UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: **MONDAY**
DATE: **OCTOBER 3, 2022**
CALENDAR: **9:00 A.M. CHAPTER 7 CASES**

RULINGS

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

"**No Ruling**" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"**Tentative Ruling**" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"**Final Ruling**" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("$880," not "$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. 22-21122-A-7 **IN RE: JOYCE NOLAN**
APN-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-29-2022 [19]

GARY FRALEY/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.
DEBTOR DISCHARGED: 08/16/2022
TOYOTA MOTOR CREDIT CORPORATION VS.

Tentative Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part; denied in part as moot
Order: Civil minute order

Discharge Entered: August 16, 2022

Subject: 2018 Toyota RAV4
Cause: delinquent installment payments 3 months June – August 2022/$ $2,031.84

These minutes constitute the court's findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a), *incorporated by* Fed. R. Bankr. P. 7052, 9014(c). The findings of fact are as set forth above; the conclusions of law are as set forth below.

DEFAULT OF RESPONDENT

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Toyota Motor Credit Corporation seeks an order for relief from the automatic stay of 11 U.S.C. § 362(a). The debtor received a discharge on August 16, 2022. The chapter 7 trustee has indicated that he intends to sell the non-exempt equity in the subject vehicle to the debtor, with the debtor obligated to make monthly payments to the trustee. *See Notice of Intent to Sell Assets and Opportunity for Hearing*, ECF No. 15. However, the chapter 7 trustee has not responded to or opposed this motion, nor has he appeared to provide information regarding the status of the sale of equity in the subject vehicle to the debtor. On August 29, 2022, the movant sent a Notice of Intent to File Motion for Relief From Stay to the debtor and the chapter 7 trustee. *See Exhibit E*, ECF No. 22.

STAY RELIEF

As to the Debtor

The motion will be denied in part as moot to the extent it seeks stay relief as to the debtor. The stay that protects the debtor terminates at the entry of discharge. 11 U.S.C. § 362(c)(2). In this case, discharge has been entered. As a result, the motion will be denied as moot as to the debtor.

As to the Estate

"[A]fter notice and a hearing," the court may terminate, annul, modify or condition the stay: (1) "for cause, including the lack of adequate protection"; or (2) "with respect to a stay of an act against property [of the estate]" if the debtor lacks "equity" in that property and if that "property is not necessary for an effective reorganization." 11 U.S.C. § 362(d); *see also* Fed. R. Bankr. P. 4001(a)(1). The party seeking stay relief bears the burden of proof as to "the debtor's equity in the property" and on the validity and perfection of its security interest, as well as the amount of its debt. 11 U.S.C. § 362(g)(1); *In re Dahlquist*, 34 B.R. 476, 481 (Bankr. S.D. 1983). The party opposing stay relief, e.g., the debtor or Chapter 7 trustee, bears the burden of proof on all other issues. 11 U.S.C. § 362(g)(2).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). The debtor bears the burden of proof. 11 U.S.C. § 362(g)(2). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1). "An undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." *See* Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1065.1 (rev. 2019) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)); *see also In re Weinstein*, 227 BR 284, 296 (9th Cir. BAP 1998) ("Adequate protection is provided to safeguard the creditor against depreciation in the value of its collateral during the reorganization process"); *In re Deico Electronics, Inc.*, 139 BR 945, 947 (9th Cir. BAP 1992) ("Adequate protection payments compensate undersecured creditors for the delay bankruptcy imposes upon the exercise of their state law remedies").

The debtor is obligated to make debt payments to the moving party pursuant to a loan contract that is secured by a security interest in the debtor's vehicle described above. The debtor has defaulted on such loan with the moving party, and postpetition payments are past due. Vehicles depreciate over time and with usage. As a consequence, the moving party's interest in the vehicle is not being adequately protected due to the debtor's ongoing postpetition default.

Absent opposition by the chapter 7 trustee the court will grant the motion.
Cause exists to grant relief under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

PROOF OF SERVICE NOT FILED AS SEPARATE DOCUMENT

Local Bankruptcy Rule 9014-1(e)(3) provides, "The proof of service for all pleadings and documents filed in support or opposition to a motion shall be filed as a separate document and shall bear the Docket Control Number. Copies of the pleadings and documents served shall not be attached to the proof of service. Instead, the proof of service shall identify the title of the pleadings and documents served."

In this case, the movant has accomplished service using the Bankruptcy Noticing Center ("BNC"). The BNC states that it served documents identified by a form identification code that does not describe the documents served but instead attaches copies of the pleadings it contends it served. The court finds the manner of service to violate Local Bankruptcy Rule 9014-1(e)(3). In the future, failure to following local rules may result in denial of the motion or other sanctions. LBR 1001-1(g).

LIMITED NOTICING AND STANDARDIZED CERTIFICATE OF SERVICE

As of July 5, 2022, this court adopted Local Bankruptcy Rules 2002-3 (limiting notice for Rule 2002(a)(6) (motions for compensation), Rule 9036-1 (electronic service) and Rule 7005-1 (requiring attorneys and trustees to use a standardized Certificate of Service, EDC 7-005).

While its use is not yet mandatory the movant used the standardized Certificate of Service, EDC 7-005 in memorializing the service of documents in this motion. The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding. The court appreciates the voluntary and proper use of the new form.

In support of this application, Bonial and Associates, P.C., filed a Certificate of Service, ECF No. 22. That form was signed "Corey Banks," who apparently is a paraprofessional employed by that firm. Other than not filing the certificate of service as a separate document on the court's docket as discussed above, the Certificate of Service represents a textbook example of the proper use of the new local rules and form Certificate of Service. The applicant has properly limited notice of the application. Section 4 properly list the documents served. Section 6 properly identifies service of the motion under Rule 7004. Attachment 6a is a properly prepared list of parties served. The firm and Corey Banks are to be commended on their precise and skillful application of the new local rules.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:
Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Toyota Motor Credit Corporation's motion for relief from the automatic stay has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted in part and denied as moot in part. The automatic stay is vacated with respect to the interest of the trustee in the property described in the motion, commonly known as 2018 Toyota RAV4. Relief from the automatic stay as to the interest of the debtor in such property is denied as moot given the entry of the discharge in this case. 11 U.S.C. § 362(c)(2)(C).

IT IS FURTHER ORDERED that no other relief is awarded. To the extent that the motion includes any request for attorney's fees or other costs for bringing this motion, the request is denied.

2. 22-21726-A-7 **IN RE: JORETHA WALKER**
SKI-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-2-2022 [17]

CANDACE BROOKS/ATTY. FOR DBT.
SHERYL ITH/ATTY. FOR MV.
AMERICREDIT FINANCIAL SERVICES, INC. VS.

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); non-opposition by chapter 7 trustee
Disposition: Granted
Order: Civil minute order

Subject: 2017 Chevrolet Malibu
Cause: delinquent installment payments prepetition - $ 1,172.61; post-petition - $ 590.87

These minutes constitute the court's findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a), *incorporated by* Fed. R. Bankr. P. 7052, 9014(c). The findings of fact are as set forth above; the conclusions of law are as set forth below.

DEFAULT OF RESPONDENT

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written

opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The movant, Americredit Financial Services, Inc., seeks relief from the automatic stay of 11 U.S.C. § 362(a). On September 20, 2022, the chapter 7 trustee filed non-opposition to the motion on the court's docket.

STAY RELIEF

"[A]fter notice and a hearing," the court may terminate, annul, modify or condition the stay: (1) "for cause, including the lack of adequate protection"; or (2) "with respect to a stay of an act against property [of the estate]" if the debtor lacks "equity" in that property and if that "property is not necessary for an effective reorganization." 11 U.S.C. § 362(d); *see also* Fed. R. Bankr. P. 4001(a)(1). The party seeking stay relief bears the burden of proof as to "the debtor's equity in the property" and on the validity and perfection of its security interest, as well as the amount of its debt. 11 U.S.C. § 362(g)(1); *In re Dahlquist*, 34 B.R. 476, 481 (Bankr. S.D. 1983). The party opposing stay relief, e.g., the debtor or Chapter 7 trustee, bears the burden of proof on all other issues. 11 U.S.C. § 362(g)(2).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). The debtor bears the burden of proof. 11 U.S.C. § 362(g)(2). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1). "An undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." *See* Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1065.1 (rev. 2019) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)); *see also In re Weinstein*, 227 BR 284, 296 (9th Cir. BAP 1998) ("Adequate protection is provided to safeguard the creditor against depreciation in the value of its collateral during the reorganization process"); *In re Deico Electronics, Inc.*, 139 BR 945, 947 (9th Cir. BAP 1992) ("Adequate protection payments compensate undersecured creditors for the delay bankruptcy imposes upon the exercise of their state law remedies").

The debtor is obligated to make payments to the moving party pursuant to a loan contract that is secured by a security interest in the debtor's vehicle described above. The debtor has defaulted on such loan with the moving party, and postpetition payments are past due. Vehicles depreciate over time and with usage. As a consequence, the moving party's interest in the vehicle is not being

adequately protected due to the debtor's ongoing postpetition default.

Cause exists to grant relief under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Americredit Financial Services, Inc.'s motion for relief from the automatic stay has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The automatic stay is vacated with respect to the property described in the motion, commonly known as 2017 Chevrolet Malibu, as to all parties in interest. The 14-day stay of the order under Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived. Any party with standing may pursue its rights against the property pursuant to applicable non-bankruptcy law.

IT IS FURTHER ORDERED that no other relief is awarded. To the extent that the motion includes any request for attorney's fees or other costs for bringing this motion, the request is denied.

3. 22-22056-A-7 **IN RE: DAVID MICHAL**
CLH-1

MOTION TO SET TRIAL DATE
9-19-2022 [14]

PATRICIA WILSON/ATTY. FOR DBT.

No Ruling

4. 22-22056-A-7 **IN RE: DAVID MICHAL**
DBL-1

MOTION TO DISMISS CASE AND/OR MOTION FOR SANCTIONS AND MOTION FOR COMPENSATION BY THE LAW OFFICE OF DWIGGINS & WILSON BANKRUPTCY LAW FOR PATRICIA WILSON, DEBTOR'S ATTORNEY(S)
9-3-2022 [7]

PATRICIA WILSON/ATTY. FOR DBT.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Motion to Dismiss Involuntary Petition and for Sanctions and Attorneys' Fees
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied; debtor to file answer not later than October 10, 2022
Order: Civil minute order

David R. Michal ("Michal") moves to dismiss an involuntary chapter 7 petition filed against him by Sarah Halevy; David H. Walker, individually and as trustee of the Sarah H. Walker T[rust]; and Marjorie B. Walker (collectively "the petitioning creditors"). Mot. to Dismiss, ECF No. 7. Michal also seeks sanctions, punitive damages, and attorneys' fees in an unspecified amount. *Id.* The petitioning creditors oppose the motion. Oppos., ECF No. 18.

FACTS

On August 18, 2022, the petitioning creditors filed an involuntary chapter 7 petition against Michel. Invol. Petition, ECF No. 1. Counsel for the petitioning creditors is Charles L. Hastings.

The petitioning creditors properly used Official Form 105 to present their case against the targeted debtor. As is the case in a forms driven practice, many of the allegations are boilerplate. Among the preprinted allegations alleged are that: (1) "Each petitioner is eligible to file this petition under 11 U.S.C. § 303(b)," *id.* at § 11; (2) The debtor may be the subject of an involuntary case under 11 U.S.C. § 303(a)," *id.*; (3) "The debtor is generally not paying such debtor's debts as they become due, unless they are the subject of a bona fide dispute as to liability or amount," *id.*; (4) "Has there been a transfer of any claim against the debtor by or to any petitioner? Yes. Attach all documents that evidence the transfer and any statements required under Bankruptcy Rule 1003(a)," *id* at § 12. The petition purports to have been signed by three petitioning creditors: (1) "Sarah Halevy, Assignment of Judgment $4,777,759.80"; (2) David H. Walker, individually and as trustee of the Sarah H. Walker T[rust] Assignment of Judgment $4,777,759.80"; and (3) Marjorie B. Walker, individually, Assignment of Judgment $4,777,759.80." *Id.*

Appended to the Involuntary Petition is a document entitled, "Statement Required Under Bankruptcy Rule 1003(a). That statement provided:

> The Petitioning Creditors, who's signatures are below, hereby state that they each received an assignment of a judgment against the debtor, David R. Michal. The assignment was not for the purpose of commencing this involuntary case against the debtor. The consideration of the transfer was in settlement of a claim held by each of the undersigned against the previous holder of the judgment.

Invol. Petition, ECF No. 1.

None of the assignment documents were appended to the involuntary petition or filed with the Clerk of the Court. Fed. R. Bankr. P 1003(a).

The petitioning creditors served the summons and involuntary petition on Michal thereafter. Certificate of Service, ECF No. 3.

PROCEDURE

This motion followed. Michal filed a "motion to dismiss the involuntary petition against him and sought attorneys' fees and sanctions against the petitioning creditors and their attorney. Motion to Dismiss, ECF No. 7. Michal is represented by the firm of Dwiggins & Wilson. Michal argues that he is paying his debts as they come due, except for those subject to bona fide dispute as to liability or amount. Though styled as a motion to dismiss, presumably under Rule 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012, it is supported by the declaration of Michal, his counsel (Patricia Wilson), and a credit report. Michal advances two arguments that: (1) he doesn't owe the petitioning creditors any money, Decl. of Michal ¶ 2, ECF No. 22; and (2) his just, undisputed bills are paid as they come due. Mot. to Dismiss 2:21-3:15, ECF No. 7. 11 U.S.C. § 303(h). The petitioning creditors oppose the motion, offering evidence of their own and objecting to the evidence offered by Michal.

REPLY

On September 26, 2022, Michal filed objections to the evidence proffered by the petitioning creditors as hearsay, and further argument that Michal was not provided the opportunity to pay the debt owed to the petitioning creditors. *See* ECF No. 29.

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); *see also* General Order No. 182 of the Eastern District of California. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A); *In re QDOS, Inc.*, 607 B.R. 338, 342 (9th Cir. BAP 2019).

LAW

Involuntary Petitions

Bankruptcy Code § 303 authorizes creditors to file a Chapter 7 bankruptcy on behalf of an individual who is not paying his or her undisputed debts. 11 U.S.C. § 303. Such a bankruptcy is commenced by filing an involuntary petition; after it is filed it must be served on the debtor. Fed. R. Bankr. P. 1010(a). As a rule, the respondent debtor may file an answer, 11 U.S.C. § 303(h); Fed. R. Bankr. P. 1011(a), or may challenge the sufficiency of the petition by Rule 12 motion. Fed. R. Bankr. P. 1011(b). If the debtor fails to contest the petition, the court shall order relief against the debtor. 11 U.S.C. § 303(h). If the debtor contests the petition by Rule 12 motion, no answer is required until the motion is resolved. Fed. R. Bankr. P. 1011(c); *QDOS, Inc.*, 607 B.R. at 345. If an answer is filed, the debtor must file the list described in Rule 1003(b), other creditors may join the petition, and discovery rights attach. *Id.* at 346-347. In such instances, resolution of evidentiary issues occurs by summary judgment or trial. *Cunningham v. Rothery (In re Rothery)*, 143 F.3d 546, 548-549 (9th Cir. 1998) (summary judgment); *QDOS, Inc.*, 607 B.R. at 344-345.

At trial, the petitioning creditors bear the burden of proof. *Rothery*, 143 F.3d at 548; *QDOS, Inc.*, 607 B.R. at 343. Those creditors must prove: (1) petitioning creditor eligibility, Fed. R. Bankr. 1003(a) (applicable to assignees only);[1] (2) numerosity: at least one petitioning creditor if the debtor has fewer than 12 creditors or at least three petitioning creditors if the debtor has 12 or more creditors, 11 U.S.C. § 303(b); *In re Kidwell*, 158 B.R. 203 (Bankr. E.D. Cal. 1993) (Klein, J.), cited by *QDOS, Inc.*, 607 B.R. at 347;[2] (3) the petitioning creditors' claims are not contingent and not the subject of a bona fide dispute; (4) the petitioning creditors' claims aggregate is not less than $18,600, 11 U.S.C. § 303(b); and (5) the debtor is generally not paying undisputed debts as "they become due." 11 U.S.C. § 303(b), (h); *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1064 (9th Cir. 2002); *Morabito v. JH, Inc. (In re Morabito)*, 2016 WL 3267406 * 8-9 (9th Cir. BAP 2016).

[1] Petitioning creditors have not fully complied with Federal Rule of Bankruptcy Procedure 1003(a), i.e., attachment of specified assignment documents.

[2] Here, it is unclear whether Michal's has at least 12 creditors. If so, at least creditors must join the petition. 11 U.S.C. § 303(b). Since the petitioners appear to hold but a single, indivisible judgment, *In re Mid-America Industrial, Inc.*, 236 B.R. 640, 645 (Bankr. N.D. Il. 1999) (joint creditors counted as but a single claim under 11 U.S.C. § 303(b); see also *In re Richard A. Turner Co., Inc.*, 209 B.R. 177, 17 (Bankr. D. Mass. 1997), it appears that this has but one single petitioning creditor, not three creditors. If Michal has at least twelve creditors, it appears that there are an insufficient number of petitioning creditors.

Rule 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). Failure to state a claim may exist as a matter of law or as a matter of fact. *Johnson v. Riverside Healthcare Sys.*, LP, 534 F.3d 1116, 1121–22 (9th Cir. 2008) ("A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory"); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering the sufficiency of the complaint, the court may consider the factual allegations in the complaint itself and some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

After *Iqbal* and *Twombly*, courts employ a three-step analysis in deciding Rule 12(b)(6) motions. At the outset, the court takes notice of the elements of the claim to be stated. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014). Next, the court discards conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *United States ex rel. Harper v. Muskingum Watershed Conservancy District*, 842 F.3d 430, 438 (6th Cir. 2016) (the complaint failed to include "facts that show how" the defendant would have known alleged facts). Finally, assuming the truth of the remaining well-pleaded facts, and drawing all reasonable inferences therefrom, the court determines whether the allegations in the complaint "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679; *Sanchez v. United States Dept. of Energy*, 870 F.3d 1185, 1199 (10th Cir. 2017). *See generally*, *Wagstaff Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 23.75-23.77 (Matthew Bender & Company, Inc. 2019).

Plausibility means that the plaintiff's entitlement to relief is more than possible. *Twombly*, 550 U.S. at 570 (the facts plead "must cross the line from conceivable to plausible"); *Almanza v. United Airlines, Inc.*, 851 F.3d 1060, 1074 (11 Cir. 2017). Allegations that are "merely consistent" with liability are insufficient. *Iqbal*, 556 U.S. at 662; *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011).

If the facts give rise to two competing inferences, one of which supports liability and the other of which does not, the plaintiff will be deemed to have stated a plausible claim within the meaning of *Iqbal* and *Twombly*. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015); *16630 Southfield Ltd. P'hsip v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013); see also, Wagstaff, Motion to Dismiss at § 23.95. But if one of the competing inferences is sufficiently strong as to constitute an "obvious alternative explanation," that inference defeats a finding of plausibility, and the complaint should be dismissed. *Marcus & Millichap Co.*, 751 F.3d at 996 ("Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that the plaintiff's explanation is implausible."); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Group, PLC*, 709 F.3d 109, 121 (2nd Cir. 2013).

DISCUSSSION

Notwithstanding denominating the matter as a "motion to dismiss," Michal's resort to extrinsic evidence, suggests treatment by summary judgment. Fed. R. Bankr. P. 7056; *Cunningham v. Rothery (In re Rothery)*, 143 F.3d 546, 548-549 (9th Cir. 1998) (involuntary petition).

Summary Judgment

Summary judgment is not appropriate in this case. Summary judgment is a discretionary remedy. *Fernandez-Montes v. Allied Pilots Ass'n.*, 987 F.2d 278, 283 (5th Cir. 1993); *Alexander v. Oklahoma*, 382 F.3d 1206, 1213-1214 (10th Cir. 2004); *In re Mortg. Electronic Registration Systems, Inc.*, 754 F.3d 772, 781 (9th Cir. 2014). Several factors weigh against such treatment. The most frequent reason to deny summary judgment is prematurity. *Texas Partners v. Conrock Co.*, 685 F.2d 1116, 1121 (9th Cir. 1982). No answer has been filed; the case is just more than one month old. They issue for which Michal seeks summary judgment, i.e., whether he is paying his bills as they come due, is only adjudicated if and when an answer has been filed. Moreover, it is factually complex, e.g., objectively considered and based on the totality of the circumstances the debtor is not paying his bills as they come due. *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1072 (9th Cir. 2002); *Morabito v. JH, Inc. (In re Morabito)*, 2016 WL 3267406 * 8-9 (9th Cir. BAP 2016). Once an answer is filed, discovery rights attach. *In re QDOS, Inc.*, 607 B.R. 338, 342 (9th Cir. BAP 2019). Unless and until an answer is filed and, if requested by the petitioning creditors, discovery has been completed, the matter is premature.[3]

Even if the court were to convert the motion to a summary judgment it would deny the motion because genuine disputes of material facts exit. Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. Those disputed facts are: (1) whether Michal owes the

[3] Moreover, the motion does not comply with LBR 7056-1(a): (1) 42 days notice required; and (2) supported by separate statement of undisputed facts.

petitioning creditors money, Compare Decl. of Michal ¶ 2, ECF No. 11 (never "incurred a debt to them") with Judgment, Marshal Melton v. BHB of Georgia, LLC, No. 188809 (Shasta County Superior Court 2017) (judgment for $3.4 million); and (2) whether objectively considered Michal is paying his undisputed unsecured debts. Compare Decl. of Wilson ¶ 4, ECF No. 9 (hearsay that bill "paid as agreed") with Invol. Pet., Part 3, Items 11, 13 ("not paying debtor's debts as they come due") and unpaid judgment $4.777 million). At best, disputes exist.

Rule 12(b)(6)

Falling back to Rule 12(b)(6), Michal's motion will be denied. Under the rubric of a Rule 12(b)(6) motion, i.e., consideration of the factual allegations of involuntary petition, and not extrinsic evidence, the petitioning creditors have plead a plausible claim for relief under § 303. That is true for two reasons. First, a fully and properly completed Involuntary Petition, Official Form 105, states a prima facie case for § 303 relief. *In re Gutierrez*, 2020 WL 3720211 * 3 (Bankr. S.D. Miss. 2020). And that is the case here. Second, the elements of a prima facie case have been plead.[4] Summarized, the elements are: petitioning creditor eligibility;[5] numerosity; claims are not contingent and not the subject of a bona fide dispute; claims aggregate is not less than $18,600; and the debtor is generally not paying undisputed debts as "they become due." The allegations of the Involuntary Petition, albeit boilerplate, state a plausible claim against Michal. Invol. Petition, Part 3, Items 11-13, ECF No. 1.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

David R. Michal's motion has been presented to the court. Having considered the motion and opposition, as well as the arguments of counsel,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that not later than October 10, 2022, David R. Michal shall file an answer to the involuntary petition;

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[4] Any defect with respect to the number of petitioning creditors does not defeat the petition at this time. Lack of numerosity is an affirmative defense and need not be plead. *In re QDOS, Inc.*, 607 B.R. 338, 346-47 (9th Cir. 2019).

[5] The failure to file documents supporting the assignment, Fed. R. Bankr. P. 1003(a) is not a basis to grant the motion. *In re Hujazi*, 2017 WL 3007084 * 8 (9th Cir. BAP 2017). In the event Michal contends that the assignment was improperly made for the purposes of filing an involuntary petition, in contravention of Rule 1003(a), this is a matter for resolution by evidentiary hearing.

IT IS FURTHER ORDERED that if David R. Michal contends that: (1) the petitioner creditors are but a single claim for the purposes of numerosity under 11 U.S.C. § 303(b), and (2) that he has 12 or more creditors, he shall file the statement required by Federal Rule of Bankruptcy Procedure 1003(b); and

IT IS FURTHER ORDERED that all other relief is denied.

5. 22-21277-A-7 **IN RE: YOUSEF HADDAD**
PP-2

CONTINUED MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR AND/OR MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGEABILITY OF A DEBT
8-15-2022 [40]

MARK WOLFF/ATTY. FOR DBT.
THOMAS PHINNEY/ATTY. FOR MV.

Final Ruling

Matter: Motion to Extend Deadlines
Notice: Continued from August 29, 2022
Disposition: Denied as moot
Order: Civil minute order

The hearing on EBF Holdings, LLC, dba Everest Business Funding's motion to extend deadlines to file a complaint objecting to discharge and/or a complaint objecting to dischargeability of debt was continued to allow the moving party to augment the record with a showing of cause under Fed. R. Bankr. P. 4007(d).

On September 6, 2022, the movant filed the adversary complaint against the debtor (22-02091). This motion will be denied as moot.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

EBF Holdings, LLC, dba Everest Business Funding's motion has been presented to the court. Having considered the motion together with papers filed in support and opposition, and having heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied as moot.