UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Wednesday, December 13, 2023
Department A – Courtroom #11
Fresno, California

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INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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. 22-12016-A-11 **IN RE: FUTURE VALUE CONSTRUCTION, INC.**
CAE-1

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
11-28-2022 [1]

D. GARDNER/ATTY. FOR DBT.

NO RULING.

2. 22-12016-A-11 **IN RE: FUTURE VALUE CONSTRUCTION, INC.**
DMG-12

CONTINUED AMENDED CHAPTER 11 DISCLOSURE STATEMENT
9-29-2023 [379]

D. GARDNER/ATTY. FOR DBT.
PLAN WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the plan and disclosure statement on November 29, 2023. Doc. #402.

3. 23-11623-A-11 **IN RE: MATEO ENTERPRISE, INC. DBA EL MILAGRO MARKET**
CAE-1

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V VOLUNTARY PETITION
7-28-2023 [1]

LEONARD WELSH/ATTY. FOR DBT.

NO RULING.

4. 23-11623-A-11 **IN RE: MATEO ENTERPRISE, INC. DBA EL MILAGRO MARKET**
LKW-6

CONTINUED MOTION TO CONFIRM CHAPTER 11 PLAN
8-24-2023 [64]

MATEO ENTERPRISE, INC. DBA EL MILAGRO MARKET/MV
LEONARD WELSH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Confirm under 11 U.S.C. § 1191(b).

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.

Mateo Enterprise, Inc., dba El Milagro Market ("Debtor"), the debtor and debtor in possession in this Subchapter V Chapter 11 case, moves the court for confirmation of its Plan of Reorganization dated August 24, 2023 as modified by Modification of Debtor's Plan of Reorganization Dated August 24, 2023 ("First Modification") filed on August 31, 2023, and Second Modification of Debtor's Plan of Reorganization Dated August 24, 2023 ("Second Modification") filed on October 4, 2023 (collectively, the "Plan"). Doc. ##63, 64, 85, 127. The hearing to confirm the Plan was set by order of the court filed on August 24, 2023 ("Order"). Doc. #70. In the Order, the court ordered the transmission of the Plan, Order, ballots, and notice of the confirmation hearing by August 29, 2023; submission of acceptances or rejections of the Plan and filing of objections to confirmation by October 4, 2023; and filing of responses to objections, tabulation of ballots, and brief by October 11, 2023.

On October 4, 2023, the same date that acceptances or rejections of the Plan as well as objections to confirmation of the Plan were due, Debtor filed and served the Second Modification that proposes to pay the Class Eleven creditor $275,130.75 over time instead of the Class Eleven creditor sharing pro rata in the Class Thirteen pot of $300,000.00. Doc. ##127, 128. In addition, the Second Modification reduces the Class Thirteen pot from $300,000.00 to $103,500.00. Doc. #127.

At the initial hearing to confirm the Plan held on October 18, 2023, the court determined that the increase in the amount to be paid to Class Eleven as well as the significant reduction in the proposed pot available for members of Class Thirteen to share as set forth in the Second Modification constituted material plan modifications to the treatment of the members of Classes Eleven and Thirteen as well as the members of Classes Six, Seven, Eight, Nine, Ten and Twelve, each of whom are to be treated as Class Thirteen members under the Plan. Andrew v. Coopersmith (In re Downtown Inv. Club III), 89 B.R. 59, 65 (B.A.P. 9th Cir. 1988); In re Am. Solar King, 90 B.R. 808, 824 (Bankr. W.D. Tex. 1988) ("A modification is material if it so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance."). Because the Second Modification was filed and served on affected creditors on the same day that ballots and objections to confirmation of the Plan were due and significantly modified the recovery for Classes Six, Seven, Eight, Nine, Ten, Twelve and Thirteen, the court determined that the members of Classes Six, Seven, Eight, Nine, Ten, Twelve and Thirteen did not receive the 28 days' notice required by Federal Rule of Bankruptcy Procedure 2002(b) of the deadline to file objections

to the Plan and each such class should have another opportunity to vote on the Plan if Debtor wanted to confirm the Plan under 11 U.S.C. § 1191(a).

On October 23, 2023, Debtor provided new notice of the Plan as well as a new deadline for filing ballots and objections to confirmation of the Plan as modified. Doc. ##150, 151. No objections to confirmation of the Plan have been filed and no additional ballots were submitted. Supp. Decl. of Leonard K. Welsh, Doc. #165. The court finds notice and service of the Plan and related documents were proper. Doc. ##77, 86, 128, 150, 151. Based on the record before the court, the court will confirm the Plan under 11 U.S.C. § 1191(b).

The court finds that the Plan meets the requirements of 11 U.S.C. § 1190. Specifically, the Plan includes a brief history of Debtor's business operations, a liquidation analysis, and projections with respect to the ability of Debtor to make payments under the proposed Plan as required by § 1190(1). The Plan provides for the submission of all or such portion of Debtor's future earnings or other future income to the supervision and control of the Subchapter V Trustee as is necessary for the execution of the Plan as required by § 1190(2). The court finds § 1190(3) does not apply to the Plan.

Section 1191 of the Bankruptcy Code governs plan confirmation in Subchapter V. Debtor can confirm the Plan under 11 U.S.C. § 1191(a) if § 1129(a)(8) has been satisfied. If § 1129(a)(8) has not been satisfied, confirmation can occur only under § 1191(b).

On December 5, 2023, Debtor filed a supplemental memorandum of points and authorities in support of confirmation asserting that Debtor can confirm the Plan under 11 U.S.C. § 1191(a): (1) because the Plan provides that the failure of a claimant or other interested party to return a ballot to Debtor's attorney or vote on the plan shall be deemed to be acceptance of the plan by such person or persons; and (2) for reasons articulated in In re Hot'z Power Wash, Inc., Case No. 23-30749, 2023 Bankr. LEXIS 2700 (Bankr. S.D. Tex. Nov. 7, 2023). Doc. #166. The Subchapter V Trustee supports Debtor's argument. Doc. #168.

With respect to Debtor's contention that the Plan can provide for the failure of a claimant or other interested party to return a ballot to Debtor's attorney or vote on the plan to be deemed to be acceptance of the plan by such person or persons, the court agrees with the analysis in Hot'z Power Wash that such a provision violates Federal Rule of Bankruptcy Procedure ("Rule") 3018(c). Hot'z Power Wash, 2023 Bankr. LEXIS 2700, at *6-9. Rule 3018(c) provides in relevant part that "[a]n acceptance of rejection shall be in writing[.]" Fed. R. Bankr. P. 3018(c). In a prior decision, the bankruptcy judge in the Hot'z Power Wash case analyzed the interplay between Rule 3018(c) and 11 U.S.C. § 1126(c) and concluded "that failure to cast a written vote constitutes neither acceptance nor rejection of the plan, and 'nonvotes do not satisfy the language of § 1126(c) and thus, do not count toward the numerosity requirements.' Debtor's attempt to treat non-votes as having accepted the plan directly contravenes this holding." Hot'z Power Wash, 2023 Bankr. LEXIS 2700, at *8 (footnotes omitted)(discussing In re Bressler, Case No. 20-31024, 2021 Bankr. LEXIS 64, at *7 ((Bankr. S.D. Tex. Jan. 13, 2021). Thus, the court finds Debtor's attempt through the First Modification to deem the failure of a claimant or other interested party to return a ballot to Debtor's attorney or vote on the Plan to be acceptance of the Plan by such person or persons is not consistent with the law and will not deem the classes that did not vote on the Plan to have accepted the Plan as proposed by Debtor through the language in the First Modification.

Turning to the remaining analysis in Hot'z Power Wash, the court agrees with the Hot'z Power Wash court that treating a nonvoting class as having implicitly

accepted or rejected the plan is prohibited by the Bankruptcy Code and applicable rules. Hot'z Power Wash, 2023 Bankr. LEXIS 2700, at *14. The Hot'z Power Wash court then contends that when an impaired class of creditors fails to cast a ballot, the application to the mathematical calculation in 11 U.S.C. § 1126(c) is absurd and so a nonvoting class should not be counted for purposes of whether 11 U.S.C. § 1129(a)(8) is satisfied. Id.

Contrary to the position of Debtor and the Subchapter V Trustee, this court rejects the further contention of the Hot'z Power Wash court that when an impaired class of creditors fails to cast a ballot, the application to the mathematical calculation in 11 U.S.C. § 1126(c) is absurd and so a nonvoting class should not be counted for purposes of whether 11 U.S.C. § 1129(a)(8) is satisfied. Hot'z Power Wash, 2023 Bankr. LEXIS 2700, at *14. This court does so both because this court does not find that a nonvoting class leads to a mathematical absurdity under 11 U.S.C. § 1126(c) and because not including a nonvoting class for purposes of 11 U.S.C. § 1129(a)(8) is not consistent with the express language of 11 U.S.C. § 1129(a)(8).

Turning first to whether a nonvoting class leads to a mathematical absurdity under 11 U.S.C. § 1126(c), this court holds that a class of claims can: (a) accept a plan by written ballot and applicable computation under 11 U.S.C. § 1126(c); (b) reject a plan by written ballot and applicable computation under 11 U.S.C. § 1126(c); or (c) not submit any written ballots either accepting or rejecting a plan. A class of claims that does not submit any written ballots either accepting or rejecting a plan does not implicitly accept or reject a plan and, not counting those votes does not lead to a mathematical absurdity under 11 U.S.C. § 1126(c) as held in In re Franco's Paving LLC, 654 B.R. 107, 2023 Bankr. LEXIS 2505, at *4-8 (Bankr. S.D. Tex. Oct. 5, 2023). Rather, that class simply is nonvoting for purposes of 11 U.S.C. § 1126(c).

11 U.S.C. § 1129(a)(8) provides:

> With respect to each class of claims or interests —
> (A) such class has accepted the plan; or
> (B) such class is not impaired under the plan.

11 U.S.C. § 1129(a)(8). Under 11 U.S.C. § 1129(a)(8), a class has to either accept the plan or not be impaired. Nothing in the express language of 11 U.S.C. § 1129(a)(8) permits this court to ignore an impaired class that did not vote for a plan for purposes of determining whether 11 U.S.C. § 1129(a)(8) is satisfied as proposed in Hot'z Power Wash. Accordingly, the court finds that § 1129(a)(8) has not been satisfied in this case. The court will only confirm the Plan under 11 U.S.C. § 1191(b).

11 U.S.C. § 1191(b) provides in relevant part:

> [I]f all of the applicable requirements of section 1129(a) of this title, other than paragraphs (8), (10), and (15) of that section, are met with respect to a plan, the court, on request of the debtor, shall confirm the plan notwithstanding the requirements of such paragraphs if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1191(b). By the motion, Debtor requests that the court confirm the Plan pursuant to 11 U.S.C. § 1191(b). For a plan to be fair and equitable with respect to a class of secured claims that is impaired and has not accepted the Plan, the Plan must meet the requirements of § 1129(b)(2)(A). 11 U.S.C.

§ 1191(b), (c)(1). For a plan to be fair and equitable with respect to a class of unsecured creditors that is impaired and that has not accepted the Plan, the Plan must meet the requirements of § 1191(c)(2) and § 1191(c)(3). 11 U.S.C. § 1191(b), (c)(2)-(3).

With respect to § 1129(a)(1), the Plan complies with the applicable provisions of Chapter 11 and meets the applicable mandatory provisions of 11 U.S.C. § 1123(a). The provisions of § 1123(a)(6) of the Bankruptcy Code, which relate to the issuance of securities pursuant to a reorganization plan, are not applicable in this case. The provisions of § 1123(a)(8) do not apply in a Subchapter V case. 11 U.S.C. § 1181. The Plan:

(1) Designates classes of claims other than claims of a kind specified in Bankruptcy Code sections 507(a)(2), 507(a)(3), or 507(a)(8) as required by § 1123(a)(1). The claims are Class One (priority claims), Classes Two through Twelve (secured claims), Class Thirteen (general unsecured claims), Class Fourteen (executory contracts and unexpired leases), Class Fifteen (Debtor's interests), and Class Sixteen (interests of Debtor's shareholder).

(2) Specifies the classes that are not impaired under the Plan (Classes Two, Three, Five, Fourteen and Fifteen) as required by § 1123(a)(2).

(3) Specifies the treatment of any class of claims or class of interest which is impaired under the Plan (Classes One, Four, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen and Sixteen) as required by § 1123(a)(3).

(4) Provides for the same treatment for each claim or interest of a particular class as required by § 1123(a)(4).

(5) Provides adequate means for the implementation and execution of the Plan as required by § 1123(a)(5).

(6) Contains no provisions inconsistent with the interests of creditors and equity security holders and public policy with respect to the manner of selection of any officer, director, or trustee under the Plan and any successor to such officer, director, or trustee as required by § 1123(a)(7).

(7) Provides for the assumption or rejection of all executory contracts and unexpired leases not expressly rejected by Debtor in accordance with Debtor's sound business judgment as required by § 1123(b)(2).

Debtor, as proponent of the Plan, provided adequate disclosure regarding the Plan to all creditors and interest holders in good faith and has complied with the applicable provisions of Chapter 11 as required by § 1129(a)(2).

The Plan has been proposed in good faith and not by any means forbidden by law as required by § 1129(a)(3).

Pursuant to § 1129(a)(4), the Plan provides that payments made or to be made to Debtor's attorneys and other professionals in connection with the case or the Plan are subject to approval of the court.

The Plan provides that Debtor will be responsible for implementation of the Plan and Debtor's existing shareholder, Salvador Carrera, will serve as Debtor's Chief Executive Officer and Chief Financial Officer during the term of

the Plan and the Subchapter V Trustee will remain in place until all payments due under the Plan are made, which is consistent with interests of creditors and equity security holders and with public policy as required by § 1129(a)(5).

Section 1129(a)(6) is inapplicable and no changes in regulatory rates are provided for in the Plan.

Pursuant to § 1129(a)(7), each holder of a claim or interest in an impaired class has either accepted the Plan or will receive an amount equal to or greater than the amount such holder of a claim or interest would receive in a Chapter 7 case. No member of Classes One, Six, Seven, Eight, Nine, Ten, Twelve or Thirteen returned a ballot. Debtor contends that there are no Class One claims and if there are, such claims will be paid as required by the Bankruptcy Code, so any holders of Class One claims will receive equal to or greater than priority claimants would receive in a Chapter 7 case. Plan, § 5.01, Doc. #63. The secured creditor claimants in Classes Six, Seven, Eight, Nine, Ten and Twelve are fully undersecured, and any claims owed to Class Six, Seven, Eight, Nine, Ten and Twelve claimants are to be included in Class Thirteen (general unsecured claims). Plan, §§ 6.07-6.11 and 6.13, Doc. #63. Because general unsecured creditor claimants would not receive any distribution in a hypothetical Chapter 7 liquidation, the Plan provides more to Class Thirteen claimants than those creditors would receive in a Chapter 7 case. Ex. A, Doc. #66.

Section 1129(a)(8) has not been satisfied because Classes One, Six, Seven, Eight, Nine, Ten, Twelve and Thirteen have not voted affirmatively to accept the Plan. Thus, Debtor has not satisfied 11 U.S.C. § 1129(a)(8) for the reasons explained above. Nevertheless, § 1129(a)(8) need not be satisfied if the Subchapter V plan is confirmed, as here, under § 1191(b).

Pursuant to § 1129(a)(9), the Plan provides for treatment of claims under 11 U.S.C. §§ 507(a)(1), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), 507(a)(7) and 507(a)(8), to the extent there are any, in a manner consistent with 11 U.S.C. § 1129(a)(9).

Section 1129(a)(10) need not be satisfied if the Subchapter V plan is confirmed, as here, under § 1191(b).

Regarding § 1129(a)(11), payments under the Plan are to be made from future income of Debtor. Ex. B, Doc. #66. The court finds, based on the evidence submitted by Debtor, that the Plan is feasible and confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of Debtor or any successor to Debtor under the Plan.

Section 1129(a)(12) has been satisfied because all fees due under 28 U.S.C. § 1930 have been paid.

Sections 1129(a)(13)-(16) are not applicable to this case.

Pursuant to § 1191(c)(1), with respect to a class of secured claims, the Plan meets the requirements of § 1129(b)(2)(A). Section 1129(b)(2)(A) provides that a plan is "fair and equitable" with respect to a class of secured claims if the plan provides:

(1) the secured claimant retains his or her liens securing repayment of the creditor's claim, and

(2) the secured claimant receives the present value of his or her claim on the effective date of the plan.

The court finds that the Plan is fair and equitable as to Classes Six, Seven, Eight, Nine, Ten and Twelve. The Plan satisfies 11 U.S.C. § 1129(b)(2)(A) with respect to each of these classes because the value of the collateral securing the claims of each of these claimants renders each of these claimants to be unsecured, so the claims of each of these class members will be treated as a general unsecured claim. Plan, §§ 6.07-6.11 and 6.13, Doc. #63.

Because Classes One and Thirteen consists of members holding unsecured claims, the Plan must comply with § 1191(c)(2) and (c)(3). Section 1191(c)(2) requires that all projected disposable income received in the five years of the Plan be applied to make payments under the Plan or that the value of the property to be distributed under the Plan is greater than the projected disposable income of Debtor. While "projected disposable income" is not defined in the Bankruptcy Code, § 1191(d) provides that, for purposes of § 1191, "the term 'disposable income' means the income that is received by the debtor and that is not reasonably necessary to be expended . . . for the payment of expenditures necessary for the continuation, preservation or operation of the business of the debtor." 11 U.S.C. § 1191(d)(2).

Based on the Plan projections, all of the projected disposable income Debtor will receive during the five-year term of the Plan is being applied to make payments under the Plan as is required under 11 U.S.C. § 1191(c)(2)(A). Ex. B, Doc. #66.

Section 1191(c)(3) requires that either Debtor will be able to make all payments under the Plan or there is a reasonable likelihood that Debtor will be able to make all payments under the Plan and the Plan provides appropriate remedies in the event Plan payments are not made.

With respect to § 1191(c)(3)(A), payments under the Plan are to be made from future income of Debtor. Ex. B, Doc. #66. Debtor owns and operates a supermarket and convenience store. Decl. of Salvador Carrera at ¶ 2, Doc. #67. Based on Debtor's filed monthly operating reports, the court calculates the net income during Debtor's chapter 11 case as $16,894.66 through the three months ending October 31, 2023, for an average monthly net income of $5,631.33. Doc. ##129, 139, 161. However, proposed monthly plan payments are $9,780.00. Ex. C, Doc. #127. Debtor is in the process of expanding its business to include a meat market, bakery and taqueria that Debtor expected would be completed in November 2023 and will significantly increase Debtor's net income. Carrera Decl. at ¶ 5, Doc. #67. Because Debtor had a negative net monthly income of $11,306.72 in October 2023 and the average net monthly income during the chapter 11 case is less than the proposed monthly plan payments, the court cannot find that the Plan satisfies § 1191(c)(3)(A).

Because the Plan does not satisfy § 1191(c)(3)(A), the Plan needs to satisfy § 1191(c)(3)(B), which requires the Plan to provide appropriate remedies to protect the holders of claims or interests in the event payments due under the Plan are not made. Section 13.06 of the Plan provides in relevant part that: "The United States Trustee, the Subchapter V Trustee, all creditors and any other party in interest shall have the right to seek the appointment of a Chapter 11 Trustee, the dismissal of Debtor's case, or the conversion of Debtor's case to Chapter 7 if Debtor defaults in the payments required by the Plan." Plan § 13.06, Doc. #63. As explained in In re Urgent Care Physicians, Ltd., Case No. 21-24000, 2021 Bankr. LEXIS 3466, "there is no indication that Congress intended section 1191(c)(3)(B) to require anything beyond the preservation of a creditor's rights to seek the enforcement of the plan terms in the bankruptcy court and, if necessary, its rights under applicable state law." Urgent Care Physicians, 2021 Bankr. LEXIS 3466, at *32-33. Consistent with the caselaw interpreting § 1191(c)(3)(B) and in the absence of any

objection by unsecured creditors insisting on additional plan language that outlines specific remedies in the event of a default by Debtor in Plan payments, the court finds the proposed remedies in section 13.06 of the Plan satisfy § 1191(c)(3)(B).

Accordingly, confirmation of the Plan is proper under 11 U.S.C. § 1191(b), and the Plan will be confirmed under that provision.

5. 23-10571-A-11 **IN RE: NABIEKIM ENTERPRISES, INC.**
CAE-1

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 SUBCHAPTER V VOLUNTARY PETITION
3-24-2023 [1]

PETER FEAR/ATTY. FOR DBT.

NO RULING.

6. 23-10571-A-11 **IN RE: NABIEKIM ENTERPRISES, INC.**
FW-2

FURTHER HEARING RE: MOTION TO USE CASH COLLATERAL
3-24-2023 [6]

NABIEKIM ENTERPRISES, INC./MV
PETER FEAR/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted on a further interim basis through March 31, 2024.

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 pursuant to an interim order authorizing use of cash collateral ("Interim Order"). Doc. #132. The motion was heard initially on March 29, 2023, and again on April 12, 2023, and again on June 28, 2023, and again on September 27, 2023 and was granted on an interim basis each time. See Doc. ##22, 46, 82. 132. A further hearing on use of cash collateral was set for December 13, 2023. Interim Order, Doc. #132. The Interim Order provided that the debtor may file and serve any supplemental documents, which may include a revised budget, on or before November 29, 2023. Id.

On November 29, 2023, the debtor filed a supplemental document and revised budget. Doc. ##179, 180. Pursuant to the Interim Order, opposition to the continued use of cash collateral may be raised at the hearing. Interim Order, Doc. #132. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant continued use of cash collateral on an interim basis through March 31, 2024. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper. The court will issue an order if a further hearing is necessary.

NabieKim Enterprises, Inc. ("Debtor" or "DIP") moves the court for an order authorizing Debtor to use the cash collateral of Small Business Administration ("SBA") on a monthly basis subject to a revised budget. Ex. D, Doc. #180. Debtor asserts SBA holds a duly perfected security interest in nearly all of Debtor's cash collateral, including funds in Debtor's bank accounts at Wells Fargo. Motion, Doc. #6. Based on Debtor's schedules, SBA is owed $312,300.00 and its collateral, as of the petition date, was $49,657.38. Schedule D, Doc. #34. While there are other entities that may assert a security interest in Debtor's cash collateral, all other entities hold a junior security interest to the undersecured SBA and are, thus, unsecured.

Pursuant to 11 U.S.C. § 363, a debtor in possession can use property of the estate that is cash collateral by obtaining either the consent of each entity that has an interest in such cash collateral or court authorization after notice and a hearing. 11 U.S.C. § 363(c)(2). "The primary concern of the court in determining whether cash collateral may be used is whether the secured creditors are adequately protected." In re Plaza Family P'ship, 95 B.R. 166 (E.D. Cal. 1989) (citing 11 U.S.C. § 363(e)). Pursuant to 11 U.S.C. § 363(o), DIP carries the burden of proof on the issue of adequate protection.

Here, DIP seeks court authorization to use cash collateral to pay costs incurred by DIP in the normal course of its business for January 1, 2024 through March 31, 2024. Doc. #180; Ex. D, Doc. #179. As adequate protection for DIP's use of SBA's cash collateral, to the extent cash collateral is actually used, DIP will grant SBA a replacement lien against DIP's post-petition sales and other income as well as granting a replacement lien to any other creditor with a valid security interest in DIP's cash collateral that was served with notice of the motion. Decl. of Kaye Kim, Doc. ##8, 24.

Consistent with the Interim Order, DIP filed and served a supplemental statement in support of further use of cash collateral. Doc. ##179, 181. By the supplemental statement, DIP explains that the amount of cash collateral needed for January 2024 through March 2024 is identical the budget submitted for the previous three-month period of October 2023 through December 2023, with a notable addition being that percentage rent owed to Debtor's landlord is paid annually and is budgeted to be paid in January 2024. Supp. Stmt., Doc. #179.

Accordingly, pending any opposition at the hearing, the motion will be GRANTED on a further interim basis through March 31, 2024, consistent with the budget attached as Exhibit D to Doc. #180. At the hearing, counsel for DIP should be prepared to set a new hearing date for the further use of cash collateral and date to file and serve supplemental pleadings in case Debtor's chapter 11 plan is not confirmed by March 31, 2024.

1. 23-12003-A-7 **IN RE: NOEL CAVAZOS AND SAVANA SANCHEZ**
CAS-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-31-2023 [23]

FORD MOTOR CREDIT COMPANY, LLC/MV
BENNY BARCO/ATTY. FOR DBT.
CHERYL SKIGIN/ATTY. FOR MV.

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 pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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.

The movant, Ford Motor Credit Company, LLC ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2) with respect to a 2020 Ford Explorer XLT Sport Utility 4D, VIN: 1FMSK7DH5LGB42444 (the "Vehicle"). Doc. #23.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

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

After review of the included evidence, the court finds that "cause" exists to lift the stay because the debtors have failed to make at least five complete pre- and post-petition payments. Movant has produced evidence that the debtors are delinquent by at least $4,371.50. Doc. #26.

The court also finds that the debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because the debtors

are in chapter 7. The Vehicle is valued at $26,479.00 and the debtors owe $35,915.08. Doc. #26.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because the debtors have failed to make at least five pre- and post-petition payments to Movant and the Vehicle is a depreciating asset.

2. 23-12032-A-7 **IN RE: BENSON RICKS**
KMM-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-7-2023 [14]

TOYOTA MOTOR CREDIT CORPORATION/MV
D. GARDNER/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.

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 pursuant to 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.

The movant, Toyota Motor Credit Corporation ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2) with respect to a 2022 Toyota Tacoma 4X, VIN: 3TYSZ5AN6NT103289 (the "Vehicle"). Doc. #14.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

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.

After review of the included evidence, the court finds that "cause" exists to lift the stay because the debtor has failed to make at least three complete pre- and post-petition payments. Movant has produced evidence that the debtor is delinquent by at least $2,979.00. Doc. #16.

The court also finds that the debtor does not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because the debtor is in chapter 7. The Vehicle is valued at $37,750.00 and the debtor owes $54,949.83. Doc. #16.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) to permit Movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded. According to the debtor's Statement of Intention, the Vehicle will be surrendered. Doc. #1.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because the debtor has failed to make at least three pre- and post-petition payments to Movant and the Vehicle is a depreciating asset.

3. 20-10271-A-7 **IN RE: JEFFREY KERBO**
ICE-4

OBJECTION TO CLAIM OF NANCY RUSSELL KERBO, CLAIM NUMBER 2
10-30-2023 [38]

IRMA EDMONDS/MV
NICHOLAS WAJDA/ATTY. FOR DBT.
IRMA EDMONDS/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained in part and overruled in part.

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

This objection was set for hearing on at least 44 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 3007-1(b)(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 3007-1(b)(1)(A) may be deemed a waiver of any opposition to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the non-responding parties in interest are entered. Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has not done here.

Irma Edmonds ("Trustee"), the chapter 7 trustee in this bankruptcy case, objects to claim no. 2 (the "Claim") filed by Nancy Russell Kerbo ("Claimant") on the grounds that the Claim does not provide documentation to support the priority claim status for a domestic support obligation in the principal amount

of $53,000.00. Trustee's Obj., Doc. #38. The Claim was filed on May 11, 2020 by Claimant in pro se and asserts a priority unsecured claim of $53,000.00 under 11 U.S.C. § 507(a)(15). Am. Claim 2-2. The Claim includes as an attachment section 9 of the debtor's summary of assets and liabilities (the "Schedule"), which lists a domestic support obligation in the amount of $53,424.00. Attach. 1, Claim 2-2. The Schedule comes from part 4 of the debtor's summary of schedules. Doc. #1. Claimant has not responded to Trustee's objection.

Federal Rule of Bankruptcy Procedure 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." 11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof of claim filed under § 501, is deemed allowed unless a party in interest objects. The party objecting to a presumptively valid claim has the burden of presenting evidence to overcome the *prima facie* showing made by the proof of claim. In re Medina, 205 B.R. 216, 222 (B.A.P. 9th Cir. 1996). The objecting party must provide "sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves.'" Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. 2000) (quoting In re Holm, 931 F.2d 620, 623 (9th Cir. 1991)). "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." Id. (quoting Ashford v. Consol. Pioneer. Mortg. (In re Consol. Pioneer Mortg.), 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995)).

Trustee contends that the Claim should be disallowed in its entirety because Claimant has failed to provide Trustee with a state court order to establish that the $53,000.00 in support obligation has been ordered to be paid by the debtor. Tr.'s Obj., Doc. #38. Although Claimant did not attach to the Claim a state court order establishing that $53,000.00 in support obligation has been ordered to be paid to Claimant by the debtor, Claimant did attach a copy of the Schedule that was filed by the debtor and in which the debtor admits to owing a domestic support obligation in the amount of $53,424.00. According to the debtor's filed Schedule E/F, the debtor owes $53,424.00 to Nancy Kerbo for a domestic support obligation. Schedule E/F, Doc. #1.

"If a proof of claim correlates to a debt listed by the debtor in his or her schedules, this may be sufficient, by itself, to establish the *prima facie* validity of the proof of claim. Of course, a debtor's scheduling of a debt does not constitute an admission by a trustee, but as a sworn statement and admission against interest, it is nevertheless strongly probative of the claim's validity." In re Burkett, 329 B.R. 820, 829 (Bankr. S.D. Ohio 2005) (citations and footnote omitted). With respect to whether the debtor owes this obligation to Claimant, the debtor's Schedule E/F, which was filed under oath, matches up almost identically with the Claim in terms of the dollar amount owed to Claimant.

"On the other hand, if a proof of claim lacking proper attachments does not correlate to a debt scheduled by the debtor, or aspects of the claim differ from the scheduled debt, this may give rise to a valid objection by the debtor or trustee for lack of verification of ownership and/or the amount of the claim." Burkett, 329 B.R. at 829 (footnote omitted). Here, Claimant asserts priority status for the Claim under 11 U.S.C. § 507(a)(15). However, there is no such provision in the Bankruptcy Code. In addition, the debtor's Schedule E/F lists the $53,424.00 owed to Claimant as not having any priority. Schedule E/F, Doc. #1.

Because the Claim seeks priority status under a Bankruptcy Code provision that does not exist and because the debtor's Schedule E/F shows that the Claim has

no priority status, the court will sustain Trustee's objection as to the Claim being a priority claim. However, the Claim is consistent with the debtor's schedules. The court considers this statement to be strongly probative of the fact that the debtor owes the Claim to Claimant and will overrule Trustee's request to disallow the Claim in its entirety. The court will allow the Claim in the amount of $53,000.00 as a general unsecured claim.

Accordingly, Trustee's objection will be SUSTAINED IN PART and OVERRULED IN PART. Trustee's objection as to the Claim being a priority claim will be sustained but Trustee's request to disallow the Claim in its entirety will be overruled. The Claim will be allowed as a general unsecured claim in the amount of $53,000.00.