UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, November 19, 2020
Place: Department A – Courtroom #11
Fresno, California

ALL APPEARANCES MUST BE TELEPHONIC
(Please see the court's website for instructions.)

Pursuant to District Court General Order 618, no persons are permitted to appear in court unless authorized by order of the court until further notice. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

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. 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. 18-10105-A-13 **IN RE: SCOTT MARSH**
JRL-4

MOTION TO MODIFY PLAN
10-13-2020 [102]

SCOTT MARSH/MV
JERRY LOWE/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 as required by 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.

2. 20-10509-A-13 **IN RE: EDDIE CALDWELL**
TCS-1

CONTINUED MOTION TO MODIFY PLAN
9-4-2020 [36]

EDDIE CALDWELL/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion is DENIED AS MOOT. The debtor filed a modified plan on October 22, 2020 (TCS-2, Doc. #58), with a motion to confirm the modified plan set for hearing on December 10, 2020 at 9:30 a.m. Doc. ##53-59.

3. 20-12730-A-13 **IN RE: RUSSELL GROSSBARD**
MHM-1

MOTION TO DISMISS CASE
10-20-2020 [41]

MICHAEL MEYER/MV
BRIAN FOLLAND/ATTY. FOR DBT.
DISMISSED 10/23/20

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was already entered on October 23, 2020. Doc. #46. The motion will be DENIED AS MOOT.

4. 20-12732-A-13 **IN RE: JOSE CUIRIZ**
MHM-1

MOTION TO DISMISS CASE
10-21-2020 [27]

MICHAEL MEYER/MV
CHINONYE UGORJI/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to December 10, 2020 at 9:30 a.m.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The debtor filed a written response on November 3, 2020 (Doc. #32), and this matter will proceed as scheduled.

Michael H. Meyer ("Trustee"), the Chapter 13 trustee in the bankruptcy case of Jose J. Cuiriz ("Debtor"), moves the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay that is prejudicial to creditors and under 11 U.S.C. § 1307(e) because Debtor has failed to file his tax returns for the years 2016, 2017, and 2018.

Debtor timely filed written opposition asserting that the relevant tax returns were filed but have yet to be processed by the IRS. Doc. #32. However, Debtor's written response does not comply with LBR 9014-1(f)(1)(B) as it was not "accompanied by evidence establishing its factual allegations."

While the court could overrule Debtor's written opposition for lack of accompanying evidence, the court is inclined to continue the hearing on this matter to December 10, 2020 at 9:30 a.m. to address the status of Debtor's tax returns.

5. 17-14334-A-13 **IN RE: BRANDY BUMP**
JRL-8

MOTION TO MODIFY PLAN
10-15-2020 [139]

BRANDY BUMP/MV
JERRY LOWE/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 as required by 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.

6. 15-10135-A-13 **IN RE: SERGIO/IRMA PIZARRO**
TCS-3

MOTION FOR CONTEMPT
10-14-2020 [84]

SERGIO PIZARRO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). Creditors Rushmore Loan Management Services, LLC and U.S. Bank National Associating, as Trustee for the RMAC Trust, Series 2016-CTT (hereafter collectively, "Creditor"), timely filed written opposition. This matter will proceed as scheduled.

Sergio Nieblas Pizarro and Irma Lorena Pizarro (together, "Debtors") move the court to enter a contempt order against Creditor and to impose monetary sanctions, actual damages, and attorney's fees. Mot., Doc. #84. Debtors' motion is rooted in Creditor's conduct related to collection of a payment for a loan secured by Debtors' home. Id. Creditor counters that its efforts to collect payments on the loan are permissible because Creditor's debt stems from a mortgage loan secured by Debtors' residence and Creditor is seeking to collect payments that are owed pre-petition. Creditor's Resp., Doc. #94.

The court is inclined to deny this motion on the grounds that it appears, based on documents filed with the bankruptcy court, that Creditor acknowledges that all pre-petition arrears have been paid, Debtors are delinquent in post-petition mortgage payments, and the amounts being collected arose post-petition and are not subject to the discharge injunction.

The bankruptcy court has civil contempt powers pursuant to 11 U.S.C. § 105(a). Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003)("Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)."). Under Section 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(2). Together, Sections 524(a)(2) and 105(a) authorize the court to impose civil contempt sanctions for violation of the discharge order. When a party acts in violation of a debtor's discharge, the court may award the debtor "compensatory damages, attorneys fees, and [coerce] the offending creditor's compliance with the discharge injunction." See Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). Relatively mild, non-compensatory fines against the offending creditor also may be necessary in some circumstances. Dyer, 322 F.3d at 1193-94.

To establish a violation of 11 U.S.C. § 524, the debtor must prove that the creditor willfully violated the discharge injunction. In the Ninth Circuit, courts have applied a two-part test to determine whether a party's violation was willful: (1) did the alleged offending party know that the discharge injunction applied; and (2) did such party intend the actions that violated the discharge injunction? See, e.g., Nash v. Clark Cnty. Dist. Attorney's Office (In re Nash), 464 B.R. 874, 880 (B.A.P. 9th Cir. 2012)(citing Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008), aff'd, 559 U.S. 260 (2010)); Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006). The party seeking sanctions for contempt has the burden of proving, by clear and convincing evidence, that the offending party violated the order and sanctions are justified. Zilog, 450 F.3d at 1007. Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." Emmert v. Taggart (In re Taggart), 584 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted) (vacated and remanded on other grounds by Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)). Debtors have failed to prove by clear and convincing evidence that Creditor violated the discharge injunction.

Debtors' Chapter 13 plan, filed on January 17, 2015 (the "Plan"), was confirmed on July 17, 2015. Doc. #40. On April 8, 2020, the Chapter 13 trustee ("Trustee") filed a Notice of Final Cure Payment asserting that Creditor's pre-

petition arrearage had been paid in full and that Debtors had completed all plan payments. Doc. #65. Creditor agreed in its response to Trustee's notice that Debtors had paid the full amount required to cure the prepetition default but asserted that Debtors were not current on all post-petition payments. Resp. to Notice, Doc. doc(5), Apr. 24, 2020. The itemized payment history attached to Creditor's Response indicates that Debtors' post-petition payments have been behind for at least one month since the filing of the Plan. Id. Debtors ultimately completed their Plan payments and a discharge was granted to Debtors on June 30, 2020. Doc. #77; see also Doc. #62.

Although Debtors ultimately completed their Plan payments, the payment history filed with Creditor's Response shows that Debtors have been delinquent in post-petition mortgage payments by at least one month since the filing of the petition in 2015. Debtors have not shown by clear and convincing evidence that Debtors are current on all post-petition payments to Creditor and that Creditor is seeking to collect pre-petition debt in violation of the discharge injunction. Accordingly, Debtors' motion will be denied.

7. 20-11243-A-13 **IN RE: ARTHUR/SONIA PINA**
MHM-3

CONTINUED SHOW CAUSE HEARING RE: ORDER TO SHOW CAUSE
10-1-2020 [45]

THOMAS MOORE/ATTY. FOR DBT.
DISMISSED 06/15/2020

NO RULING.

8. 19-13645-A-13 **IN RE: GUSTAVO/BEATRIZ ROCHA**
SLL-4

MOTION TO MODIFY PLAN
10-14-2020 [59]

GUSTAVO ROCHA/MV
STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The Chapter 13 trustee timely opposed this motion, but withdrew his opposition in consideration of terms agreeable to the debtors and set forth in a stipulation and proposed order filed November 17, 2020. Doc. ##73-74. 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 be consistent with the proposed order marked Exhibit A and filed November 17, 2020. Doc.. #74.

9. 20-12667-A-13 **IN RE: KIMBERLY/KIM LOPEZ**
EPE-1

MOTION TO CONFIRM PLAN
10-15-2020 [32]

KIMBERLY LOPEZ/MV
ERIC ESCAMILLA/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 as required by 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 movant 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.

10. 19-12168-A-13 **IN RE: SANDRA BOMBITA**
TCS-3

MOTION TO SELL
10-28-2020 [81]

SANDRA BOMBITA/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
NON-OPPOSITION

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. 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.

LBR 9014-1(d)(3)(A) requires a motion "set forth the relief or order sought" and "state with particularity the factual and legal grounds therefor. Legal grounds for the relief means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability." LBR 9014-1(d)(3)(A). The motion and supporting documents do not cite any statute, rule, case, or common law doctrine supporting the relief requested. Rather than deny this motion without prejudice, the court will allow the movant to clarify the record and confirm the legal grounds upon which relief is sought.

Sandra Jeanette Bombita ("Debtor"), the Chapter 13 debtor in this case, petitions the court for an order authorizing Debtor to sell real property located at 1343 N. Wilson Ave, Fresno, CA 93728 ("Property) for $195,400.00 to Edward Bombita ("Buyer"). Doc. #81; Decl. of Sandra Bombita, Doc. #83. Debtor's Chapter 13 plan was confirmed on October 5, 2019 (the "Plan"). Doc. #71. Section 6 of Debtor's Plan revested property of the estate in Debtor upon confirmation of the Plan but requires Debtor to obtain court authorization prior to transferring property. Plan, Doc. #10.

Debtor has had difficulty securing employment and seeks to sell the Property and apply the sale proceeds to debts secured by the Property. Debtor states that "[a]ll creditors with liens and security interests encumbering the subject property will be paid in full before, or simultaneously with the transfer of title." Decl., Doc. #83. Debtor asserts the offer is fair and reasonable and will enable Debtor's reorganization efforts. Decl., Doc. #83. LoanCare LLC, as servicer for Lakeview Loan Servicing, LLC, holder of a first priority deed of trust on the Property and the sole Class 1 secured creditor, consents to the sale of the Property as described by Debtor. Non-Opp'n, Doc. #86.

Accordingly, the court is inclined to grant Debtor's motion. Debtor shall file a confirmable modified plan pursuant to 11 U.S.C. § 1329(a).

11. 19-12872-A-13 **IN RE: ANTHONY RAMIREZ**

NOTICE OF DEFAULT AND MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
10-5-2020 [44]

NICHOLAS WAJDA/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

On October 5, 2020, the Chapter 13 trustee ("Trustee") filed a Notice of Default and Intent to Dismiss Case ("Notice"). Doc. #44. Pursuant to the Notice, Anthony Ramirez ("Debtor"), the Chapter 13 debtor in this case, timely filed and set for hearing an objection acknowledging that some payments were missed but that all outstanding payments were cured on October 6, 2020. Doc. ##46-49.

At the hearing, the court will confirm whether Debtor has made all payments required under by his confirmed plan and may dismiss his case if his plan payments are not current.

12. 20-12774-A-13 **IN RE: MOHOMMAD KHAN**
MHM-1

MOTION TO DISMISS CASE
10-20-2020 [35]

MICHAEL MEYER/MV

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

DISPOSITION: Granted.

ORDER: The court will issue the order.

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 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 amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Here, the chapter 13 trustee asks the court to dismiss this case for unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C.

§ 1307(c)(1)); failure to complete accurate schedules and petition (11 U.S.C §521) and/or F.R.B.P 1007; failure to set a plan for hearing with notice to creditors and failure to complete credit counseling certificate timely. Debtor 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.

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

13. 19-13376-A-13 **IN RE: OPAL RIDER**
SLL-1

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED OBJECTION TO CLAIM OF WRCOG ENERGY EFFICIENCY AND WATER CONSERVATION PROGRAM FOR WESTERN RIVERSIDE COUNTY, CLAIM NUMBER 3-1
11-4-2019 [36]

OPAL RIDER/MV
STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Continued to December 10, 2020 at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the joint status conference statement filed on November 12, 2020, the pre-trial conference will be continued to be heard in conjunction with other motions in the case related to this proceeding. Doc. #88. The court will issue an order.

14. 19-14187-A-13 **IN RE: KELLY BURNS AND MARIA SANTORA-BURNS**
TCS-2

CONTINUED MOTION TO MODIFY PLAN
9-9-2020 [26]

MARIA SANTORA-BURNS/MV
TIMOTHY SPRINGER/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 motion on November 17, 2020. Doc. #46.

15. 16-10790-A-13 **IN RE: JOSE/MARIA CASILLAS**
MHM-3

MOTION TO DETERMINE FINAL CURE AND MORTGAGE PAYMENT RULE 3002.1
10-8-2020 [64]

MICHAEL MEYER/MV
JANINE ESQUIVEL OJI/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice pursuant to 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 movant has done here.

Michael H. Meyer ("Trustee"), the Chapter 13 trustee in this case, moves the court for an order determining that (1) the debtors have cured the default with respect to a secured debt held by Wells Fargo and (2) all post-petition payments due and owing as of April 2016 through August 2020 to Wells Fargo have been paid. Doc. #64. Wells Fargo filed a non-opposition on November 5, 2020. Doc. #69.

Federal Rule of Bankruptcy Procedure 3002.1(g) requires that within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with 11 U.S.C. § 1322(b)(5).

Bankruptcy Rule 3002.1(h) states that on motion by the trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

This motion is GRANTED. The record shows that the procedures set forth in Rule 3002.1 are satisfied. The court finds that the debtors have cured the default on the loan with Wells Fargo and are current on payments to the same.

16. 20-13427-A-13 **IN RE: DAVID DY**
PBB-1

MOTION TO EXTEND AUTOMATIC STAY
11-5-2020 [9]

DAVID DY/MV
PETER BUNTING/ATTY. FOR DBT.

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. 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.

Debtor David Dy ("Debtor") moves the court for an order extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). Doc. #9.

Debtor had a Chapter 13 case pending within the preceding one-year period that was dismissed, Case No. 20-11698 (Bankr. E.D. Cal.) (the "Prior Case"). The Prior Case was filed on May 15, 2020 and dismissed on September 3, 2020. Decl. of Peter B. Bunting, Doc. #11. Under 11 U.S.C. § 362(c)(3)(A), if a debtor had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the current case. Debtor filed this case on October 29, 2020. Petition, Doc. #1. The automatic stay will terminate in the present case on November 28, 2020.

Section 362(c)(3)(B) allows the court to extend the stay "to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]" 11 U.S.C. § 362(c)(3)(B).

Section 362(c)(3)(C)(i) creates a presumption that the case was not filed in good faith if (1) the debtor filed more than one prior case in the preceding year; (2) the debtor failed to file or amend the petition or other documents without substantial excuse, provide adequate protection as ordered by the court, or perform the terms of a confirmed plan; or (3) the debtor has not had a substantial change in his or her financial or personal affairs since the dismissal, or there is no other reason to believe that the current case will result in a discharge or fully performed plan. 11 U.S.C. § 362(c)(3)(C)(i).

The presumption of bad faith may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). Under the clear and convincing standard, the evidence

presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." Emmert v. Taggart (In re Taggart), 584 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted) (vacated and remanded on other grounds by Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)).

In this case, the presumption of bad faith arises. Debtor's Prior Case was dismissed for unreasonable delay. A review of the court's docket in the Prior Case disclosed a Chapter 13 plan was never confirmed. The Chapter 13 trustee ("Trustee") filed a Motion to Dismiss for unreasonable delay and failure to confirm a Chapter 13 plan, and on September 3, 2020 the court dismissed the Prior Case upon for cause under 11 U.S.C. § 1307. See Case No. 20-11698, Doc. ##14-19. Counsel for Debtor asserts that the Prior Case was dismissed due to counsel's failure to adequately respond to Trustee's motion. Decl. of Peter B. Bunting, Doc. #11.

In support of this motion to extend the automatic stay, Debtor's counsel declares that the plan confirmation documents in the Prior Case were not received by Trustee due to clerical errors made by Debtor's counsel. Decl., Doc. #11. Debtor's counsel states that Debtor's monthly income and ability to maintain plan payments has not changed and is confident that a Chapter 13 plan will be confirmed in this case. Decl., Doc. #11. Further, Debtor's plan payments are equal to the payments called for in the Prior Case, and in neither case has a party filed for relief from the automatic stay. Decl., Doc. #11. Debtor filed a proposed plan on October 29, 2020, that provides for 100% payment to general unsecured creditors. Doc. #2. Debtor's Schedules I and J filed in this case list monthly income of $4,245.44 and expenses of $3,585.00, resulting in monthly net income of $660.44 of which Debtor proposes to apply $565.00 to plan payments in this case. Schedule I, Am. Schedule J; Plan, Doc. #2.

The court is inclined to find that the clerical errors preventing plan confirmation rebut the presumption of bad faith that arose from the failure to perform in the Prior Case and that Debtor's petition commencing this case was filed in good faith. The dismissal was caused by the negligence or inadvertence of Debtor's attorney.

Accordingly, the court is inclined to GRANT the motion and extend the automatic stay for all purposes to all creditors unless terminated by further order of the court. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is necessary.

11:00 AM

1. 17-13112-A-11 **IN RE: PIONEER NURSERY, LLC**
18-1039

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-3-2018 [1]

PIONEER NURSERY, LLC V. NEW HAMPSHIRE INSURANCE COMPANY ET AL
PETER FEAR/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar

NO ORDER REQUIRED.

This adversary proceeding was dismissed on November 17, 2020. Doc. #78.

2. 19-14729-A-13 **IN RE: JASON/JODI ANDERSON**
19-1131

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT
12-10-2019 [1]

ANDERSON ET AL V. NATIONAL ENTERPRISE SYSTEMS, INC.
GABRIEL WADDELL/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

3. 19-14729-A-13 **IN RE: JASON/JODI ANDERSON**
19-1131

MOTION FOR SUMMARY JUDGMENT
10-9-2020 [33]

ANDERSON ET AL V. NATIONAL ENTERPRISE SYSTEMS, INC.
ANTHONY VALENTI/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied in part and granted in part.

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

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.

On October 8, 2020, defendant National Enterprise Systems, Inc. ("NES") filed a motion for partial summary judgment (the "Motion") in the adversary proceeding filed by plaintiffs Jason and Jodi Anderson (collectively,

"Plaintiffs"). Doc. #33. By the Motion, NES seeks summary judgment that NES did not willfully violate the automatic stay in Plaintiffs' bankruptcy case when NES garnished Mrs. Anderson's wages post-petition because NES did not receive actual notice of Plaintiffs' bankruptcy case until approximately two months after the bankruptcy case was filed. The Motion was accompanied by a memorandum of points and authorities in support of the Motion ("MPA") as well as several declarations, exhibits and a statement of undisputed facts. Doc. ##34-44. Plaintiffs filed a timely opposition. Doc. ##47-54. NES timely replied. Doc. ##60-63.

Plaintiffs filed their Chapter 13 bankruptcy case on November 11, 2019. Admitted Fact No. 1, Doc. #53. Plaintiffs assert that their counsel sent two letters to NES, one on November 12, 2019 and the second on November 27, 2019, that notified NES that Plaintiffs had filed for bankruptcy on November 11, 2019. Partially Admitted Fact Nos. 2 and 4, Doc. #53. On December 7, 2019, the court mailed a bankruptcy notice to NES. Admitted Fact No. 7, Doc. #53. NES asserts that it did not receive either of these letters or the bankruptcy notice, a fact which Plaintiffs dispute. Disputed Fact Nos. 3, 5 and 8, Doc. #53. On December 10, 2019, Plaintiffs commenced this adversary proceeding and served the complaint on NES at its agent for service of process. Partially Admitted Fact Nos. 10 and 11, Doc. #53. NES asserts it did not receive notice of Plaintiffs' bankruptcy case until January 7, 2020. Disputed Fact No. 13. Doc. #53. NES garnished Mrs. Anderson's wages on or about November 29, 2019, and January 9, 2020. Partially Admitted Fact Nos. 6 and 9, Doc. #53.

For the reasons set forth below, the court finds there is a genuine issue of material fact related to whether NES has rebutted the presumption that two letters, a bankruptcy court notice and the complaint in this adversary proceeding were received by NES at or about the time sent such that NES received notice of Plaintiffs' bankruptcy case before garnishing Mrs. Anderson's wages post-petition. The court also finds that a genuine issue of material fact exists regarding Plaintiffs' claim of emotional distress as to Mrs. Anderson. However, no genuine issue of material fact exists regarding Plaintiffs' claim of emotional distress as to Mr. Anderson. Accordingly, the Motion will be DENIED in part and GRANTED in part.

Legal Standard

Under Federal Rule of Civil Procedure 56(a), made applicable by Federal Rule of Bankruptcy Procedure 7056, summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." At the summary judgment stage, evidence must be viewed in the light most favorable to the non-moving party and all justifiable inferences are to be drawn in favor of the non-moving party. Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). The judge's function with respect to summary judgment is not to weigh the evidence and determine the truth of the matter but rather to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249.

Mailbox Rule

As the MPA in support of the Motion correctly states, "[t]his case turns on whether NES had actual notice of Plaintiffs' bankruptcy or not." MPA at 6:22. As NES concedes, the evidence submitted by Plaintiffs tends to prove that the two letters were mailed to NES by Plaintiffs' counsel but fails to prove that NES received those letters. NES's Response to Plaintiffs' Reply to NES's Statement of Undisputed Facts (Doc. #62) at Fact Nos. 2-5, 8 and 13; NES's

Response to Plaintiffs' Reply to NES's Statement of Disputed Facts (Doc. #61) at Fact Nos. 1-8 and 10-11. NES incorrectly contends that it is Plaintiffs' obligation "to produce evidence which establishes a triable issue of fact regarding whether NES received the letters or notice." MPA at 8:7-8. The court finds Plaintiffs have done so, and the Motion should be denied.

Under the mailbox rule, the proper and timely mailing of a document raises a rebuttable presumption that the document was received by the addressee. Schikore v. BankAmerica Supplemental Ret. Plan, 269 F.3d 956, 961 (9th Cir. 2001); CUNA Mut. Ins. Grp. v. Williams (In re Williams), 185 B.R. 598, 599 (B.A.P. 9th Cir. 1995). The mailbox rule functions to "aid finders of fact in circumstances where direct evidence of either receipt or non-receipt is, as here, not available." Schikore, 269 F.3d at 961-62. "This rule is a key support of the bankruptcy system's notice by mail." Williams, 185 B.R. at 599. In this case, NES does not argue that the mailbox rule is inapplicable, but instead argues that no genuine issue of material fact exists because NES has rebutted the presumption created by the mailbox rule. See NES's MPA, § IV, Doc. #43.

NES cites to Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995) for the proposition that a specific factual denial of receipt may rebut the presumption created by the mailbox rule. However, Nunley involved the alleged non-receipt of the notice of entry of judgment that, once received, would trigger the time to file an appeal under Federal Rule of Appellate Procedure, Rule 4(a)(6). Nunley, 52 F.3d at 796. The extension of the mailbox rule in Nunley was required in that case because "the would-be appellant claimed not to have received notice of the entry of judgment. Allowing a rebuttal of the presumption of receipt by a 'specific factual denial' was therefore consistent with the general purpose of Federal Rule of Appellate Procedure 4(a)(6), which is to ensure that parties who have not received notice of the entry of judgment are not thereby deprived of the opportunity to appeal." Schikore, 269 F.3d at 964 n.7 (citations omitted). The Ninth Circuit in Schikore went on to say "We are not certain that Nunley's approach to the application of the rule would apply outside the [Federal] Rule [of Appellate Procedure] (4)(a)(6) context." Id.; accord Chavez v. Bank of Am., 2011 U.S. Dist. LEXIS 116630, at *18-19 (N.D. Cal. Oct. 7, 2011) ("The rule articulated in Nunley does not apply beyond its procedural and factual setting.").

However, "[d]enial of receipt does not rebut the presumption of receipt; it creates a question of fact." Leventhal v. Schenberg, 484 B.R. 731, 7344 (N.D. Ill. 2012) (citing Longardner & Assocs., Inc., 855 F.2d 455, 459 (7th Cir. 1988)). As explained by the Ninth Circuit in Nunley, "[e]ven after the 'bubble' of presumption has 'burst,' the factual question of receipt remains and may be decided in favor of receipt by a fact finder who may choose to draw inferences of receipt from the evidence of mailing, in spite of contrary evidence." Nunley, 52 F.3d at 796 (citing In re Yoder Co., 758 F.2d 1114, 1119 n.8 (6th Cir. 1985)). Once the presumption created by the mailbox rule is rebutted, "the evidence must be weighed. Of course this leaves it to the fact finder whether, under the specific facts, the bare denial of receipt is sufficient to carry the movant's burden of proof." In re Todd, 441 B.R. 647, 651 (Bankr. D. Ariz. 2011).

Here, Plaintiffs dispute Defendant's evidence supporting its assertion of non-receipt of the two letters and the bankruptcy court's notice. Specifically, Plaintiffs assert that the declaration of NES's Manager of Regulatory Compliance, Eric Thut, filed in support of the Motion (Doc. #34) contradicts deposition testimony provided by Mr. Thut in this adversary proceeding with respect to how mail was processed at NES at the time the two letters and the bankruptcy court's notice were mailed to NES. See evidence cited in support of Disputed Fact nos. 3, 5 and 8, Doc. #35. Resolving the factual dispute of NES's

receipt of the two letters and the bankruptcy court's notice under the mailbox rule requires determining the credibility of witnesses and evidence, see Williams, 185 B.R. at 600, and summary judgment is not the appropriate manner to decide the issue. Cf. Bd. of Trs. of the Cal. Winery Workers' Pension Tr. Fund v. Giumarra Vineyards, 2018 U.S. Dist. LEXIS 34663, at *1 (E.D. Cal. Mar. 2, 2018) (declining summary judgment after discussing mailbox rule in nonbankruptcy proceeding).

Accordingly, the court finds that a genuine dispute of material fact exists as to when NES received notice of Plaintiff's bankruptcy case filing, and NES's motion for partial summary judgment on this basis is DENIED.

Emotional Distress

NES also argues that no genuine dispute of material facts exists with respect to Plaintiffs' emotional distress claim because Plaintiffs have not met their evidentiary burden under the Bankruptcy Code.

> Section 362(k) permits an award of emotional distress damages if the bankruptcy petitioner (1) suffers significant harm, (2) clearly establishes the significant harm, and (3) demonstrates a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process).

Snowden v. Check into Cash of Wash., Inc. (In re Snowden), 769 F.3d 651, 656-57 (9th Cir. 2014) (quoting Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004)) (punctuation omitted). NES acknowledges that "Mrs. Anderson claims that NES'[s] alleged conduct has caused her to experience 'stress, nervousness, anxiety and worry.'" NES's Mem., Doc. #43. NES argues that the symptoms Mrs. Anderson claims to suffer from are transitory, and therefore insufficient to support a claim of emotional distress. However, a finding as to the severity of the symptoms would require the court to weigh the relevant evidence and determine its truth, which is inappropriate at the summary judgment stage. Further, NES asserts an additional defect with Plaintiffs' emotional distress claim, that "the only evidence of Mrs. Anderson's emotional distress is her own self-serving testimony." Doc. #43. However, the Ninth Circuit has consistently held that a debtor's emotional distress claim may be supported by the debtor's own testimony. Dawson, 390 F.3d at 1149.

Here, Mrs. Anderson asserts that she experienced emotional harm in the form of stress, nervousness, anxiety and worry, that NES's conduct caused that emotional harm, and that the emotional harm required medical attention. Dep. of Jodi Anderson 47:1-57:22, Doc. #47. The court must view this evidence in favor of the nonmoving party, Plaintiffs. However, Mr. Anderson disclaimed any emotional damages in his deposition. Doc. #42, Ex. T, 78:7-14.

Accordingly, the court finds that a genuine issue of material fact exists with respect to Mrs. Anderson's emotional distress claim, and NES's motion for partial summary judgment on this basis is DENIED as to Mrs. Anderson and GRANTED as to Mr. Anderson.

4. 19-12047-A-7 **IN RE: ROBERT FLETCHER**
19-1097

RESCHEDULED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
9-30-2019 [8]

FLETCHER V. FLETCHER ET AL
DAVID JENKINS/ATTY. FOR PL.
ORDER CONTINUING TO 1/28/21 DOC. #S 71, 74

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

DISPOSITION: Continued to January 28, 2021 at 11:00 a.m.

NO ORDER REQUIRED.

On October 29, 2020, the court issued an order continuing the pre-trial conference to January 28, 2021 at 11:00 a.m. Doc. #73.

5. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 CLF-4

MOTION FOR SUMMARY JUDGMENT
10-8-2020 [467]

KODIAK MINING & MINERALS II LLC ET AL V. DON ROSE OIL CO., INC.
VONN CHRISTENSON/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

The court will call this motion for summary judgment second.

In addition to any other arguments the parties may make at the hearing on November 19, 2020, the parties should be prepared to address the following issues. To the extent a capitalized term is not otherwise defined, it has the same meaning as that set forth in the Hellenic Parties' motion for summary judgment (Doc. #467):

(1) If in connection with the summary judgment motion filed by Trustee, Sallyport and DRO Barite (LAK-9), Doc. #435, this court determines that the Original Barite Claims (as defined in that motion) were forfeited in September 2017 as a matter of law, does that resolve this summary judgment motion in favor of the opposing parties and, if not, why not?

(1) Does the position of Trustee, Sallyport Commercial Finance, LLC ("Sallyport") and DRO Barite, LLC ("DRO Barite") that Don Rose Oil Co., Inc. ("DRO") retained an interest in the barite mining claims as of the petition date depend upon a determination by this court that DRO Barite did not consent to the transfer of an interest-free $3 million junior interest in the barite mining claims to Hellenic either through the Settlement Agreement or the Intercreditor Agreement? If this court determines that DRO Barite did consent to such a transfer, what interest in the barite mining claims did DRO retain as of the petition date?

(2) Insider status

a. As of the petition date, Hellenic was a former minority shareholder. How is a former minority shareholder a statutory insider?

b. If a former minority shareholder is not a statutory insider, then why isn't whether Hellenic was an insider of DRO as of the petition date a disputed factual question that precludes summary judgment, as conceded by Trustee, Sallyport and DRO Barite in their opposition to the motion (Doc. #482 at 11:4-9)?

The pre-trial conference in this adversary proceeding is currently set for December 17, 2020 at 11:00 a.m. The parties should be prepared to discuss whether the pre-trial conference should be continued pending a ruling on the summary judgment motion assuming the court does not rule on the summary judgment motion at the November 19, 2020 hearing.

6. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 LAK-9

CONTINUED MOTION FOR SUMMARY JUDGMENT, AND/OR MOTION FOR PARTIAL SUMMARY JUDGMENT
8-25-2020 [435]

KODIAK MINING & MINERALS II LLC ET AL V. DON ROSE OIL CO., INC.
T. BELDEN/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

The court will call this motion for summary judgment first.

In addition to any other arguments the parties may make at the hearing on November 19, 2020, the parties should be prepared to address the following issues. To the extent a capitalized term is not otherwise defined, it has the same meaning as that set forth in the moving parties' memorandum of points and authorities in support of the motion (Doc. #437):

(1) Does DRO Barite have standing to move for summary judgment based on its forfeited status in California? If not, what is the effect of DRO Barite's continued forfeited status on this motion and the relief requested therein?

(2) Can Trustee, Sallyport and DRO Barite raise for first time in their summary judgment motion an affirmative defense that the Original Barite Claims were extinguished in September 2017?

a. In the Ninth Circuit, an affirmative defense can be raised for the first time at summary judgment absent a showing of prejudice. Garcia v. Salvation Army, 918 F.3d 997, 1008 (9th Cir. 2019). "There is no prejudice to a plaintiff where 'an affirmative defense would have been dispositive' if asserted 'when the action was filed.'" Garcia, 918 F.3d at 1008-09 (citing Owen v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001)).

b. Because forfeiture of the Original Barite Claims will eliminate any right of Hellenic to the New Barite Claims, it appears there is no

prejudice to Hellenic in permitting Trustee, Sallyport and DRO Barite from asserting that affirmative defense for the first time in their summary judgment motion under Garcia.

(3) Can Hellenic assert for the first time in a summary judgment motion a claim for fraudulent concealment of security interests in the Original Barite Claims?

a. In the Ninth Circuit, a plaintiff is precluded from asserting a new theory of liability for the defendant for the first time at summary judgment and following the close of discovery. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1292-93 (9th Cir. 2000). "[A]dding a new theory of liability at the summary judgment stage would prejudice the defendant who faces different burdens and defenses under this second theory of liability. . . . [P]laintiff should have moved to amend his pleadings during discovery." Coleman, 232 F.3d at 1292 (citations omitted).

b. Under Coleman, it appears Hellenic is precluded from asserting a claim for fraudulent concealment of security interests in the Original Barite Claims.

c. Assuming that such claim can be asserted now by Hellenic, was that claim previously dismissed by this court?

(4) Were the Original Barite Claims extinguished in September 2017 when fees to the Federal Bureau of Land Management ("BLM") were not paid?

a. 30 U.S.C. § 28f(a)(1) provides in relevant part: "The holder of each unpatented lode mining claim, mill site, or tunnel site, located pursuant to the mining laws of the United States before, on, or after August 10, 1993, shall pay to the Secretary of the Interior, on or before September 1 of each year, to the extent provided in advance in appropriations Acts, a claim maintenance fee of $100 per claim or site, respectively. Such claim maintenance fee shall be in lieu of the assessment work requirement contained in the Mining Law of 1872 [30 U.S.C. 28–28e] and the related filing requirements contained in section 314(a) and (c) of the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1744 (a) and (c)]."

b. 30 U.S.C. § 28i provides: "Failure to pay the claim maintenance fee or the location fee as required by this subtitle shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law."

c. The burden is on the moving parties (Trustee, Sallyport and DRO Barite), as parties asserting subsequent relocation, "to prove affirmatively by clear and satisfactory evidence" that DRO Barite forfeited its mining claims "for failure to conform to the law." Bigelow v. San Juan Gold Co., 64 Cal. App. 2d 188, 195-96 (1944). It appears the moving parties have met this burden with Exhibits 38-43. Doc. # 450.

d. While most of the cases cited by the moving parties regarding forfeiture of the Original Barite Claims involve an unrelated third party that relocates the forfeited claims, United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971), involved the same party seeking to have relocations of abandoned

claims relate back to the original abandoned claims, and the Ninth Circuit denied that request. Consolidated, 455 F.2d at 448. It appears from the cases cited by the moving parties that where there are valid but defective locations, those locations can relate back to the original claims so long as there are no intervening rights. But that is not the situation here. Under what legal authority can this court hold that the New Barite Claims relate back to the Original Barite Claims?

e. If this court determines that the Original Barite Claims were forfeited in September 2017 as a matter of law, does that resolve this summary judgment motion in favor of the moving parties and, if not, why not?

(5) If the Original Barite Claims were owned by DRO Barite when DRO's bankruptcy case was filed, and it was DRO Barite who was responsible for paying the annual fees to BLM, how can Trustee be held liable for the forfeiture of the Original Barite Claims as asserted by Hellenic in its opposition at Section IV.B.5.a?

(6) Transfer of an interest-free $3 million junior interest in the Original Barite Claims to Hellenic

a. The February 2017 Settlement Agreement at section 2(j) identifies the "Barite Mine Claims" as the "locatable minerals/mining claims identified in the Amended Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing dated July 31, 2014" ("2014 Deed of Trust"). Ex. To the Motion, Doc. #446 at p. 2 of 9. Schedule 1 to the 2014 Deed of Trust lists the Original Barite Claims by their claim numbers. Ex. J to Second Amended Complaint, Doc. #133 at p. 93. Why should any interest of Hellenic in the "Barite Mine Claims" under the February 2017 Settlement Agreement not be limited to the Original Claims?

b. Hellenic concedes there is no separate notarized agreement granting an interest-free $3 million junior interest in the "Barite Mine Claims" to Hellenic as required by section 2(j) of the February 2017 Settlement Agreement. Hellenic also concedes that the transfer of an interest-free $3 million junior interest in the Original Barite Claims is subject to the statute of frauds. What is the effect on this summary judgment motion if this court determines that no documents purporting to grant Hellenic an interest-free $3 million junior interest in the Original Barite Claims satisfy the statute of frauds?

(7) Prayer subsections E and G of the Second Amended Complaint request that the barite mineral rights allegedly transferred to Hellenic by the February 2017 Settlement Agreement and the Intercreditor Agreement be sold pursuant to a sale conducted through sale procedures established by Court order. Doc. #131. The moving parties assume that any such sale would be conducted pursuant to Bankruptcy Code section 363 and any sale proceeds would be subject to the priorities of the Bankruptcy Code. Doc. #437, at 9:26 – 10:6. Is that assumption based on a finding that DRO retained an interest in the Barite Mining Claims under the February 2017 Settlement Agreement and the Intercreditor Agreement? If this court finds that an interest-free $3 million junior interest in the Barite Mining Claims were properly transferred to Hellenic by DRO Barite pursuant to the February 2017 Settlement Agreement and the

Intercreditor Agreement, should the sale of those claims still be subject to the Bankruptcy Code since DRO Barite is not a debtor?

(8) Insider status

a. As of the petition date, Hellenic was a former minority shareholder. Under what section of the Bankruptcy Code is a former minority shareholder a statutory insider?

b. If a former minority shareholder is not a statutory insider, then why isn't whether Hellenic was an insider of DRO as of the petition date a disputed factual question that precludes summary judgment?

(9) Why aren't the assertions that Kodiak and Hellenic should be treated as the same entity a disputed factual question that precludes summary judgment?

(10) Why aren't the assertions that Hellenic breached the Intercreditor Agreement a disputed factual question that precludes summary judgment?

(11) The pre-trial conference in this adversary proceeding is currently set for December 17, 2020 at 11:00 a.m. The parties should be prepared to discuss whether the pre-trial conference should be continued pending a ruling on the summary judgment motion assuming the court does not rule on the summary judgment motion at the November 19, 2020 hearing.