeding with a supporting exhibit (such as a receipt) evidencing that the $1,500 was paid as reimbursement by Attorney Zimmerman to Defendants within seven days of entry of the order.

4. The court shall enter an order in the second bankruptcy case 14 days after entry of the order approving this settlement agreement in this adversary proceeding that resolves the motion to vacate by amending the dismissal order to be without prejudice instead of with prejudice.

5. Defendants waive the right to appeal the final order approving this stipulation and agree that they will not seek reversal, modification, or any other judicial means to vacate or set aside the final order approving this stipulation.

Doc. #24, Ex. A. The settlement was reached pursuant to ongoing settlement negotiations since the filing of the complaint. Doc. #25.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Rule 9019. Under 28 U.S.C. § 586, Plaintiff, as U.S. Trustee, is charged with administrative oversight of cases commenced under the Bankruptcy Code. Plaintiff has standing to raise, appear, and be heard on any issue in any case under title 11, certain exceptions notwithstanding. 11 U.S.C. § 307.

Approval of a compromise must be based upon considerations of fairness and equity. *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection;

3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the *Woodson* factors balance in favor of approving the compromise. That is: (1) the probability of success is not assured because Defendants claim to have lacked knowledge of Ayala's fraudulent credit counseling certificate. Plaintiff believes it would be successful in litigating on the merits but doing so would cause loss of time and expenses for the Defendants. (2) The matter of collection likely would not be an issue because Plaintiff is seeking injunctive relief. (3) Litigation would likely not be very complex, but it would be time consuming and increase the costs and expenses for both parties. (4) The interests of creditors would only be affected insofar that Defendants would not be able to file for bankruptcy. Defendants did, however, propose 100% plans in both of their bankruptcy cases. Plaintiff believes this is fair and equitable because Defendants signed under penalty of perjury that their petition was accurate. The settlement appears to be fair and equitable and a reasonable exercise of Plaintiff's business judgment.

However, the adversary proceeding cover sheet includes cause of action under 11 U.S.C. § 727 for objection to or revocation of discharge. Doc. #2. Though, notably, it does not appear to be covered in the complaint, which focuses on §§ 307, 1307(c), and Rules 7001 and 7065. *Cf.* Doc. #1.

Rule 7041 provides that Civil Rule 41 applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, U.S. trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions deemed proper. The Advisory Committee on Rules – 1983 explain that dismissal of a complaint objecting to discharge raises special concerns because the plaintiff may have been induced to dismiss the adversary proceeding in exchange for an advantage given or promised by the debtor.

The majority approach to settlement of claims under § 727, which has been used in other Ninth Circuit bankruptcy courts, is limited to circumstances where the terms of the settlement are fair and equitable and in the best interests of the estate. *Bankr. Receivables Mgmt. v. De Armond (In re De Armond)*, 240 B.R. 51, 56 (Bankr. C.D. Cal. 1999) citing *In re Bates*, 211 B.R. 338, 347 (Bankr. D. Minn. 1997) ("[D]ismissal of a § 727 complaint in return for the provision of a private benefit to the plaintiff would violate the plaintiff's fiduciary duty to the bankruptcy estate.")

No such private benefit to Plaintiff is being conferred by this settlement. Defendants will receive a refund of legal fees paid to Attorney Zimmerman, be enjoined from refiling for one year and have their bankruptcy dismissal order be amended to without prejudice. Further, the complaint does not seek relief under § 727 even though it is included in the cover sheet. Doc. #1.

The court concludes the compromise to be in the best interests of the creditors and the estate. Furthermore, the law favors compromise and not litigation for its own sake. This motion will be GRANTED.

2. 20-12036-B-7 **IN RE: SANDRA SANCHEZ**
21-1016

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-30-2021 [1]

SALVEN V. SANCHEZ ET AL
ANTHONY JOHNSTON/ATTY. FOR PL.

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

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

DISPOSITION: Continued to September 29, 2021 at 11:00 a.m.

ORDER: The court will issue an order.

Chapter 7 trustee James E. Salven ("Plaintiff") filed a motion for approval of a settlement agreement between himself and debtor Sandra Sanchez ("Defendant") in Defendant's main bankruptcy case, which is set for hearing on September 21, 2021. Bankr. Case No. 20-12036, ADJ-2. Accordingly, this status conference will be continued to September 29, 2021 at 11:00 a.m. to be heard after resolution of the motion to approve settlement agreement.

3. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
20-1001

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-6-2020 [1]

SUGARMAN V. CRAWFORD ET AL
JOHN MACCONAGHY/ATTY. FOR PL.
STIPULATED TO DISMISS WITH PREJUDICE 8/19/2021, DOC. #43.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

On August 19, 2021, the parties stipulated to dismiss this action in its entirety with prejudice. Doc. #43. The court approved the stipulation on August 20, 2021 and the case was dismissed with prejudice. Doc. #44. Accordingly, this status conference will be dropped from calendar.

4. 21-10753-B-7 **IN RE: GUSTAVO DEL TORO**
21-1027

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

PRODUCERS LIVESTOCK MARKETING
ASSOCIATION V. DEL TORO
MICHAEL GOMEZ/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

This status conference will be called as scheduled. The parties filed a joint status report indicating that they have commenced discovery. Doc. #12. If mediation is ordered by the court with a completion deadline, the parties request that this status conference be continued to 60 days from the completion of mediation