UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Wednesday, October 26, 2022
Department B – Courtroom #13
Fresno, California

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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.

Post-Publication Changes: 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 any possible updates.

9:30 AM

1. 21-12702-B-13 **IN RE: GABRIEL/GINA BENAVIDES**
KMM-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-15-2022 [85]

VW CREDIT, INC./MV
PATRICK KAVANAGH/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.
DISMISSED 10/5/22

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

VW Credit, Inc. seeks relief from the automatic stay for cause with respect to a 2020 Volkswagen Tiguan pursuant to 11 U.S.C. § 362(d)(1). Doc. #85. However, this case was dismissed on October 5, 2022. Doc. #101. Under § 362(c)(1) and (c)(2)(B), the stay against property of the estate continues until such property is no longer property of the estate, and the stay of any other act continues until the time the case is dismissed. Accordingly, this motion will be DENIED AS MOOT.

2. 21-12008-B-13 **IN RE: CELESTE MURILLO**
JNV-5

MOTION TO MODIFY PLAN
9-1-2022 [64]

CELESTE MURILLO/MV
JASON VOGELPOHL/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

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

ORDER: The court will issue an order.

Celeste Lucia Murillo ("Debtor") moves for an order confirming the *Fourth Modified Chapter 13 Plan* dated September 1, 2022. Doc. #64. The 60-month plan proposes that Debtor shall pay $899.00 per month for 1 month, $1,357.00 per month for 1 month, $1,509.00 per month for 9 months, and $156.00 per month for 49 months with a 0% dividend to allowed, non-priority unsecured claims. Doc. #68. Debtor's *Amended*

Schedules I and *J* indicate that Debtor receives $156.18 in monthly net income. Doc. #69.

In contrast, the *Third Amended Chapter 13 Plan* dated December 20, 2021, confirmed June 10, 2022, provides that Debtor shall pay $899.00 per month for 1 month, $1,357.00 per month for 1 month, and $1,509.00 per month for 58 months with a 100% dividend to allowed, non-priority unsecured claims. Docs. #35; #57. Further, the order confirming plan states that the Chapter 7 Liquidation Test requires that priority and general unsecured creditors receive not less than a combined total of $1,453.04. *Id.*

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to confirmation for three reasons:

(1) the plan fails to provide for submission of all or such portion of Debtor's future earnings or other income to the supervision and control of the Trustee as is necessary to execute the plan (11 U.S.C. § 1322(a));
(2) the plan has not proposed in good faith (11 U.S.C. § 1325(a)(3)) and/or the actions of the Debtor in filing the petition was in bad faith (11 U.S.C. § 1325(a)(7); and
(3) Debtor failed to file, serve, and set for hearing a motion to value collateral (LBR 3015-1(i)).

Doc. #71.

This motion to modify plan will be CONTINUED to November 30, 2022 at 9:30 a.m. Unless this case is voluntarily converted to chapter 7, dismissed, or the Trustee's opposition to confirmation is withdrawn, the Debtor shall file and serve a written response not later than November 16, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. Trustee shall file and serve a reply, if any, by November 23, 2022.

If the Debtor elects to withdraw the plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing not later than November 23, 2022. If the Debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the objection without a further hearing.

3. 22-11410-B-13 **IN RE: HOWARD/KIM CRAUSBY**
BPN-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
9-22-2022 [22]

NORTHROP GRUMMAN FEDERAL CREDIT UNION/MV
DAVID BOONE/ATTY. FOR DBT.
BRUCE NEEDLEMAN/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

The notice of hearing (Doc. #23) did not comply with LBR 9014-1(d)(3)(B)(iii), which requires the movant to notify respondents that they can determine (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at http://www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

4. 21-11619-B-13 **IN RE: JUSTINA GONZALEZ**
SL-3

MOTION FOR COMPENSATION FOR SCOTT LYONS, DEBTORS ATTORNEY(S)
9-26-2022 [31]

SCOTT LYONS/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.

Scott Lyons ("Applicant"), attorney for Justina Jane Gonzalez ("Debtor"), seeks interim compensation in the sum of $3,862.42 under 11 U.S.C. §§ 330-31. Doc. #31. This amount consists of $3,851.68 in fees as reasonable compensation and $10.74 in reimbursement for

actual, necessary expenses from August 12, 2021 through September 14, 2022. *Id.*

Debtor executed a statement dated September 23, 2022 indicating that Debtor has reviewed the fee application and has no objections. *Id.*, § 9(7).

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) and Fed. R. Bankr. P. ("Rule") 2002(a)(6). The failure of the creditors, the debtor, 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 Sys., 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 chapter 13 bankruptcy on June 25, 2021. Doc. #1. Section 3.05 of the *Chapter 13 Plan* dated June 25, 2021, confirmed August 5, 2021, provides that Applicant was paid $1,460.00 prior to the filing of this case and, subject to court approval, additional fees of $10,540.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329-30 and Fed. R. Bankr. P. 2002, 2016-17.[1] Docs. #3; #16. Additionally, Applicant was paid $313.00 for the filing fee and $37.00 for a credit report, so a total of $1,810.00 was paid in pre-petition fees. Docs. #23; #31.

This is Applicant's second fee application. On September 24, 2021, the court awarded $8,051.66 in fees and $435.92 in costs, for a total of $8,487.58 for services rendered and expenses incurred between July 22, 2019 and August 11, 2021. Docs. ##23-24. After application of the $1,810.00 pre-petition retainer, $6,677.58 remained to be paid through the plan. *Id.* As a result, $3,862.42 remains in the plan to fund this application.

Applicant's firm provided 14.33 billable hours of legal services at the following rates totaling $3,935.50 in fees, but has limited this application to **$3,851.68:**

Professional	Rate	Hours	Rate x Hours	Requested
Scott Lyons	$400	0.00	$0.00	$0.00
Louis Lyons	$350	10.01	$3,503.50	$3,422.17
Sylvia Gutierrez	$100	4.32	$432.00	$429.51
Total Hours & Fees		**14.33**	**$3,935.50**	**$3,851.68**

Docs. #31; #33, *Ex. B*. Applicant also incurred **$10.74** in postage expenses. *Id.* These combined fees and expenses total **$3,862.42**, which is the same amount remaining in the plan for attorney's fees.

11 U.S.C. § 330(a)(1)(A) and (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person, or attorney" and "reimbursement for actual, necessary expenses." In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, considering all relevant factors, including those enumerated in subsections (a)(3)(A) through (E). § 330(a)(3).

Applicant's services included, without limitation: (1) finalizing the first interim fee application (SL-1); (2) increasing Debtor's plan payment from $1,400.00 per month to $1,800.00 per month because the filed claims stated a higher amount than was estimated in the plan and schedules (SL-2); and (3) filing and serving this fee application (SL-3). Doc. #33, *Ex. A*. As noted above, Debtor has consented to payment of the requested fees. Doc. #31, § 9(7). The court finds the services and expenses actual, reasonable, and necessary.

No party in interest timely filed written opposition. Accordingly, the motion will be GRANTED. Applicant will be awarded $3,851.68 in fees and $10.74 in expenses on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to § 330. The chapter 13 trustee is authorized, in his discretion, to pay Applicant $3,862.42 in accordance with the chapter 13 plan for services rendered and expenses incurred from August 12, 2021 through September 14, 2022.

The court notes that any additional fees requested by counsel will require another modified plan.

[1] On August 23, 2022, the court granted Debtor's *ex parte* request to increase the plan payment from $1,400.00 to $1,800.00. Doc. #30. This minor modification did not affect the attorney's fees dividend.

5. 22-11319-B-13 **IN RE: JEBR ALFAREH**
MHM-1

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
9-29-2022 [15]

STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to the *Chapter 13 Plan* filed by Jebr A. Alfareh ("Debtor") on July 31, 2022 under 11 U.S.C. § 1325(a)(4) because the plan fails to provide for the value of property to be distributed under the plan on account of each allowed unsecured claim in at least the amount that would be paid on such claim if the case was liquidated under chapter 7, and under § 1325(a)(3) and (a)(7) because the plan has not been proposed in good faith and/or the Debtor filed the petition in bad faith. Doc. #15.

Though not required, Debtor filed written opposition, a supporting declaration, and over 1,100 pages of exhibits. Docs. ##19-21.

Written opposition was not required and may be presented at the hearing. This objection will be called and proceed as scheduled.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. 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.

According to the Trustee, Debtor testified at the 341 meeting that on or about March 2021, Naji Algharasi purchased a 2021 California lottery scratcher ticket for $20.00, which resulted in winning the sum of $5 million dollars. Doc. #17. Debtor and Algharasi allegedly entered into a verbal agreement wherein Debtor would claim the lottery ticket and reimburse Algharasi upon receipt of the lottery ticket monies. In return, Algharasi agreed to pay Debtor $144,000. *Id.*

In May 2021, after deducting taxes, the state of California issued a payment in the sum of $2,204,004.80. Debtor deposited the lottery winnings into Debtor's bank account. On or about September 2021, Algharasi demanded payment of the outstanding sum owed, which Algharasi contended totaled $1,220,000.00 in a complaint filed on April 1, 2022 for breach of contract, accounting, and declaratory relief. *Id.*

Debtor filed bankruptcy on July 31, 2022. Doc. #1. At the time of filing, the schedules indicate that Debtor had a total of $24,001.00

in bank accounts. *Id.* Trustee says that Debtor has lost over a million dollars from May 2021 through April 2022. Doc. #17.

Debtor's plan proposes that Debtor will pay $2,360.63 per month for 60 months. Doc. #3. From these proceeds, Trustee will pay $12,000.00 in attorney fees, $16,779.17 to secured creditor BMO Harris Bank for a 2021 Tesla, and $17,313.61 to Patelco Credit Union for a 2016 Honda Pilot. Unsecured creditors will be paid 5.41% of the estimated unsecured claims totaling $1,561,655.35, resulting in an estimated payoff of $84,485.55. Doc. #15.

Trustee received numerous financial documents from Debtor, including bank statements, brokerage E*TRADE account statements, Coinbase transactions, and numerous other accounting documents. *Id.* It appears that Debtor included over 1,100 pages of these documents as exhibits. *See* Doc. #21.

Trustee is unable to determine the final destination of the funds withdrawn and the entity or persons who received the funds. Therefore, Trustee cannot determine if unsecured creditors are receiving the same amount that they would be paid if this case were to be liquidated under chapter 7.

In response, Debtor acknowledges receipt of $2,204.005.80 in lottery proceeds from the state of California. Doc. #20. From this amount, Debtor paid Algharasi $1,012,600 via wire transfers, cash transfers, ACH transfers, and Algharasi performming ATM withdrawals over a period of seven months. A total of $50,000.00 paid to Ali Alfar, Debtor's father, via cash or by paying the bills or expenses of Ali Alfar. *Id.*

Next, Debtor lost a total of $1,048,847 in the stock market and received $104,000.00 that was spent on cryptocurrency transactions, bills, and home improvements. *Id.* Debtor summarizes the accounting of the funds as follows:

E*TRADE Losses	$1,048,847
Naji Algharasi	+ $1,012,600
Ali Alfar	+ $50,000
Debtor	+ $104,000
Total	= **$2,215,447**
Total Received	- $2,204,005
Excess[2]	= $11,442

Id. Debtor says the excess amount is due to the fact that he did not keep an accurate running total of money taken for personal uses.

Subtracting the $11,442 from the $104,000 that went to Debtor results in $92,558. From this amount, Debtor purchased a total of $39,045 in cryptocurrency, which was worth approximately $21,000 on the petition date. *Id.*; *cf.* Doc. #1, *Sched. A/B*, at ¶ 17.4. Debtor acknowledges

that he has lost nearly 50% of the value invested in these transactions. Docs. #20; #21, *Ex. G*.

Debtor also paid a $10,000 Paypal loan on May 20, 2021, made home improvements totaling about $15,000, spent $5,000 on a pool cover, and approximately $10,000 getting his home painted. Doc. #20. The remaining money went to debt payments. Debtor was taking cash advances and borrowing from lines of credit to invest in the market, pay other loans, or pay living expenses. In total, Debtor paid over $107,000 on credit card payments over 10 months.

The debtor has the burden of proving all elements of plan confirmation. *Meyer v. Hill*, 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001). A reply declaration attaching 1100 pages of exhibits is not proof of where the money went. Debtor's summary is helpful but at this moment the court can make no credibility determination, which will be important in this case given the large pre-petition losses.

The declaration provides no evidentiary foundation for the records. Further the declaration does not adequately prove the veracity of the "other payments" summarized in the declaration. Debtor surmises a forensic audit would reveal little discrepancy. Frankly, that conclusion is unacceptable given the facts of this case. Also, the court is unable to determine whether distributions proposed under the plan comply with § 1325(a)(4).

The objection will be called as scheduled to inquire about Trustee's response to Debtor's opposition. This matter may be continued for scheduling at the hearing. It appears additional discovery and an evidentiary hearing may be necessary.

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[2] The court notes that Debtor says there is $12,442 in excess funds, but it appears to be $11,442.

6. 22-11035-B-13 **IN RE: DONALD/STEPHANIE SALKIN**
MHM-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE
MICHAEL H. MEYER
8-29-2022 [38]

BENNY BARCO/ATTY. FOR DBT.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection was originally set for hearing on September 21, 2022 and continued to October 26, 2022 so that the debtors could either file a written response to the trustee's objection or file, serve, and set for hearing a confirmable modified plan. Docs. ##43-44.

However, on October 19, 2022, the court granted the debtors' motion to voluntarily dismiss this case. Doc. #65. Accordingly, the trustee's objection to plan confirmation will be OVERRULED AS MOOT because the case has already been dismissed.

7. 22-11341-B-13 **IN RE: ALEJANDRO/JULIA ZAMORA**
JDR-1

MOTION TO CONFIRM PLAN
9-14-2022 [20]

JULIA ZAMORA/MV
JEFFREY ROWE/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

Alejandro Orozco Zamora and Julia Cerda Zamora (collectively "Debtors") move for an order confirming the *First Modified Chapter 13 Plan* dated September 14, 2022. Doc. #20. The plan proposes that Debtors shall pay $4,001.16 for 60 months with a 24.70% dividend to allowed, non-priority unsecured claims. Doc. #18. Debtors' *Amended Schedules I* and *J* indicate that they receive $4,053.00 in monthly net income, which is sufficient to fund the plan as originally proposed. Doc. #16. No plan has been confirmed in this case.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected. Doc. #38.

Debtors responded. Doc. #40.

This motion to modify plan will be called and proceed as scheduled. If Debtor has resolved Trustee's objection, this motion may be GRANTED.

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 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. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

Trustee objects under 11 U.S.C. § 1325(b) because the plan does not provide for all of Debtors' projected disposable income to be applied to unsecured creditors under the plan. Doc. #38. Trustee says that Debtors deducted $970.00 on Form 122C-2, Line 11, for local transportation expenses. *Id.; cf.* Doc. #17. However, the maximum allowable deduction on Line 11 per the U.S. Trustee Program for the West Region, is $570.00, and Debtors cannot deduct an older vehicle car expense. *Id.*, citing *Drummond v. Luedtke (In re Leudtke)*, 508 B.R. 408 (B.A.P. 9th Cir. 2014).

Debtors responded to Trustee's objection, agreeing that Debtors cannot take an older car exemption in calculating their plan payment. Doc. #40. As a result, Debtors will increase the chapter 13 plan payment to $4,404.55 per month commencing in Month 2 of the plan. The current *Amended Schedules I and J* accompanying this motion show net income of $4,053.00 per month. Doc. #16. Yet under the proposed plan, the Debtors say they will pay $4,404.55 in response to the Trustee's objection. Doc. #40. That is a $351.55 deficit per month. This raises questions about the feasibility of the Plan.

Debtors say that Trustee has agreed with this new calculation and amount.

This matter will be called as scheduled to inquire about Trustee's reply, if any, to Debtors' response. If Trustee's objection is resolved, this motion may be GRANTED. Otherwise, this motion will be DENIED.

If granted, the confirmation order shall include the docket control number of the motion, shall reference the plan by the date it was filed, and shall be approved as to form by Trustee.

8. 22-11341-B-13 **IN RE: ALEJANDRO/JULIA ZAMORA**
JDR-2

MOTION TO VALUE COLLATERAL OF SERVICE FINANCE COMPANY, LLC
9-14-2022 [27]

JULIA ZAMORA/MV
JEFFREY ROWE/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Alejandro Orozco Zamora and Julia Cerda Zamora (collectively "Debtors") requests an order valuing "solar panels" at $3,633.55 under 11 U.S.C. §§ 506, 1322(b), and Federal Rule of Bankruptcy Procedure ("Rule") 3012. Doc. #27. The solar panels are encumbered by a secured claim in favor of Service Finance Company, LLC ("Creditor") in the amount of $25,399.00.[3] *Id.*

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with Rule 9013 and Local Rule of Practice ("LBR") 9014-1(d)(3)(A). The motion fails to state the factual and legal grounds upon which the requested relief is sought with sufficient particularity. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Rule 9013 requires a request for an order to be by written motion, unless made during a hearing. "The *motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought*." Rule 9013 (emphasis added).

The particularity requirement is restated in the local rules:

> The application, motion, contested matter, or other request for relief shall set forth the relief or order sought and *shall state with particularity the factual and legal grounds therefor*. Legal grounds for the relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability.

LBR 9014-1(d)(3)(A). Here, the motion states:

1. Debtors move for an order valuing the collateral of Creditor of solar panels.
2. This motion is based on the declaration, exhibits, and points and authorities filed concurrently with the motion.

3. Debtors believe the total amount of Creditor's claim is $25,399.00, but that the replacement value of the collateral is $3,633.55.
4. Debtors' plan provides that the secured claim will be paid in the amount of the market value of the collateral.
5. Therefore, Debtors request an order valuing the collateral of the $25,399.00 [*sic*] at the replacement value of $3,633.55.

Doc. #27. This is insufficient. No citations to any statutes, rules, cases, or doctrines were included. The motion is also entirely devoid of any reference to or analysis of 11 U.S.C. §§ 506 or 1325(a)(*).

Some legal citations and analyses are included in the memorandum of points and authorities, including references to 11 U.S.C. §§ 506(a) and (d), 1322(b)(2), Rules 3012 and 9014, and case law. Doc. #29, citing *Nobleman v. Am. Serving Bank*, 508 U.S. 324 (1993); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (1997); and *In re Zimmer*, 313 F.3d 1220 (9th Cir. 2002). However, these cases are inapplicable because they involved bifurcating and stripping partially secured claims, defining a secured claim within the meaning of § 506, and avoiding a lien that encumbers a residence.

Additionally, the memorandum of points and authorities clarifies that the "solar panels" that Debtors wish to value consist of "panels and equipment." *Id.* This detail and description of the collateral was omitted from the motion.

The declaration of joint debtor Alejandro Orozco Zamora, Jr., provides (i) foundation for the copy of *Schedule D*, the plan, and a printout of a similar solar power system/equipment selling on the open market, which were included as exhibits to this motion, (ii) Debtor's opinion that the replacement value of the solar panels is $3,633.55, and (iii) that the *First Modified Chapter 13 Plan* provides for the secured creditor to be paid the fair market value of its collateral. Doc. #30.

The motion omits necessary facts, such as a specific description of the collateral that Debtors seek to value, when the collateral was acquired, and whether Creditor's security interest is a purchase money security interest. Doc. #27. Per *Schedule D*, it appears that the collateral may consist of "16 Solar Panels, String Inverter, Production Monitoring Unit," and may have been acquired sometime in August 2020. Doc. #1. But none of these facts were included in the motion as they should have been.

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) that collateral is personal property other than a motor vehicle acquired for the personal use of the debtor, and (3) the debt was incurred within one year preceding

the filing of the petition. Debtors have failed to plead and prove § 1325(a)(*) is inapplicable and only § 506 applies.

For the above reasons, this motion will be DENIED WITHOUT PREJUDICE.

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[3] Debtors complied with Rule 7004(b)(3) by serving Corporation Service Company Which Will Do Business In California as CSC – Lawyers Incorporating Service, Creditor's registered agent for service of process, by certified mail on September 14, 2022. Doc. #32.

9. 19-12843-B-13 **IN RE: DONNIE EASON**
FW-2

CONTINUED MOTION TO MODIFY PLAN
8-16-2022 [43]

DONNIE EASON/MV
GABRIEL WADDELL/ATTY. FOR DBT.
PLAN WITHDRAWN

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

DISPOSITION: Withdrawn; taken off calendar.

NO ORDER REQUIRED.

Debtor Donnie L. Eason withdrew the *First Modified Chapter 13 Plan* on September 30, 2022. Doc. #73. Accordingly, this hearing will be dropped and taken off calendar pursuant to the withdrawal.

10. 19-12843-B-13 **IN RE: DONNIE EASON**
MHM-1

CONTINUED MOTION TO DISMISS CASE
8-3-2022 [39]

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

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

DISPOSITION: Continued to November 16, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

This motion was originally heard on August 31, 2022. Docs. ##54-55.

Chapter 13 trustee Michael H. Meyer ("Trustee") moved to dismiss this case for cause under 11 U.S.C. § 1307(c)(1) for unreasonable delay that is prejudicial to creditors and (c)(6) for material default by the debtor with respect to a term of a confirmed plan. Doc. #39.

Trustee said that the confirmed plan's 36-month term completed in July 2022. However, the proposed payments were insufficient to fund the case by month 36 and as of August 3, 2022, payments are delinquent in the amount of $2,218.92. Doc. #41. The plan states, "[i]f necessary to complete the plan, monthly payments may continue for an additional 6 months, but in no event shall monthly payments continue for more than 60 months." Doc. #3, Section 2.03. But based on Trustee's calculations, even if Debtor continues making regular payments through month 42, there will not be sufficient funds to pay off the case. Doc. #41.

Donnie L. Eason ("Debtor") timely filed opposition. Docs. ##51-52. Debtor filed a modified plan that is set for hearing in matter #9 above. FW-2. As a result, the court continued this motion to the same date and time as the confirmation hearing.

Trustee objected to Debtor's motion to modify plan, causing it to be continued to October 26, 2022 so that Debtor could either file and serve a written response or set a confirmable modified plan for hearing. Doc. #57; #61; #63. Debtor supplemented the opposition on September 21, 2022 indicating that a new plan would need to be filed.

This motion was further continued to October 26, 2022 to be heard in connection with Debtor's continued motion to modify plan. On September 30, 2022, Debtor withdrew the *First Modified Chapter 13 Plan* and filed, served, and set for hearing on November 16, 2022 the *Second Modified Chapter 13 Plan*. Docs. #73; FW-3.

Accordingly, this motion to dismiss will be further CONTINUED to November 16, 2022 at 9:30 a.m. to be heard in connection with Debtor's motion to modify plan.

11. 19-15350-B-13 **IN RE: LUIS BORGES**
PLG-4

MOTION TO MODIFY PLAN
9-6-2022 [67]

LUIS BORGES/MV
STEVEN ALPERT/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.

Luis Fernando Borges ("Debtor") moves for an order confirming the *Third Modified Chapter 13 Plan* dated September 12, 2022. Doc. #67. The plan proposes that Debtor has paid $7,499.98 through August 31, 2022 (Month 32), and commencing October 25, 2022 (Month 34), Debtor shall pay $311.60 per month through December 2024 (Month 60) with a 0% dividend to allowed, non-priority unsecured claims. Doc. #70. Debtor's *Schedules I* and *J* indicate that Debtor receives $313.00 in monthly net income. Doc. #1.

In contrast, Debtor's *Second Modified Chapter 13 Plan* dated September 16, 2020, confirmed November 16, 2020, provides that Debtor has paid $933.00 through August 31, 2020 and commencing September 25, 2020 (Month 9), Debtor shall pay $311.60 per month through December 2024 (Month 60) with a 0% dividend to allowed, non-priority unsecured claims. Docs. #36; #58. No party in interest timely filed written opposition.

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 Sys., 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.

12. 19-10752-B-13 **IN RE: STEVEN CHAVEZ**
MHM-3

CONTINUED MOTION TO DISMISS CASE
7-12-2022 [158]

MICHAEL MEYER/MV
SHARLENE ROBERTS-CAUDLE/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied as moot.

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

This motion was originally heard on August 10, 2022, continued to September 21, 2022, and continued a second time to October 26, 2022. Docs. ##169-70; #184; #187.

Chapter 13 trustee Michael H. Meyer ("Trustee") asked the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtor that is prejudicial to creditors and 11 U.S.C. § 1307(c)(6) for failure to make all payments due under the confirmed plan. Doc. #158.

Steven Chavez ("Debtor") did not oppose. However, on August 9, 2022, Debtor filed the *Fourth Modified Chapter 13 Plan* to cure the delinquency, which was set for hearing on September 21, 2022. Docs. #159; #165. As a result, the court continued this motion to the same date and time as the confirmation hearing. Docs. ##169-70.

On September 17, 2022, Debtor withdrew the plan and filed the *Fifth Modified Plan* dated the same, which was set for hearing on October 26, 2022. Docs. ##176-83. The court further continued this hearing to October 26, 2022 to be heard with the hearing on the *Fifth Modified Plan*, which is the subject of matter #13 below. SFR-8.

This matter will be called and proceed as scheduled. If Debtor has resolved the Trustee's objection, the motion to modify plan may be granted, and this motion to dismiss will be moot. If so, this motion will be DENIED AS MOOT. If the motion to modify plan is denied, the court may take up the merits of this motion to dismiss.

13. 19-10752-B-13 **IN RE: STEVEN CHAVEZ**
SFR-8

MOTION TO MODIFY PLAN
9-17-2022 [178]

STEVEN CHAVEZ/MV
SHARLENE ROBERTS-CAUDLE/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Conditionally granted or denied without prejudice.

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

Steven Chavez ("Debtor") moves for an order confirming the *Fifth Modified Chapter 13 Plan* dated September 17, 2022. Doc. #178. The plan proposes that Debtor has paid an aggregate amount of $342,982.19 for months 1-41, and payments shall increase to $11,071.00 per month beginning September 2022 effective month 41 to the end of the 60-month plan with a 0% dividend to allowed, non-priority unsecured claims. Doc. #182. Debtor's *Amended Schedules I* and *J* indicate that Debtor receives $11,245.00 per month in monthly net income, which is sufficient to fund the plan. Doc. #177.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to Debtor's motion to modify plan. Doc. #190.

Debtor responded, asking this hearing to be vacated because Trustee's opposition has been resolved. Doc. #192.

This motion to modify plan will be called and proceed as scheduled. If Debtor has resolved Trustee's objection, this motion may be CONDITIONALLY GRANTED provided that Debtor files a corrected certificate of service with the required attachments before the hearing. If Debtor did not serve the Trustee and U.S. Trustee ("UST"), then this motion will be DENIED WITHOUT PREJUDICE.

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 UST, 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. Upon default, factual allegations will be taken as true (except those

relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

Procedural Defects

As a preliminary matter, Debtor's certificate of service does not procedurally comply with the local rules.

LBR 3015-1(d)(3) requires all other proposed modified plans and the motion to modify the plan, as well as all other supporting documents, to be served on (1) the UST; (2) the Chapter 13 Trustee; (3) indentured trustees; (4) the debtor(s) and counsel; and (5) all creditors who have filed proofs of claim and creditors who are still permitted to file a proof of claim due to a court-ordered extension.

LBR 7005-1(a) requires the Certificate of Service Form to have attached to it the Clerk of the Court's Official Matrix, as appropriate: (1) for the case or adversary proceeding; (2) list of ECF Registered Users; (3) list of persons who have filed Requests for Special Notice; and/or (4) the list of Equity Security Holders.

Here, page two, section 5 of the certificate of service states that the following parties were served: Debtor, Trustee, UST, persons who have filed a request for notice, and creditors holding allowed secured claims, allowed priority unsecured claims, and leases or executory contracts that have been assumed. Doc. #183. Page three, section 6 states that Debtor effected service of the moving papers via first class mail. This section further states:

> A list of the persons served, including their name/capacity to receive service, and address is appended hereto and numbered. ***Attachment 6A1***.

Id. (emphasis in original). However, no Attachment 6A1 is included. Instead, Debtor includes Attachment 5, which omits the Trustee, UST, and Debtor. Since Debtor did not attach a matrix of names and addresses used in service on these parties, Debtor has failed to comply with LBR 3015-1(d)(3) and 7005-1(a).

Fed. R. Civ. P. 4(*l*)(3), *incorporated by* Fed. R. Bankr. P. 7004(a)(1), provides that failure to prove service does not affect the validity of service, and the court may permit proof of service to be amended. Further, LBR 1001-1(f) allows the court *sua sponte* to suspend provisions of the LBR not inconsistent with the Federal Rules to accommodate the needs of a particular case or proceeding. If Debtor files a corrected certificate of service with necessary attachments before the hearing, the court will overlook this procedural deficiency.

If Debtor does not correct the certificate of service by refiling it with the necessary attachments denoting the names and addresses used

for serving the Trustee and UST on September 17, 2022, or if Trustee and UST were not served on September 17, 2022 as alleged in the certificate of service, then this motion will be DENIED WITHOUT PREJUDICE for failure to comply with LBR 3015-1(d)(3) and Fed. R. Bankr. P. 2002(b), 3015(d) and (H).

Trustee's Objection

Trustee objects under (i) 11 U.S.C. § 1322(a) because the plan fails to provide for submission of all or such portion of future earnings or other income to the supervision and control of the Trustee as is necessary for execution of the plan, and (ii) 11 U.S.C. § 1325(a)(6) because Debtor will not be able to make all payments under the plan and comply with the plan. Doc. #190.

First, Trustee says that the third additional provision related to 3.07 should be stricken and replaced with the following language:

> Class 1 ongoing mortgage creditor Morgan Stanley Private Bank, N.A., as to the first deed of trust, has been paid the aggregate of $136,876.07 through month 41 with regular monthly payments resuming in month 42. All missed mortgage payments shall be paid by month 60. Class 1 creditor Morgan Stanley Private Bank N.A., as to the first deed of trust, has been paid an aggregate of $65,056.13 through month 41 in pre-petition arrears with monthly payments resuming in month 42. Class 1 ongoing mortgage creditor Morgan Stanley Private Bank N.A. as to the second deed of trust, has been paid an aggregate arrearage of $17,837.15 through month 41 with regular monthly payments resuming in month 42. All missed regular payments shall be paid by month 60.

Id. Second, Trustee claims that Debtor will not be able to make all payments under the plan and comply with the plan because the second additional provision relating to 2.1 refers to September 2022 as Month 41, but Month 41 of the plan is August 2022. Even if the $342,982.19 said to be paid through Month 41 includes plan payments of $11,071.00 for both August and September 2022, Debtor has only paid $329,112.83 into the plan, so payments are delinquent $13,869.36 through September 2022. *Id.*

Debtor's Response

In response, Debtor first agrees to strike and replace the additional provision for 3.07 with Trustee's language proposed language that is delineated into subsections a through c. Doc. #192.

Second, Debtor agrees to strike and replace the additional provision for 2.1 as follows:

> Debtor has paid the aggregate amount of $318,038.83 for months 1-41. The plan payment is $11,074.00 for month 42 (September 2022) and then $11,455.00 per month effective month 43 to end of plan.

Id. Lastly, Debtor claims that the chapter 7 liquidation test requires that priority and general unsecured creditors receive a combined total of $76,986.00, and that this plan satisfies that test. However, to remain in compliance after all claims have been filed, this plan shall not pay less than what liquidation requires with interest thereon at the federal judgment interest rate. *Id.*

It appears that Debtor has resolved Trustee's objections. This matter will be called as scheduled to inquire about Trustee's reply, if any, to Debtor's response.

If Trustee's objection has been resolved, this motion may be GRANTED provided that Debtor files a corrected certificate of service with Attachment 6A1 to prove that Trustee and the UST were properly served. If granted, the confirmation order shall include the docket control number of the motion, shall reference the plan by the date it was filed, and shall be approved as to form by Trustee.

If Debtor fails to file a corrected certificate of service, or if Debtor did not serve the Trustee and UST, then this motion will be DENIED WITHOUT PREJUDICE.

14. 20-11186-B-13 **IN RE: JOSE RECILLAS**
TCS-2

MOTION TO MODIFY PLAN
9-8-2022 [37]

JOSE RECILLAS/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

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

ORDER: The court will issue an order.

Jose C. Recillas ("Debtor") moves for an order confirming the *Second Modified Chapter 13 Plan* dated September 8, 2022. Doc. #37. The 60-month plan proposes that Debtor's aggregate payment for months 1-29 is $38,565.00, and beginning Month 30, Debtor shall pay $970.00 per month with a 0% dividend to allowed, non-priority unsecured claims. Doc. #41. Debtor's *Amended Schedules I* and *J* indicate that Debtor

receives $970.00 in monthly net income, which is sufficient to fund the proposed plan. Doc. #44.

In contrast, the *First Modified Chapter 13 Plan* dated August 25, 2020, confirmed October 2, 2020, provides that Debtor shall pay $899.00 per month for 1 month, $1,357.00 per month for 1 month, and $1,509.00 per month for 58 months with a 100% dividend to allowed, non-priority unsecured claims with a 0% dividend to allowed, non-priority unsecured claims. Docs. #25; #29.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to confirmation under 11 U.S.C. § 1322(a) because the plan fails to provide for submission of all or such portion of future earnings or other future income to the supervision and control of the Trustee as is necessary for the execution of the plan. Doc. #45. Trustee says that the plan increases the monthly dividend to Class 2 creditor Blue Federal Credit Union from $270.78 to $327.02, decreases the monthly dividend to Class 2 creditor Golden One Credit Union from $531.20 to $506.17, and reclassifies creditor Santander Consumer from Class 2 to Class 4, but the plan fails to state when any of these changes are to occur. *Id.*

This motion to modify plan will be CONTINUED to November 30, 2022 at 9:30 a.m. Unless this case is voluntarily converted to chapter 7, dismissed, or the Trustee's opposition to confirmation is withdrawn, the Debtor shall file and serve a written response not later than November 16, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. Trustee shall file and serve a reply, if any, by November 23, 2022.

If the Debtor elects to withdraw the plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing not later than November 23, 2022. If the Debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the objection without a further hearing.

15. 22-11295-B-13 **IN RE: MARIA URBIETA**
MHM-1

MOTION TO DISMISS CASE
9-19-2022 [22]

MICHAEL MEYER/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 court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case for (1) unreasonable delay by debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1); (2) failure to appear at the scheduled 341 Meeting of Creditors; (3) failure to provide documents to the trustee; (4) failure to file complete and accurate schedules (11 U.S.C. § 521); (5) failure to set a plan for hearing with notice to creditors; (6) ineligibility to be a debtor in chapter 13 due to failure to file a Credit Counseling Course (11 U.S.C. § 109(h)); and (7) failure to make all payments due under the plan. Doc #22. Maria Eleasar Urbieta ("Debtor") did not oppose.

This motion will be called and proceed as scheduled because Debtor is *pro se* and is not represented by counsel. Unless the trustee's motion is withdrawn before the hearing, the motion will be GRANTED at the hearing for cause shown.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the Debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. 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. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v.*

Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay.

First, Trustee says that Debtor failed to appear at the § 341 meeting of creditors on September 13, 2022. Doc. #24.

Second, Debtor failed to provide numerous required documents to the Trustee. Debtor was required to file the following documents:

(a) Class 1 Checklist with most recent mortgage statement. LBR 3015-1(b)(6).
(b) Evidence of payment to Class 1 claims. *See* Doc. #6.
(c) Domestic Support Obligation Checklist. LBR 3015-1(b)(6).
(d) Authorization to Release Information. LBR 3015-1(b)(6).
(e) All pages of the most recent Federal Tax Return filed by the Debtor. 11 U.S.C. § 521(e)(2)(A)(B). Tax returns shall be provided 7 days prior to the 341 meeting or the court shall dismiss if not provided.
(f) Copies of all payment advices or other evidence of payment received within 60 days before the date of filing the petition. 11 U.S.C. § 521(a)(1)(B)(iv) and (i)(1); LBR 1007-1(c)(1). Failure to file this document is an automatic dismissal on the 46th day, which was September 11, 2022.
(g) Completed Statement by Debtor not Represented by an Attorney.
(h) Copy of Original Valid Picture ID, such as a driver's license.
(i) Proof of Debtor's complete social security number, by way of social security card or W-2 Form.

Id. Third, Trustee contends that Debtor failed to file complete and accurate schedules and statements as required by 11 U.S.C. § 521 and Fed. R. Bankr. P. 1007. Debtor's *Schedule A/B* does not list any interest in real property, only a bank account, and *Schedule C* does not list any exempted assets. Doc. #19. Debtor's chapter 13 plan is mostly blank. Doc. #21.

Fourth, Debtor failed to set the plan for hearing with notice to creditors, which is required under LBR 3015-1(d)(1) since the plan was not filed and served upon Trustee within 14 days of the petition date under the procedure specified in LBR 3015-1(c)(1), (2), and (3). Doc. #21.

Fifth, Trustee says that Debtor is ineligible to be a debtor in chapter 13 because Debtor has failed to provide her Credit Counseling Certificate. Doc. #22. In the petition, Debtor certified that she asked for credit counseling services from an approved agency, but was unable to obtain those services during the 7 days after making the request, and exigent circumstances merit a 30-day temporary waiver of

the requirement. Doc. #1. More than 30 days have passed since this case was filed on July 29, 2022.

Lastly, as of September 14, 2022, Debtor has failed to make all payments due under the plan. Doc. #24. Debtor is delinquent $150.00 through September 14, 2022 and an additional $150.00 will become due for September 25 and October 25, 2022. *Id.*

In sum, the record shows that there has been unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtor failed to provide required documentation to the trustee and failed to provide proof of income for the last 6 months as required by 11 U.S.C. § 521(a)(3) and (4)). Therefore, cause exists to either convert or dismiss the case, whichever is in the best interests of creditors and the estate.

Trustee has reviewed the schedules and determined that Debtor owns a home that is encumbered, but not disclosed on *Schedule A/B*. Docs. #19; #22. No address of the residence is provided, so Trustee is unable to determine whether the home has non-exempt equity. Debtor did not claim any exemptions on *Schedule C*, so if the schedules are amended, then there may not be non-exempt equity for the benefit of unsecured claims. However, since Debtor has failed to file a Credit Counseling Certificate, Debtor may be ineligible to be a chapter 7 debtor.

This motion will be called as scheduled to inquire about Debtor's unencumbered, non-exempt assets, if any, and whether dismissal or conversion better serves the interests of creditors and the estate. At the hearing, the court intends to GRANT the motion and either dismiss the case or convert the case to chapter 7.

16. 22-10699-B-13 **IN RE: JESUS GUERRA**
LAK-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-21-2022 [87]

COMMUNITY IMPROVEMENT CAPITAL, LLC/MV
HENRY NUNEZ/ATTY. FOR DBT.
STEVEN KURTZ/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: This matter will proceed as a scheduling conference.

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

Community Improvement Capital, LLC ("Movant") seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) with respect to real property located at 209 S. O Street, Madera, CA 93637 ("Property"). Doc. #87.

Jesus Lopez Guerra ("Debtor") timely filed written opposition, supporting declarations, and exhibits. Docs. #99-102.

Movant then sought an order redacting personal information in Debtor's exhibits, which the court granted. Doc. #107.

Thereafter, on October 14, 2022, Debtor filed a supplemental memorandum of points and authorities in support of his opposition, which was after the October 12, 2022 opposition deadline. Doc. #110. The memorandum of points and authorities also was filed under Docket Control Number AP-1, rather than LAK-1.

On October 19, 2022, Movant responded and filed a request for judicial notice. Docs. ##112-13.

The next day, Debtor filed a request for judicial notice, a motion to confirm chapter 13 plan, and an objection to Movant's claim. Doc. #127; HDN-1; HDN-2.

This matter will be called and proceed as scheduled. The parties shall be prepared for the court to set an early evidentiary hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest except Debtor to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except Debtor are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

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).

Movant is the super priority certificate lienholder pursuant to a recorded *Short Form Super-Priority Deed of Trust and Assignment of Rents* ("Receivership") in connection with a *Receiver Certificate* that matured on July 1, 2022, as executed by California Receivership Group, Inc., a California Benefit Corporation, through its president Mark

Adams as the state court appointed Health and Safety Receiver ("Receiver").

Movant funded the Receiver's Certificate issued by the state court Receiver for a short-term loan of $30,000 with 15% interest per annum from the date of funding to remedy the issues on the Property that were created by the Debtor if they were not paid back by the July 1, 2022 maturity date.

Thereafter, Debtor filed chapter 13 bankruptcy. Doc. #1. Debtor listed Property in *Schedule A/B* with a petition-date value of $290,000.00. Movant claims that it was not listed in the schedules nor provided notice of any of the filings in this case prior to filing its proof of claim.

On May 17, 2022, the court issued an order granting in part Receiver's motion to confirm exemption from the automatic stay, ordering that "[t]he Superior Court is authorized to issue receivership certificates to be secured by the Property." Doc. #36.

Movant's contentions

Movant claims that it is entitled to relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1) because Movant's claim as the beneficiary under the Receivership Certificate has not been satisfied since the maturity date. Doc. #87. Additionally, Movant claims that Debtor cannot modify Movant's claim under the anti-modification statute, 11 U.,S.C. § 1322(b)(2), because its claim is secured only by a security interest in real property that is Debtor's residence, and Debtor's plan fails to provide for full repayment with interest of Movant's claim. *Id.*

Debtor's response

In response, Debtor first contends that Movant is adequately protected because it has $258,980.82 in equity protection and he is entitled to pay Movant as a Class 2A claim at 15% interest as set forth in the proposed *Fourth Modified Chapter 13 Plan*, which is set for hearing on November 30, 2022 at 9:30 a.m. Doc. #99; *see also* HDN-1.

Second, Debtor disputes Movant's claim because $30,000 was not used to preserve, maintain, and ensure rehabilitation of the Property, as required by the Superior Court's order. Debtor also did not agree to the terms of the note, which he contends are unreasonable. Debtor also claims that there is no supporting evidence for $9,000.00 in attorney costs. Debtor says this amount is excessive and not warranted, and as a result Debtor has filed an objection to Movant's claim, which is set for hearing on January 25, 2023 at 9:30 a.m. *See* HDN-2.

Debtor argues that the proposed plan is feasible and that he is current with his plan payments. As a result, Debtor insists that cause

for stay relief does not exist because (i) the nuisance has been abated, (ii) health and safety violations are "95% repaired," (iii) there are no health and safety issues pending, (iv) each case must be decided on a case-by-case basis, (v) a loan secured by deed of trust at 15% interest at principal sum of $30,000 at a loan-to-value ratio of 10 to 1 is not a deterrence to any lender, and (vi) the creditor has created its own problem by demanding attorney fees and costs which are excessive after receiving an offer to purchase the note and deed of trust.

Lastly, Debtor describes Movant as taking advantage of Debtor due to his disability within the meaning of the Americans with Disabilities Act.

Debtor's supplemental points and authorities argues that the anti-modification provision of § 1322 does not support lifting the automatic stay, the balance of equities do not favor lifting the stay, and reiterates that cause does not exist to lift the stay. Doc. #110.

Movant's reply

In reply, Movant objects on the timeliness of Debtor's supplemental points and authorities, raises 9 arguments in support of its motion, and requests the court take judicial notice of certain documents filed in state court proceedings. Docs. ##112-13.

First, Movant objects to modification of its claim under the anti-modification statute, § 1322(b)(2), and objects to receiving payment on its claim over a three-year period. But 11 U.S.C. § 1322(b) is subject is subject to subsections (a) and (c). § 1322(b). Subsection (c) provides:

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
>
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
>
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title[.]

Here, Movant says that the Certificate matured on July 1, 2022. Doc. #89. There is no evidence that Debtor has entered into any loan modification agreements. So, Movant's claim is a default with respect

to a lien on Debtor's principal residence and this is a case in which the last payment on the original payment schedule for a claim secured by Debtor's residence was due before the date on which the final payment under the plan is due. Accordingly, § 1322(c)(2) is applicable.

Section 1322(c)(2) "carves out an exception to the anti-modification rule against home mortgages, allowing modification if the last payment on the original payment schedule for the mortgage is due prior to the date on which the final plan payment is due." *Palacios v. Upside Invs. LP (In re Palacios)*, No. CC-12-1502-KiPaTa, 2013 Bankr. LEXIS 3943, at *11 (B.A.P. 9th Cir. Apr. 15, 2013) (emphasis in original), citing *In re Jones*, 188 B.R. 281, 282 (Bankr. D. Or. 1995); *accord. In re Bagne*, 219 B.R. 272, 277 (Bankr. E.D. Cal. 1998) ("Plainly, this language [in § 1322(c)(2)] instructs the court to disregard § 1322(b)(2)."). The provisions of § 1325(a)(5) are therefore applicable.

Under § 1325(a)(5)(B), secured creditors may be treated one of three ways: (1) convince the claimholder to accept the plan [(a)(5)(A)]; (2) provide in the plan that the holder of the secured claim retains its lien and will be paid not less than the present value of the allowed amount of its secured claim [(a)(5)(B)(i) and (ii)]; or (3) surrender the collateral [(a)(5)(C)]. § 1325(a)(5)(B); *see also In re Young*, 199 B.R. 643, 648 (Bankr. E.D. Tenn. 1996). Therefore, Movant's claim can be modified under § 1322(c)(2) provided that Movant retains its lien and is not paid less than the present value of the allowed amount of its secured claim. § 1325(a)(5)(B)(ii).

Second, Movant argues that the cases cited in Debtor's opposition are distinguishable because none of them account for a short-term loan that matured post-petition or were requested by a court-appointed receiver.

Third, Movant argues that there is no settled law in the Ninth Circuit on whether the debtor is allowed to cram down a short-term debt secured by the Debtor's principal residence. Therefore, this is a matter of first impression as to whether Debtor may modify Movant's super-priority lien in his amended plan.

Fourth, Movant argues that it would not have funded the short-term receiver certificate for the benefit of the Property if it knew that it might not be paid back for 36 months. Citing to *In re Lobue*, 189 B.R. 216, 219, Bankr. S.D. Fla. 1995), Movant argues that it is grossly unfair to wait three years to be paid back on a short-term loan.

Fifth, Movant claims that Debtor was provided notice of Receiver's efforts and had notice of the recordation of the underlying Appointment Order.

Sixth, Movant argues that Debtor has not provided any credible evidence in support of an alleged refinance, such as identifying the lender Debtor's attorney spoke with, providing the contents of that conversation, when it took place, and what relevant experience Debtor's attorney has that makes him an authority in the lending and refinancing industry.

Seventh, the issues related to the Property have not been abated, so Movant argues that Debtor's "95%" repaired estimation lacks merit.

Eighth, Movant insists that Debtor's allegations of a rising value for Property should be disregarded because it provides zero evidence indicating that the equity position and value of Property have increased. Additionally, Movant asks the court to disregard Debtor's alleged increase in income and mental handicap because no evidence has been provided. Lastly, Movant claims that Debtor attached and disseminated privileged and confidential settlement communications, so those communications should be stricken from the record. Movant requests to be reimbursed $26.00 by Debtor's attorney for its expenses in filing a motion to remove, withdraw, and/or redact personal information.

Ninth, Movant contends that Debtor's declaration should be stricken in its entirety. Debtor's attorney has indicated in state court filings that Debtor is illiterate, cannot read or write English and/or Spanish, and has a mental disability. Since no evidence has been provided that Debtor's attorney translated Debtor's declaration, there is no indication that Debtor's declaration was understood by Debtor.

This matter is now deemed to be a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The parties shall be prepared for the court to set an evidentiary hearing. The court intends to continue the hearing on this motion and will inquire whether the parties consent to extend the automatic stay in effect under 11 U.S.C. § 362(e) pending the conclusion of the final hearing on this matter at the continued hearing.

Based on the record, the factual issues appear to include:
1. The value of the Property.
2. The amount of Movant's equity cushion.

The legal issues appear to include:
1. Whether Movant is adequately protected.
2. Whether cause exists to lift the automatic stay.

11:00 AM

1. 19-15103-B-7 **IN RE: NATHAN/AMY PERRY**
20-1017 CAE-1

CONTINUED FURTHER STATUS CONFERENCE RE: COMPLAINT
3-15-2020 [1]

RICHNER ET AL V. PERRY
RICHARD FREEMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

Though this adversary proceeding is stayed pending the outcome of a state court action, the order continuing this status conference required the plaintiff to file and serve a status report not later than October 19, 2022. Docs. #44; #67. No such status report has been filed. This status conference will be called and proceed as scheduled.

2. 20-10809-B-11 **IN RE: STEPHEN SLOAN**
22-1007 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-1-2022 [1]

SLOAN V. SLOAN
PETER SAUER/ATTY. FOR PL.

NO RULING.

Per *Plaintiff's Status Report* dated September 21, 2022, the plaintiff has prepared a draft stipulation to be signed by all parties to dismiss the adversary proceeding that will be filed upon approval and return from Sandton Credit Solutions Master Fund IV and the defendant. Doc. #36. Since the last status conference on September 28, 2022, no stipulation of dismissal nor any other pleadings have been filed in this adversary proceeding. Docs. ##38-39.

3. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1007 CAE-1

FURTHER STATUS CONFERENCE RE: COMPLAINT
1-7-2019 [1]

SUGARMAN V. BOARDMAN TREE FARM, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 16, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court issued orders requiring Boardman Tree Farm, LLC, IRZ Consulting, LLC, and Sineco Construction, LLC to each file a corporate ownership statement pursuant to Fed. R. Bankr. P. 7007-1, or to show cause why pleadings should not be stricken for failure to file a corporate ownership statement. Docs. #136; #138; #140. The hearings on those orders are set for November 16, 2022. IRZ Consulting, LLC filed its corporate ownership statement on October 21, 2022. Doc. #142. Accordingly, this further status conference will be continued to November 16, 2022 at 11:00 a.m.

4. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033

FURTHER STATUS CONFERENCE RE: THIRD-PARTY COMPLAINT
2-24-2021 [163]

SUGARMAN V. IRZ CONSULTING, LLC ET AL
KYLE SCIUCHETTI/ATTY. FOR PL.

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

DISPOSITION: Continued to November 16, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court issued orders requiring IRZ Consulting, LLC, Valmont Northwest, Inc., Nucor Building Systems Utah LLC, and Maas Energy Works, Inc. to each file a corporate ownership statement pursuant to Fed. R. Bankr. P. 7007-1, or to show cause why pleadings should not be stricken for failure to file a corporate ownership statement. Docs. #502; #504; #506; #508. The hearings on those orders are set for November 16, 2022. IRZ Consulting, LLC filed a corporate ownership statement on October 21, 2022, and Valmont Northwest, Inc. filed a corporate ownership statement on October 24, 2022. Docs. #512; #518.

Accordingly, this further status conference will be continued to November 16, 2022 at 11:00 a.m.

5. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 CAE-1

FURTHER STATUS CONFERENCE RE: COMPLAINT
3-8-2019 [1]

SUGARMAN V. IRZ CONSULTING, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR PL.

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

DISPOSITION: Continued to November 16, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court is in receipt of chapter 11 trustee Randy Sugarman's *Plaintiff's Status Report* filed October 19, 2022. Doc. #500.

The court issued an order requiring IRZ Consulting, LLC ("IRZ") to file a corporate ownership statement pursuant to Fed. R. Bankr. P. 7007-1, or to show cause why the answer should not be stricken for failure to file a corporate ownership statement. Doc. #502. The hearing on that order is set for November 16, 2022. Although IRZ filed a corporate ownership statement on October 21, 2022, this further status conference will be continued to November 16, 2022 at 11:00 a.m.

6. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 MB-3

MOTION FOR SUMMARY JUDGMENT
9-6-2022 [424]

SUGARMAN V. IRZ CONSULTING, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

Chapter 11 trustee Randy Sugarman ("Plaintiff") moves for partial summary judgment on the first claim for relief of his complaint against IRZ Consulting, LLC ("Defendant" or "IRZ"), which is an objection to Defendant's Proof of Claim No. 19 filed June 4, 2018 in the amount of $347,057.56. Docs. #1; #424.

Defendant objects to Plaintiff's evidence and opposes summary judgment. Docs. #459; #461.

Plaintiff replied and submitted its own evidentiary objections.[4] Docs. #473; #475.

This motion for summary judgment was filed on 42 days' notice as required by Local Rule of Practice ("LBR") 7056-1 and in conformance with Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56.

This matter will be called and proceed as scheduled. The court intends to take the matter under submission and issue a proposed report and recommendation for *de novo* consideration by the District Court. The court will issue an order.

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[4] The court granted Plaintiff's request for an extension of time to October 13, 2022 to file his reply to Defendant's opposition. Doc. #490.

7. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 MB-4

MOTION FOR LEAVE TO AMEND COMPLAINT
9-11-2022 [434]

SUGARMAN V. IRZ CONSULTING, LLC ET AL
JOHN MACCONAGHY/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 shall submit a proposed order after hearing.

Chapter 11 trustee Randy Sugarman ("Plaintiff") moves for an order granting leave to file an amended complaint under Rule 7015, Civ. Rule 15, and LBR 7015-1.[5] Doc. #434.

IRZ Consulting, LLC ("Defendant") opposes.[6] Doc. #471.

Trustee replied. Doc. #510.

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

This motion was filed on 28 days' notice pursuant to LBR 9014-1(f)(1) and will proceed as scheduled. The failure of any other party in interest except Defendant to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed

a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of all parties in interest except Defendant IRZ are entered.

This motion will be called and proceed as scheduled.

BACKGROUND

Plaintiff's contentions

Plaintiff contends that the complaint needs to be amended to conform the pleadings to evidence revealed in discovery, and to correct other minor errors. Doc. #438. The complaint names Defendant as also being known as "IRZ Construction Division, LLC" ("ICD"), which is a non-existent legal entity. *Cf.* Doc. #1. Plaintiff indicates that ICD is an unregistered "DBA" of the Lindsay Corporation, its parent company. As a result, Plaintiff seeks to add the Lindsay Corporation as a defendant and correct other minor errors. Plaintiff claims this does not prejudice Defendant or any other party.

This mistaken identification of a defendant arises from late 2015. Gregory John te Velde ("Debtor") entered into a "Work Order" with "IRZ Construction Division, an Oregon limited liability company ("ICD")" to provide a feasibility study for the design of a dairy and the qualification for governmental entitlements. Docs. #436; #438. Debtor subsequently purchased the property and on November 17, 2015, Debtor executed a second agreement for more extensive services with "IRZ Consulting, LLC (DBA IRZ Construction Division)". Doc. #436. As a result, when Plaintiff filed this action, only "IRZ Consulting, LLC aka IRZ Construction Division" was listed as the sole defendant.

Additionally, the amended complaint: (a) corrects certain typographical errors, (b) corrects an arithmetical error in the calculation of damages, (c) adds two new fraudulent transfer claims for relief, seeking the identical recovery, but each alleging an enhanced "clawback" period, and (d) attaches complete copies of the operative agreements executed by the Debtor as exhibits. *Id.* Plaintiff attached a copy of the amended complaint and a "redlined" version showing the changes between it and the original. Doc. #437.

Plaintiff claims that no party will be prejudiced because no trial date has been set, the parties are only now scheduling depositions, and when discovery and law and motion practice have concluded, the action must be transferred to District Court for jury trial. Further, Plaintiff argues that there is newly discovered evidence of claims against the parent entity, Lindsay Corporation, because ICD was inaccurately identified as an Oregon limited liability company and incorrectly claimed to be a licensed contractor, when it was not. Doc. #438.

Defendant's response

In response, Defendant claims that Plaintiff unreasonably delayed in filing this motion because more than three years have passed since the complaint was filed.

Second, Defendant says that the Lindsay Corporation was not a party to the Work Order, the Contract, nor any other agreement with Debtor related to the dairy. Doc. #471. Both agreements provided that Defendant's Construction Division, a division of Defendant IRZ Consulting, LLC, would perform various services and work related to project management at the dairy. It is not and has never been a separate legal entity from Defendant and currently functions as a registered assumed business name of Defendant. Docs. ##462-63, *Ex. A*; #478.

Defendant insists this motion must be denied because it fails to submit any valid reason for neglect or delay and Plaintiff is incorrect that Defendant was an unlicensed contractor. Doc. #471.

Plaintiff's reply

In reply, Plaintiff says that both of Defendant's arguments are wrong. First, delay alone is insufficient grounds to deny leave to amend, such delay must be prejudicial. Doc. #510, citing *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Plaintiff contends that Rule 15(b) expressly permits amendments during and after trial and Plaintiff has failed to show any evidence of prejudice. *Id.*, citing *Grenentech, Inc. v. Abbott Laboratories*, 127 F.R.D. 529 (N.D. Cal. 1989); *Pizana v. San Medica International, LLC*, __ F.R.D. __, 22 WL 1241098 (E.D. Cal. Apr. 27, 2022.

Additionally, Defendant is the party responsible for the delay by successfully staying the case while its motion to withdraw reference was being decided, says Plaintiff. The stay was in effect from May 22, 2019 (Doc. #72) to February 2, 2021 (Doc. #162). Thereafter, Defendant filed its third-party complaint, which resulted in considerable delay while third party defendants were served and familiarized with the case.

Second, Plaintiff argues that the proposed amendment is not futile because it seeks to add the parent entity of the non-existent entity ICD that created the pre-printed "Work Order." Since the amendment assigning liability to a major corporation is not "clearly frivolous," Plaintiff requests that the motion be granted.

DISCUSSION

Civ. Rule 15(a), *incorporated by* Rule 7015, permits a party to amend its pleading once as a matter of course within 21 days after serving it, 21 days after service of a responsive pleading, or 21 days after a

motion under Civ. Rule 12(b), (e), or (f), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. "The court should freely give leave when justice so requires." Civ. Rule 15(a)(2). The Ninth Circuit has stated that "[Civ. R]ule 15's policy of favoring amendments should be applied with 'extreme liberality.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987), quoting *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

Courts should consider four factors in determining whether to grant leave to amend a complaint: bad faith, undue delay, prejudice to the opposing party, and futility of the amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Prejudice to the opposing party is the strongest factor. In the absence of prejudice, or a "strong showing" of the other factors, "[t]here is a presumption that leave to amend should be granted." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Shaw v. Burke*, No. 17-cv-2386, 2018 WL 2459720, at *3 (C.D. Cal. May 1, 2018).

1. Bad faith: There is no indication that Plaintiff has acted in bad faith. This factor supports granting leave to amend the complaint.

2. Undue delay: As noted by Defendant, more than six years have passed since Debtor and Defendant executed the agreements giving rise to this complaint, and more than three years since this complaint was filed. At any time during the last three years, Plaintiff could have sought leave to amend the complaint to correct typographical and arithmetical errors.

Plaintiff's attorney claims that "a recent public records search" revealed that as of September 30, 2015, ICD was not a duly formed legal entity in Oregon or any other state and was not organized until October 31, 2017. Doc. #436. Plaintiff had ample time to perform a public records search prior to or shortly after this adversary proceeding was filed to discover the alleged legal status of ICD. Plaintiff did not do so until recently.

Defendant argues that Plaintiff has not submitted any factual support for its contentions. Doc. #471. Instead, Plaintiff concedes that the contract explicitly identified ICD as a "DBA" of Defendant. No new information has been discovered since the Work Order and contract were executed in 2015, and no discovery has identified Lindsay Corporation as being involved in the instant action, says Defendant. Since Plaintiff has failed to make a factual showing demonstrating good cause for leave to amend, Defendant says this motion must be denied.

However, Plaintiff argues that any delay is not prejudicial, and further that Defendant is responsible for the delay by staying proceedings from May of 2019 to February of 2021, and then by filing a third-party complaint without leave. Doc. #510. Still, Plaintiff has had more than a year and a half since the stay of proceedings

terminated to file a motion to amend. This factor weighs against granting leave to amend, but this factor is mitigated by Defendant's delay.

The delay argument is also superficial. Defendant, most Third-Party Defendants, and Plaintiff agreed to "pause" formal discovery and litigation to accommodate a voluntary information exchange and mediation. The mediation was not totally successful. Now, it appears litigation is about to "ramp up." Plaintiff has not delayed after the mediation mostly failed.

3. Prejudice to opposing party: Defendant does not appear to be prejudiced by the amendment because additional allegations are added against Lindsay Corporation However, Defendant says that Plaintiff's claim that ICD was not a licensed contractor is without merit because Defendant was a duly licensed contractor and limited liability company. As the construction division for Defendant, ICD by extension would be a licensed contractor.

Defendant suggests that Lindsay Corporation may be prejudiced by this amendment since it was not involved in this action.

However, if Lindsay Corporation was in fact involved in this action, denying leave to add Lindsay Corporation as a defendant would prejudice Plaintiff. Such denial of leave would prevent the estate's recovery against the alleged parent corporation of ICD. This factor appears to weigh in favor of granting leave to amend.

4. Futility of the amendment: Plaintiff says that the amendment is necessary to add the parent company of ICD. But Defendant claims that there is no parent company because ICD is its construction division.

If Defendant is correct that Lindsay Corporation is not involved, then the amendment would largely appear to be futile, notwithstanding the correcting of typographical and arithmetical errors.

However, Plaintiff replies that the amendment is not clearly frivolous or insufficient on its face, so it should be permitted. If Lindsay Corporation is the parent company of ICD, and it appears it may be, then the amendment would be necessary.

This matter will be called and proceed as scheduled.

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[5] Unless otherwise indicated, references to: "Rule" are to the Federal Rules of Bankruptcy Procedure; "Civ. Rule" are to the Federal Rules of Civil Procedure, "LBR" are to the Local Rules of Practice, and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
[6] The court granted Defendant's request for leave to file opposition one day late. Doc. #481.

8. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 MB-5

MOTION FOR SUMMARY JUDGMENT
9-15-2022 [440]

SUGARMAN V. IRZ CONSULTING, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

Chapter 11 trustee Randy Sugarman ("Plaintiff") moves for partial summary judgment declaring that the limitation of damages provisions contained in the September 30, 2015 *Work Order* ("Work Order") and the November 17, 2015 *Design, Engineer, and Project Management Services for Greg Tevelde Willow Creek Dairy Construction Project November 2015* ("Contract") purporting to limit Plaintiff's damages to $550,000.00 are unenforceable. Doc. #440.

IRZ Consulting, LLC ("Defendant" or "IRZ") objects to Plaintiff's evidence and opposes summary judgment. Docs. #465; #467.

Plaintiff replied and submitted its own evidentiary objections.[7] Docs. #482; #484.

This motion for summary judgment was filed on 42 days' notice as required by Local Rule of Practice ("LBR") 7056-1 and in conformance with Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56.

This matter will be called and proceed as scheduled. The court intends to take the matter under submission and issue a proposed report and recommendation for *de novo* consideration by the District Court. The court will issue an order.

[7] The court granted Plaintiff's request for an extension of time to October 15, 2022 to file his reply to Defendant's opposition. Doc. #491.

9. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1037 CAE-1

FURTHER STATUS CONFERENCE RE: NOTICE OF REMOVAL
7-23-2018 [1]

IRZ CONSULTING LLC V. TEVELDE ET AL
HAGOP BEDOYAN/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 16, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court issued orders requiring IRZ Consulting, LLC, Boardman Tree Farm, LLC, and Sineco Construction, LLC to file corporate ownership statements pursuant to Fed. R. Bankr. P. 7007-1, or to show cause why pleadings should not be stricken for failure to file a corporate ownership statement. Docs. #131; #133; #135. The hearings on those orders are set for November 16, 2022. IRZ filed a corporate ownership statement on October 21, 2022. Doc. #137. Accordingly, this further status conference will be continued to November 16, 2022 at 11:00 a.m.

10. 21-11674-B-7 **IN RE: JULIO ARELLANO**
22-1010 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-5-2022 [1]

DIVERSIFIED FINANCIAL
SERVICES, LLC V. ARELLANO, SR.
PAUL PASCUZZI/ATTY. FOR PL.

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

DISPOSITION: Terminated.

ORDER: The court will issue an order.

The court intends to grant the plaintiff's motion for entry of default judgment in matter #11 below, which will resolve the adversary proceeding. Accordingly, this status conference will be terminated.

11. 21-11674-B-7 **IN RE: JULIO ARELLANO**
22-1010 FWP-1

MOTION FOR ENTRY OF DEFAULT JUDGMENT
9-19-2022 [37]

DIVERSIFIED FINANCIAL
SERVICES, LLC V. ARELLANO, SR.
PAUL PASCUZZI/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 shall submit a proposed order after hearing.

Diversified Financial Services, LLC ("Plaintiff") seeks entry of a default judgment against debtor Jose Arellano, Sr. ("Defendant") finding that the Defendant's obligations owed to Plaintiff for the financing of a forklift and trailer are non-dischargeable under 11 U.S.C. § 523. Doc. #37. Plaintiff seeks a judgment determining that: (1) Defendant is obligated under the contracts to pay Plaintiff the total sum of $74,792.89; and (2) the debt owed by Defendant to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6).

There is no opposition from Defendant.

The court is inclined to GRANT this motion.

Plaintiff's motion was filed on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. In accordance with Fed. R. Bankr. P. ("Rule") 7004(b)(1) and (b)(9), Plaintiff served the following documents on Defendant and his attorney: (i) the complaint and second reissued summons on June 22, 2022, (ii) the request for entry of default on August 19, 2022, and (iii) this motion and supporting papers on September 19, 2022. Docs. ##22-23; ##29-30; #42.

The court entered Defendant's default on August 19, 2022 under Fed. R. Civ. P. ("Civ. Rule") 55(a) and directed Plaintiff to apply for a default judgment and set this "prove up" hearing within 30 days of entry of default. Doc. #31. September 18, 2022 is the 30th day after August 19, 2022. But under Rule 9006(a)(1)(C), if the last day of a time period specified in a court order is a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday. So, because September 18, 2022 fell on a Sunday, the last day to apply for a default judgment was extended to September 19, 2022. Plaintiff timely applied for default judgment on September 19, 2022.

The United States District Court for the Eastern District of California has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) because this is a case arising under title 11. This court has jurisdiction to hear and determine this matter by reference from the District Court under 28 U.S.C. § 157(a). This is a "core" proceeding under 28 U.S.C. § 157(b)(2)(I) (determinations as to the dischargeability of particular debts). Venue is proper pursuant to 28 U.S.C. § 1409(a) because this adversary proceeding arises in a bankruptcy case pending in this judicial district.

BACKGROUND

On or about October 24, 2018, Defendant executed and delivered a *Retail Installment Contract (Security Agreement)* ("First Contract") to Kings River Tractor, Inc. ("Kings River") to finance Defendant's purchase of a used 2016 Model H05000 Harlo Forklift (the "Forklift"). *See* First Contract, Doc. #39, *Ex. A;* Kelley Decl., Doc. #40.

On or about March 12, 2019, Defendant executed and delivered a second *Retail Installment Contract (Security Agreement)* ("Second Contract") to Kings River to finance Defendant's purchase of a 2019 Model TTE 92 McCarron MF Trailer (the "Trailer"). *Id.;* Second Contract, Doc. #39, *Ex. D*. As part of the Second Contract transaction, Debtor executed and delivered an *Equipment Certification* regarding the Trailer and confirming that it did not require a *Certificate of Title*. *Id.*, *Ex. F*.

At the time Defendant entered into both Contracts, Defendant signed and submitted separate *Agricultural Credit Applications* (collectively "Applications"), which were sent to Plaintiff for its approval. *Id.*, *Exs. B*, *E*; Kelley Decl., Doc. #40.

Kings River assigned both Contracts to Plaintiff, who is the current holder. Plaintiff perfected its security interests by filing Uniform Commercial Code Financing Statements with the California Secretary of State regarding the Forklift on October 22, 2018, and the Trailer on March 12, 2019. Doc. #39, *Exs. C*, *G*.

Both Contracts signed by Defendant included clauses by which Defendant warranted that (1) the collateral would be kept at Debtor's residence or principal place of business and (2) Debtor would not sell, offer to sell, or otherwise transfer the collateral or any interest. *Id.*, *Exs. A*, *D*, at ¶ 2.

Prior to filing bankruptcy, Defendant had defaulted on both Contracts by failing to pay, resulting in ongoing litigation initiated by Plaintiff in Douglas County District Court in Nebraska. Kelley Decl. Doc. #40. As of September 14, 2022, Defendant owes $62,631.06 on the First Contract and $12,161.83 on the Second Contract, for a total of $74,792.89. *Id.*

Defendant filed chapter 7 bankruptcy on June 30, 2021. Bankr. Case No. 21-11674 ("Bankr."), Doc. #1. In his amended schedules, Defendant stated, under penalty of perjury, that he owned the Forklift and Trailer. Bankr. Doc. #15, *Sched. A/B*, ¶ 4.1. In the *Statement of Intentions* and *Statement of Financial Affairs*, Defendant indicated an intent to surrender the Forklift and Trailer to Plaintiff. *Id.*, Forms 107-108. However, Defendant says that the Trailer is located at Refugio's Welding in Strathmore, California, and the Forklift is located with Mario Farias in Lindsay, California. *Id.*

Plaintiff has been in contact with Refugio's Welding, who does have a trailer, but it does not have a serial number, so Plaintiff is unable to confirm whether that trailer is its collateral. Kelley Decl., Doc. #40. Additionally, Refugio's Welding is claiming a mechanic's lien on the trailer for alleged work performed on it.

The current whereabouts of the Forklift are unknown. Plaintiff's Nebraska counsel sent a letter to Mr. Farias requesting information about the Forklift, but no response was received. *Id.*; Doc. #39, *Ex. H*.

The parties stipulated to relief from the automatic stay in January 2022. Bankr. Doc. #45. At this time, Defendant has not surrendered the Trailer and Forklift. Kelley Decl., Doc. #40. Plaintiff has been advised that Defendant transferred possession of the Trailer and Forklift to his son, and he has no ability to return the Trailer and Forklift to Plaintiff. *Id.* At no time did Plaintiff give Defendant permission to transfer possession of the trailer. *Id.*

Plaintiff initiated this adversary proceeding against Defendant on April 5, 2022 asserting two causes of action: (1) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny under 11 U.S.C. § 523(a)(4); and for willful and malicious injury by the debtor to another entity or to the property of another entity under § 523(a)(6). Doc. #1. Plaintiff reserved the right to supplement its pleadings to pursue its claims under § 523(a)(4) if this motion is denied. Doc. #37.

DISCUSSION

I. Default Judgment Standard

Civ. Rule 55, *as incorporated by* Rule 7055, governs default judgments. "To obtain a default judgment of nondischargeability of a loan debt, a two-step process is required: (1) entry of the party's default (normally by the clerk), and (2) entry of default judgment." *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006), citing *Brooks v. United States*, 29 F.Supp 2d 613, 618 (N.D. Cal. 1998), *aff'd mem.*, 162 F.3d 1167 (9th Cir. 1998). "[A] default establishes the well-pleaded allegations of a complaint unless they are . . . contrary to facts

judicially noticed or to uncontroverted material in the file." *Anderson v. Air West Inc. (In re Consol. Pretrial Proceedings in Air West Secs. Litig.)*, 436 F.Supp 1281, 1285-86 (N.D. Cal. 1977), citing *Thomson v. Wooster*, 114 U.S. 104, 114 (1885). Thus, a default judgment based solely on the pleadings may only be granted if the factual allegations are well-pled and only for relief sufficiently asserted in the complaint. *Benny v. Pipes*, 799 F.2d 487, 495 (9th Cir. 1986), *amended on other grounds*, 807 F.2d 1514 (9th Cir. 1987).

The court has broad discretion to require that a plaintiff prove up a case and require the plaintiff to establish the necessary facts to determine whether a valid claim exists supporting relief against the defaulting party. Entry of default does not automatically entitle a plaintiff to a default judgment. *Beltran*, 182 B.R. at 823; *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) ("Rule 55 gives the court considerable leeway as to what it may require as a prerequisite to entry of a default judgment.").

A. § 523(a)(6)

11 U.S.C. § 523(a)(6) excepts from discharge any debt for willful and malicious by the debtor to another entity or property of another entity. To prevail under this subsection, a creditor must establish that the debtor deliberately or intentionally produced harm without just cause or excuse. *Lin v. Ehrle (In re Ehrle)*, 189 B.R. 771, 776 (B.A.P. 9th Cir. 1995), citing *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986). The court must separately inquire as to whether the injury was willful and whether it was malicious. *In re Su*, 259 B.R. 909, 914 (B.A.P. 9th Cir. 2001), *aff'd*, 290 F.3d 1140 (9th Cir. 2002).

Plaintiff argues that it is entitled to a non-dischargeability determination under § 523(a)(6) because Defendant, with knowledge that injury to Plaintiff was substantially certain to occur, willfully and maliciously converted collateral in which Plaintiff has a security interest in violation of the Contracts.

When conversion is alleged as grounds for non-dischargeability under § 523(a)(6), state law governs whether a conversion occurred. *In re Thiara*, 285 B.R. 420, 427 (B.A.P. 9th Cir. 2002). Under California law, conversion includes (1) "the Plaintiff's ownership or right to possession of the property at the time of the conversion," (2) "the defendant's conversion by wrongful act or disposition of property rights," and (3) damages. *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 451-52 (1997). "[O]ne who wrongfully withholds personal property from one who is entitled to it under a security agreement may be liable for conversion." *Thiara*, 285 B.R. at 428.

An injury is malicious if caused by "a wrongful act, done intentionally, which necessarily causes injury, and which is done without just cause or excuse." *Jercich*, 238 F.3d at 1208. To prove malice, a creditor must make a further showing that "the debtor's

actual knowledge or the reasonable foreseeability that his conduct will result in injury to the creditor." *In re Britton*, 950 F.2d 602, 605 (9th Cir. 1991), quoting *CIT Fin. Servcs., Inc. v. Posta (In re Posta)*, 866 F.2d 364, 367 (10th Cir. 1989).

"The willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001), *cert. den.*, 533 U.S. 930 (2001). "In order to apply this 'subjective standard,' the court must examine the debtor's state of mind and 'actual knowledge that harm to the creditor was substantially certain.' *Christen v. Himber (In re Himber)*, 296 B.R. 217, 226 (Bankr. C.D. Cal. 2002), quoting *Su*, 290 F.3d at 1146.

The *Jercich* court applied this standard stating, "the conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6). *Jercich*, 238 F.3d at 1208 (internal citations omitted), quoting *In re Bailey*, 197 F.3d 997, 1000 (9th Cir. 1999).

The Ninth Circuit Bankruptcy Appellate Panel has stated that the act of conversion is inherently intentional, but the creditor must still establish that the debtor had the intent to injure the creditor by virtue of the conversion to satisfy the "willful" prong of § 523(a)(6). *Thiara*, 285 B.R. at 432.

1. Defendant converted the collateral

Here, Plaintiff argues that Defendant converted the collateral. Doc. #41. Plaintiff had a perfected security interest in the Forklift and Trailer, entitling Plaintiff to possession. In violation of the Contracts, Defendant converted the Forklift and Tailer to his son or third parties, such as Refugio's Welding or Mario Farias. This conversion damaged Defendant.

2. Defendant had substantial certainty that the conversion would injure Plaintiff

At the time of the transfer, Defendant had signed and acknowledged the warranties in the Contracts, which made him substantially certain that the transfer of the Forklift and Trailer would injure Plaintiff, yet Defendant transferred the collateral anyways, injuring Plaintiff.

3. Defendant acted intentionally and maliciously by converting the collateral

Since Defendant knew of his obligations under the Contracts and that injury to Plaintiff was substantially certain to occur, but Defendant

converted the collateral anyways, the fact finder may infer maliciousness to satisfy § 523(a)(6). *Thiara*, 285 B.R. at 434. This is further borne out by Defendant stating in the bankruptcy schedules under penalty of perjury that Defendant intended to surrender the collateral to plaintiff. Nevertheless, Defendant did not surrender the collateral but just told Plaintiff where he thought the collateral was located.

Intent is also established by the terms of the loan contracts which Defendant presumably knew, since he signed them. Defendant has presented no evidence of any just cause or excuse for converting Plaintiff's collateral.

CONCLUSION

Defendant promised to use the Forklift and Trailer as collateral for a loan from Plaintiff. Defendant promised that he would not sell or give away the Forklift and Trailor, which would be stored in his home or principal place of business. Upon defaulting on that loan, Plaintiff became entitled to possession of the Forklift and Trailer. Defendant sold or gave away the Forklift and Trailor to his son or someone else, injuring Plaintiff. Defendant had knowledge that injury to Plaintiff was substantially certain to occur as a result, which makes his conversion willful and malicious.

Therefore, Defendant willfully and maliciously converted the Forklift and Trailor to which Plaintiff had a security interest, causing Plaintiff $74,792.89 in damages on the amount owed under the Contracts. Under 11 U.S.C. § 523(a)(6), that debt is non-dischargeable.

Accordingly, this motion will be GRANTED. Judgment will be entered in favor of Plaintiff against Defendant in the sum of $74,792.89. The judgment is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6).

12. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 CAE-1

FURTHER STATUS CONFERENCE RE: AMENDED COMPLAINT
12-19-2019 [11]

TULARE LOCAL HEALTHCARE DISTRICT V. MEDLINE
MICHAEL WILHELM/ATTY. FOR PL.
RESPONSIVE PLEADING
DISMISSED 10/19/2022

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

DISPOSITION: Terminated.

ORDER: The court will issue an order.

Although *Plaintiff's Status Report* dated October 19, 2022 requests a 30-day continuance of this status conference to allow the parties to execute and file a stipulation to dismiss this adversary proceeding, later that same day, the parties stipulated to dismiss this adversary proceeding. Docs. ##214-15. Accordingly, this status conference will be terminated and taken off calendar because the case has already been dismissed pursuant to the parties' stipulation.