UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, October 27, 2021
Place: Department B – Courtroom #13
Fresno, California

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 19-14100-B-13 **IN RE: FREDDIE PEREZ**
MAZ-1

MOTION TO MODIFY PLAN
9-10-2021 [27]

FREDDIE PEREZ/MV
MARK ZIMMERMAN/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.

Freddie Perez ("Debtor") seeks confirmation of the First Modified Chapter 13 Plan. Doc. #27. 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.

2. 16-14508-B-13 **IN RE: JOSEPH/JENNIFER BAEZA**
FW-2

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
9-28-2021 [38]

GABRIEL WADDELL/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.

Gabriel J. Waddell for Fear Waddell, P.C. ("Applicant"), attorney for Joseph Anthony Baeza and Jennifer Ann Baeza ("Debtors"), requests final compensation in the sum of $1,916.98 pursuant to 11 U.S.C. §§ 330 and 331. Doc. #38. This amount consists of $1,784.00 for reasonable compensation and $132.98 as reimbursement for actual, necessary expenses incurred from December 1, 2019 through September 21, 2021.

Debtors signed a statement of consent on September 25, 2021 indicating that they have read the fee application and approve the same. Doc. #40, Ex. E.

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 Debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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.

Section 3.05 of the confirmed chapter 13 plan provides that Applicant was paid $2,190.00 prior to filing and, subject to court approval, $8,000.00 shall be paid through this plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Docs. #5; #13. The joint *ex parte* modification pursuant to LBR 3015-1(d)(3) did not affect payment of attorney fees. Doc. #28. Applicant was paid $2,190.00 plus a filing fee of $310.00, for a total of $2,500.00. Doc. #38, § 2(b)(1).

This is Applicant's second and final fee application. The court previously awarded $3,079.00 in fees and $328.97 in expenses, totaling $3,407.97, for services rendered and expenses incurred from February 22, 2016 through November 30, 2019. Doc. #35. Applicant now requests $1,916.98 pursuant to § 330, as well as final approval of the interim fees of $3,407.97 awarded under § 331. Doc. #38.

Applicant's office provided 7.60 billable hours of legal services totaling **$1,784.00** in fees as follows:

FEE SUMMARY

Professional	Rate	Billed	Total Amount
Gabriel J. Waddell (2020)	$320	0.20	$64.00
Gabriel J. Waddell (2021)	$330	1.10	$363.00
Gabriel J. Waddell (2021)[1]	$330	3.00	$990.00
Katie Waddell (2020)	$220	0.20	$44.00
Kayla Schlaak (2019)	$80	0.60	$48.00
Kayla Schlaak (2021)	$110	2.50	$275.00
Total Hours & Fees		**7.60**	**$1,784.00**

Id., § 6. Applicant also advanced costs of **$132.98**:

Photocopying	$66.75
Postage	+ $66.23
Total Costs	= **$132.98**

Id., § 7. These combined fees and expenses total **$1,916.98**.

The source of funds for payment of the fees will be from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. Doc. #38. Applicant declares that there are $4,592.03 remaining in the plan for attorney fees, so payment of this fee application will not affect plan feasibility. *Id.*, § 8(3)(a).

11 U.S.C. § 330(a)(1)(A) & (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person, or attorney" and "reimbursement for actual, necessary expenses."

Applicant's services included, without limitation: (1) finalizing the initial fee application (FW-1) and preparing this fee application; (2) case administration, communicating with the Debtors, and analyzing issues regarding a change of address; and (3) future estimated fees for reviewing the notice of completed plan payments and the trustee's final report, preparing the § 1328 certificate and obtaining a discharge, communicating with the Debtors about discharge and case closing, and drafting a demand letter for Debtors' pink slips for two vehicles. Doc. #40, Exs. A, B, C.

No party in interest timely filed written opposition. As noted above, Debtors consented to the application. Accordingly, this

motion will be GRANTED. Applicant will be awarded $1,784.00 in fees for services rendered and $132.98 for costs incurred from December 1, 2019 through September 21, 2021 on a final basis. The chapter 13 trustee, in his discretion, will be authorized to pay Applicant $1,916.98 under the chapter 13 plan pursuant to § 330. The court will approve on a final basis the $3,407.97 awarded and paid pursuant to Applicant's prior interim fee application. The total amount of fees and expenses awarded to Applicant in this case is $5,324.95.

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[1] This entry is an estimate of fees for future services in connection with case closing. It consists of (a) 0.5 hours reviewing the case for closing; (b) 0.5 hours preparing 1328 cert and communicating with Debtors; (c) 1.0 hour reviewing final report; and (d) 1.0 hour drafting a demand letter for Debtors' pink slips for two vehicles and communicating with Debtors and creditors. Doc. #40, Ex. A.

3. 16-14310-B-13 **IN RE: AMELIA RODRIGUEZ CARRILLO**
RS-1

OBJECTION TO CLAIM OF BENEFICIAL STATE BANK, CLAIM NUMBER 2-1
8-27-2021 [49]

AMELIA RODRIGUEZ CARRILLO/MV
RICHARD STURDEVANT/ATTY. FOR DBT.

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

DISPOSITION: Overruled 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") and the Federal Rules of Bankruptcy Procedure ("Rules").

First, LBR 9014-1(d)(3)(B)(iii) requires the objecting party 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 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. Here, the original, first amended, and second amended notices omitted this language. Docs. #50; #54; #57.

Second, LBR 9014-1(d)(3)(B)(i) requires the notice to include the names and addresses of persons who must be served with any opposition. The notice here states only that opposition "shall be served and filed with the Court" but does not say where or to whom it should be served. Names and addresses of the debtor and the debtor's attorney, the chapter 13 trustee, and any other parties in interest required to be served the opposition must be specified.

Third, the debtor attempted to comply with Rule 7004(h) by serving a named officer of Beneficial State Bank ("Creditor") by certified mail. But for a typographical error, service would have been sufficient. The certificate of service includes three addresses for Creditor:

1. Beneficial State Bank
   PO Box 2900
   Porterville, CA 93258

2. Richard H. Harvey
   Agent for Service of Process
   14385 Webster Street, Suite 300
   Oakland, CA 94612

3. SENT VIA CERTIFIED MAIL
   Richard H. Harvey Jr.
   SECRETARY
   Beneficial State Bank
   14385 Webster Street, Suite 300
   Oakland, CA 94612

Docs. #51; #55; #58. The first two addresses do not comply with Rule 7004(h). Neither were sent by certified mail. The first does not include a named officer, and the second is to Harvey in his capacity as registered agent, which is not a party on whom service may be accomplished under Rule 7004(h).

The third address is close, but it contains an error. Creditor's most recent Statement of Information filed with the California Secretary of State on October 14, 2021 lists Harvey as an officer – secretary – and as a registered agent for service of process with the following address:

> RICHARD H. HARVEY Jr.
> **1438** WEBSTER STREET, SUITE 300
> OAKLAND, California 94612
> United States of America

Statement of Information (Oct. 14, 2021) (emphasis added).[2] Though this motion was filed on August 27, 2021, the previous Statement of Information filed July 29, 2020 provided the same address for Harvey.[3] So, Creditor was not properly served because the address contained a typographical error and may not have been received by Creditor. In addition, as representative of the estate, the chapter 13 trustee must be served under Rule 7004(b).

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

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[2] https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=03692096-31549440.
[3] https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=03692096-28694062.

4. 17-14112-B-13 **IN RE: ARMANDO NATERA**
FW-3

MOTION FOR SUMMARY JUDGMENT
9-14-2021 [115]

GABRIEL WADDELL/ATTY. FOR DBT.
DISMISSED 01/03/2018. RESPONSIVE PLEADING.

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

DISPOSITION: Continued to November 17, 2021 at 9:30 a.m.

ORDER: The court will issue an order.

Armando Natera ("Debtor") moves for partial summary judgment for an order (1) granting this motion for summary judgment; (2) finding the bankruptcy petition was filed at 1:59:28 p.m. on October 25, 2017; (3) finding the automatic stay went into immediate effect; (4) finding the foreclosure sale conducted by Parker Foreclosure Services, LLC, was in violation of the stay; (5) finding the recording of the trustee's deed upon sale in favor of defendant Richard Barnes was a knowing and willful violation of the stay; (6) finding Barnes' conveyance to the Lincicums was a knowing and willful violation of the stay; (6) finding because the original foreclosure sale was void, all acts and conveyances subsequent to the foreclosure sale are void; and (7) denying the motion to retroactively annul the automatic stay (TAT-2). Doc. #115.

Roger S. and Sandra L. Ward (the "Wards") timely opposed and submitted their responses to the statement of undisputed facts. Docs. ##121-22.

In the parties' related adversary proceeding, the court previously granted Debtor's motion to permit service of his supplemental complaint upon the Wards. *See* Adv. Proc. No. 20-01035, FW-5. The Wards have until October 29, 2021 to respond to the new allegations in the supplemental complaint. The Wards' pending motion for summary judgment was continued to November 17, 2021 due to the enlarged time to file a response to Plaintiff's supplemental pleadings. *Id.*, TAT-3; Doc. #182.

Accordingly, this motion for summary judgment will be CONTINUED to November 17, 2021 at 9:30 a.m. to be heard in connection with the Wards' motion for summary judgment.

The court notes that Plaintiff also has a similar motion for summary judgment in that adversary proceeding, which is in matter #1 at 11:00 a.m. *See* Adv. Proc. No. 20-01035; FW-6.

5. 19-13822-B-13 **IN RE: SALVADOR PULIDO**
TCS-3

MOTION TO REFINANCE
10-13-2021 [73]

SALVADOR PULIDO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Salvador Pulido ("Debtor") seeks authority to refinance the loan on his primary residence located at 1366 Linda Mesa Drive, Madera, CA 93638 ("Property"). Doc. #73. Property is currently encumbered by a first priority deed of trust in favor of HomeStreet Bank ("Creditor") in the amount of $220,454.00. Doc. #21, *Am. Sched. D*.

Debtor declares, "[t]he proposed refinance would set the rate at 3.5% fixed interest for 720 months and would make their payment $1443.00 per month." Doc. #76, ¶ 14. The motion reaffirms these terms. Doc. #73. Does this mean that Debtor will have the 3.5% interest rate "locked in" for 720 months, or that Debtor will make 720 payments of $1,443? If the latter, then Debtor would be paying approximately $1,038,960 over the life of the loan term.

Creditor does not oppose the refinance provided that it receives payment in full for its first priority lien secured by the Property. Doc. #78.

This motion will be DENIED WITHOUT PREJUDICE for failing to comply with the Local Rules of Practice ("LBR") and the Federal Rules of Bankruptcy Procedure ("Rules").

LBR 3015-1(h)(1)(C) allows a debtor, *ex parte* and with court approval, to refinance existing debts encumbering the debtor's residence if the written consent of the chapter 13 trustee is filed with or as part of the motion. The trustee's approval is a certification to the court that: (i) all chapter 13 plan payments are current; (ii) the chapter 13 plan is not in default; (iii) the debtor has demonstrated an ability to pay all future plan payments, projected living expenses, and the refinanced debt; (iv) the new debt is a single loan incurred only to refinance existing debt encumbering the debtor's residence; (v) the only security for the new debt is the debtor's existing residence; (vi) all creditors with liens and security interests encumbering the debtor's residence will be paid in full from the proceeds of the new debt and in a manner consistent with the plan; and (vii) the monthly payment will not exceed the greater of the debtor's current monthly payments on the existing debt, or $2,500.

If the trustee will not give consent, or if a debtor wishes to incur new debt on terms and conditions not authorized by subsection

(h)(1)(C), the debtor may still seek court approval under LBR 3015-1(h)(1)(E) by filing and serving a motion on the notice required by Rule 2002 and LBR 9014-1.

Rule 2002(a)(2) requires 21 days' notice to the debtor, trustee, all creditors, and other parties in interest of the proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shortens the time.

This motion was filed on October 13, 2021, which is 14 days before the scheduled hearing on October 27, 2021. Doc. #74. Though sufficient for LBR 9014-1(f)(2) notice, Rule 2002(a)(2) requires 21 days' notice. No order shortening time under the procedure specified in LBR 9014-1(f)(3) was requested or filed with this motion.

Accordingly, this motion will be DENIED WITHOUT PREJUDICE.

6. 21-11822-B-13 **IN RE: MARIA PAREDES**
PBB-1

MOTION TO CONFIRM PLAN
9-21-2021 [24]

MARIA PAREDES/MV
PETER BUNTING/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to December 1, 2021 at 9:30 a.m.

ORDER: The court will issue an order.

Maria De La Luz Paredes ("Debtor") seeks confirmation of her First Modified Chapter 13 Plan. Doc. #24.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected pursuant to 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. #33.

This matter will be CONTINUED to December 1, 2021 at 9:30 a.m.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the 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 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 to language used in Section 7, referencing Section 3.07(c): "Post-petition arrearage due to Pennymac for August and September 2021 have been added to the pre-petition arrearage." Instead, post-petition arrearages will need to be treated as a separate claim. Trustee suggests striking the quoted language and replacing it with the following: "Post-petition arrearage due to Pennymac for August and September 2021 will be paid through the Plan by Month 60."

Unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, the Debtor shall file and serve a written response not later than November 17, 2021. The response shall specifically address each issue raised in the opposition 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 24, 2021.

If the Debtor elects to withdraw this 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 24, 2021. 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 opposition without a further hearing.

7. 21-12029-B-13 **IN RE: FRANK/MARIA VALLES**
PBB-1

MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
9-24-2021 [16]

MARIA VALLES/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Frank Lucero Valles, Jr., and Maria Guadalupe Valles ("Debtors") seek an order valuing three couches and an ottoman ("Property") at $500.00. Doc. #16. Property is encumbered by a purchase money security interest in favor of Wells Fargo, N.A. ("Creditor") in the amount of $2,005.25.[4] Claim #3-1; *cf.* Doc. #1, *Sched. D.*

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 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.

Property was purchased on November 14, 2019 with an open-end revolving credit account opened with Creditor on September 22, 2019. Doc. #18; Claim #3-1.

Debtors filed bankruptcy on August 20, 2021. Doc. #1. Debtors listed Property with a combined value of $500 in the schedules. *Id.*, *Sched. A/B*. Creditor was listed in Schedule D with a purchase money security in interest encumbering Property and it filed Proof of Claim No. 3 on September 3, 2021. Claim #3-1. Creditor is listed in the plan as a Class 2(B) creditor and Debtor proposes to reduce its claim to $500 based on the value of Property.

11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described 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.

Joint debtor Maria Guadalupe Valles declares that Property was purchased on November 14, 2019, and more than 910 days have passed since incurring the debt. Doc. #18. But that is not correct. The petition date, August 20, 2021, is only 645 days after November 14, 2019. This error is *de minimis* because the appropriate standard for personal property other than a motor vehicle acquired for personal use is one year, not 910 days. The debt was incurred more than one year preceding the filing of the petition, so the elements of § 1325(a)(*) are not met and § 506 is applicable.

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

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

Joint Debtor's declaration states the replacement value of Property is $500.00. Doc. #18, ¶¶ 4, 7. Debtor is competent to testify as to the value of the Property. Given the absence of contrary evidence, Debtor's opinion of value may be conclusive. *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

No party in interest timely filed written opposition.

This motion will be GRANTED. Creditor's secured claim will be fixed at $500.00. The proposed order shall specifically identify the collateral and the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

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[4] Debtors have complied with Federal Rule of Bankruptcy Procedure 7004(h) by serving Charles W. Scharf, Creditor's Chief Executive Officer and President, by certified mail at Creditor's main office address on September 24, 2021. Doc. #20; *see also*, https://banks.data.fdic.gov/bankfind-suite/bankfind/details/3511.

8. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**
AMS-5

CONTINUED HEARING RE: MOTION TO VALUE COLLATERAL OF FORD MOTOR CREDIT COMPANY
9-21-2021 [135]

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

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

DISPOSITION: Granted.

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

Miguel Rodriguez-Cisneros and Maria De Jesus Ceja ("Debtors") seek an order valuing a 2014 Ford F150 ("Vehicle") at $22,131.00. Doc. #118. The Vehicle is encumbered by a security interest in favor of Ford Motor Credit Company ("Creditor") in the amount of approximately $65,000.00.[5] Doc. #1, *Sched. D*; Claim #9.

This motion was originally filed on less than 14 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2). Doc. #136. The court noted a procedural issue with the notice of hearing, which was overlooked by *sua sponte* suspending certain provisions of the local rules under LBR 1001-1(f).

No opposition was presented at that hearing, but there were problems with Debtors' evidence. Debtors offered conflicting valuations and relied in an email exchange with Kevin Pryor, the General Sales Manager of Paso Robles Ford, in which he estimated the replacement value of the vehicle to be between $26,000 to $28,000. Docs. ##143-44. Though the court assumed that Mr. Pryor is qualified as an

expert by knowledge, skill, experience, training, or education under Fed. R. Evid. ("FRE") 702, he responded to an email inquiry, had not seen the vehicle, and had not submitted any declarations. So, his statements were hearsay and could not be used to prove Vehicle's replacement value.

Though admissible, the declaration of Miguel Rodriguez-Cisneros did not provide a specific dollar amount for replacement value. Instead, Rodriguez-Cisneros relied on Pryor's email exchange, basing his opinion on scientific, technical, or other specialized knowledge as described in FRE 702, which exceeded the scope of his lay opinion. FRE 701. Further, Rodriguez-Cisneros and Pryor provided the replacement value as a range between $26,000 to $28,000. Doc. #138, ¶ 9. Debtors also submitted and incorporated copies of the amended schedules valuing Vehicle at $20,029.00 (Doc. #140) and an offer from Carvana.com to purchase Vehicle for $22,900 (Doc. #141).

The court continued the motion and directed Debtors' attorney to file a declaration no later than October 22, 2021, precisely stating the asserted replacement value of the Vehicle. Docs. #153; #157.

On October 18, 2021, Debtors filed a CARFAX vehicle history report (Doc. #163), two copies of the email string (Docs. ##161-62), and a declaration from Pryor (Doc. #165) dated October 14, 2021.

Pryor declares that he has 20 years of experience appraising used vehicles, which is a primary part of his profession. Doc. #165. Free of charge, Pryor prepared an email appraisal on September 16, 2021 to determine Vehicle's replacement value on the petition date. After evaluating Vehicle's VIN number, CARFAX report, assuming it is in average condition, and considering that it has not been serviced since April 2017, Pryor placed Vehicle's replacement value at $28,000. *Id.*, ¶ 9.

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

Rodriguez-Cisneros declares that the vehicle was purchased on July 6, 2016. Doc. #138. the loan agreement was dated July 6, 2015 and Rodriguez-Cisneros declared it was purchased on July 6, 2016. *Id.*, ¶ 3. The loan agreement is most likely to be the correct date, but both exceed 910 days preceding the petition date. The elements of § 1325(a)(*) are not met and § 506 is applicable.

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

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

Here, Pyror is qualified as an expert by knowledge, skill, experience, training, or education under FRE 702. Pryor declares that Vehicle's replacement value on the petition date is $28,000.00. Doc. #165. Though Pryor did not physically inspect the car and the weight of his testimony would be questionable if contrary evidence were presented, no party in interest timely filed written opposition. The defaults of all non-responding parties are entered. In the absence of opposition, Pryor's declared valuation is conclusive. *Enewally v. Wash. Mut. Bank*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Accordingly, this motion will be GRANTED. Creditor's secured claim will be fixed at $28,000.00. The proposed order shall specifically identify the collateral and the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

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[5] Debtors have complied with Federal Rule of Bankruptcy Procedure 7004(b)(3) by serving Marion Harris, Creditor's CEO, at Creditor's main office address on September 21, 2021. Doc. #146.

9. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**
MHM-3

CONTINUED HEARING RE: MOTION TO DISMISS CASE
9-15-2021 [131]

MICHAEL MEYER/MV
ADELE SCHNEIDEREIT/ATTY. FOR DBT.
RESPONSIVE PLEADING

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.

Chapter 13 trustee Michael H. Meyer ("Trustee") moves to dismiss this cause for cause pursuant to 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtors that is prejudicial to creditors and failure to confirm a chapter 13 plan. Doc. #131. Since this case had been pending for more than 10 months, Trustee believes the delay is prejudicial to creditors because it cannot file the order confirming the plan until the debtors successfully prosecute their motion to value collateral. Doc. #133.

Miguel Rodriguez-Cisneros and Maria De Jesus Ceja ("Debtors") timely filed written opposition and provided notice of conversion from chapter 7 to chapter 13 under § 1307(a) and Fed. R. Bankr. P. 1017(f)(3). Docs. ##148-49. Debtors subsequently withdrew the opposition and notice of conversion on October 12, 2021. Doc. #152.

This motion was originally filed on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). Doc. #132. Other than Debtors' opposition and withdrawal, no party in interest timely filed written opposition and the defaults of all parties except the Debtors were entered. Doc. #154. The court continued this motion pending resolution of Debtors' motion to value collateral in matter #8 above. AMS-5.

The court intends to GRANT the motion to value collateral, so Trustee's basis for dismissal is resolved and this motion is moot. The court is inclined to DENY this motion AS MOOT.

10. 21-10443-B-13 **IN RE: JORGE LOPEZ**
MHM-5

MOTION TO DISMISS CASE
9-28-2021 [122]

MICHAEL MEYER/MV
DUSHAWN JOHNSON/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors. Doc #122. Debtor did not oppose.

Unless the trustee's motion is withdrawn before the hearing, the motion will be GRANTED without oral argument 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). 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.

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).

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 confirm a chapter 13 plan on July 30, 2021, and no new plans have been filed. Doc. #116.

The court has reviewed the schedules and determined that there is no non-exempt, unencumbered assets that could be liquidated for the benefit of unsecured claims. Docs. #48, *Am. Scheds. A/B, C;* #15, *Sched. D.* Debtor's real property valued at $220,219 is exempted for $82,850.44 and encumbered by a deed of trust in the amount of $137,368.56. Debtor's personal property totaling $4,439.26 is also fully exempted for that same amount. Dismissal, rather than conversion, serves the interests of creditors and the estate.

Accordingly, the motion will be GRANTED, and the case dismissed.

11. 11-60647-B-13 **IN RE: RON/CYNTHIA KURISU**
JDM-2

MOTION TO AVOID LIEN OF RIVERWALK HOLDINGS. LTD.
9-16-2021 [84]

CYNTHIA KURISU/MV
JAMES MILLER/ATTY. FOR DBT.

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") and Federal Rules of Bankruptcy Procedure ("Rules").

First, Rule 4003(d) requires that proceedings to avoid a lien under 11 U.S.C. § 522(f) "shall be commenced by motion in the manner provided in Rule 9014." Rule 9014(b) requires motions in contested matters to be served upon the parties against whom relief is being sought pursuant to Rule 7004.

Service on domestic and foreign corporations, partnerships, or other unincorporated associations is governed by Rule 7004(b)(3). Rule

7004(b)(3) allows service in the United States by first class mail "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process[.]" Rule 7004(b)(3).

Here, the certificate of service indicates that secured creditors Discover Bank and Riverwalk Holdings, LTD, were served as follows:

1. **CREDITOR Discover (sent via Certified Mail Return Receipt Requested and Via First Class Mail) (address as listed in Abstract of Judgment and Proof of Claim):**
   DB Servicing Corporation
   PO Box 3025
   New Albany, OH 43054

2. Discover Bank
   720 Olive Way, Suite 1201
   Seattle, WA 98101

3. Discover Bank
   c/o Bishop White Marshall & Weibal, PS
   901 Sunvalley Blvd., Suite 220
   Concord, CA 94520

4. **CREDITOR Riverwalk (sent via Certified Mail Return Receipt Requested and Via First Class Mail) (address as listed in Abstract of Judgment and Proof of Claim):**
   Riverwalk Holdings, LTD
   c/o Winn Law Group, APC
   110 E. Wilshire Ave., Suite 212
   Fullerton, CA 92832

5. Winn Law Group, APC
   PO Box 1216
   Fullerton, CA 92832

6. Riverwalk Holdings, LTD
   1132 Glade Road
   Colleyville, TX 76034

Doc. #90 (emphasis in original). Entries 1-3 relate to Discover Bank and 4-6 relate to Riverwalk Holdings, LTD. But all of these are incorrect because they do not include a named officer.

The Ninth Circuit has long required Rule 7004(b)(3) service to be directed to a named officer. *See In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) ("By addressing the envelope 'Attn: President' the debtors did not serve an officer, they served an *office*.") (emphasis in original); *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 98 (B.A.P. 9th Cir. 2004) ("Only if the

notice is 'directed to a corporation and the attention of an officer or agent as identified in Rule 7004(b)(3),' can it be considered to have been received by a person who is charged with responding to service."), quoting *Schwab v. Assocs. Commercial Corp. (In re C.V.H. Transp., Inc.)*, 254 B.R. 331, 334 (Bankr. M.D. Pa. 2000).

Additionally, the creditors' state court attorneys cannot be presumed to be authorized to accept Rule 7004 service without evidence of an express or implied agency. "An implied agency to receive service is not established by representing a client in an earlier action." *Villar*, 317 B.R. at 93; *Rubin v. Pringle (In re Focus Media, Inc.)*, 387 F.3d 1077, 1083 (9th Cir. 2004) (finding that a former attorney did not have explicit or implicit authority from client to accept Rule 7004(b) service).

Second, even if the motion had been properly served, there is no evidence that the second abstract of judgment in favor of Discover Bank was ever recorded. Doc. #86, Ex. D. Though Debtor declares that Exhibit D is a true and correct copy of Discover Bank's abstract of judgment that was recorded pre-petition, the page proving that it was recorded is omitted.

Under Cal. Code Civ. Proc. § 697.310, a judgment lien on real property is created by recording an abstract of judgment with the county recorder. Here, the judgment was entered in the sum of $5,856.18 on April 27, 2011, but there is no evidence that it was recorded. Debtors filed bankruptcy on September 26, 2011. Doc. #1. If Discover Bank failed to record the abstract of judgment before the petition date, the automatic stay may have prevented Discover Bank from creating a judgment lien.

The court is unable to avoid a lien under 11 U.S.C. § 522(f) where it is unclear whether the lien exists. Debtors have therefore failed to make a *prima facie* showing that they are entitled to the relief sought. *Tracht Gut, LLC v. County of L.A. (In re Tracht Gut, LLC)*, 503 B.R. 804, 811 (B.A.P. 9th Cir. 2014).

Third, LBR 9004(c)(1) requires motions, notices, and other specified pleadings to be filed as separate documents. LBR 9004-2(d) requires exhibits to be filed as a separate document, include an exhibit index at the start of the document identifying by exhibit number or letter each exhibit with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets.

Here, the exhibit is attached to the declaration and not filed separately. Doc. #86. There is no exhibit index, and the pages are not consecutively numbered. Another copy of the exhibits with the same errors is filed with all of the motion documents. Doc. #87. That document is filed with two pages per page in "side-to-side" view and landscape orientation. Some are also blank and upside-down.

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

12. 21-12151-B-13 **IN RE: BRIAN FOLLAND**
AP-1

OBJECTION TO CONFIRMATION OF PLAN BY DEUTSCHE BANK NATIONAL TRUST COMPANY
10-7-2021 [17]

DEUTSCHE BANK NATIONAL TRUST COMPANY/MV
BRIAN FOLLAND/ATTY. FOR DBT.
BRYAN FAIRMAN/ATTY. FOR MV.

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

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

Deutsche Bank National Trust Company, as Trustee for the HarborView Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-5 ("Secured Creditor"), objects to the chapter 13 plan filed by Brian Nicholas Folland ("Debtor") because it (1) improperly classifies the claim in Class 4; and (2) is not feasible since the claim has significant pre-petition arrears that are not promptly cured by the plan. Doc. #17.

The chapter 13 trustee has a motion to dismiss this case in matter #13 below for unreasonable delay that is prejudicial to creditors, failure to appear at the § 341 meeting of creditors, and failure to provide required documents. MHM-1. The court intends to grant that motion, so this objection to plan confirmation will be OVERRULED AS MOOT.

The court notes that section 3.02 of the plan provides that it is the proof of claim, not the plan itself, that determines the amount that will be repaid under the plan. Doc. #6. Creditor's proof of claim, filed September 29, 2021, states a claimed arrearage of $247,482.11. This claim is classified in Class 4 – paid directly by Debtor. If confirmed, the plan terminates the automatic stay for Class 4 creditors. Doc. #6, § 3.11. Debtor may need to modify the plan to account for the arrearage. If he does not and the plan is confirmed, Creditor will have stay relief. If the plan is modified, then this objection would still be moot.

13. 21-12151-B-13 **IN RE: BRIAN FOLLAND**
MHM-1

MOTION TO DISMISS CASE
9-24-2021 [13]

MICHAEL MEYER/MV
BRIAN FOLLAND/ATTY. FOR DBT.

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

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by Brian Nicholas Folland ("Debtor") that is prejudicial to creditors and Debtor is ineligible to be a debtor in a chapter 13 case under 11 U.S.C. § 109(e). Doc #13. Debtor did not oppose.

Unless the Trustee's motion is withdrawn before the hearing, the motion will be GRANTED without oral argument 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). 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.

Trustee requests the court take judicial notice of the voluntary petition and schedules. Doc. #15. The court may take judicial notice of all documents and other pleadings filed in this bankruptcy case, in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, but not the truth or falsity of the documents as they relate to findings of fact. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

To be eligible to be a debtor under chapter 13, 11 U.S.C. § 109(e) requires that a debtor have noncontingent, liquidated, unsecured debts of less than $419,725.00 and noncontingent, liquidated, secured debts of less than $1,257,850.00. *See* 84 F.R. 3488 (Feb. 5, 2019, eff. Apr. 1, 2019). Section 109(e) determines a debtor's eligibility for chapter 13 on the petition date. *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001).

According to Schedule D, Debtor's residence, located at 1530 E. La Quinta Ave., Fresno, CA 93730, is encumbered by first and second priority deeds of trust in favor of Mr. Cooper and Citi Bank, N.A. Doc. #1, *Sched. D*. Mr. Cooper and Citi Bank are secured in the amounts of $968,609.11 and $352,094.09, respectively. Combined, these amounts total $1,320,703.20, which exceeds the noncontingent, liquidation, secured debts limit of $1,257,850.00 specified in 11 U.S.C. § 109(e).

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).

The record shows that Debtor is not eligible to be a chapter 13 debtor under 11 U.S.C. § 109(e). Doc. #1. There is cause to convert or dismiss this case.

The court has reviewed the schedules and there appears to be approximately $589,648.40 in unencumbered, non-exempt equity that could be liquidated for the benefit of the estate. This consists of Debtors' community property interest in Property valued at $2,500,000. Doc. #1, *Scheds. A/B*. Property is encumbered by two deeds of trust: (a) $352,094.09 in favor of Citi Bank, N.A., and (b) $968,609.11 in favor of Mr. Cooper. *Id.*, *Sched. D*. The sum of consensual liens is $1,320,703.20. Subtracting the consensual liens from the total value of Property leaves $1,179,296.80. No exemptions are claimed.

But Debtor's schedules are incomplete. He indicates that he owns $0.00 in personal property. Debtor apparently does not own any vehicles, household goods and furnishings, electronics, clothes, jewelry, cash, deposits of money, bonds, mutual funds, stocks, retirement accounts, trusts, unliquidated claims, or any other assets. *Id.*, *Sched. A/B*. Even though Debtor is an attorney, he apparently is not in possession of any licenses. *Id.*, ¶ 27; *cf. Sched. I*.

Though conversion appears to serve the interests of the estate and creditors, Debtor previously received a chapter 7 discharge in case no. 17-12750 on November 9, 2017, so he is not eligible to receive a chapter 7 discharge under 11 U.S.C. § 727(a)(5). Dismissal is therefore appropriate. Accordingly, the motion will be GRANTED. The case will be dismissed.

14. 20-13965-B-13 **IN RE: STEPHANIE FOREMAN**
DMG-3

CONTINUED MOTION TO AVOID LIEN OF GEORGE FOREMAN
8-5-2021 [53]

STEPHANIE FOREMAN/MV
D. GARDNER/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Stephanie Maryann Foreman ("Debtor") moves to avoid a judicial lien in favor of George Foreman ("Creditor"), Debtor's ex-husband, in the amount of $24,500.00 and encumbering residential real property located at 111 S. Mt. Whitney Dr., Lone Pine, CA 93545 ("Property"). Doc. #53. Debtor claims that Property had a value of $120,000 on the petition date. Since the judgment lien, homestead exemption, and unavoidable liens total more than the value of Property, Debtor insists that the lien should be avoided.

Creditor timely responded, contending that the motion should be denied because the lien fixed at the same time Debtor's interest in Property was created. Doc. #58. Since Debtor never possessed her fee simple interest in Property before Creditor's lien fixed, Creditor claims that Debtor cannot avoid the lien under 11 U.S.C. § 522(f)(1) as a matter of law. If the motion is not denied outright, Creditor requests an opportunity to obtain an appraisal.

Debtor replied and objected to the admissibility of Creditor's evidence. Docs. #62; #65.

This motion was originally filed on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). This matter was originally heard on September 8, 2021 and the defaults of all non-responding parties except Creditor were entered. Doc. #67. The matter was continued to October 27, 2021 and Debtor was ordered to file and serve a brief not later than September 29, 2021, with Creditor to file and serve a response not later than October 13, 2021. Doc. #68. Any reply by Debtor was due by October 20, 2021. *Id.*

Debtor and Creditor timely filed briefs and Debtor timely replied. Docs. #71; #73; #75. The court appreciates the briefing provided by counsel.

Debtor and Creditor were married between 2008 and July 20, 2020. Doc. #59. After they each stipulated to judgment, the Inyo County Superior Court entered a judgment for the dissolution of their marriage effective June 20, 2020 in the parties' divorce case (Case No. SICVFL 17-61665) on August 10, 2020. Doc. #60, Ex. A.

Prior to the divorce, Debtor and Creditor owned Property in joint tenancy. Doc. #59.

Per the stipulation, the parties agreed that Debtor shall be awarded Property as her sole and separate property. Doc. #60, Ex. A at 2. The parties further agreed that Debtor would pay Creditor $24,500.00 as an equalization payment for community property awarded Debtor, which shall be due and payable upon receipt of Debtor's anticipated CalPERS disability benefits. *Id.*, at 3.

Creditor alleges Debtor never paid him. Doc. #59. Thereafter, Creditor obtained a $24,500 judgment against Debtor on August 10, 2020. Docs. #56, Ex. A; #60, Ex. B. The abstract of judgment was issued on September 15, 2020 and recorded in Inyo County on October 13, 2020. *Id.* That lien attached to Debtor's interest in Property. The motion estimates the balance on the lien to be approximately $25,000 at the time of filing based on accrual of interest at 10 percent.

Debtor argues that a lien cannot "fix" as part of a divorce decree absent express language creating the lien. Doc. #71, citing *In re Pedersen*, 78 B.R. 264, 266 (B.A.P. 9th Cir. 1987) (specifically deeming divorce judgment to be a lien because of express language in the judgment creating the lien), *aff'd*, 875 F.2d 781 (9th Cir. 1989), *disapproved on other grounds*, *Farrey v. Sanderfoot*, 500 U.S. 291 (1999) and *Catli v. Catli (In re Catli)*, 999 F.2d 1405, 1406) (citing *Pederson* as disapproved but noting *Pederson* was correct in defining a lien in a dissolution decree as a "judicial lien."); *Law Offices of Moore v. Stoneking (In re Stoneking)*, 225 B.R. 690, 694 (B.A.P. 9th Cir. 1998) (acknowledging the existence of a lien that explicitly encumbered community property of a debtor and their former spouse); *Catli*, 999 F.2d at 1406 (quoting language of a divorce decree that specifically granted a lien as part of the dissolution).

Since no language creating a lien was included in Debtor and Creditor's dissolution judgment, Debtor insists that no lien existed until Creditor obtained an abstract of judgment in Inyo County Superior Court. Doc. #71. And because Creditor did not timely object to Debtor's chapter 13 plan, Debtor argues that Creditor is bound by the terms of the confirmed chapter 13 plan that does not provide for treatment of his claim as a secured creditor. *Id.*

Creditor, meanwhile, insists that the *Barnes* and *Farrey* cases are directly applicable here. Doc. #73. Creditor also argues that the recording of the abstract of judgment and the confirmed chapter 13 plan are irrelevant because the lien "fixed" at the time the property was divided, and the chapter 13 plan will not automatically avoid the lien without successfully prosecuting this lien avoidance motion.

In *Farrey*, the Supreme Court held "that § 522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." *Farrey*, 500 U.S. at 301. Whether Debtor ever possessed an interest to which the lien fixed, before it fixed,

is a question of state law, so the Supreme Court found that the lien in question "fixed" at the same time the new property interest was created, so the debtor could not avoid the fixing of the lien under § 522(f)(1).

Though *Farrey* applied Wisconsin law, the Ninth Circuit applied it in *Barnes*. *Nelson v. Barnes (In re Barnes)*, 198 B.R. 779, 783 (B.A.P. 9th Cir. 1998). In *Barnes*, the Bankruptcy Appellate Panel did not mention that a lien must be explicitly created by way of a dissolution agreement, instead it held that "a lien is created in dissolution proceedings when the court completes its division of the community property." *Ibid. Barnes* did not state any requirement that the divorce decree explicitly mention the granting of a lien, only that "[a]t the time all community property is divided, money judgments awarded in the proceedings for the purposes of dividing property will attach to any existing property interests." On this basis, Creditor argues that it does not matter whether the divorce mentioned the lien because the money judgment will attach to the existing property interests.

As with *Barnes*, this case involves a dispute between former spouses, which is treated differently than a dispute between third parties. Under *Barnes*, explicit language regarding the creation of a lien was not required. Entry of the judgment of dissolution dividing the property was sufficient to create a judgment lien.

Creditor also cites to *Wells*, also cited in *Barnes*. *In re Wells*, 139 B.R. 255 (Bankr. D. N.M. 1993). *Wells* involved a similar chain of events where the marital settlement agreement provided that the wife shall receive the residence as her sole and separate property, but if the residence is sold, the husband would receive $10,000 out of the net sale proceeds. *Ibid.* The wife defaulted on the agreement and attempted to avoid the lien. The *Wells* court found that *Farrey* was applicable, and the wife's sole and separate property interest did not exist before the judicial lien fixed to the property, so the lien could not be avoided. *Id.*, at 257.

Debtor relies on *Stoneking* as an example for how a lien can only be created explicitly. *Stoneking*, 225 B.R. at 694. But in *Stoneking*, the lien was imposed before the creation of the separate property interest, whereas in *Farrey*, the lien was created simultaneously with the creation of the separate property interest. This case is distinguishable from *Stoneking* because the lien here was created pursuant to the dissolution proceeding, as in *Farrey*, and not prior to the division of assets, as in *Stoneking*.

In reply, Debtor notes that *Barnes* did not cite to any California statutes or cases that described, identified, or acknowledged the imposition of a lien in favor of the non-retaining spouse. Doc. #75. None of the California Family Code statutes cited involved the awarding of liens. Thus, Debtor contends that the cases cited by Creditor are coincidental and lack a legal basis for creating a lien, by statute or by case law. Debtor describes Creditor's lien here as a "phantom lien."

To be sure, none of the Family Code sections cited in *Barnes* specifically provide for the awarding of liens. But they are applicable because of the authority they convey to the Superior Court in dissolution proceedings. Cal. Fam. Code § 2010 (make appropriate orders concerning settlement of the parties' property rights); Cal. Fam. Code § 2550 (except upon parties' contrary agreement, court "shall . . . divide the community estate of the parties equally"); Cal. Fam. Code § 2601 (may award a community asset to one party on conditions the court deems proper to effect a substantially equal division). Debtor's authorities do not hold the dissolution judgment must provide for a lien before a lien is imposed simultaneously with property division.

The court is persuaded *Farrey*, *Barnes*, and *Wells* are applicable here. Though Creditor acquired a separate abstract of judgment three months after the dissolution, that judgment was obtained pursuant to the marital settlement agreement that divided the community property and granted an equalization payment to Creditor from the Debtor's anticipated CalPERS disability benefits. Doc. #60, Ex. A.

This community property equalization payment is a money judgment that was part of the division of assets. So, the time that the community property was divided is the date that the lien "fixed" for the purposes of § 522(f). *Barnes*, 198 B.R. at 783; *Wells*, 139 B.R. at 257. Since § 522(f)(1) requires Debtor to have possessed an interest in Property prior to the fixing of the lien, and the lien here "fixed" simultaneously with the creation of Debtor's separate property interest and extinction of Creditor's interest, Debtor cannot avoid this lien under § 522 (f). *Farrey*, 500 U.S. at 301.

This ruling is not intended to apply to Debtor's claims that the property settlement is null and void under its terms due to unforeseen events, the recording of the abstract was a preference, the effect of plan confirmation, or the timeliness of the filing of the claim.

For the foregoing reasons, this motion will be DENIED.

15. 21-11799-B-13 **IN RE: VIRGIL CRUSE AND LISA GAVIN-CRUSE**
DMG-1

MOTION TO CONFIRM PLAN
9-7-2021 [22]

LISA GAVIN-CRUSE/MV
D. GARDNER/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice or continued to a date to be determined.

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

Virgil Ray Cruse and Lisa Ann Gavin-Cruse ("Debtors") seek confirmation of their First Amended Chapter 13 Plan. Doc. #22.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected under 11 U.S.C. § 1325(a)(6), arguing Debtors will not be able to make all payments under the plan and comply with the plan. Doc. #36. Trustee states that the modified plan calls for increased payments of $1,270 but does not give a starting date. Presuming that the increased payment begins month 1 would leave a delinquency of $270.00. *Id.*

Debtors replied, stating that they have tendered the additional $270 to bring month 1 current. Doc. #38. As stated in the status report on matter #16 below (Doc. #40), Debtors now request to increase the plan payment to $1,310 per month through the term of the plan to pay the additional secured claim to the Internal Revenue Service. *Id.*

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest except Trustee to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition. *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).

No other parties in interest timely filed written opposition, but there are evidentiary issues with Debtors' motion to value collateral in matter #16 below. The court intends to deny the motion to value collateral without prejudice. This matter will be called and proceed as scheduled. The court is inclined to DENY WITHOUT PREJUDICE or CONTINUE this motion.

16. 21-11799-B-13 **IN RE: VIRGIL CRUSE AND LISA GAVIN-CRUSE**
DMG-2

MOTION TO VALUE COLLATERAL OF INTERNAL REVENUE SERVICE
9-28-2021 [29]

LISA GAVIN-CRUSE/MV
D. GARDNER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice

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

Virgil Ray Cruse and Lisa Ann Gavin-Cruse ("Debtors") seek an order valuing the collateral ("Property") securing the Internal Revenue Service's ("IRS") secured tax lien claim for the tax years 2014, 2016, and 2017 at $6,110.00.[6] Doc. #29.

The IRS amended its proof of claim on October 18, 2021 reducing the secured portion of its claim to $8,287.89. Claim #10-2.

On October 20, 2021, Debtors filed a status report indicating that the parties agreed to value the collateral at $8,139.00 and the IRS would not oppose this motion. Doc. #40. This would require Debtors' chapter 13 plan payment to increase to $1,310 per month. *Id.* Debtors' chapter 13 plan confirmation is set for hearing in matter #15 above. DMG-1.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered.

Debtors filed bankruptcy on July 21, 2021. Doc. #1. On August 19, 2021, the IRS filed Proof of Claim No. 10-1 for a tax lien in the sum of $52,055.92. Claim #10-1. Of this amount, $22,895.00 is secured by all of Debtors' right, title, and interest to property under 26 U.S.C. § 6321.

Debtors seek to reduce the secured portion of the tax lien to the value of the collateral securing it. Doc. #29. Debtor's plan proposes to pay the IRS the secured portion of the claim in Class 2(B), reducing it based on the value of the collateral securing it in matter #15 above. Doc. #24. The unsecured portion entitled to priority under 11 U.S.C. § 507(a)(8) will still be paid in full pursuant to the plan.

The IRS amended Claim No. 10 on October 18, 2021 and reduced the secured portion of its claim to $8,287.89, with the remaining $43,768.03 unsecured and entitled to priority. Claim #10-2. Debtors' status report dated October 20, 2021 states that the IRS has agreed to reduce the value of the secured portion to $8,139.00 and the IRS will not oppose this motion. Doc. #40. However, Debtors' proposed valuation is $148.89 less than that in the IRS' amended proof of claim.

After notice to the claimant and a hearing, Rules 3012(a)(1) and (2) allow any party in interest to request the court to determine the amounts of a secured claim under § 506(a) and a claim entitled to priority under § 507. Value of secured claims of governmental units may only be determined after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired. Rule 3012(c).

11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described in subparagraph (5) if (1) the creditor has a purchase money security interest ("PMSI") securing the debt that is the subject of the claim, (2) the debt was incurred within (a) 910 days preceding the petition date if the collateral is a motor vehicle acquired for personal use of the debtor, or (b) one year preceding the petition date for personal property other than a motor vehicle.

Per joint debtor Virgil Cruse's declaration and the amended schedules, Debtors owned the following property ("Estate Assets") on the petition date:

ESTATE ASSETS (including Property)					
Asset	Value	Owed	Exempt	Debtors' Interest	Non-Exempt
Real property lease	$0.00	$0.00	$0.00	$0.00	$0.00
2014 Toyota Camry	$10,087	$8,287.89	$2,800	$1,799.11	$0.00
2015 Kia Optima	$10,832	$12,499.72	$2,595	$0.00	$0.00
PROPERTY SUBJECT TO IRS TAX LIEN AND THIS MOTION					
1999 Toyota Corolla	$1,000	$0.00	$1,000	$1,000	$0.00
Furniture	$2,000	$0.00	$2,000	$2,000	$0.00
Electronics	$500	$0.00	$1,500	$500	$0.00
Antiques	$500	$0.00	$500	$500	$0.00
Apparel	$500	$0.00	$2,000	$500	$0.00
Rings	$500	$0.00	$1,000	$500	$0.00
Checking/Savings	$1,110	$0.00	$0.00	$1,110	$1,110
Total Estate Assets	**$27,029**	**$20,787.61**	**$13,395**	**$7,909.11**	**$1,110**
Total Property	**$6,110**	**$0.00**	**$8,000**	**$6,110**	**$1,110**

Doc. #38; *cf.* Docs. #21, *Am. Scheds. A/B, C*; #11, *Sched. D*.

Cruse declares that Debtors value the 2015 Kia Optima at $10,832 and the 2014 Toyota Camry at $10,832. Doc. #38. Both are subject to a PMSI in favor of Bridgecrest Credit Company, LLC ("BCC") in the

amounts of $12,499.72 and $8,287.89, respectively. *See* Claims #8-1; #9-1. Debtors omitted the Toyota Camry from this motion because commissions and costs of sale would exhaust the remaining $1,799.11 equity interest. The Kia Optima and real property were omitted because Debtors do not own an equity interest, so the Property subject to this motion consists of everything except the real property lease, Toyota Camry, and Kia Optima.

Though not necessary, Debtors included BCC's proofs of claim as exhibits, which have attached sale contracts. From these, it appears the Kia Optima was purchased on October 28, 2020. Doc. #32, Exs. D, at 40. The Toyota Camry was purchased on May 22, 2019. Both were purchased within 910 days of the July 21, 2021 petition date: after January 23, 2019. But as stated, these assets are not being valued by this motion.

Property included in this motion and subject to the IRS tax lien are not encumbered by a PMSI, so the elements of 11 U.S.C. § 1325(a)(*) are not met and § 506 is applicable.

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

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

Cruse declares that the replacement value of Property is $6,110:

PROPERTY	
1999 Toyota Corolla	$1,000
Furniture	$2,000
Electronics	$500
Antiques	$500
Apparel	$500
Rings	$500
Checking/Savings	$1,110
Total Property	**$6,110**

Doc. #31, ¶¶ 2-3. In their status report, Debtors state that they have agreed with the IRS to value Property at $8,139.00. Doc. #40. No basis or itemization for that valuation is provided, only that Debtors must increase their plan payment accordingly. But the IRS amended proof of claim is slightly higher: $8,287.89.

So, Debtors have not submitted admissible evidence that the claim should be valued at $8,139.00. This motion will be called as

scheduled. The court is inclined to DENY this motion WITHOUT PREJUDICE.

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[6] Debtors have complied with Federal Rule of Bankruptcy Procedure 7004(b)(5) by serving the IRS, the U.S. Attorney for this district, and the U.S. Department of Justice in Washington, DC, by regular U.S. mail on September 28, 2021. Doc. #33.

11:00 AM

1. 17-14112-B-13 **IN RE: ARMANDO NATERA**
   20-1035 FW-6

   MOTION FOR SUMMARY ADJUDICATION
   9-14-2021 [138]

   NATERA V. BARNES ET AL
   GABRIEL WADDELL/ATTY. FOR MV.
   RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 17, 2021 at 11:00 a.m.

ORDER: The court will issue an order.

Debtor Armando Natera ("Plaintiff") moves for partial summary judgment for an order (1) granting this motion; (2) finding the bankruptcy petition was filed at 1:59:28 p.m. on October 25, 2017; (3) finding the automatic stay went into immediate effect; (4) finding the foreclosure sale conducted by defendant Parker Foreclosure Services, LLC, was in violation of the stay; (5) finding the recording of the trustee's deed upon sale in favor of defendant Richard Barnes was a knowing and willful violation of the stay; and (6) because the original foreclosure sale was void, finding all acts and conveyances subsequent to the foreclosure sale are void. Doc. #138.

Defendants Michael Scott Lincicum and Mitzi Lincicum (the "Lincicums"), Richard Barnes ("Barnes"), and Parker Foreclosure Services, LLC ("Parker Foreclosure") timely opposed and submitted their responses to the statement of undisputed facts. Docs. #165; #167; ##173-74.

The court previously granted Plaintiff's motion to permit service of Plaintiff's supplemental complaint upon defendants Roger L. and Sandra S. Ward (the "Wards"). FW-5. The Ward have until October 29, 2021 to respond to the new allegations in the supplemental complaint. The Ward pending motion for summary judgment was continued to November 17, 2021 due to the enlarged time to file a response to Plaintiff's supplemental pleadings. TAT-3; Doc. #182.

Accordingly, this motion for summary judgment will be CONTINUED to November 17, 2021 to be heard in connection with the Ward's motion for summary judgment.

The court notes that Plaintiff also has a similar motion for summary judgment in the underlying bankruptcy case, which is scheduled in matter #4 at 9:30 a.m. *See* Bankr. Case No. 17-14112, FW-3.

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

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

SALVEN V. SANCHEZ ET AL
ANTHONY JOHNSTON/ATTY. FOR PL.
DISMISSED 10/6/21

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

DISPOSITION: Dropped from calendar.

ORDER: The court will issue an order.

Chapter 7 trustee James E. Salven ("Plaintiff") filed a notice of dismissal on October 6, 2021 in connection with the approved settlement agreement with debtor Sandra Sanchez ("Defendant"). Doc. #37. Accordingly, this status conference will be dropped from calendar.

3. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
20-1049

PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
10-28-2020 [25]

GUILLERMO V. LOCKE ET AL
GILBERT ZAVALA/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

The court notes that Plaintiff Gloria Guillermo did not file a pre-trial statement in accordance with the scheduling order. Doc. #36; *cf.* Doc. #30. The pre-trial conference will not go forward and will be continued to a date determined at the hearing.

4. 20-12269-B-7 **IN RE: ANTHONY VILLA**
20-1054

PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
11-12-2020 [23]

VOKSHORI LAW GROUP V. VILLA
NIMA VOKSHORI/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

Vokshori Law Group ("Plaintiff") timely filed a pre-trial conference statement on October 12, 2021. Doc. #39. Debtor Anthony Villa ("Defendant") timely filed his pre-trial conference statement on

October 20, 2021. Doc. #40. This pre-trial conference will proceed as scheduled and the parties shall be prepared to discuss trial dates at the hearing.

5. 20-11295-B-7 **IN RE: MAURIN CONSTRUCTION CORP**
21-1035

STATUS CONFERENCE RE: COMPLAINT
8-20-2021 [1]

EDMONDS V. BERNARDS BROS.,
INC.
HAGOP BEDOYAN/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Chapter 7 trustee Irma C. Edmonds ("Plaintiff") requested dismissal of this adversary proceeding on October 21, 2021 pursuant to Fed R. Civ. P. 41(a)(1)(A) (incorporated by Fed. R. Bankr. P. 7041). Doc. #15. Since Bernards Bros., Inc. ("Defendant") has not filed an answer or a motion for summary judgment, Plaintiff may dismiss the action without a court order by filing a notice of dismissal. Fed. R. Civ. P. 41(a)(1)(A). The court entered the dismissal order on October 22, 2021. Doc. #17. Accordingly, this status conference will be dropped from calendar.

6. 20-11296-B-7 **IN RE: KYLE/DEANNA MAURIN**
20-1044

PRE-TRIAL CONFERENCE RE: COMPLAINT
7-10-2020 [1]

KAPITUS SERVICING, INC. V.
MAURIN
MICHAEL MYERS/ATTY. FOR PL.
CONTINUED TO 12/15/21, DOC. #60

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

DISPOSITION: Continued to December 15, 2021.

NO ORDER REQUIRED.

Due to ongoing negotiations, the parties stipulated to modify the scheduling order to continue this pre-trial conference to December 15, 2021. Doc. #58. The court approved the stipulation on September 27, 2021 and continued the pre-trial conference to December 15, 2021 at 11:00 a.m. Doc. #60.

7. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 MRH-4

MOTION TO DEFER CONSIDERATION OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
9-22-2021 [92]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL HOGUE/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: Order preparation determined at the hearing.

Defendant Medline Industries, Inc. ("Medline") asks the court to defer ruling on or deny without prejudice Plaintiff Tulare Local Healthcare District's ("District") Motion for Summary Judgment under Fed. R. Civ. Proc. 56(d) (Fed. R. Bankr. Proc. 7056). Medline wants more time to conduct discovery before responding to the merits of the motion. District opposes.[7]

BACKGROUND

I

Under the authority conferred by its confirmed Chapter 9 Plan of Adjustment, District filed this preference action against Medline in November 2019. The complaint was amended a month later. District alleges Medline received preferential payments of over $507,000.00.[8] District also alleged Medline's filed proof of claim should be disallowed under § 502(d).

Medline's answer denied liability and raised several affirmative defenses including that the transfers were in the ordinary course of business and were made contemporaneously with Medline's extension of "new value" and subsequent "new value." § 547(c)(1), (2), (4). Though the extent of the parties' cooperation is in dispute, some discovery began. Completion was difficult because of the intervening COVID-19 pandemic.[9] To date, no motions to enforce discovery have been filed.

Three separate Scheduling Orders have been entered. The first was entered about four months after the complaint was filed (Doc. #33) and vacated almost one year later (Doc. #46). The second was entered in late February 2021. Doc. #56. This order – which the parties agreed upon – set the close of discovery on September 24, 2021, and the deadline for hearing dispositive motions is set for October 27, 2021. *Id.*

District filed its motion for summary judgment on August 31, 2021. The hearing was originally scheduled for October 13, 2021. Medline filed a motion to extend the existing deadlines in the second

Scheduling Order to accommodate discovery it claims is needed to thwart the summary judgment motion. That motion was granted in part since the parties agreed to a slightly modified schedule.
The third Scheduling Order was entered September 29, 2021. The relevant dates now as agreed by the parties are close of all discovery – November 23, 2021; last day to hear dispositive motions – January 12, 2022.

II

District's summary judgment motion asks for judgment against Medline for the alleged preference - $244,000.00. The discrepancy between the original alleged preference (about $507,000.00) and the current claim reflects a credit District concedes is due Medline for subsequent "new value" of approximately $263,000.00.

District contends all the elements for preferential transfers are present based on undisputed facts supported by Medline's invoices and the history of District's payments. District also argues that contemporaneous "new value" was not advanced by Medline because Medline credited District's payments to early invoices during the preference period.

District further contends its payments to Medline during the preference period were not made in the ordinary course of business between District and Medline nor in accordance with industry standards. Doc. #75. Support for that contention includes testimony of District's current CFO and a risk management expert. The evidence includes Medline allegedly requiring double payments before shipments during the preference period. Also, District's expert opines the industry-wide range for payment during the relevant period was approximately 56 days. The District/Medline schedule was far outside that standard. *Id.*

Medline filed "preliminary" opposition. Docs. ##96, *et seq*. Other than objecting to the lack personal knowledge of both witnesses whose declarations were submitted by District, Medline urges that the summary judgment hearing be continued under Civ. Rule 56(d) to accommodate Medline's discovery needs.[10] More specifics will be summarized below.

III

Medline urges that the court should defer the hearing on District's summary judgment motion until it can "gather complete discovery." Attorney Elrod's declaration says that discovery is "essential" so that Medline can "determine facts related to the summary judgment motion." Doc. #94. Medline's counsel also wants to depose the witnesses whose declarations support District's summary judgment motion. *Id.*

Attorney Elrod's declaration states the "essential" discovery will determine facts, including:

1. Timing, nature, and reasons for District's transfers to Medline and the reasons and other circumstances surrounding them.

2. District's relationship with its other vendors and collection activity taken by them.
3. District's financial condition and reason(s) for it in the lead up to bankruptcy.
4. Facts relating to the ordinary course of business defense.
5. Evidentiary bases for the summary judgment motion.

District opposes and argues Medline has not been diligent in pursuing discovery nor met the evidentiary burden on this motion.

Medline's reply (Doc. #144) repeats the averments in the Elrod declaration and references the new modified scheduling order.

DISCUSSION

I

If a party opposing summary judgment shows by declaration that for specified reasons it cannot present facts essential to justify an opposition to summary judgment, the court may (1) defer the motion or deny it, (2) permit discovery, or (3) issue any appropriate order. Civ. Rule 56(d); *Intelliclear, LLC v. ETC Glob. Holdings, Inc.*, 978 F.3d 653, 661-62 (9th Cir. 2020).

A.

Grant or denial of the motion is reviewed for abuse of discretion. *SEC v. Stein*, 906 F.3d 823, 833 (9th Cir. 2018). The court only abuses its discretion if the moving party diligently pursued discovery and the additional evidence would preclude summary judgment. *Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1076 (9th Cir. 2019).

The additional evidence sought must be essential to the opposing party's opposition, and it must be likely the evidence exists. *Stein*, 906 F.3d at 833. The burden is on the party pursuing additional discovery to tender sufficient facts to show the evidence sought exists, and that the evidence would thwart summary judgment. *Atay v. Cty. of Maui*, 842 F.3d 688, 698 (9th Cir. 2016).

B.

The court should consider whether the moving party had adequate opportunity to conduct discovery, the information sought is based on speculation, and whether additional discovery would preclude summary judgment. *Intelliclear, LLC*, 978 F.3d at 662; *Stein*, 906 F.3d at 833.

1.

Medline's diligence in pursuing discovery is contested here. Looking at the length of time this case has been pending – now nearly two years – easily leads to the conclusion that sufficient time has already been given Medline. The court cannot ignore the effect of the pandemic. But nothing in Medline's motion outlines how the

pandemic specifically caused delays. There is no discussion why remote depositions could not be possible.

District states without contradiction that it has produced an exceedingly high number of documents compared to that produced by Medline. Medline's motion does not address its diligence in pursing discovery before the filing of this motion.

Medline allegedly cancelled depositions at the last minute earlier in the case, says District. Doc. #138. Also, Medline allegedly only showed interest in discovery after District's summary judgment motion was filed. *Id.* So, Medline's diligence is very suspect here. That said, courts "fairly freely" grant additional discovery time related to a summary judgment motion before discovery has elapsed. *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation,* 323 F.3d 767, 773(9th Cir. 2003). The parties have agreed to a close of discovery in approximately three weeks from now.

2.

Medline has not outlined specific facts that further discovery would reveal. Medline's list of facts to be discovered are not specific; rather they are areas of inquiry. True enough that less specificity is required when the parties have not had an opportunity for discovery. *Burlington*, 323 F.3d at 774. But here, discovery has occurred. Medline admits this. Doc. #144. There has been opportunity to specify the salient facts needed to defeat summary judgment.

Also, except for the depositions of the witnesses whose declarations were submitted by District, Attorney Elrod's declaration does not specify the facts that, if discovered, would defeat summary judgment. Medline does not state that the timing and transfers that are the subject of the action are disputed and if so, the facts supporting the dispute. Medline presumably has access to all records of its sales, deliveries, and collections.

It is also unclear why District's relationships with other vendors is relevant when § 547(c)(2) examines the relationship between the debtor and the transferee. It seems unlikely the evidence would show the history between District and Medline within the preference period were "ordinary business terms."

So, there is no proof the summary judgment motion would be defeated even if that evidence was established. There is no specificity of how District's terms with other vendors support a material disputed fact about ordinary business terms either.

Denial of this motion for lack of such a showing is appropriate where it is clear the evidence sought was almost certainly non-existent or was the subject of pure speculation. *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986). The court has doubts about the existence of this evidence but cannot find that the evidence is pure speculation or non-existent on this record.

Medline's motion does not fully demonstrate how their proposed "areas of inquiry" would preclude summary judgment. *Maljack Prods. V. Goodtimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir. 1996) (holding trial court properly refused to allow further discovery on a Rule 56(d) [then 56(f)] motion to search for evidence that the moving party "thought may exist") and *Big Lagoon Rancheria v. California*, 789 F.3d 947, 955 (9th Cir. 2015) (denial of motion is an abuse of discretion only if movant shows diligence and how discovery would preclude summary judgment).

Still, the case cited by District on this issue is distinguishable. *Brae Transp. Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) (affirming grant of summary judgment against plaintiff who stipulated not to take discovery before disposition of the motion and vague references in opposing declaration to discovery were insufficient). *Brae* was later limited by another panel in the Ninth Circuit. *Garrett v. San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987) (finding sufficient declaration stating what discovery would be sought and the purpose for the information).

On balance, though the showing by Medline on this motion is very weak, the court is constrained by the realities of the current scheduled dates. Discovery cutoff is in a few weeks and the last day for hearing dispositive motions is now two and one-half months away. Denial of this motion is especially inappropriate when the material at issue is the subject of outstanding discovery requests. *Burlington*, 323 F.3d at 774-775, quoting *VISA Int'l*, 784 F.2d at 1475.

The motion will be GRANTED.

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[7] Future references: to the Federal Rules of Civil Procedure will be "Civ. Rule;" to the Federal Rules of Bankruptcy Procedure will be "Rule." Unless otherwise indicated, references to section numbers will be references to the Bankruptcy Code.

[8] The amended complaint (Doc. #11) contains a specific listing of the alleged preferential payments and a more complete listing in an attached exhibit.

[9] Medline's counsel represented to the court that Medline's internal policies forbade travel by its employees and counsel which complicated the deposition process.

[10] In fact, Medline's declaration of one of their attorneys, John Elrod, is identical to the declaration submitted in support of this motion. Docs. #94 and #99.

8. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 WJH-2

CONTINUED MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY ADJUDICATION
8-31-2021 [67]

TULARE LOCAL HEALTHCARE DISTRICT V. MEDLINE
MICHAEL WILHELM/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

The court intends to grant Defendant Medline Industries' motion to defer consideration of Plaintiff Tulare Local Healthcare District's motion for summary judgment in matter #7 above. MRH-4.

This matter will be called as scheduled and continued to a date determined at the hearing in accordance with the Third Scheduling Order. Doc. #114.

9. 20-10024-B-7 **IN RE: SUKHJINDER SINGH**
20-1036 RWR-3

MOTION FOR SANCTIONS
10-18-2021 [65]

SALVEN V. SINGH ET AL
RUSSELL REYNOLDS/ATTY. FOR MV.

NO RULING.