UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, October 31, 2024
Department A – Courtroom #11
Fresno, California

Unless otherwise ordered, all matters before the Honorable Jennifer E. Niemann shall be simultaneously: (1) **In Person** at, Courtroom #11 (Fresno hearings only), (2) via **ZoomGov Video**, (3) via **ZoomGov Telephone**, and (4) via **CourtCall**. You may choose any of these options unless otherwise ordered or stated below.

All parties who wish to appear at a hearing remotely must sign up by 4:00 p.m. **one business day** prior to the hearing. Information regarding how to sign up can be found on the **Remote Appearances** page of our website at https://www.caeb.uscourts.gov/Calendar/RemoteAppearances. Each party who has signed up will receive a Zoom link or phone number, meeting I.D., and password via e-mail.

If the deadline to sign up has passed, parties who wish to appear remotely must contact the Courtroom Deputy for the Department holding the hearing.

Please also note the following:

- Parties in interest may connect to the video or audio feed free of charge and should select which method they will use to appear when signing up.
- Members of the public and the press appearing by ZoomGov may only listen in to the hearing using the zoom telephone number. Video appearances are not permitted.
- Members of the public and the press may not listen in to trials or evidentiary hearings, though they may appear in person in most instances.

To appear remotely for law and motion or status conference proceedings, you must comply with the following guidelines and procedures:

1. Review the Pre-Hearing Dispositions prior to appearing at the hearing.
2. Parties appearing via CourtCall are encouraged to review the CourtCall Appearance Information.

If you are appearing by ZoomGov phone or video, please join at least 10 minutes prior to the start of the calendar and wait with your microphone muted until the matter is called.

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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.

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. 24-11712-A-13 **IN RE: MARK FLORENTINO**
SLL-1

MOTION TO CONFIRM PLAN
9-23-2024 [54]

MARK FLORENTINO/MV
STEPHEN LABIAK/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.

This motion was set for hearing on at least 35 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is 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. 24-12116-A-13 **IN RE: MICHAEL/VICTORIA BUTLER**
LGT-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY LILIAN G. TSANG
9-10-2024 [17]

LILIAN TSANG/MV
BENNY BARCO/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the objection to confirmation on October 30, 2024. Doc. #30.

3. 24-12617-A-13 **IN RE: FAROK ZAMZAMI AND JAWAHER ALYAGHORI**
LGT-1

OBJECTION TO CONFIRMATION OF PLAN BY LILIAN G. TSANG
10-10-2024 [22]

LILIAN TSANG/MV
PETER BUNTING/ATTY. FOR DBT.

NO RULING.

4. 24-12617-A-13 **IN RE: FAROK ZAMZAMI AND JAWAHER ALYAGHORI**
PBB-1

MOTION TO VALUE COLLATERAL OF CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION
10-2-2024 [17]

JAWAHER ALYAGHORI/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice prior to the hearing date as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have done here.

Farok Nagi Zamzami and Jawaher Abdullah A. Alyaghori (together, "Debtors"), the debtors in this chapter 13 case, move the court for an order valuing Debtors' personal property ("Property"), which is the collateral of California Department of Tax and Fee Administration ("Creditor"). Doc. #17; Decl. of Farok Nagi Zamzami, Doc. #19. Creditor's tax lien on all of Debtors' personal property arose on June 21, 2022. Ex. A, Doc. #20.

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." The limitations of 11 U.S.C. § 1325(a)(*) (the hanging paragraph) do not apply to this debt. Section 506(a)(2) of the Bankruptcy Code 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" where the personal property is "acquired for personal, family, or household purposes" 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." 11 U.S.C. § 506(a)(2).

Creditor filed a proof of claim on October 16, 2024, which asserts $34,225.00 as the secured portion of Creditor's claim. Claim 5. Debtors agree with the $34,225.00 value for the Property asserted by Creditor. Zamzami Decl., Doc. #19.

The motion is GRANTED. Creditor's secured claim will be fixed at $34,225.00. 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.

5. 23-11520-A-13 **IN RE: THEDFORD JONES**
FW-4

MOTION TO MODIFY PLAN
9-10-2024 [180]

THEDFORD JONES/MV
GABRIEL WADDELL/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after the hearing.

This motion was set for hearing on at least 35 days' notice prior to the hearing date as required by Local Rule of Practice 3015-1(d)(2). Denise Balestier ("Creditor") timely filed written opposition. Doc. #190. The failure of other creditors, 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 non-responding parties in interest are entered. This matter will proceed as scheduled.

As a procedural matter, the certificate of service filed in connection with the opposition does not comply with LBR 7005-1 and General Order 22-03, which require attorneys and trustees to use the court's Official Certificate of Service Form (EDC Form 7-005, Rev. 10/22) as of November 1, 2022. The court encourages counsel for Creditor to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the

local rules. The rules can be accessed on the court's website at https://www.caeb.uscourts.gov/LocalRulesAndGeneralOrders.

Debtor Thedford Lewis Jones, Jr. ("Debtor") filed his modified chapter 13 plan ("Plan") on September 10, 2024. Doc. #182. Creditor objects to confirmation of the Plan on the grounds that the Plan: (1) does not adequately provide for payment of Creditor's priority claims; (2) does not provide for Debtor's attorneys' fees to be paid over the life of the Plan; and (3) proposes to pay an additional $50,000.00 to Debtor's attorney, Gabriel Waddell. Doc. #190.

The party moving to confirm the chapter 13 plan bears the burden of proof to show facts supporting the proposed plan. Max Recovery v. Than (In re Than), 215 B.R. 430, 434 (B.A.P. 9th Cir. 1997).

After considering the opposition and Debtor's response thereto (Doc. #194), the court intends to overrule the opposition and confirm the modified plan.

TREATMENT OF CREDITOR'S PRIORITY CLAIM

Section 1322(a)(2) of the Bankruptcy Code requires a chapter 13 plan to provide for the payment in full of all claims entitled to priority under 11 U.S.C. § 507 unless the holder of a particular claim agrees to a different treatment. 11 U.S.C. § 1322(a)(2). Creditor asserts that the proposed Plan proposes to pay priority claims in the total amount of $151,519.85, which is insufficient to pay all priority claims in full. Doc. #190. However, section 3.12 of the Plan provides for priority claims in the amount of $211,575.15. Plan, Doc. #182. Based on filed and agreed priority claims, $211,575.15 is sufficient to pay all priority claims in full:

Name of Creditor	**Claim #**	**Priority Claim Amount**
Denise Balestier	1 (as agreed)	$20,000.00
Denise Balestier	2	$59,480.27
CA Franchise Tax Board	7	$27,145.78
Internal Revenue Service	9 (as amended)	$104,949.10
CA Employment Development Dept.	No claim filed	$0.00
Total Priority Claims		**$211,575.15**

Accordingly, the court is inclined to overrule this basis for Creditor's objection.

PAYMENT OF ATTORNEYS' FEES

Creditor also objects to confirmation of the Plan asserting that the fees for Debtor's counsel need to be paid over the life of the Plan. However, that is only the case if Debtor's counsel had elected to be paid pursuant to LBR 2016-1(c). That is not the case. Debtor's counsel has elected to be paid pursuant to LBR 2016-1(b). Plan, Doc. #182. Because Creditor's objection is based on an inapplicable local rule, the court is inclined to overrule this basis for Creditor's objection.

Finally, Creditor objects to confirmation of the Plan because the Plan proposes to reserve $100,000.00 for potential attorney's fees, which is an additional $50,000.00 over the amount reserved for Debtor's attorney in the original plan. Doc. #190. Creditor requests that the attorney fee reserve be reduced to $50,000.00. Id.

Debtor responds that reserving for attorneys' fees does not mean those fees will be paid to Debtor's counsel. Such fees are only paid after a motion and court approval. Doc. #194.

The court notes that on April 26, 2024, attorneys' fees in the amount of $50,256.00 were approved for services rendered by Debtor's counsel from January 16, 2024 through February 21, 2024. Order, Doc. #139. Since February 21, 2024, Creditor and Debtor were involved in a very contested objection to claim proceeding that settled on the eve of trial. Doc. #169. Moreover, any attorneys' fees for Debtor's counsel that are not paid through the Plan are not discharged and will become the responsibility of Debtor. Plan, Doc. #182. Thus, it is reasonable for Debtor to request additional attorneys' fees be reserved in the modified Plan from the amount set forth in the original plan. Moreover, assuming Debtor is current on his plan payments under the original plan and the proposed Plan, the court calculates that the reserve for attorneys' fees should be fully funded by February or March 2025.

Accordingly, the court is inclined to overrule this basis for Creditor's objection.

CONCLUSION

For the foregoing reasons, this court is inclined to overrule Creditor's objection to confirmation of the Plan and grant the motion.

6. 24-12127-A-13 **IN RE: ISAAC PICHE**
LGT-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY LILIAN G. TSANG
9-9-2024 [17]

LILIAN TSANG/MV
STEVEN ALPERT/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 to confirmation is OVERRULED AS MOOT. The debtor filed a first modified plan on October 25, 2024 (PLG-1, Doc. #30), with a motion to confirm the modified plan set for hearing on December 12, 2024 at 9:30 a.m. Doc. ##26-32.

7. 23-10947-A-13 **IN RE: SONIA LOPEZ**

CONTINUED NOTICE OF DEFAULT AND MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
5-17-2024 [111]

SUSAN SILVEIRA/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

8. 23-10947-A-13 **IN RE: SONIA LOPEZ**
SDS-6

MOTION TO MODIFY PLAN
9-24-2024 [147]

SONIA LOPEZ/MV
SUSAN SILVEIRA/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.

This motion was set for hearing on at least 35 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is 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.

9. 24-12052-A-13 **IN RE: PARAMJIT SINGH**
LGT-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE LILIAN G. TSANG
9-5-2024 [23]

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This case was dismissed at the request of the debtor on October 28, 2024. Doc. #39. Therefore, this objection will be DROPPED AS MOOT.

10. 24-12052-A-13 **IN RE: PARAMJIT SINGH**
LGT-2

MOTION TO DISMISS CASE
9-27-2024 [31]

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This case was dismissed at the request of the debtor on October 28, 2024. Doc. #39. Therefore, this motion to dismiss will be DROPPED AS MOOT.

11. 24-12462-A-13 **IN RE: JAMES/NINA JESSOP**
LGT-2

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-1-2024 [17]

LILIAN TSANG/MV
SUSAN SILVEIRA/ATTY. FOR DBT.
WITHDRAWN 10/17/24

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on October 17, 2024. Doc. #29.

12. 22-12163-A-13 **IN RE: TINA GARCIA**
SL-1

CONTINUED EVIDENTIARY HEARING RE: OBJECTION TO CLAIM OF CHICAGO TITLE INSURANCE COMPANY, CLAIM NUMBER 6
4-11-2023 [44]

TINA GARCIA/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

13. 24-12881-A-13 **IN RE: HILDA JIMENEZ**
BRK-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-11-2024 [11]

JERRY LEWANDOWSKI/MV
BRIAR KEELER/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 the hearing.

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Though not required, Hilda Jimenez ("Debtor") filed written opposition on October 24, 2024. Doc. #25. Further opposition may be presented at the hearing, and this matter will proceed as scheduled.

The movant, Jerry Lewandowski ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2) to permit Movant to proceed with an unlawful detainer action in Kern County Superior Court Case No. BCL-23-017502 (the "Unlawful Detainer Action") against Debtor and Debtor's partner and co-defendant, Bedros Balian ("Co-Defendant"). Doc. ##11, 14. The Unlawful Detainer Action is in reference to Debtor's occupancy of real property located at 21369 McIntosh Street, Tehachapi, California 93561 (the "Property"). Id.

Debtor filed this chapter 13 bankruptcy case on October 3, 2024. Doc. #1. Movant owns the Property. Decl. of Jerry Lewandowski, Doc. #13. In July 2021, Debtor asked Movant for a loan to purchase a home. Lewandowski Decl., Doc. #13. Instead of loaning money to Debtor, Movant purchased the Property and allowed Debtor to reside at the Property rent free for 6 months to allow Debtor to obtain financing to purchase the Property from Movant for $399,999.00. Lewandowski Decl., Doc. #13; Ex. A, Doc. #15. No written agreement was ever signed between Movant and Debtor, and Debtor never paid Movant any rent while residing at the Property. Id. When Movant decided to sell the Property in 2023, Movant retained counsel to

assist in terminating Debtor occupying the Property by serving Debtor with a 60-day Notice of Termination on August 1, 2023. Ex. B, Doc. #15.

Thereafter, Movant filed a state court action on November 28, 2023 to remove Debtor from the Property and subsequently sell the Property. Lewandowski Decl., Doc. #13; Ex. B, Doc. #15. On June 3, 2024, the state court served a notice on all parties in the Unlawful Detainer Action informing them of a trial date on June 18, 2024. Lewandowski Decl., Doc. #13. Co-Defendant filed chapter 13 bankruptcy on June 14, 2014 but that bankruptcy case has since been dismissed. Id.; see Case No. 24-11650 (Bankr. E.D. Cal). During Co-Defendant's bankruptcy case, Movant successfully obtained relief from the automatic stay to proceed with the Unlawful Detainer Action. Lewandowski Decl., Doc. #13. Movant obtained a new trial date for the Unlawful Detainer Action of October 3, 2024, which is the same date in which Debtor filed the instant bankruptcy case. Id.; Ex. C, Doc. #15. Movant seeks relief from the automatic stay to proceed with the Unlawful Detainer Action against Debtor to regain possession and sell the Property. Lewandowski Decl., Doc. #13.

In Debtor's opposition, Debtor requests this matter be continued two to three weeks to allow Debtor's Chapter 13 Plan be confirmed. Doc. #25. However, in her opposition, Debtor acknowledges that Debtor has not filed her schedules, statement of financial affairs or a chapter 13 plan. Id. Additionally, Debtor states that she has an ongoing civil case in Los Angeles Superior Court with a jury trial that she needs to attend starting October 28, 2024 for two to three weeks. Ex. A, Doc. #26.

11 U.S.C. § 362(d)(1) Analysis

11 U.S.C. § 362(d)(1) allows the court to grant relief from the automatic stay for cause. "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). When a movant prays for relief from the automatic stay to initiate or continue non-bankruptcy court proceedings, a bankruptcy court may consider the "Curtis factors" in making its decision. In re Kronemyer, 405 B.R. 915, 921 (9th Cir. B.A.P. 2009). "[T]he Curtis factors are appropriate, nonexclusive, factors to consider in determining whether to grant relief from the automatic stay" to allow litigation in another forum. Id. The Curtis factors include: (1) whether the relief will result in a partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) whether the non-bankruptcy forum has the expertise to hear such cases; (4) whether litigation in another forum would prejudice the interests of other creditors; and (5) the interest of judicial economy and the expeditious and economical determination of litigation for the parties. In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984).

Here, granting Movant relief from the automatic stay will allow Movant to continue the Unlawful Detainer Action in state court, which will allow the issue of possession of the Property to be adjudicated on its merits. Further, the interests of judicial economy favor granting relief from the automatic stay so that Movant can regain possession of the Property. Finally, permitting Movant to pursue a judgment in state court will not prejudice the interests of Debtor as Debtor has no legal right to occupy the Property either through ownership or a lease agreement. Debtor will suffer no legally cognizable harm by being forced to resolve the Unlawful Detainer Action in state court. To the extent that Debtor has a conflicting obligation to attend a trial in Los Angeles, that conflict is not a basis to deny Movant relief from the automatic stay. The state court can

take that conflict into consideration when re-setting the trial in the Unlawful Detainer Action.

For these reasons, the court finds that cause exists to lift the stay to permit Movant to proceed with the Unlawful Detainer Action in state court and enforce any resulting judgment.

11 U.S.C. § 362(d)(2) Analysis

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

Here, the court finds that Debtor is not the owner of the Property and does not have any equity in the Property. Further, the Property is not necessary to an effective reorganization because Debtor has no legal right to occupy the Property either through ownership or a lease agreement.

Conclusion

Accordingly, the court is inclined to overrule Debtor's opposition and grant the motion pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) to permit Movant to proceed under applicable nonbankruptcy law to prosecute the Unlawful Detainer Action in state court and to enforce any resulting judgment for unlawful detainer, including all necessary steps to obtain possession of the Property from Debtor. No other relief is awarded.

Because Debtor has no legal right to occupy the Property either through ownership or a lease agreement and trial on the Unlawful Detainer Action was set to proceed on the same day that Debtor filed her bankruptcy petition, the 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived to permit Movant to prosecute the Unlawful Detainer Action in state court.

14. 24-10889-A-13 **IN RE: SALATIEL/MARIA RUIZ**
LGT-2

MOTION TO DISMISS CASE
10-8-2024 [33]

LILIAN TSANG/MV
JOEL WINTER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented

at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Here, the chapter 13 trustee asks the court to dismiss this case for unreasonable delay by the debtors that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) and because debtors have failed to make all payments due under the plan (11 U.S.C. § 1307(c)(4)). The debtors are delinquent in the amount of $4,024.94. Doc. #33. Before this hearing, another payment in the amount of $2,012.47 will also come due. Id. The debtors did not oppose.

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 by debtor that is prejudicial to creditors and 11 U.S.C. § 1307(c)(4) for failing to timely make payments due under the plan.

A review of the debtors' Schedules A/B, C and D shows there is minimal equity in the debtors' assets after considering secured claims and claimed exemptions. Therefore, dismissal, rather than conversion to chapter 7, is in the best interests of creditors and the estate.

Accordingly, this motion will be GRANTED. The case will be dismissed.

11:00 AM

1. 20-13822-A-7 **IN RE: FAUSTO CAMPOS AND VERONICA NAVARRO**
21-1006 CAE-1

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
5-6-2021 [18]

RAMIREZ V. CAMPOS
PAMELA THAKUR/ATTY. FOR PL.

NO RULING.

2. 22-10825-A-7 **IN RE: JAMIE/MARIA GARCIA**
22-1018 BBR-7

MOTION TO COMPEL AND/OR DISCOVERY MOTION AND REQUEST FOR ATTORNEYS FEES
10-2-2024 [96]

AGRO LABOR SERVICES, INC. ET AL V. GARCIA ET AL
VIVIANO AGUILAR/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the defendants 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 defendants are entered. Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have not done here.

Agro Labor Services, Inc. and Cal Central Harvesting, Inc. (collectively, "Plaintiffs"), move pursuant to Federal Rule of Civil Procedure ("Rule") 37, made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure Rule 7037, for an order compelling Adela Garcia ("Co-Defendant"), to serve her initial disclosures, responses and produce documents responsive to Plaintiff's First Set of Request for Production of Documents and Interrogatories as well as awarding attorney's fees. Motion, Doc. #96. On October 24, 2024, Plaintiffs filed a Notice of Non-Opposition stating that no opposition to the motion has been filed by or on behalf of any of the defendants and, based on the failure of the defendants to oppose the motion, Plaintiffs request that the motion be granted. Doc. #119.

The court is inclined to DENY Plaintiffs' motion because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion.

Because the court is DENYING Plaintiffs' motion, the court will not award the requested attorney's fees.

MOTION TO COMPEL STANDARD

Rule 37(a)(1) requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). This certification requirement was described in Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D. Nev. 1996), as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170 (emphasis in original).

The Shuffle Master court explained: "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" Shuffle Master, 170 F.R.D. at 171. To meet the certification requirement,

> counsel must set forth 'essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.'

In re Sanchez, No. 03-22417-D-13L, 2008 WL 4155115, at *3 (Bankr. E.D. Cal. Sept. 8, 2008) (quoting Shuffle Master, 170 F.R.D. at 171).

"[G]ood faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather [the rule] mandates a genuine attempt to resolve the discovery dispute through non-judicial means." Shuffle Master, 170 F.R.D. at 171.

The Shuffle Master court held that Rule 37(a)(1) "requires a party to have had or attempted to have had an actual meeting or conference." Shuffle Master, 170 F.R.D. at 171. "'[C]onferring' under [Rule 37(a)(1)] must be a personal or telephonic consultation during which the parties engage in meaningful negotiations or otherwise provide legal support for their position." Id. at 172. The Shuffle Master court found that a series of facsimile letters transmitted between parties in that case did not satisfy the requirement. Id.

These principles were adopted and applied in the bankruptcy context in

Sanchez, in which the bankruptcy court concluded that the motion to compel in that case, supported by a supplemental declaration that referred to and quoted several letters between parties, and referred to a single conversation with Plaintiff's counsel, did not qualify as an "actual certification document" that "accurately and specifically convey[s] to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute." Sanchez, 2008 WL 4155115, at *3. Further, "it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes." Id.

The court adopts the standards set forth in Shuffle Master, and as applied in this case, finds that Plaintiffs' motion does not satisfy the certification requirement of Rule 37(a)(1).

APPLICATION TO PLAINTIFFS' MOTION

Plaintiffs' motion contains a certification statement in the declaration of Isabel Medellin. Ms. Medellin is a paralegal at the law firm representing Plaintiffs. Decl. of Isabel Medellin, Doc. #98. Ms. Medellin testifies that she and Plaintiffs' counsel have "in good faith attempted to confer with Co-Defendant's counsel, but these attempts have been stonewalled by Defendants and/or their counsel." Id.

In the memorandum of points and authorities ("MPA") filed with the motion to compel, Plaintiffs' counsel contends that Plaintiffs' counsel made good faith attempts to meet and confer with Co-Defendant regarding Co-Defendant's responses and produced documents. MPA, p.5, Doc. #99. To support this statement, Plaintiffs' counsel highlights that attorney Viviano Aguilar of Belden Blaine Raytis, LLP emailed Co-Defendant's counsel, Phillip Gillet, numerous times beginning on June 16, 2023 to request a status of Co-Defendant's responses to the written discovery requests but Mr. Gillet failed to respond to the emails. Id.; Medellin Decl., Doc. #98; Exs. E & F, Doc. #100. Mr. Gillet did not reach out to Mr. Aquilar until August 28, 2023 when Mr. Gillet emailed Mr. Aguilar to advise Mr. Aquilar that all of Mr. Agular's prior emails had gone into Mr. Gillet's spam folder and to request a time to discuss the matter further. Id. After this correspondence, Mr. Aguilar ceased his employment with Belden Blaine Raytis, LLP, and the matter was transferred to Scott Belden and Kaleb Judy. MPA, p.5-6, Doc. #99. On August 29, 2023, Mr. Judy responded to Mr. Gillet advising Mr. Gillet that Mr. Judy would be taking over the case and confirming Mr. Judy's availability to discuss the matter. MPA, p.6, Doc. #99. However, Mr. Gillet did not respond again. Id., Medellin Decl., Doc. #98; Ex. G, Doc. #100.

First, the court finds that Ms. Medellin's declaration is not a certification and Ms. Medellin is not an attorney. Thus, Plaintiffs have not met the certification requirement of Rule 37(a)(1).

Turning next to the contention that Plaintiffs' counsel attempted to meet and confer with counsel for Co-Defendant, Plaintiffs' counsel has failed to provide facts that demonstrate a good faith effort was made. It appears that Mr. Aquilar reached out to Mr. Gillet by email a few times before Mr. Judy sent one email to Mr. Gillet to set up a date and time to meet and confer, but it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes outside of these instances. Shuffle Master, 170 F.R.D. at 172. The court is unwilling to find that the Rule 37(a)(1) requirement of a meet and confer requirement was satisfied when Mr. Judy sent one email in which Mr. Judy only notifies Mr. Gillet that Mr. Judy is taking over the

case and only gave two days from sending the initial email in which Mr. Judy is available to discuss the case.

Further, based on this communication and the communication of Mr. Aquilar, the court cannot determine that, prior to filing this motion to compel, Plaintiffs, as the moving party, or their counsel "personally engage[d] in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." Shuffle Master, 170 F.R.D. at 171. There is nothing in the declaration of Ms. Medellin to indicate that Plaintiffs' counsel reached out to Mr. Gillet prior to filing this motion on October 2, 2024 to comply with the meet and confer requirement of Rule 37. Stating in a status report filed on August 29, 2024 that Plaintiffs intended to re-file this motion to compel is not sufficient to satisfy the meet and confer requirement of Rule 37(a)(1).

Plaintiffs' motion to compel is denied because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion.

REQUEST FOR ATTORNEY'S FEES

Rule 37(a)(4) permits a moving party to recover reasonable expenses incurred in making a discovery motion, including attorney's fees, provided the court grants the motion or the discovery is provided after the filing of the motion. However, the awarding of expenses and attorney's fees are not appropriate where the moving party filed a discovery motion without first making a good faith effort to obtain the discovery through non-judicial channels. Fed. R. Civ. P. 37(a)(4)(A). Here, Plaintiffs failed to make this effort, and Plaintiffs' request for attorney's fees must be denied.

Accordingly, the motion to compel, including the request for attorney's fees, will be denied.

3. 22-10825-A-7 **IN RE: JAMIE/MARIA GARCIA**
22-1018 BBR-8

MOTION TO COMPEL AND/OR DISCOVERY MOTION AND REQUEST FOR ATTORNEYS FEES
10-2-2024 [102]

AGRO LABOR SERVICES, INC. ET AL V. GARCIA ET AL
VIVIANO AGUILAR/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the defendants 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 defendants are entered. Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have not done here.

Agro Labor Services, Inc. and Cal Central Harvesting, Inc. (collectively, "Plaintiffs"), move pursuant to Federal Rule of Civil Procedure ("Rule") 37, made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure Rule 7037, for an order compelling Jamie Rene Garcia ("Co-Defendant"), to serve his initial disclosures, responses and produce documents responsive to Plaintiff's First Set of Request for Production of Documents and Interrogatories as well as awarding attorney's fees. Motion, Doc. #102. On October 24, 2024, Plaintiffs filed a Notice of Non-Opposition stating that no opposition to the motion has been filed by or on behalf of any of the defendants and, based on the failure of the defendants to oppose the motion, Plaintiffs request that the motion be granted. Doc. #121.

The court is inclined to DENY Plaintiffs' motion because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion. Because the court is DENYING Plaintiffs' motion, the court will not award the requested attorney's fees.

MOTION TO COMPEL STANDARD

Rule 37(a)(1) requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). This certification requirement was described in Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D. Nev. 1996), as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170 (emphasis in original).

The Shuffle Master court explained: "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" Shuffle Master, 170 F.R.D. at 171. To meet the certification requirement,

> counsel must set forth 'essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.'

In re Sanchez, No. 03-22417-D-13L, 2008 WL 4155115, at *3 (Bankr. E.D. Cal. Sept. 8, 2008) (quoting Shuffle Master, 170 F.R.D. at 171).

"[G]ood faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather [the rule] mandates a genuine attempt to resolve the discovery dispute through non-judicial means." Shuffle Master, 170 F.R.D. at 171.

The Shuffle Master court held that Rule 37(a)(1) "requires a party to have had or attempted to have had an actual meeting or conference." Shuffle Master, 170 F.R.D. at 171. "'[C]onferring' under [Rule 37(a)(1)] must be a personal or telephonic consultation during which the parties engage in meaningful negotiations or otherwise provide legal support for their position." Id. at 172. The Shuffle Master court found that a series of facsimile letters transmitted between parties in that case did not satisfy the requirement. Id.

These principles were adopted and applied in the bankruptcy context in Sanchez, in which the bankruptcy court concluded that the motion to compel in that case, supported by a supplemental declaration that referred to and quoted several letters between parties, and referred to a single conversation with Plaintiff's counsel, did not qualify as an "actual certification document" that "accurately and specifically convey[s] to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute." Sanchez, 2008 WL 4155115, at *3. Further, "it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes." Id.

The court adopts the standards set forth in Shuffle Master, and as applied in this case, finds that Plaintiffs' motion does not satisfy the certification requirement of Rule 37(a)(1).

APPLICATION TO PLAINTIFFS' MOTION

Plaintiffs' motion contains a certification statement in the declaration of Isabel Medellin. Ms. Medellin is a paralegal at the law firm representing Plaintiffs. Decl. of Isabel Medellin, Doc. #104. Ms. Medellin testifies that she and Plaintiffs' counsel have "in good faith attempted to confer with Co-Defendant's counsel, but these attempts have been stonewalled by Defendants and/or their counsel." Id.

In the memorandum of points and authorities ("MPA") filed with the motion to compel, Plaintiffs' counsel contends that Plaintiffs' counsel made good faith attempts to meet and confer with Co-Defendant regarding Co-Defendant's responses and produced documents. MPA, p.5, Doc. #105. To support this statement, Plaintiffs' counsel highlights that attorney Viviano Aguilar of Belden Blaine Raytis, LLP emailed Co-Defendant's counsel, Phillip Gillet, numerous times beginning on June 16, 2023 to request a status of Co-Defendant's responses to the written discovery requests but Mr. Gillet failed to respond to the emails. Id.; Medellin Decl., Doc. #104; Exs. F & G, Doc. #106. Mr. Gillet did not reach out to Mr. Aquilar until August 28, 2023 when Mr. Gillet emailed Mr. Aguilar to advise Mr. Aquilar that all of Mr. Agular's prior emails had gone into Mr. Gillet's spam folder and to request a time to discuss the matter further. Id. After this correspondence, Mr. Aguilar ceased his employment with Belden Blaine Raytis, LLP, and the matter was transferred to Scott Belden and Kaleb Judy. MPA, p.5-6, Doc. #105. On August 29, 2023, Mr. Judy responded to Mr. Gillet advising Mr. Gillet that Mr. Judy would be taking over the case and confirming Mr. Judy's

availability to discuss the matter. MPA, p.6, Doc. #105. However, Mr. Gillet did not respond again. Id., Medellin Decl., Doc. #104; Ex. H, Doc. #106.

First, the court finds that Ms. Medellin's declaration is not a certification and Ms. Medellin is not an attorney. Thus, Plaintiffs have not met the certification requirement of Rule 37(a)(1).

Turning next to the contention that Plaintiffs' counsel attempted to meet and confer with counsel for Co-Defendant, Plaintiffs' counsel has failed to provide facts that demonstrate a good faith effort was made. It appears that Mr. Aquilar reached out to Mr. Gillet by email a few times before Mr. Judy sent one email to Mr. Gillet to set up a date and time to meet and confer, but it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes outside of these instances. Shuffle Master, 170 F.R.D. at 172. The court is unwilling to find that the Rule 37(a)(1) requirement of a meet and confer requirement was satisfied when Mr. Judy sent one email in which Mr. Judy only notifies Mr. Gillet that Mr. Judy is taking over the case and only gave two days from sending the initial email in which Mr. Judy is available to discuss the case.

Further, based on this communication and the communication of Mr. Aquilar, the court cannot determine that, prior to filing this motion to compel, Plaintiffs, as the moving party, or their counsel "personally engage[d] in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." Shuffle Master, 170 F.R.D. at 171. There is nothing in the declaration of Ms. Medellin to indicate that Plaintiffs' counsel reached out to Mr. Gillet prior to filing this motion on October 2, 2024 to comply with the meet and confer requirement of Rule 37. Stating in a status report filed on August 29, 2024 that Plaintiffs intended to re-file this motion to compel is not sufficient to satisfy the meet and confer requirement of Rule 37(a)(1).

Plaintiffs' motion to compel is denied because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion.

REQUEST FOR ATTORNEY'S FEES

Rule 37(a)(4) permits a moving party to recover reasonable expenses incurred in making a discovery motion, including attorney's fees, provided the court grants the motion or the discovery is provided after the filing of the motion. However, the awarding of expenses and attorney's fees are not appropriate where the moving party filed a discovery motion without first making a good faith effort to obtain the discovery through non-judicial channels. Fed. R. Civ. P. 37(a)(4)(A). Here, Plaintiffs failed to make this effort, and Plaintiffs' request for attorney's fees must be denied.

Accordingly, the motion to compel, including the request for attorney's fees, will be denied.

4. 22-10825-A-7 **IN RE: JAMIE/MARIA GARCIA**
22-1018 BBR-9

MOTION TO COMPEL AND/OR DISCOVERY MOTION AND REQUEST FOR ATTORNEYS FEES
10-2-2024 [108]

AGRO LABOR SERVICES, INC. ET AL V. GARCIA ET AL
VIVIANO AGUILAR/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the defendants 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 defendants are entered. Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have not done here.

Agro Labor Services, Inc. and Cal Central Harvesting, Inc. (collectively, "Plaintiffs"), move pursuant to Federal Rule of Civil Procedure ("Rule") 37, made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure Rule 7037, for an order compelling Maria Cruz Garcia ("Co-Defendant"), to serve her initial disclosures, responses and produce documents responsive to Plaintiff's First Set of Request for Production of Documents and Interrogatories as well as awarding attorney's fees. Motion, Doc. #108. On October 24, 2024, Plaintiffs filed a Notice of Non-Opposition stating that no opposition to the motion has been filed by or on behalf of any of the defendants and, based on the failure of the defendants to oppose the motion, Plaintiffs request that the motion be granted. Doc. #123.

The court is inclined to DENY Plaintiffs' motion because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion. Because the court is DENYING Plaintiffs' motion, the court will not award the requested attorney's fees.

MOTION TO COMPEL STANDARD

Rule 37(a)(1) requires that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make . . . discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). This certification requirement was described in Shuffle Master v. Progressive Games, 170 F.R.D. 166 (D. Nev. 1996), as comprising two elements:

> [T]wo components are necessary to constitute a facially valid motion to compel. First is the actual certification document. The certification must accurately and specifically convey to the court

> who, where, how, and when the respective parties attempted to personally resolve the discovery dispute. Second is the performance, which also has two elements. The moving party performs, according to the federal rule, by certifying that he or she has (1) in good faith (2) conferred or attempted to confer. Each of these two subcomponents must be manifested by the facts of a particular case in order for a certification to have efficacy and for the discovery motion to be considered.

Shuffle Master, 170 F.R.D. at 170 (emphasis in original).

The Shuffle Master court explained: "[A] moving party must include more than a cursory recitation that counsel have been 'unable to resolve the matter.'" Shuffle Master, 170 F.R.D. at 171. To meet the certification requirement,

> counsel must set forth 'essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.'

In re Sanchez, No. 03-22417-D-13L, 2008 WL 4155115, at *3 (Bankr. E.D. Cal. Sept. 8, 2008) (quoting Shuffle Master, 170 F.R.D. at 171).

"[G]ood faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather [the rule] mandates a genuine attempt to resolve the discovery dispute through non-judicial means." Shuffle Master, 170 F.R.D. at 171.

The Shuffle Master court held that Rule 37(a)(1) "requires a party to have had or attempted to have had an actual meeting or conference." Shuffle Master, 170 F.R.D. at 171. "'[C]onferring' under [Rule 37(a)(1)] must be a personal or telephonic consultation during which the parties engage in meaningful negotiations or otherwise provide legal support for their position." Id. at 172. The Shuffle Master court found that a series of facsimile letters transmitted between parties in that case did not satisfy the requirement. Id.

These principles were adopted and applied in the bankruptcy context in Sanchez, in which the bankruptcy court concluded that the motion to compel in that case, supported by a supplemental declaration that referred to and quoted several letters between parties, and referred to a single conversation with Plaintiff's counsel, did not qualify as an "actual certification document" that "accurately and specifically convey[s] to the court who, where, how, and when the respective parties attempted to personally resolve the discovery dispute." Sanchez, 2008 WL 4155115, at *3. Further, "it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes." Id.

The court adopts the standards set forth in Shuffle Master, and as applied in this case, finds that Plaintiffs' motion does not satisfy the certification requirement of Rule 37(a)(1).

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APPLICATION TO PLAINTIFFS' MOTION

Plaintiffs' motion contains a certification statement in the declaration of Isabel Medellin. Ms. Medellin is a paralegal at the law firm representing Plaintiffs. Decl. of Isabel Medellin, Doc. #110. Ms. Medellin testifies that she and Plaintiffs' counsel have "in good faith attempted to confer with Co-Defendant's counsel, but these attempts have been stonewalled by Defendants and/or their counsel." Id.

In the memorandum of points and authorities ("MPA") filed with the motion to compel, Plaintiffs' counsel contends that Plaintiffs' counsel made good faith attempts to meet and confer with Co-Defendant regarding Co-Defendant's responses and produced documents. MPA, p.5, Doc. #111. To support this statement, Plaintiffs' counsel highlights that attorney Viviano Aguilar of Belden Blaine Raytis, LLP emailed Co-Defendant's counsel, Phillip Gillet, numerous times beginning on June 16, 2023 to request a status of Co-Defendant's responses to the written discovery requests but Mr. Gillet failed to respond to the emails. Id.; Medellin Decl., Doc. #110; Exs. F & G, Doc. #112. Mr. Gillet did not reach out to Mr. Aquilar until August 28, 2023 when Mr. Gillet emailed Mr. Aguilar to advise Mr. Aquilar that all of Mr. Agular's prior emails had gone into Mr. Gillet's spam folder and to request a time to discuss the matter further. Id. After this correspondence, Mr. Aguilar ceased his employment with Belden Blaine Raytis, LLP, and the matter was transferred to Scott Belden and Kaleb Judy. MPA, p.5-6, Doc. #111. On August 29, 2023, Mr. Judy responded to Mr. Gillet advising Mr. Gillet that Mr. Judy would be taking over the case and confirming Mr. Judy's availability to discuss the matter. MPA, p.6, Doc. #111. However, Mr. Gillet did not respond again. Id., Medellin Decl., Doc. #110; Ex. H, Doc. #112.

First, the court finds that Ms. Medellin's declaration is not a certification and Ms. Medellin is not an attorney. Thus, Plaintiffs have not met the certification requirement of Rule 37(a)(1).

Turning next to the contention that Plaintiffs' counsel attempted to meet and confer with counsel for Co-Defendant, Plaintiffs' counsel has failed to provide facts that demonstrate a good faith effort was made. It appears that Mr. Aquilar reached out to Mr. Gillet by email a few times before Mr. Judy sent one email to Mr. Gillet to set up a date and time to meet and confer, but it appears no attempt was made to arrange a personal or telephonic communication to meaningfully discuss the discovery disputes outside of these instances. Shuffle Master, 170 F.R.D. at 172. The court is unwilling to find that the Rule 37(a)(1) requirement of a meet and confer requirement was satisfied when Mr. Judy sent one email in which Mr. Judy only notifies Mr. Gillet that Mr. Judy is taking over the case and only gave two days from sending the initial email in which Mr. Judy is available to discuss the case.

Further, based on this communication and the communication of Mr. Aquilar, the court cannot determine that, prior to filing this motion to compel, Plaintiffs, as the moving party, or their counsel "personally engage[d] in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." Shuffle Master, 170 F.R.D. at 171. There is nothing in the declaration of Ms. Medellin to indicate that Plaintiffs' counsel reached out to Mr. Gillet prior to filing this motion on October 2, 2024 to comply with the meet and confer requirement of Rule 37. Stating in a status report filed on August 29, 2024 that Plaintiffs intended to re-file this motion to compel is not sufficient to satisfy the meet and confer requirement of Rule 37(a)(1).

Plaintiffs' motion to compel is denied because Plaintiffs did not meet the certification requirements of Rule 37(a)(1) before filing this motion.

REQUEST FOR ATTORNEY'S FEES

Rule 37(a)(4) permits a moving party to recover reasonable expenses incurred in making a discovery motion, including attorney's fees, provided the court grants the motion or the discovery is provided after the filing of the motion. However, the awarding of expenses and attorney's fees are not appropriate where the moving party filed a discovery motion without first making a good faith effort to obtain the discovery through non-judicial channels. Fed. R. Civ. P. 37(a)(4)(A). Here, Plaintiffs failed to make this effort, and Plaintiffs' request for attorney's fees must be denied.

Accordingly, the motion to compel, including the request for attorney's fees, will be denied.

5. 22-10825-A-7 **IN RE: JAMIE/MARIA GARCIA**
22-1018 PWG-1

MOTION BY PHILLIP W. GILLET JR. TO WITHDRAW AS ATTORNEY
10-17-2024 [114]

AGRO LABOR SERVICES, INC. ET AL V. GARCIA ET AL

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This matter is DENIED WITHOUT PREJUDICE for improper notice.

Notice of this motion and related pleadings were mailed on October 17, 2024, with a hearing date set for October 31, 2024, which is less than 28 days from the date of mailing. Doc. ##115, 118. Pursuant to Local Rule of Practice 9014-1(f)(2)(A), motions in an adversary proceeding may not be set for hearing on less than 28 days' notice prior to the hearing date.

6. 23-10947-A-13 **IN RE: SONIA LOPEZ**
23-1039

PRE-TRIAL CONFERENCE RE: COMPLAINT
9-21-2023 [1]

LOPEZ V. UNIFIED MORTGAGE SERVICE, INC. ET AL
SUSAN SILVEIRA/ATTY. FOR PL.
CONTINUED TO 12/19/24 PER ECF. #125

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

DISPOSITION: Continued to December 19, 2024 at 11:00 a.m.

NO ORDER REQUIRED.

On September 26, 2024, the court issued an order continuing the pre-trial conference to December 19, 2024 at 11:00 a.m. Doc. #125.

7. 23-10947-A-13 **IN RE: SONIA LOPEZ**
23-1039 SDS-3

MOTION TO COMPEL AND/OR MOTION FOR SANCTIONS
10-3-2024 [128]

LOPEZ V. UNIFIED MORTGAGE SERVICE, INC. ET AL
SUSAN SILVEIRA/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The minutes of the hearing will be the courts findings and conclusions. The Moving Party shall submit a proposed order after the hearing.

This motion was set for hearing on at least 28 days' notice prior to the hearing date as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The defendants timely filed written opposition on October 17, 2024. Doc. #134. The plaintiff filed a timely reply on October 24, 2024. Doc. #136. This matter will proceed as scheduled.

As a procedural matter, the opposition filed by the defendants does not comply with LBR 9014-1(e)(3), which requires that proof of service of all pleadings be filed with the court not more than three days after the pleading is filed with the court. Here, there is no proof of service filed with the court showing when and on whom the opposition was served.

Sonia Lopez ("Plaintiff"), moves for an order compelling Unified Mortgage Service, Inc.; Brilena, Inc.; Michael and Adele Bumbaca; Equity Trust Company Successor in Interest to First Regional Bank as Custodian FBO Robert Pastor IRA Account #051236; Equity Trust Company as Custodian FBO Charles A. Gurule Jr.

IRA Account #T058685; Equity Trust Company Custodian FBO Robert B. Pastor IRA Account #T058686; and Robert C. Edwards (collectively, "Defendants") to provide responses to interrogatories and production of documents pursuant to Federal Rule of Civil Procedure ("Rule") 37, made applicable to this adversary proceeding through Federal Rule of Bankruptcy Procedure Rule 7037. Pl.'s Mot., Doc. #128.

On September 21, 2023, Plaintiff filed a complaint against Defendants and Capital Benefit Mortgage, Inc. alleging 18 claims for relief relating to improperly requested excessive charges asserted by Defendants under a note and deed of trust secured by real property located at 819, 819½, 821 and 821½ N. Divisadero Street, Visalia, California 93291 ("Complaint"). Doc. #1. Defendants answered the Complaint on October 20, 2023. Doc. #9. The court scheduling order issued on November 30, 2023 set a discovery deadline of April 5, 2024. Doc. #43.

On February 16, 2024, Plaintiff served Defendants with Plaintiff's First Set of Interrogatories and First Set of Requests for Production of Documents. Decl. of Susan D. Silveira at ¶¶ 6-7, Doc. #132; Exs. A-D, Doc. #130. On March 5, 2024, Plaintiff served Defendants with Plaintiff's First Set of Requests for Admissions. Silveira Decl. at ¶ 8, Doc. #132; Exs. E-F, Doc. #71.

On March 15, 2024, counsel for Plaintiff received a request from counsel for Defendants for an extension of time to respond to discovery, which was granted until April 5, 2024, the discovery cut-off date in this court's scheduling order. Silveira Decl. at ¶ 11, Doc. #132. On April 5, 2024, counsel for Plaintiff received another request from counsel for Defendants for an extension of time to respond to discovery. Id. at ¶ 12. Counsel for Plaintiff agreed to an additional week subject to counsel for Defendants preparing a stipulation and order extending the discovery deadline. Id. Counsel for Plaintiff did not hear further from counsel for Defendants. Id.

On April 23, 2024, counsel for Plaintiff reached out to counsel for Defendants requesting the status of discovery. Silveira Decl. at ¶ 14, Doc. #132. As of May 22, 2024, counsel for Plaintiff had not heard back from counsel for Defendants. Id. Defendants never responded to the written discovery. Silveira Decl. at ¶¶ 9, 13, Doc. #132.

It is now known that counsel for Defendants, Mr. Weber, was admitted to the hospital on May 22, 2024 and passed away two days later. Silveira Decl. at ¶ 17, Doc. #132. On June 17, 2024, Michael Brooks contacted counsel for Plaintiff to inform her of Mr. Weber's passing but did not give any further information about his part of representing Defendants or discovery responses. Id. at ¶ 19. At the hearing for Plaintiff's Motion for Default on June 20, 2024, the motion was denied except to find the Plaintiff's Request for Admissions were deemed admitted. Id. at ¶ 21. Based on what was said on the recovered, counsel for Plaintiff believed that Mr. Brooks was prepared to respond to Plaintiff's First Set of Interrogatories and First Set of Requests for Production of Documents. Id.

At the hearing for Plaintiff's Motion for Summary Judgment held on August 22, 2024, the court denied the motion and counsel for Plaintiff had the impression again that Defendants were in the process of providing responses to Plaintiff's discovery requests. Silveira Decl. at ¶ 23. On August 16, 2024, Defendants filed a Motion to Withdraw or Amend Admissions to be heard on September 25, 2024. Id. at ¶ 19; Motion, Doc. #112. On September 3, 2024, counsel for Plaintiff called Mr. Brooks and suggested the parties stipulate to a reasonable deadline to provide responses to Plaintiff's discovery. Id. at ¶ 25. Mr. Brooks was amenable to reviewing a draft of the proposed stipulation and counsel for Plaintiff

forwarded a draft of the stipulation setting deadlines to Mr. Brooks that day. Id. Counsel for Plaintiff never received a response from Mr. Brooks and followed up with a phone call and several email exchanges but no agreement to a proposed stipulation was reached. Id. at ¶ 26. At the hearing on September 25, 2024, Defendant's Motion to Withdraw Admissions was granted, and the court extended the pre-trial conference deadline to October 31, 2024 with the new deadline for Defendants to provide their responses to Plaintiff's Request for Admissions on October 2, 2024. Id. at ¶ 28; Doc. #124.

On September 30, 2024, counsel for Plaintiff sent an email to Mr. Brooks with a revised proposed stipulation in hopes he would reconsider agreeing to deadlines to provide the remaining discovery responses, but Mr. Brooks responded and refused to agree to providing any further discovery. Id. at ¶ 29. On October 1, 2024, counsel for Plaintiff telephoned Mr. Brooks to resolve the discovery issue, and Mr. Brooks responded the same day refusing to agree to provide any discovery responses. Id. at ¶ 30. On October 2, 2024, counsel for Plaintiff called Mr. Brooks again regarding the discovery responses and Mr. Brooks stated his clients will not be providing the discovery responses unless ordered by the court to do so. Id. at ¶ 31.

Although Mr. Brooks stated he would not be providing any responses, counsel for Plaintiff drafted a revised stipulation in hopes of addressing Mr. Brooks' concerns and forwarded the stipulation to Mr. Brooks' email. Id. Counsel for Plaintiff has not heard any further from Mr. Brooks and this matter is still unresolved. Id. at ¶ 32. Plaintiff filed the instant motion on October 3, 2024. Doc. #132. On October 17, 2024, Defendants filed opposition to the motion stating that the motion should be denied because it is untimely and that sanctions are not warranted in this case. Doc. #134. Further, Defendants argue that if discovery is reopened, discovery should be reopened for both parties and subject to a new scheduling order. Id.

To determine whether a motion to compel is timely, the court must review "the circumstances specific to each case." KST Data, Inc. v. DXC Tech. Co., 344 F. Supp. 3d 1132, 1134 (C.D. Cal. 2018). In general, the filing of a motion to compel discovery prior to the ordered discovery deadline supports a finding that the motion is timely, and a finding of untimeliness in that scenario will be rare. Gault v. Nabisco Biscuit Co., 184 F.R.D. 620, 622 (D. Nev. 1999). On the other hand, courts have repeatedly denied motions to compel discovery filed after the close of discovery as untimely. Id.

Pursuant to the Scheduling Order, fact discovery was to be completed no later than April 5, 2024. Doc. #43. The Scheduling Order also required that any disputes relative to discovery must have been raised by an appropriate timely motion before the discovery deadline. Id. Plaintiff filed the present motion nearly six months after the close of fact discovery, which the court does not consider timely. The failure of Plaintiff to comply with this aspect of the Scheduling Order warrants denial of the motion.

Accordingly, this motion is DENIED.

8. 24-12052-A-13 **IN RE: PARAMJIT SINGH**
24-1031 CAE-2

ORDER TO SHOW CAUSE
9-25-2024 [8]

SINGH V. LIL' WAVE FINANCIAL, INC. ET AL

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

DISPOSITION: The order to show cause will be vacated.

ORDER: The court will issue an order.

The record shows that the missing corporate disclosure statement was filed on October 29, 2024. Doc. #16. Therefore, this order to show cause will be VACATED.

9. 24-12052-A-13 **IN RE: PARAMJIT SINGH**
24-1031 CAE-3

ORDER TO SHOW CAUSE
9-25-2024 [9]

SINGH V. LIL' WAVE FINANCIAL, INC. ET AL
RESPONSIVE PLEADING

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

DISPOSITION: The order to show cause will be vacated.

ORDER: The court will issue an order.

The record shows that the missing corporate disclosure statement was filed on October 9, 2024. Doc. #13. Therefore, this order to show cause will be VACATED.

10. 23-10963-A-7 **IN RE: JESUS GUERRA**
24-1033 HDN-5

MOTION FOR TEMPORARY RESTRAINING ORDER
10-2-2024 [7]

GUERRA V. ADAMS ET AL
HENRY NUNEZ/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

11. 24-11967-A-11 **IN RE: LA HACIENDA MOBILE ESTATES, LLC**
24-1020 CAE-1

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
7-30-2024 [1]

HACIENDA HOMEOWNERS FOR JUSTICE ET AL V. LA HACIENDA

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

DISPOSITION: Continued to December 12, 2024 at 11:00 a.m.

ORDER: The court will issue an order.

As set forth at the hearing on October 30, 2024, this status conference will be continued to December 12, 2024 at 11:00 a.m. The court will issue an order.

12. 17-13776-A-7 **IN RE: JESSICA GREER**
18-1017 CAE-1

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-23-2018 [1]

SALVEN V. CALIFORNIA DEPARTMENT OF FOOD & AG
SHARLENE ROBERTS-CAUDLE/ATTY. FOR PL.

NO RULING.

13. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
23-1029 CAE-1

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
6-24-2024 [82]

NICOLE V. LOS BANOS TRANSPORT & TOWING ET AL
SYLVIA NICOLE/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

14. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
23-1029 LBB-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-9-2024 [87]

NICOLE V. LOS BANOS TRANSPORT & TOWING ET AL
MARIA GARCIA/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with leave to amend.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after the hearing.

This motion was set for hearing on at least 28 days' notice prior to the hearing date as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The plaintiff timely filed written opposition on October 15, 2024. Doc. #97. The moving party filed a timely reply on October 24, 2024. Doc. #101. This matter will proceed as scheduled.

As a procedural matter, the notice of hearing and motion (Doc. #87) do not comply with LBR 9004-2(c)(1), which requires the notice of hearing and the motion be filed as separate documents. Here, the notice of hearing and motion were filed as a single document.

As a further procedural matter, the notice of hearing does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice include the names and addresses of persons who must be served with any opposition. The notice of hearing also does not comply with LBR 9014-1(d)(3)(B)(iii), which requires the notice to advise respondents that they can determine whether the matter has been resolved without oral argument or whether the court has issued a tentative ruling by viewing the court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing, and that parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

The court encourages counsel for the moving party to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the local rules. The rules can be accessed on the court's website at https://www.caeb.uscourts.gov/LocalRulesAndGeneralOrders.

BACKGROUND

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On July 12, 2023, Plaintiff initiated this adversary proceeding against defendants AAA Insurance and Los Banos Transport & Towing. Doc. #1. On June 24, 2024, Plaintiff amended her complaint to initiate this adversary proceeding against American Automobile Association of Northern California, Nevada & Utah ("AAA") and Los Banos Transport & Towing (together with AAA, "Defendants"). Doc. #82. By the amended complaint ("Complaint"), Plaintiff asserts two claims for relief against AAA for breach of contract and fraud and a claim for relief against all Defendants for violation of the automatic stay.

The allegations in the Complaint stem from a claim regarding the failure of AAA to provide roadside assistance to Plaintiff. Compl., Doc. #1. In the Complaint, Plaintiff asserts she had a roadside service contract with AAA that allows up to four service calls per year. Compl. at ¶ 4, Doc. #1. On July 6, 2023, Plaintiff alleges she contacted AAA to assist her in moving her 2003 Saturn SUV ("Vehicle") to a new location. Compl. at ¶ 5, Doc. #1. AAA sent a technician with a truck to assist Plaintiff. Compl. at ¶ 6, Doc. #1. However, when Plaintiff showed the AAA technician a registration form with a one day moving permit, the AAA technician informed Plaintiff that AAA does not allow the technician to tow her Vehicle to Plaintiff's preferred location to purchase a battery, but the Vehicle could be towed to an AAA location for the purchase of a new battery from AAA. Compl. at ¶ 7, Doc. #1. Plaintiff asked the AAA technician to assist in pushing the Vehicle out of the gate, which was done. Compl. at ¶¶ 7-8, Doc. #1. Plaintiff alleges that she asked the AAA technician if he could jump start the Vehicle, but the AAA technician immediately left and drove away without saying anything and leaving the Vehicle blocking traffic. Compl. at ¶¶ 9-10, Doc. #1. When a call was placed about the Vehicle blocking traffic, the police contacted co-defendant Los Banos Transport & Tow to tow Plaintiff's Vehicle. Compl. at ¶ 11, Doc. #1.

On September 9, 2024, AAA moved to dismiss each allegation against them under Federal Rule of Civil Procedure ("Rule") 12(b)(6). Doc. #87. Rule 12(b) is made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012. On October 15, 2024, Plaintiff filed written opposition addressing AAA's request for dismissal under Rule 12(b)(6). Doc. #97. AAA replied to Plaintiff's opposition on October 24, 2024. Doc. #101.

Having considered the motion, opposition, reply and Complaint in its entirety, the court is inclined to GRANT AAA's motion to dismiss with leave to amend.

MOTION TO DISMISS

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." Vess,317 F.3d at 1107. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

"As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." Vess, 317 F.3d at 1108 (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990)) (internal quotation marks omitted). The Ninth Circuit has consistently held that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee, 236 F.3d at 1019 (quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

"[A] pro se litigant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). "[I]n applying the foregoing standards [for ruling on 12(b)(6) motions] enunciated by the Supreme Court, a federal court must construe a pro se complaint liberally, and hold it to less stringent standards than pleadings drafted by lawyers." Greenstein, 576 B.R. at 171 (citing Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Rule 12(d). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into a motion for summary judgment. Branch, 14 F.3d at 454.

BREACH OF CONTRACT

The elements of a claim for relief for breach of contract are: (1) the existence of the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. First Com. Mortg. Co. v. Reece, 89 Cal. App. 4th 731, 745 (2001).

Plaintiff's Complaint fails to allege sufficient facts to support each of the elements to find breach of contract against AAA. Therefore, AAA's motion to dismiss the first claim for relief for breach of contract will be granted with leave to amend.

The Complaint identifies an agreement to purchase roadside assistance from AAA and further alleges that: (a) AAA failed to tow the Vehicle which left Plaintiff and the Vehicle in the middle of the road; (b) AAA forced Plaintiff to buy its products in order to obtain roadside service; and (c) Plaintiff was damaged as a direct and proximate result of the breach of contract. However, Plaintiff fails to identify if the contract with AAA was an oral or written contract and fails to state the specific terms of the contract that were allegedly breached by AAA. In Plaintiff's opposition, Plaintiff provides a copy of her temporary membership card that is the subject of this dispute. Ex. A, Doc. #99. Because the authenticity of the contract for membership is disputed and the Complaint does

not identify the contract for membership, the court cannot consider the temporary membership card in deciding this motion to dismiss. See Branch, 14 F.3d at 454.

Because the Complaint does not adequately set forth facts that would support a possible claim for relief for breach of contract against AAA and because it is not clear to the court that such facts do not exist, the court is inclined to grant the motion to dismiss with leave to amend.

FRAUD CLAIM

"Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted).

Here, the allegations in Plaintiff's Complaint fail to plead fraud with the requisite specificity. Specifically, there are no facts alleged by Plaintiff regarding what AAA represented to Plaintiff regarding the coverage offered by AAA, when such representations were made and by whom. Because the Complaint does not adequately set forth facts that would support a possible claim for relief for fraud and because it is not clear to the court that such facts do not exist, the court is inclined to grant the motion to dismiss with leave to amend.

VIOLATION OF THE AUTOMATIC STAY

"A party seeking damages for violation of the automatic stay must prove by a preponderance of the evidence that: (1) a bankruptcy petition was filed; (2) the debtor is an individual; (3) the creditor received notice of the petition; (4) the creditor's actions were in willful violation of the stay; and (5) the debtor suffered damages." In re Jha, 461 B.R. 611, 616 (Bankr. N.D. Cal. 2011). Here, Plaintiff asserts the Vehicle was listed in her Schedules A/B and Defendants were aware of the automatic stay. Compl. at ¶¶ 32-34, Doc. #1. However, a review of the creditor matrices filed in Plaintiff's bankruptcy case do not include AAA. Case No. 21-10679, Doc. ##1, 132, 352. In addition, there are no allegations that AAA held possession of the Vehicle in violation of the automatic stay. Because the Complaint does not adequately set forth facts that would support a possible claim for relief for violation of the automatic stay and because it is not clear to the court that such facts do not exist, the court is inclined to grant the motion to dismiss with leave to amend.

CONCLUSION

Having considered the Complaint in its entirety, the court is inclined to GRANT AAA's motion to dismiss with leave to amend. An amended complaint shall be filed and served not later than November 21, 2024.

15. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
23-1029 LBB-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-12-2024 [89]

NICOLE V. LOS BANOS TRANSPORT & TOWING ET AL
REUBEN JACOBSON/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped as moot.

ORDER: The court will issue an order.

On September 9, 2024, the defendant filed a motion to dismiss the adversary proceeding (LBB-1) and notice of hearing. Doc. #87. On September 12, 2024, the defendant filed a duplicate motion to dismiss the adversary proceeding and notice of hearing along with a certificate of service. Doc. #89, 90. The court has deemed Doc. #89 to be a duplicate of Doc. #87. Therefore, the duplicate motion and notice of hearing (Doc. #89) will be DROPPED AS MOOT.

16. 24-11967-A-11 **IN RE: LA HACIENDA MOBILE ESTATES, LLC**
24-1020 OHS-2

CONTINUED MOTION FOR REMAND
8-28-2024 [25]

HACIENDA HOMEOWNERS FOR
JUSTICE ET AL V. LA HACIENDA
MARC LEVINSON/ATTY. FOR MV.

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

DISPOSITION: Continued to December 12, 2024 at 11:00 a.m.

ORDER: The court will issue an order.

As set forth at the hearing on October 30, 2024, this matter will be continued to December 12, 2024 at 11:00 a.m. The court will issue an order.