United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

9:00 AM

: **Chapter 0**

Adv#: 2:22-01187 Emein et al v. Amin

#1.00 Trial RE: [1] Adversary case 2:22-ap-01187. Complaint by Kami Emein against Joseph Amin. ($350.00 Fee Not Required). Nature of Suit: (21 (Validity, priority or extent of lien or other interest in property)) (Jackman, Ryan)

fr. 8-28-23

Docket 1

***** VACATED *** REASON: PER ORDER ENTERED 3-22-23**

Tentative Ruling:

- NONE LISTED -

Party Information

Defendant(s):

Joseph Amin — Pro Se

Plaintiff(s):

Kami Emein — Represented By Ryan Jackman

Kami Emein — Represented By Ryan Jackman

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

9:00 AM

2:18-15693 Kami Emein **Chapter 7**

Adv#: 2:18-01260 Amin v. Emein

#2.00 Trial RE: [21] 2nd Amended Complaint by Michael N Berke on behalf of Joseph Amin against Kami Emein

fr: 7-16-19, 9-10-19; 1-14-20; 5-12-20; 11-17-20; 2-9-21' 6-15-21; 1-11-22; 6-14-22; 12-13-22

Docket 0

***** VACATED *** REASON: PER ORDER ENTERED 3-22-23**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Kami Emein	Represented By Jacques Tushinsky Fox

Defendant(s):

Kami Emein	Represented By TJ Fox

Plaintiff(s):

Joseph Amin	Represented By Michael N Berke

Trustee(s):

John J Menchaca (TR)	Represented By Uzzi O Raanan ESQ Sonia Singh

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:21-16674 JINZHENG GROUP (USA) LLC **Chapter 11**
Adv#: 2:22-01090 JINZHENG GROUP (USA) LLC et al v. Betula Lenta Inc et al

#100.00 Hearing
RE: [66] Motion to set aside RE: Default of defendants betula Lenta, Inc., Jonathan Pae and David Park to adversary complaint

Docket 66

Tentative Ruling:

6/6/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Motion is **GRANTED**.

Pleadings Filed and Reviewed:
1) Notice of Motion and Motion for Relief from Default [Adv. Doc. No. 66]
   a) Declaration of Jonathan Pae Filed in Support of Motion to Set Aside Default [Adv. Doc. No. 54]
   b) Declaration of David Park Filed in Support of Motion to Set Aside Default [Adv. Doc. No. 55]
   c) Declaration of David M. Browne Filed in Support of Motion to Set Aside Default [Adv. Doc. No. 56]
   d) Supplemental Declaration of David M. Browne Filed in Support of Motion to Set Aside Default [Adv. Doc. No. 65]
2) Plaintiff Jinzheng's Opposition to Defendants' Motion to Set Aside Default [Adv. Doc. No. 72]
3) Reply Memorandum of Points and Authorities in Support of Motion to Set Aside Default [Adv. Doc. No. 76]

I. Facts and Summary of Pleadings

A. Background

10:00 AM

CONT... JINZHENG GROUP (USA) LLC **Chapter 11**

On August 24, 2021 (the "Petition Date"), Jinzheng Group (USA) LLC (the "Debtor") filed a voluntary Chapter 11 petition. Prior to the Petition Date, the Debtor was attempting to create a residential housing development on 32 acres of undeveloped land located near downtown Los Angeles.

On February 7, 2022, the Debtor filed a complaint against Defendants Betula Lenta, Inc. ("BLI"), Jonathan Pae ("Pae"), David Park ("Park"), Betty Bao Zheng ("Zheng"), and CBW Global, Inc. ("CBW Global") in the Los Angeles Superior Court. The gravamen of the action is that Defendants had been hired to provide land use entitlement services to facilitate the Debtor's residential development project, but failed to make meaningful progress to secure the entitlements despite incurring significant costs. The complaint asserts claims for breach of contract, intentional misrepresentation, professional negligence, and breach of fiduciary duty, and seeks damages in excess of $5 million.

On June 9, 2022, Defendants removed the action to the Bankruptcy Court. On December 22, 2022, the Court entered an order compelling Zheng to respond to discovery propounded by the Debtor. On April 24, 2023, the Court consolidated this action with the Debtor's objection to a claim asserted by BLI. Bankr. Doc. No. 522.

B. Summary of Papers Filed in Connection with the Motion to Vacate Default

On January 17, 2023, the Clerk of the Court entered default as to Pae, Park, and BLI. The default of Zheng and CBW Global was not entered, because these defendants filed an answer on December 16, 2022.

Pae, Park, and BLI move to set aside the default. They testify that their prior attorney, Peter Kim, ceased communicating with them when he was appointed as an immigration judge. Pae, Park, and BLI are now represented by David Browne, the same attorney who represents Zheng and CBW Global. Browne testifies that the delay in moving to set aside the default resulted from (1) the need to clear conflicts, (2) the failure to prior counsel Peter Kim to respond to his inquiries regarding the case or to turn over the case file, and (3) the complexity of the case.

The Debtor opposes the Motion. It argues that Pae and Park have acted in bad faith by failing to appear for two prior depositions, and that Defendants failed to act diligently by waiting for approximately three months to move to set aside their defaults. The Debtor further asserts that if the defaults are set aside, Pae and Park should be required to pay $13,950 in costs and attorneys' fees the Debtor incurred in preparing for their cancelled depositions. Finally, the Debtor contends that Defendants have failed to demonstrate that they have a meritorious defense.

In response to the Debtor's opposition, Defendants contend that they have satisfied the meritorious defense requirement by "showing that there is a factual or legal basis for proceeding to a trial on the merits." Adv. Doc. No. 76 at p. 6.

II. Findings and Conclusions

A. The Motion to Vacate the Defaults is Granted

Civil Rule 55(c) provides: "The court may set aside an entry of default for good cause." "The 'good cause' standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b)." *Franchise Holding II, LLC. v. Huntington Restaurants Grp., Inc.*, 375 F.3d 922, 925 (9th Cir. 2004). The Court may deny a motion to vacate a default for any of the following reasons: "(1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default." *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000), *as amended on denial of reh'g* (Nov. 1, 2000). Because "[t]his tripartite test is disjunctive," the Debtor is required to demonstrate only that one of the factors applies in order for the Court to deny the motion to vacate default. *Id.*

As explained below, the Debtor has not demonstrated that any of the factors apply. Therefore, the defaults of Pae, Park, and BLI will be set aside.

1. Vacating the Defaults Will Not Prejudice the Debtor

Merely being required to litigate the merits of a claim does not qualify as prejudice to the Debtor. *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001), *as amended on denial of reh'g and reh'g en banc* (May 9, 2001). "To be prejudicial, the setting aside of a [default] must result in greater harm than simply delaying resolution of the case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered.'" *Id.* The non-defaulting party's ability to pursue its claim may be hindered if the delay has caused tangible harm such as "loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." *Id.*

The defaults of Pae, Park, and BLI were entered on January 17, 2023. These defendants moved to set aside their defaults on April 19, 2023. This three-month delay is not prejudicial to the Debtor. There has been no showing that the delay has made it more difficult for the Debtor to access the evidence needed to litigate its claims. There is no evidence that Pae, Park, or BLI have exploited the delay for collusive purposes. Instead, the delay in moving to set aside the defaults resulted from

the failure of Defendants' prior counsel to communicate with their current counsel.

2. The Default Was Not the Result of Culpable Conduct

"'[A] defendant's conduct [is] culpable for … where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond."' *Employee Painters' Trust v. Ethan Enterprises, Inc.*, 480 F.3d 993, 1000 (9th Cir. 2007).

Pae and Park testify that they were under the impression that their prior counsel was properly discharging his responsibilities to effectively represent them, and that they were surprised to receive notice that their defaults had been entered. Pae and Park's testimony is corroborated by the testimony of their current counsel, who testifies that prior counsel has not communicated with him or turned over the case file. Defendants' failure to timely file an Answer was not devious, deliberate, willful, or done in bad faith.

3. Defendants May Have a Meritorious Defense

"A defendant seeking to vacate a default judgment must present specific facts that would constitute a defense…. But the burden on a party seeking to vacate a default judgment is not extraordinarily heavy." *TCI Grp.*, 244 F.3d at 700. "All that is necessary to satisfy the 'meritorious defense' requirement is to allege sufficient facts that, if true, would constitute a defense: the question whether the factual allegation [i]s true is not to be determined by the court when it decides the motion to set aside the default." *United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1094 (9th Cir. 2010) (internal citations omitted).

The Motion is accompanied by a proposed Answer. Defendants have plausibly contested the Debtor's allegations by arguing, among other things, that they did in fact perform significant work to secure the entitlements desired by the Debtor, and by pointing out that securing entitlements in the Los Angeles area is a difficult and unpredictable process. Defendants have demonstrated that they may have a meritorious defense.

B. The Debtor's Request for the Imposition of Discovery Sanctions is Denied Without Prejudice

In its opposition to the Motion, the Debtor requests that it be awarded $13,950 that the Debtor alleges it incurred as a result of the failure of Pae and Park to attend two depositions. The question of whether discovery sanctions are appropriate is separate

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CONT... JINZHENG GROUP (USA) LLC **Chapter 11**

and distinct from the issue of whether the defaults should be set aside. Therefore, the Debtor's request for the imposition of discovery sanctions is denied without prejudice. Such request may be presented by way of a separately-noticed motion.

C. Status Conference

The undersigned judge (the "Judge") will be retiring from the bench on September 30, 2023. Therefore, the Court will not set litigation deadlines at this time. **[Note 1]** The last day for a dispositive motion to be heard by this Judge shall be **August 23, 2023**. All matters arising in the case subsequent to August 23, 2023 will be addressed by a different judge after the case has been reassigned.

Unless otherwise ordered, this Judge will not conduct any further Status Conferences in this case.

III. Conclusion

Based upon the foregoing, the Motion is **GRANTED**. The *Proposed Amended Answer of Betula Lenta, Inc., Jonathan Pae and David Park to Adversary Complaint* [Adv. Doc. No. 65] shall be deemed file.

The Court will prepare and enter an order granting the Motion.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

In the Motion, Defendants request that the Court set aside and vacate any scheduling orders that were issued with respect to the evidentiary hearing on the Debtor's objection to BLI's claim before the claim objection was consolidated with this action. Defendants' request is not necessary because the Court vacated all deadlines set in connection with the claim objection on April 24, 2023. Bankr. Doc. No. 522 at ¶ 4.

Party Information

10:00 AM

CONT... JINZHENG GROUP (USA) LLC **Chapter 11**

Debtor(s):

JINZHENG GROUP (USA) LLC	Represented By Zev Shechtman Alphamorlai Lamine Kebeh Danielle R Gabai Damian J. Martinez

Defendant(s):

Betula Lenta Inc	Represented By David M Browne
Betty Zheng	Represented By David M Browne
CBW Global, Inc.	Represented By David M Browne
Jonathan Pae	Represented By David M Browne
David Park	Represented By David M Browne

Plaintiff(s):

JINZHENG GROUP (USA) LLC	Represented By Alphamorlai Lamine Kebeh
JINZHENG GROUP (USA) LLC	Represented By Christopher J Langley Heidi M Cheng Zev Shechtman Damian J. Martinez Runmin Gao Alphamorlai Lamine Kebeh

10:00 AM
2:21-16674 JINZHENG GROUP (USA) LLC **Chapter 11**
Adv#: 2:22-01090 JINZHENG GROUP (USA) LLC et al v. Betula Lenta Inc et al

#101.00 Status Hearing
RE: [1] Adversary case 2:22-ap-01090. Notice of Removal by Creditor Betula Lenta, Inc. of state court action filed by JINZHENG GROUP (USA) LLC. (14 (Recovery of money/property - other)) (Kim, Peter)

FR. 6-14-22; 7-6-22;9-13-22; 11-8-22; 1-10-23; 2-14-23; 5-9-23

Docket 1

Tentative Ruling:

See Cal. No. 1, above, incorporated in full by reference.

Party Information

Debtor(s):

JINZHENG GROUP (USA) LLC	Represented By Christopher J Langley

Defendant(s):

Betula Lenta Inc	Pro Se
Jonathan Pae	Pro Se
David Park	Pro Se

Plaintiff(s):

JINZHENG GROUP (USA) LLC	Represented By Christopher J Langley
JINZHENG GROUP (USA) LLC	Pro Se

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:22-14858 Mylife.com Inc. **Chapter 11**

#102.00 Hearing
RE: [167] Application for Compensation for Leslie A Cohen, Debtor's Attorney, Period: 1/1/2023 to 5/4/2023, Fee: $74,255, Expenses: $563.50.

fr. 6-6-23

Docket 167

Tentative Ruling:

6/6/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the *Second Interim Application of Leslie Cohen Law PC, Attorneys for Debtor, for Allowance of Interim Compensation of Fees and Reimbursement of Expenses* [Bankr. Doc. No. 167] (the "Application"), and no opposition to the Application having been filed, the Court approves the Application and awards the fees and expenses set forth below on an interim basis:

Fees: $74,255.00

Expenses: $563.50

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM

CONT... Mylife.com Inc. **Chapter 11**

Party Information

Debtor(s):

Mylife.com Inc. Represented By
Leslie A Cohen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:22-14858 Mylife.com Inc. **Chapter 11**

#103.00 Hearing
RE: [168] Application for Compensation for Larson LLP, Special Counsel, Period: 1/9/2023 to 5/16/2023, Fee: $227,886.00, Expenses: $12,373.57.

fr. 6-6-23

Docket 168

Tentative Ruling:

6/6/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Fee applicant Larson LLP ("Larson"), the Debtor's special counsel, did not file invoices describing with particularity the services for which it seeks compensation until after the United States Trustee (the "UST") and the United States (the "US") objected to Larson's interim application for compensation (the "Application"). As a result, the UST and the US did not have an opportunity to evaluate the reasonableness of the compensation sought.

A continued hearing on the Application shall take place on **July 12, 2023 at 10:00 a.m.** Any supplemental opposition to the Application shall be filed by no later than **June 28, 2023**. Any supplemental reply in support of the Application shall be filed by no later than **July 5, 2023**.

The Court will prepare and enter an order setting the continued hearing on the Application.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your**

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CONT... Mylife.com Inc. **Chapter 11**

intention to do so. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Mylife.com Inc. Represented By
Leslie A Cohen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:22-14858 Mylife.com Inc. **Chapter 11**

#104.00 Hearing
RE: [165] Motion to Extend Exclusivity Period for Filing a Chapter 11 Plan and Disclosure Statement

fr. 6-6-23

Docket 165

Tentative Ruling:

6/6/2023

See Cal. No. 106, below, incorporated in full by reference.

Party Information

Debtor(s):

Mylife.com Inc. Represented By
Leslie A Cohen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:22-14858 Mylife.com Inc. **Chapter 11**

#105.00 HearingRE: [172] Motion to Reject Lease or Executory Contract Notice of Motion and Motion to Reject Stipulated Order

Docket 172

Tentative Ruling:

6/6/2023

See Cal. No. 106, below, incorporated in full by reference.

Party Information

Debtor(s):

Mylife.com Inc. Represented By
Leslie A Cohen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:22-14858 Mylife.com Inc. **Chapter 11**
Adv#: 2:23-01094 United States Of America v. Mylife.com Inc.

#106.00 Hearing
RE: [19] Motion For Summary Judgment

FR. 5-31-23

Docket 19

Tentative Ruling:

6/6/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, (1) the US is entitled to summary judgment that the US Debt is non-dischargeable, (2) the Debtor's motion to reject the Stipulated Judgment is **DENIED**, and (3) the Debtor's motion for a second extension of the plan exclusivity periods is **GRANTED IN PART** and **DENIED IN PART**.

Pleadings Filed and Reviewed:
1) US Motion for Summary Judgment:
   a) The United States of America's Complaint to Determine that its Debt is Excepted from Discharge Under 11 U.S.C. § 1141(d)(6)(A) [Adv. Doc. No. 1] (the "Complaint")
   b) The United States's Notice of Motion and Motion for Summary Judgment [Adv. Doc. No. 19] (the "MSJ")
      i) The United States's Statement of Uncontroverted Facts and Conclusions of Law [Adv. Doc. No. 20]
      ii) Notice of Hearing on the United States's Motion for Summary Judgment [Adv. Doc. No. 21]
      iii) [Proposed] Judgment for the United States of America [Adv. Doc. No. 25]
   c) Opposition to Plaintiff's Motion for Summary Judgment [Adv. Doc. No. 40]

i) Corrected Amended Statement of Genuine Issues Re: Plaintiff's Motion for Summary Judgment [Adv. Doc. No. 44]

d) The United States of America's Reply in Support of its Motion for Summary Judgment [Adv. Doc. No. 50]

2) Debtor's Motion to Reject Stipulated Judgment:
   a) Motion to Reject Stipulated Order [Bankr. Doc. No. 172]
   b) United States of America's Objection to the Motion to Reject Stipulated Order [Bankr. Doc. No. 179]
   c) Reply in Support of Motion to Reject Stipulated Order [Bankr. Doc. No. 182]
3) Debtor's Motion to Extend Exclusivity:
   a) Motion to Extend Debtor's Exclusive Period to File and Obtain Acceptances of Debtor's Plan Under 11 U.S.C. § 1121(d) [Bankr. Doc. No. 165]
   b) The United States of America's Objection to the Motion to Extend Debtor's Exclusive Period to File and Obtain Acceptances of Debtor's Plan Under 11 U.S.C. § 1121(d) [Bankr. Doc. No. 173]
   c) Reply in Support of Motion to Extend Debtor's Exclusive Period to File and Obtain Acceptances of Debtor's Plan Under 11 U.S.C. § 1121(d) [Bankr. Doc. No. 181]

I. Background

The Debtor filed a voluntary Chapter 11 petition on September 2, 2022 (the "Petition Date"). Jeffrey Tinsley ("Tinsley") is the Debtor's CEO and holds a 49% interest in the Debtor. The Debtor operates a website that allows subscribers to run background checks on individuals.

On July 27, 2020 (prior to the Petition Date), the United States of America (the "US") filed a complaint against the Debtor and Tinsley in the District Court (the "District Court Complaint"), seeking relief for (1) deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45(a), (2) violation of the Telemarketing Sales Rule (the "TSR"), 16 C.F.R. § 310.3(a)(1)–(2), and (3) violation of the Restore Online Shoppers Confidence Act ("ROSCA"), 15 U.S.C. § 8403 (collectively, the "Consumer Protection Statutes"). *See* Case No. 2:20-cv-6692-JFW (Central District of California) (the "District Court Action").

On October 19, 2021, the District Court entered summary judgment in favor of the United States [Complaint, Ex. B] (the "District Court Summary Judgment Order"). In a 17-page decision, the District Court found that the Debtor had violated the

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CONT... Mylife.com Inc. **Chapter 11**

Consumer Protection Statutes by, among other things, (1) maintaining a website that was likely to mislead consumers in violation of § 5 of the FTC Act, (2) violating the TSR by making misleading telemarketing calls to consumers, and (3) violating ROSCA by failing to provide customers simple mechanisms to stop recurring credit-card charges. *See generally* District Court Summary Judgment Order.

On December 15, 2021, the District Court approved a *Stipulated Order for Permanent Injunction and Equitable Monetary Relief* [Complaint, Ex. C] (the "Stipulated Judgment") entered into between the United States, on the one hand, and Tinsley and the Debtor, on the other hand. The Stipulated Judgment provided in relevant part:

> The facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.
>
> The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

Stipulated Judgment at § VIII(B)–(C).

The Stipulated Judgment further stated that "Defendants waive all rights to appeal or otherwise challenge or contest the validity of this Order." *Id.* at "Findings," ¶ 5. It also stated that "Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in their answer to the Complaint." *Id.* at "Findings," ¶ 3.

The Stipulated Judgment entered a monetary judgment of $28,945,968 against the Debtor to be paid to the United States (the "US Debt"), and contained a schedule for payment of the judgment. The Debtor made only two payments under the payment schedule, in the total amount of $3,166,666.66.

On March 6, 2023, the US filed a *Complaint to Determine that its Debt is Excepted from Discharge Under 11 U.S.C. § 1141(d)(6)(A)* [Adv. Doc. No. 1] (the "Complaint") against the Debtor. The Complaint seeks declaratory judgment under 28 U.S.C. § 2201(a) declaring that the Stipulated Judgment is excepted from discharge under §§ 1141(d)(6)(A) and 523(a)(2)(A).

10:00 AM

CONT... Mylife.com Inc. **Chapter 11**

On May 9, 2023, the Court issued a *Memorandum of Decision Denying Debtor's Motion to Dismiss Complaint* [Adv. Doc. No. 43].

Summary of Papers Filed in Connection with the US's Motion for Summary Judgment

The US moves for summary judgment on two alternative grounds. First, the US argues that the District Court Summary Judgment Order precludes the Debtor from contesting the non-dischargeability of the US Debt. Second, the US argues that the Debtor waived its right to a discharge in the Stipulated Judgment, and that the waiver is enforceable.

The Debtor opposes the MSJ. It argues that to the extent the Stipulated Judgment waives the Debtor's right to challenge the dischargeability of the US Debt, the waiver is unenforceable as a violation of public policy. The Debtor further asserts that disputed issues of material fact prevent the entry of summary judgment.

In connection with its opposition to the MSJ, the Debtor filed a motion to reject the Stipulated Judgment pursuant to § 365, on the ground that the payments required under the Stipulated Judgment are burdensome to the estate. The Debtor contends that if the Stipulated Judgment is rejected, the US cannot rely upon the Stipulated Judgment in support of the MSJ.

The US maintains that rejection of the Stipulated Judgment "would be a futile act as it would not alter the US Debt or permit the Debtor to resume harming consumers in violation of the District Court's injunction …." Bankr. Doc. No. 179 at p. 5. The US further asserts that the Stipulated Judgment is not an executory contract, and is therefore not subject to rejection, because the US does not have material ongoing obligations under the Stipulated Judgment.

Summary of Papers Filed in Connection with the Debtor's Motion to Extend Exclusivity

The Debtor moves for an extension of the exclusivity periods for filing and obtaining acceptances of a plan (the "Extension Motion"). On January 10, 2023, the Court extended the Debtor's exclusive period for filing a plan from December 31, 2022 to June 29, 2023, and extended the Debtor's exclusive period for obtaining acceptances of a plan from March 1, 2023 to August 28, 2023. Bankr. Doc. No. 81. The Debtor now moves to extend the exclusive period for filing a plan from June 29, 2023 to March 1, 2024, and moves to extend the exclusive period for obtaining acceptances of a plan from August 28, 2023 to May 1, 2024.

The US opposes the Extension Motion on the ground that it is premature in view of the US's MSJ. The US further argues that the case is not complicated, and that the Debtor has not shown that it is entitled to a further eight-month extension.

II. Discussion

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Civil Rule 56 (made applicable to these proceedings by Bankruptcy Rule 7056). The moving party has the burden of establishing the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is 'material' only if it might affect the outcome of the case[.]" *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (quoting Civil Rule 56(e)). The court is "required to view all facts and draw all reasonable inferences in favor of the nonmoving party" when reviewing the Motion. *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004).

A. The Stipulated Judgment Does Not Contain Conflicting Provisions

The Debtor asserts that the Stipulated Judgment contains conflicting provisions and that accordingly, summary judgment is not appropriate. The Court has reviewed the provisions of the Stipulated Judgment which the Debtor characterizes as being inconsistent, and finds that there is no conflict or inconsistency between those provisions.

The Stipulated Judgment enters a monetary judgment of approximately $29 million against the Debtor (for simplicity, figures used throughout the remainder of Section II.A. are approximate). To incentivize the Debtor to pay the judgment, the Stipulated Judgment provides that if the Debtor makes payments aggregating approximately $16 million by December 31, 2025, the remaining $13 million of indebtedness will be suspended.

The Stipulated Judgment anticipated that the Debtor might not make the payments

set forth in the payment schedule and might instead seek bankruptcy protection—which is in fact what occurred. To address that possibility, the Stipulated Judgment contains the following provision:

> The facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.
>
> The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

Stipulated Judgment at § VIII(B)–(C).

The Stipulated Judgment also contains a finding that "Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in their answer to the Complaint." *Id.* at "Findings," ¶ 3.

The Debtor alleges that the finding that "Defendants neither admit nor deny any of the allegations of the Complaint" is inconsistent with the provision stating that the "facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission …." The Debtor's position is without merit, as the two provisions are easily reconcilable. If the Debtor made the $16 million in payments by December 31, 2025, then the Debtor would be deemed to neither admit nor deny any of the allegations of the Complaint. If, however, the Debtor defaulted on the payment schedule and sought bankruptcy protection, then the facts alleged in the Complaint would be taken as true without further proof in a dischargeability proceeding. The fact that different outcomes apply depending on the action taken by the Debtor does not render the provisions inconsistent.

B. The Stipulated Judgment's Discharge Waiver is Unenforceable

The Ninth Circuit has held that a prepetition waiver of the discharge is unenforceable as a violation of public policy: "This prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive." *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002).

Huang prevents the Court from enforcing the provision of the Stipulated Judgment

waiving the dischargeability of the US Debt. However, the unenforceability of the discharge waiver is ultimately of no assistance to the Debtor, because as explained in greater detail below, the findings made in the District Court Summary Judgment Order establish that the US Debt is non-dischargeable.

Notwithstanding the unenforceability of the discharge waiver, the US and the Debtor were entitled to "stipulate to the underlying facts that support a finding of nondischargeability," *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 655 (B.A.P. 9th Cir. 1998). Therefore, the Stipulated Judgment's provision that the "facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission" remains enforceable. The reasons for this conclusion are more fully discussed in Section II.C.4, below.

C. The Findings Made by the District Court Preclude the Debtor from Contesting the Dischargeability of the US Debt

1. Legal Standard

"The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). Issue preclusion bars relitigation of issues adjudicated in an earlier proceeding if three requirements are met:

1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated;
2) the first proceeding ended with a final judgment on the merits; and
3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.

Frankford Digital Svcs. v. Kistler (In re Reynoso), 477 F.3d 1117, 1122 (9th Cir. 2007).

The findings made in the District Court Summary Judgment Order are entitled to preclusive effect. The Debtor was represented by counsel and defended against the entry of summary judgment against it (element two). After the District Court entered summary judgment in favor of the US, the Debtor and the US executed the Stipulated Judgment, which was a final judgment on the merits (element three). And for the reasons explained below, the findings in the District Court Summary Judgment Order establish that the US is entitled to summary judgment that the US Debt is excepted from the Debtor's discharge pursuant to § 1141(d)(6)(A) and § 523(a)(2)(A).

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Section 1141(d)(6)(A) provides that "the confirmation of a plan does not discharge a debtor that is a corporation from any debt of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit …."

Section 523(a)(2)(A) provides: "A discharge under section 727 … of this title does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

To prevail on a claim for relief under § 523(a)(2)(A), a creditor must show that:

1) the debtor made the representations;
2) that at the time he knew they were false;
3) that he made them with the intention and purpose of deceiving the creditor;
4) that the creditor relied on such representations; and
5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010).

In addition, "[o]mitting critical facts which a debtor has a duty to disclose may lead to a finding of fraud," provided that there is "a duty to disclose." *Daniel v. DelValle (In re Del Valle)*, 577 B.R. 789, 802 (Bankr. C.D. Cal. 2017).

2. The District Court's Findings

Since approximately 2009, the Debtor "has purchased public record data about individuals from data brokers." District Court Summary Judgment Order at p. 3. The Debtor uses that data to create a public profile or listing for these individuals that is accessible through its website. *Id.* Over 60 million of the profiles are flagged with a prominent red banner and a statement that the individual "DOES" have court, arrest, or criminal records. *Id.* at pp. 2–3. "The flags may not be accurate or may not be accurately matched to the profiles on the [Debtor's] website and could refer to anything from a traffic ticket or other minor infraction to a murder conviction. With respect to individuals without a criminal, arrest, or court record flag, [the Debtor] includes statements on those individuals' profiles that the individual 'may have Arrest or Criminal Records' even though [the Debtor] does not believe that to be the case." *Id.* at p. 3.

The purpose of the flags, and the other negative information on the Debtor's

website, is to induce consumers to purchase a subscription from the Debtor:

> The supposedly negative information about individuals available on [the Debtor's] website alarms many people and induces them to subscribe to [the Debtor's] services. Indeed, Defendant Tinsley thought it was "f------ amazing" that so many "flags" came back from the company's data provider during a data dump in 2017, because this negative information about consumers provided "so much opportunity" for the company. Many consumers encounter [the Debtor] for the first time by seeing and becoming upset by their personal information displayed in search engine results and on MyLife.com.

Id.

The design of the Debtor's website is "likely to mislead consumers acting reasonably under the circumstances," because "[i]n effect, [the Debtor] classifies everyone as a criminal or potential criminal for reasons [the Debtor] will not disclose unless and until the consumer purchases a subscription." *Id.* at pp. 10–11. The Debtor knew that the prominent placement of misleading statements on its website would alarm or upset potential customers. It saw this as a positive because it also knew that alarmed individuals were more likely to become subscribers:

> [The Debtor's] website displays prominent red banners on over 60 million individuals' profiles, declaring that the individual "DOES" have "arrest or criminal records" or "court, arrest or criminal records." These banners or "flags" create the deceptive and misleading impression that these individuals have criminal records, even though the flags may not be accurately matched to the profiles on the [Debtor's] website and could refer to anything from a minor non-criminal traffic ticket or other minor infraction to a murder conviction.
>
> Moreover, with respect to the 250 million individuals without a criminal, arrest, or court record "flag" or banner, [the Debtor] includes statements on those individuals' profiles that the individual "may have Arrest or Criminal Records." [The Debtor's] assertion that 250 million people "may" have criminal records or court records creates the misleading and deceptive impression that [the Debtor] has information suggesting that such criminal or court records exist, when, in fact, [the Debtor] has absolutely no information indicating that these individuals have any such records….
>
> Indeed, [the Debtor] recognizes that these derogatory statements about

> consumers are material and induce or entice consumers to purchase [the Debtor's] services. *See* Dietert Decl., Ex. 102, p.3 (Tinsley email stating that it was "f------ amazing" that so many flags came back from LexisNexis during a data dump in 2017 because it provides "so much opportunity" for the company). Moreover, the Government has presented substantial evidence that consumers were in fact misled, distressed, and alarmed that [the Debtor] would declare or insinuate that they had criminal or court records (when many had none) as well as evidence that some consumers purchased [the Debtor's] services to determine the basis for [the Debtor's] representations.

Id. at p. 11.

When potential consumers contacted the Debtor to purchase a subscription to the Debtor's services, the Debtor made false representations by significantly exaggerating the capabilities of its services:

> In its marketing materials, [the Debtor] represents that it "scan[s] the internet for you," that "you'll see all the private information about you that's exposed and sold across the web, and all the places it's available", and that [the Debtor] will "even give you the ability to delete with a single click anything you don't want exposed." Similarly, [the Debtor] represents in phone calls with customers that customers will be able to remove personal information about themselves "from the original source." Although [the Debtor] has a service that assists users with removing information from certain third-party websites (i.e., the service sends a request to the third-party website on the user's behalf), [the Debtor] cannot remove information about users from the public record and admits that it "does not have the ability to *force* third party websites to remove certain information and cannot ultimately control what information such third party websites will actually remove in response to [the Debtor's' efforts to have such information removed."

Id.

When consumers who had purchased a subscription telephoned the Debtor seeking a refund, the Debtor falsely represented that its subscriptions were non-refundable:

> [D]uring these retention calls, agents were instructed to advise customers that [the Debtor's] terms and conditions state that "our subscriptions are non-

refundable." However, it is undisputed that MyLife gives full refunds to customers who are "irate, adamant" or who use so-called "Magic Words," such as "FTC," "Attorney General," "BBB," "lawsuit," and others.

Id. at p. 15.

A significant portion of the subscriptions sold by the Debtor included an "auto-renewal" or "AR" feature:

> When the trial or subscription a consumer purchased ends, the AR feature automatically renews the subscription (or "rolls over" the trial into a full subscription) and re-charges the consumer's credit card—and will continue to do so indefinitely—unless and until the consumer cancels. The AR feature has generated very significant revenue for [the Debtor]. At least in the 2016 time frame, [the Debtor's] call center's "primary intention" when receiving a customer-service call was to keep "AR on."

Id. at p. 5.

The Debtor's customer service agents were "instructed to 'always assume that the caller wants the AR to remain on' and to 'not question the caller about the status of the AR' and to 'not ask if they want AR disabled. Tinsley was aware of and approved of [the Debtor's] practice of not mentioning a customer's autorenwal status." *Id.* at p. 6.

Under the TSR, the Debtor had an obligation to disclose the auto-renewal feature to consumers. *See id.* at p. 11 (District Court's finding that the Debtor's failure to disclose the auto-renewal feature violated the TSR).

The Debtor improperly retained $23,589,762 in subscription revenue by "failing to disclose or misrepresenting its refund policies" and by "failing to disclose all terms and conditions" of the auto-renewal feature. *Id.* at p. 16. As set forth in the Stipulated Judgment, the Debtor's share of the total damages caused by the wrongful conduct described above amount to $28,945,968.

3. The Findings Made in the District Court Summary Judgment Order Establish the Non-Dischargeability of the US Debt

The findings made by the District Court are more than sufficient to establish the non-dischargeability of the US Debt pursuant to § 523(a)(2)(A). The Debtor created a website deliberately designed to alarm potential customers into believing that the

Internet contained information stating that the potential customers were criminals, even though in most cases the Debtor did not believe this to be the case. The purpose of the website was to induce potential customers to purchase a subscription from the Debtor when they would not have otherwise done so. In marketing materials and in telephone conversations with prospective customers, the Debtor made false representations by significantly exaggerating the capabilities of its services. When dissatisfied customers sought refunds, the Debtor falsely represented that its subscriptions were nonrefundable. Finally, by neglecting to inform customers about the auto-renewal feature, as it was required to do by the TSR, the Debtor committed a fraudulent omission.

Consumers sustained damages as a result of the Debtor's misrepresentations and/or fraudulent omissions. The only reason many consumers purchased a subscription is because the Debtor's website contained false and misleading information and the Debtor significantly exaggerated the capabilities of its services. Many consumers who purchased subscriptions incurred unwanted additional charges because they were not properly informed of the auto-renewal feature. The foregoing misconduct damaged consumers in the amount of $28,945,968.

In an attempt to create a genuine dispute as to its liability under § 523(a)(2)(A), the Debtor submits a declaration from Tinsley, its CEO. Tinsley testifies as follows:

> In connection with the conducting of Debtor's business, neither I nor the Debtor knew consumers would be misled by Debtor's practices as described in the Summary Judgment order.
>
> In connection with the conducting of the Debtor's business, neither I nor the Debtor intended for consumers to be misled by Debtor's practices as described in the Summary Judgment order.
>
> To the best of my knowledge, information and belief, the Debtor never gave false information to consumers.
>
> To the best of my knowledge, information and belief, the Debtor never acted with reckless disregard for the truth of information given to customers.

Tinsley Decl. [Adv. Doc. No. 40] at ¶¶ 5–8.

The Supreme Court has held that an affidavit containing conclusory allegations not supported by specific facts is not sufficient to defeat entry of summary judgment:

> The object of this provision [Civil Rule 56(c)] is not to replace conclusory

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> allegations of the complaint or answer with conclusory allegations of an affidavit…. Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888–89 (1990).

The Ninth Circuit has similarly held that an affidavit containing only vague assertions cannot defeat entry of summary judgment. In *Sullivan v. Dollar Tree Stores*, 623 F.3d 770, 779 (9th Cir. 2010), the parties disputed whether Dollar Tree was a "successor in interest" to Factory 2-U under the Family and Medical Leave Act of 1993. *Sullivan*, 623 F.3d at 770. Critical to adjudication of the successor in interest issue was a finding as to how many personnel employed at Factory 2-U had continued to work for Dollar Tree. The court held that Plaintiff's testimony that "[m]ost of the same personnel continued to work when Dollar Tree took Factory 2-U over at my store" was too vague to create a genuine dispute as to a material fact, where Dollar Tree had provided detailed factual assertions about which employees it hired and for what purposes. *Id.* at 779.

Where, as here, the District Court has made specific findings that the Debtor (1) created a misleading website to induce consumers to purchase its services, (2) made false statements regarding the capabilities of its services in its marketing materials, and (3) fraudulently omitted information it was required to disclose to consumers regarding its auto-renewal policies, the conclusory statements set forth in the Tinsley Declaration are insufficient to create a genuine dispute of material fact.

4. The Factual Admissions Made by the Debtor in the Stipulated Judgment Further Establish the Non-Dischargeability of the US Debt

Although the findings made in the District Court Summary Judgment Order are, standing alone, sufficient to establish the non-dischargeability of the US Debt, the non-dischargeability of that debt is further established by the Debtor's admissions in the Stipulated Judgment. Before explaining why that is the case, the Court must first examine the circumstances under which it is appropriate to rely upon stipulated admissions as a basis for a finding of non-dischargeability.

As discussed above, *In re Huang* established that a debtor's blanket pre-petition waiver of a debt's dischargeability is unenforceable as against public policy. But *Huang* did not address the extent to which a Bankruptcy Court may rely upon a

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debtor's pre-petition stipulated admissions in determining the dischargeability of a debt, where the pre-petition admissions have clearly been drafted for the purpose of insulating the debt from discharge. Put plainly, if a debtor signs a pre-petition stipulated judgment admitting to specific facts which clearly show that the indebtedness at issue was obtained by fraud, may the admissions be used as the basis for a non-dischargeability finding in the debtor's bankruptcy case?

The concern is that such pre-petition admissions are nothing more than a clever method to circumvent *Huang*'s bar on pre-petition discharge waivers. It was on the basis of this concern that the court in *Wank v. Gordon (In re Wank)*, 505 B.R. 878 (BAP 9th Cir. 2014) found that it was improper for the Bankruptcy Court to have relied upon admissions contained in a debtor's pre-petition declaration to find that the debt at issue was non-dischargeable. The *Wank* court found that it was necessary to view the debtor's pre-petition admissions "with great skepticism" given the debtor's subsequent testimony that he had made the admissions while under duress and while under the influence of anxiety medication. *Wank*, 505 B.R. at 884. The pre-petition admissions were further clouded by the fact that they were not incorporated into a stipulated judgment, but instead were contained in a declaration that had been "sealed by the parties and deposited with an escrow company, only to be opened if [the debtor] filed a bankruptcy petition …." *Id.* at 891.

However, under appropriate circumstances, a Bankruptcy Court may rely upon pre-petition admissions to support a finding of non-dischargeability. For example, in *Yang v. Fund Mgmt. Int'l, LLC*, 847 F. App'x 419, 421 (9th Cir. 2021), the court determined that a stipulated state court judgment established the non-dischargeability of the debt. The court reasoned that the "parties intended for the state court judgment to bind them in subsequent proceedings." *Id.* It further noted that "when 'the parties stipulate[ ] to the underlying facts that support a finding of nondischargeability, [a] Stipulated Judgment would then be entitled to collateral estoppel application.'" *Id.* (citing *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 655 (B.A.P. 9th Cir. 1998)).

Here, it is appropriate for the Court to give preclusive effect to the facts that the Debtor admitted to in the Stipulated Judgment. The Stipulated Judgment was entered only after the District Court issued the Summary Judgment Order, which found that the Debtor was liable for most of the misconduct alleged in the complaint. Like the debtor in *Yang*, when entering the Stipulated Judgment, the Debtor clearly evinced an intent to be bound by its provisions in subsequent proceedings. *See* Stipulated Judgment at § VIII.B ("The facts alleged in the Complaint shall be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the

Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case."). The Debtor was not forced to execute the Stipulated Judgment and obtained various benefits from doing so—including the possibility of a suspension of up to $13 million of damages for which it had already been found liable in the District Court Summary Judgment Order.

The allegations in the District Court Complaint, which the Debtor has stipulated as true for purposes of this proceeding, establish the non-dischargeability of the US Debt. According to the District Court Complaint, the Debtor's website contained misleading statements which induced users to purchase subscriptions to the Debtor's services. District Court Complaint at ¶ 29. In addition, the Debtor made outbound telemarketing calls in which it "made materially misleading deceptive statements and omissions, including about the benefits of a subscription and about [the Debtor's] cancellation and refund policies and practices." *Id.* at ¶ 30. When users contacted the Debtor to cancel their subscriptions, the Debtor's agents "made misleading and deceptive statements and omissions to the callers, including false statements about the ease with which subscribers could cancel their subscriptions, the existence of an automatic-renewal feature, and the availability of refunds. During calls with [the Debtor's] customer-service agents, subscribers who tried to cancel their premium subscriptions have faced intense pressure to renew their subscriptions or were simply not permitted to cancel their subscriptions or to obtain refunds." *Id.* at ¶ 36. All of the foregoing misconduct was "willful and knowing." *Id.* at ¶ 50. This misconduct caused consumers to suffer "substantial injury" and resulted in the Debtor's unjust enrichment. *Id.* at ¶ 73.

D. The Debtor's Motion to Reject the Stipulated Judgment is Denied

Section 365(a) provides that the Debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." A contract is executory if "the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other." *Marcus & Millichap, Inc. v. Munple, Ltd. (In re Munple, Ltd.)*, 868 F.2d 1129, 1130 (9th Cir. 1989).

The Stipulated Judgment is *not* an executory contract. It is true that the Stipulated Judgment requires the US to refrain from enforcing the Stipulated Judgment if the Debtor makes the payments required thereunder. However, this aspect of the Stipulated Judgment is more appropriately characterized as a condition, as opposed to

an obligation that could give rise to a material breach if left unperformed. As explained in *Enterprise Energy Corp. v. U.S. (In re Columbia Gas Sys. Inc.),* 50 F.3d 233, 241 (3d Cir. 1995), "if the remaining obligations in the contract are mere conditions, not duties, then the contract cannot be executory for purposes of § 365 because no material breach could occur." The requirement that the US forebear from enforcing the Stipulated Judgment if the Debtor timely made the required payments is a condition, not an obligation or duty, because there would be no reason for the US to enforce the Stipulated Judgment if it were timely receiving payments.

It is also true that the Stipulated Judgment requires the US to reconvey to property to Tinsley if Tinsley makes certain payments. The fact that the Stipulated Judgment contains unperformed obligations *as to Tinsley* does not render the Stipulated Judgment executory as to the Debtor.

Because the Stipulated Judgment is *not* an executory contract, it is not subject to assumption or rejection under § 365. Accordingly, the Debtor's motion to reject the Stipulated Judgment is **DENIED**.

E. The Debtor's Motion to Extend Exclusivity is Granted in Part

Section 1121(b) gives the Debtor the exclusive right to file a plan during the first 120 days after the date of the order for relief. Section 1121(d) permits the Court to reduce or increase the exclusivity period "for cause." Section 1121 provides the bankruptcy court with "maximum flexibility to suit various types of reorganization proceedings." *In re Public Service Company of New Hampshire*, 88 B.R. 521, 534 (Bankr. D.N.H. 1988). In determining whether "cause" exists for purposes of § 1121(d), the Court has discretion to consider "[a] variety of matters." *Off. Comm. of Unsecured Creditors v. Henry Mayo Newhall Mem'l Hosp. (In re Henry Mayo Newhall Mem'l Hosp.)*, 282 B.R. 444, 452 (B.A.P. 9th Cir. 2002). In *Henry Mayo Newhall*, exclusivity was extended in a situation involving "(1) a first extension; (2) in a complicated case; (3) that had not been pending for a long time, relative to its size and complexity; (4) in which the debtor did not appear to be proceeding in bad faith; (5) had improved operating revenues so that it was paying current expenses; (6) had shown a reasonable prospect for filing a viable plan; (7) was making satisfactory progress negotiating with key creditors; (8) did not appear to be seeking an extension of exclusivity to pressure creditors; and (9) was not depriving the Committee of material or relevant information." *Id.*

The Court has already extended the Debtor's exclusivity periods by approximately six months. The Debtor now requests a further extension of approximately eight

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months. The Court finds that the Debtor has not shown cause for such a lengthy extension. Although this case is more complicated than many Chapter 11 cases filed by individuals, it is not particularly complicated when compared to cases filed by corporations (factor two). There is no indication that the Debtor's revenues have materially improved (factor three). The Debtor has not made any meaningful progress in negotiating with the US, its largest creditor (factor seven).

However, given the significance of the ruling that the US Debt is non-dischargeable, the Court does find a short extension of exclusivity to be appropriate. The exclusive period for the Debtor to file a plan is extended from June 29, 2023 to and including **September 30, 2023**. The exclusive period for the Debtor to obtain acceptances of a plan is extended from August 28, 2023 to and including **November 30, 2023**.

III. Conclusion

Based upon the foregoing, (1) the US is entitled to summary judgment that the US Debt is non-dischargeable, (2) the Debtor's motion to reject the Stipulated Judgment is **DENIED**, and (3) the Debtor's motion for a second extension of the plan exclusivity periods is **GRANTED IN PART** and **DENIED IN PART**.

The US shall submit a proposed order granting the MSJ and a proposed judgment. The Debtor shall submit proposed orders on the (1) motion to reject the Stipulated Judgment and the (2) motion to extend the Debtor's plan exclusivity periods.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Mylife.com Inc. Represented By
Leslie A Cohen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM

CONT... Mylife.com Inc. **Chapter 11**

Defendant(s):

Mylife.com Inc. Represented By
Leslie A Cohen

Plaintiff(s):

United States Of America Represented By
Leah Victoria Lerman
Christopher VanDeusen

United States Bankruptcy Court
Central District of California
Los Angeles
Ernest Robles, Presiding
Courtroom 1568 Calendar

Wednesday, June 7, 2023 **Hearing Room 1568**

10:00 AM
2:23-11291 Jae Paul Pak **Chapter 11**
Adv#: 2:23-01115 Rassman v. Pak

#107.00 Hearing
RE: [7] Motion to Dismiss Complaint to Determine Nondischargeability of Debt Under 11 U.S.C. Sections 523(a)(4) and (a)(6)

Docket 7
***** VACATED *** REASON: PER ORDER ENTERED 6-2-23**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Jae Paul Pak	Represented By Jeffrey I Golden Beth Gaschen Sonja Hourany

Defendant(s):

Jae Paul Pak	Represented By Jeffrey I Golden

Plaintiff(s):

William Rassman	Represented By Caroline Djang

Trustee(s):

Susan K Seflin (TR)	Pro Se

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2:22-13500 Moussa Moradieh Kashani **Chapter 11**

#200.00 Hearing
RE: [220] Motion for order confirming chapter 11 plan First Amended Plan of Reorganization Proposed by Debtor Moussa Moredieh Kashani

fr. 5-31-23

Docket 220

Tentative Ruling:

5/30/2023

Note: Parties may appear at the hearing either in-person or by telephone. The use of face masks in the courtroom is optional. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Confirmation Motion is **DENIED**. As the Debtor has failed to obtain confirmation of the Amended Plan by May 31, 2023, pursuant to the *Order: (1) Denying Without Prejudice Motions to Convert or Dismiss Chapter 11 Case and (2) Fixing May 31, 2023 as the Deadline for the Debtor to Obtain an Order Confirming a Plan* [Doc. No. 119], the case is hereby converted to Chapter 7 without further notice or hearing.

Pleadings Filed and Reviewed:

1) Memorandum in Support of Confirmation of First Amended Plan of Reorganization Proposed Under Chapter 11 of the Bankruptcy Code [Doc. No. 234] (the "Confirmation Motion")
   a) Order: (1) Finding that the Amended Disclosure Statement Contains Adequate Information and (2) Setting Dates Pertaining to Plan Confirmation [Doc. No. 207]
   b) First Amended Plan of Reorganization Proposed by Debtor Moussa Moredieh Kashani [Doc. No. 213] (the "Amended Plan")
   c) First Amended Disclosure Statement Describing Debtor's Chapter 11 Plan of Reorganization [Doc. No. 214] (the "Amended Disclosure Statement")

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CONT... Moussa Moradieh Kashani **Chapter 11**

d) Solicitation Package for the Amended Plan [Doc. No. 215]
e) Notice of Hearing on Confirmation of the Amended Plan [Doc. No. 216]
f) Proof of Service of Solicitation Package for the Amended Plan [Doc. No. 218]

2) Wilshire House Association's Objection to the Amended Plan [Doc. No. 235] (the "HOA Opposition")
3) JPMorgan Chase Bank, N.A.'s Objection to the Amended Plan [Doc. No. 236] (the "Chase Opposition")
   a) Notice of Withdrawal of the Chase Opposition [Doc. No. 254]
4) PNC Bank, N.A.'s Objection to the Amended Plan [Doc. No. 237] (the "PNC Opposition")
   a) Notice of Withdrawal of the PNC Opposition [Doc. No. 253]
5) U.S. Bank, N.A.'s Objection to the Amended Plan [Doc. No. 238] (the "US Bank Opposition")
6) Hankey Capital, LLC's Objection to the Amended Plan [Doc. No. 239] (the "Hankey Opposition")
7) City National Bank's Objection to the Amended Plan [Doc. No. 242] (the "City Opposition", and together with the HOA Opposition, the Chase Opposition, the PNC Opposition, the US Bank Opposition, and the Hankey Opposition, collectively, the "Oppositions")
8) Debtor's Omnibus Reply to the Oppositions [Doc. No. 246] (the "Reply")

I. Facts and Summary of Pleadings

Debtor and Debtor-in-Possession, Moussa Moradieh Kashani (the "Debtor"), filed a voluntary Chapter 11 case on June 24, 2022 (the "Petition Date"). The Debtor previously filed a Chapter 11 case in 1991, Case No. 1:91-bk-92891-GM. The Debtor filed a second Chapter 11 case on October 15, 2010, Case No. 2:10- bk-54460-ER (the "First Case"). A plan of reorganization was confirmed in the First Case on October 9, 2013 (the "First Plan"). No discharge has been entered in the First Case, nor has the First Case been dismissed or converted. The Debtor now seeks confirmation of the Amended Plan.

Pursuant to the *Order: (1) Denying Without Prejudice Motions to Convert or Dismiss Chapter 11 Case and (2) Fixing May 31, 2023 as the Deadline for the Debtor to Obtain an Order Confirming a Plan* [Doc. No. 119], May 31, 2023 is fixed as the deadline for the Debtor to obtain an order confirming the Amended Plan (the "Confirmation Deadline"). As set forth in the Court's order, the Confirmation Deadline "will not be extended absent exceptionally compelling circumstances." If the

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Confirmation Deadline is not met, the case will be converted to Chapter 7 without further notice or hearing.

Summary of the Amended Plan

The Amended Plan's classification structure, and the treatment of each class under the Amended Plan, is set forth in the following table:

Class	Description	Impaired	Entitled to Vote	Estimated Recovery	Treatment
N/A	Administrative Expenses	N/A	N/A	N/A	Administrative expenses total approximately $635,551.69. Depending on the claimant, administrative expenses will be paid (a) in full on the Effective Date; or (b) paid in full on the later of the Effective Date and the date the Court enters an order allowing such fees.
1	Chase/PNC (10601Wilshire, Unit 1601)	Unimpaired	No	100%	N/A
2	Wilshire House HOA (10601Wilshire, Unit 1601)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.
3	BNY Mellon/Shellpoint (10601Wilshire, Unit 501)	Impaired	Yes	100%	Monetary defaults added to principal balance and loan reinstated.

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4	Wilshire House HOA (10601Wilshire, Unit 501)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.
5	US Bank/Nationstar (10601Wilshire, Unit 602)	Impaired	Yes	100%	Monetary defaults added to principal balance and loan reinstated.
6	Wilshire House HOA (10601Wilshire, Unit 602)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.

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7	Deutsche/Select (10445 Wilshire, Unit 904)	Impaired	Yes	100%	Monetary defaults added to principal balance and loan reinstated. The note will be modified as follows: (i) the amount of the note will be altered to include all monetary defaults, accrued and unpaid interest and reasonable fees and other charges; (ii) the maturity date of the loan shall be extended to August 1, 2045; (iii) the interest rate on the note shall be fixed at 5.5%; and (iv) the allowed amount of the note shall be amortized over 30 years at the fixed interest rate of 5.5% with a balloon payment for the balance due on August 1, 2045.
8	Grand Homeowners HOA (10445 Wilshire, Unit 904)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.

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9	Chase (10550 Wilshire, Unit 1204)	Impaired	Yes	100%	Monetary defaults added to principal balance and loan reinstated. The note will be modified as follows: (i) 2.81% fixed interest rate; (ii) loan term for 180 months; (iii) P&I monthly payment of $2,022.49; and (iv) escrowed monthly real property taxes.
10	Wilshire Thayer HOA (10550 Wilshire, Unit 1204)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.
11	Dardashti (10550 Wilshire, Unit 1204)	Impaired	Yes	100%	Monthly Payment: $2,894 over 6 years and a balloon payment of $451,068.22.
12	Wells Fargo/Select (10724 Wilshire, Unit 704)	Impaired	Yes	100%	Contractual loan arrears will be deferred as a non-interest-bearing balloon payment on the maturity date.
13	Park Wilshire HOA (10724 Wilshire, Unit 704)	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.

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14	Azadegan Judgment	Impaired	Yes	100%	Claimant shall receive 28 equal Quarterly Plan Payments.
15	Chase – 2020 Jaguar XE S	Unimpaired	No	100%	N/A
16	BofA – 2007 Mercedes Benz SL550	Impaired	Yes	100%	Claimant shall receive 4 equal Quarterly Plan Payments.
17	Franchise Tax Board	Unimpaired	No	100%	N/A
18	Other Secured Claims	Unimpaired	No	100%	N/A
19	General Unsecured Claims	Impaired	Yes	100%	On the Effective Date, each Holder of an Allowed General Unsecured Claim shall receive, up to the full amount of such Holder's Allowed General Unsecured Claim, its respective portion of 40 Quarterly Plan Payments, which shall be distributed Pro Rata among the Holders of the Allowed General Unsecured Claims.

20	Interest of the Debtor	Unimpaired	No	The Debtor shall retain his interests.	N/A

Per the Reply, Classes 2, 3, 4, 6, 8, 10, 13, 16, and 19, which are impaired, have voted to reject the Amended Plan. Due to settlement negotiations, Classes 1, 7, 9, and 12 have changed their dissenting votes to accepting votes in favor of the Amended Plan. The Debtor anticipates that Class 5 will change its dissenting vote to an accepting vote before the hearing on the Confirmation Motion.

The Debtor owns six personal residential condominiums (collectively, the "Personal Properties"). In addition, the Debtor owns equity interests in eleven entities (collectively, the "Non-Debtor Entities") that own income producing commercial properties (collectively, the "Non-Debtor Properties").

The Amended Plan will be funded by contributions from the Non-Debtor Entities. Per the Confirmation Motion, four of the Non-Debtor Properties are in escrow for a total of approximately $36 million (collectively, the "Pending Sales"). Additional Non-Debtor Properties are currently being marketed for sale or refinancing. The proceeds of the Pending Sales will be used to satisfy/reduce blanket liens against those properties, which will free up cash flow on the remaining retained Non-Debtor Properties. The net proceeds of the Pending Sales/refinancings (after the payment of the blanket liens) will be used to fund the Amended Plan.

Additionally, the Plan will be funded by the rental revenues generated from the retained Non-Debtor Properties. Per the Amended Disclosure Statement, prior to the sale of any of the Non-Debtor Properties, the Non-Debtor Entities are projected to provide the Debtor with an average monthly income of $133,842.18. The Debtor also reserves the right, in his sole and absolute discretion, to sell or lease any of the Personal Properties.

The Oppositions

The HOA Opposition & The Debtor's Reply

Wilshire House Association (the "HOA") asserts that the Amended Plan cannot be confirmed for the following reasons **[Note 1]**:

1. The Amended Plan is infeasible and neither fair nor equitable because the

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Debtor is in default of the post-petition HOA dues and the Special Assessments and the Debtor proposes paying the HOA over a seven-year period.

2. The Amended Plan was filed in bad faith because this is the Debtor's third bankruptcy filing, the second of which is admittedly in default. The Amended Plan is an improper modification of the First Plan. The Amended Plan does not address how and why the Debtor defaulted under the First Plan.
3. The Amended Plan is vague and ambiguous and does not provide adequate information, including the exact amount of funds to be contributed by the Non-Debtor Entities, and whether there are any restrictions on the use of such funds.

Per the Reply, the Amended Plan is feasible, fair and equitable, and neither vague nor ambiguous with respect to the HOA. The Amended Plan provides that the Special Assessments will be paid on the Effective Date. The Debtor believes he is current on all monthly dues owed to the HOA.

The Amended Plan is feasible because the Debtor will have sufficient funds to make all Effective Date payments and the monthly payments due under the Amended Plan. The proceeds from the Pending Sales, cash flow, and funds from refinancing remaining Non-Debtor Properties will fund the Amended Plan. In addition, the Amended Plan provides that the Debtor will either rent or sell Unit 501 and Unit 704. If necessary, the Debtor will also rent or sell other Personal Properties. The Debtor contends that funding is not speculative because the Pending Sales are well underway and the Debtor is also negotiating additional sales and refinancings of the remaining Non-Debtor Properties.

The Debtor contends that the Amended Plan is proposed in good faith because he has complied with all orders of the Court and all claimants will receive more under the Amended Plan than they would in a Chapter 7 liquidation.

The US Bank Opposition & The Debtor's Reply

U.S. Bank, N.A. ("US Bank") asserts that the Amended Plan cannot be confirmed for the following reasons:

1. The Amended Plan is ambiguous with respect to US Bank's claim, including whether the arrears will be capitalized or the claim shall remain unaltered.
2. The Debtor contends that it will object to US Bank's claim but has yet to do

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so. However, without an adjudication of US Bank's claim, it is not possible to fully evaluate the feasibility of the Amended Plan.

3. The Amended Plan is infeasible and not proposed in good faith. The Debtor could reopen the First Case and modify the First Plan, however, that would require good faith negotiations with creditors because of the substantial defaults under the First Plan. Therefore, the Amended Plan seeks to modify the terms of the First Plan in bad faith.
4. Contrary to the Amended Plan's language, as the Debtor is an individual and is currently operating under the First Plan, the Debtor is not entitled to a discharge upon confirmation.

Per the Reply, the Debtor contends that settlement discussions with US Bank are ongoing.

The Hankey Opposition & The Debtor's Reply

Hankey Capital, LLC ("Hankey") asserts that the Amended Plan cannot be confirmed for the following reasons:

1. The Amended Plan is ambiguous with respect to (i) Class 19, including when the first payment is to be made and whether general unsecured creditors will receive both 100% of their claims and interest (if it is not 100%, then the Amended Plan violates the absolute priority rule); (ii) the Personal Properties and their use in funding the Amended Plan; (iii) the Pending Sales and the unknown amount of net proceeds; and (iv) what impact the Pending Sales, which generate over half of the net income of the Debtor, and the resulting loss of rental income will have on the ability to fund the Amended Plan.
2. The Debtor's Chapter 7 liquidation analysis contained in the Confirmation Motion is flawed because it does not take into account the Debtor's interests in the Non-Debtor Entities. Therefore, the Debtor has not established that the Amended Plan is in the best interests of general unsecured creditors.
3. The Amended Plan is infeasible. The Debtor's estimate of total general unsecured claims (Class 19), which is $300,000.00–$1,226,186.00, does not include the amount of Hankey's amended claim. The Pending Sales will eliminate over half of the Debtor's projected income generated from the Non-Debtor Entities used to fund the Amended Plan. Moreover, the Debtor has not provided any evidence as to the amount of net proceeds from the Pending

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Sales that will be available to fund the Amended Plan.

4. The Amended Plan's provision relating to the automatic disallowance of amended claims after the bar date is contrary to the Bankruptcy Code.

Per the Reply, the Debtor intends to file a modification to the Amended Plan to correct certain errors identified by Hankey. The Debtor confirms that Class 19 will receive 100% of their allowed unsecured claims. Additionally, the Debtor failed to include Hankey's amended claim and, therefore, Class 19 ranges from $426,000.00 to $2,226,000.00.

According to the Debtor, the net proceeds of the Pending Sales and the refinancing of the remaining Non-Debtor Properties, which is currently being negotiated, cannot be ascertained with certainty at this time. The net proceeds are unknown until the sales and refinancing are completed and closed, the liabilities of the applicable Non-Debtor Entities settled, and the taxable income determined and paid.

The Debtor argues that the Chapter 7 liquidation analysis is accurate and the Amended Plan does satisfy the best interests test because the Debtor has a junior interest in the Non-Debtor Entities. Senior creditors of the Non-Debtor Entities need to be paid before the Debtor receives any distribution on account of his interest in the Non-Debtor Entities. Hankey's argument fails to take the senior claims of creditors of the Non-Debtor Entities, which are significant, into consideration. Additionally, Hankey provides no contradictory evidence of value of the Debtor's interests in the Non-Debtor Entities. Therefore, the value of the Debtor's interests in the Non-Debtor Entities is $0.00 and general unsecured creditors would receive no distribution in a Chapter 7 context.

The Non-Debtor Properties are encumbered by blanket deeds of trust in favor of (a) Lone Oak Fund ("Lone Oak") in the approximate amount of $45,185,000; and (b) RTI Properties, Inc ("RTI") in the approximate amount of $6,000,000 (collectively, the "Senior Blanket Liens"). The Non-Debtor Property owned by Commonwealth Properties, a Non-Debtor Entity, is encumbered by an $8 million lien. The Non-Debtor Properties subject to the lien of Lone Oak are being managed by a receiver. A foreclosure proceeding was instituted by RTI, although it has been continued as the parties work to market and sell/refinance the assets. The Debtor further notes that the Non-Debtor Entities have additional liabilities that need to be satisfied and that there will be closing costs associated with the Pending Sales and refinancings.

The City Opposition & The Debtor's Reply

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City National Bank ("City") asserts that the Amended Plan cannot be confirmed for the following reasons:

1. The Amended Plan is not proposed in good faith. The Debtor has not and will not commit to monetize the Personal Properties. As the Debtor is attempting to modify City's treatment under the First Plan, the Debtor must provide evidence that he suffered real losses from lack of rental payments and that he was unable to make payments under the First Plan. However, while defaulting under the First Plan, the Debtor found income to fund purchases and payments on non-essential luxury vehicles.
2. The Amended Plan is not in the best interests of general unsecured creditors because the updated liquidation analysis is flawed. The liquidation analysis includes inflated Chapter 7 administrative costs and provides no evidence of the Personal Properties' equity/value.

Per the Reply, the Debtor reaffirms his intention to file an objection to City's claim. The Debtor contends that the Amended Plan was filed in good faith and satisfies the best interests test because Class 19 will be paid 100%, plus interest, on their allowed unsecured claims.

The Chase Opposition & The Debtor's Reply

JPMorgan Chase Bank, N.A. ("Chase") asserts that the Amended Plan cannot be confirmed because the Amended Plan does not completely adhere to the language regarding the treatment of Chase's claim that the Debtor and Chase had previously agreed upon.

Per the Reply, a settlement has been reached with Chase and the Chase Opposition has been withdrawn.

The PNC Opposition & The Debtor's Reply

PNC Bank, N.A. ("PNC") asserts that the Amended Plan cannot be confirmed because the Amended Plan is ambiguous as to PNC's claim, including the amount of the arrears to be cured.

Per the Reply, a settlement has been reached with PNC and the PNC Opposition has been withdrawn.

The Reply

Per the Reply, the Debtor asserts that the Amended Plan should be confirmed over the Oppositions for the above-stated reasons. In the alternative, the Debtor requests that the Confirmation Deadline be extended to at least June 30, 2023 so that the Pending Sales, which are being held up by negotiations with the secured creditors of the Non-Debtor Properties, may close and the additional sales/refinancing of the remaining Non-Debtor Properties may advance.

II. Findings of Fact and Conclusions of Law

For the reasons stated below, the Confirmation Motion is DENIED.

A. The Amended Plan is Not Feasible as Required by § 1129(a)(11)

Section 1129(a)(11), known as the "feasibility requirement," requires the Court to find that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."

"The purpose of section 1129(a)(11) is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation." *Pizza of Hawaii, Inc. v. Shakey's Inc. (Matter of Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1382 (9th Cir. 1985). To satisfy the feasibility requirement, the Debtor must present "evidence to demonstrate that the Plan has a reasonable probability of success." *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1364 (9th Cir. 1986). "The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan of reorganization can be performed. However, where the financial realities do not accord with the proponent's projections or where the projections are unreasonable, the plan should not be confirmed…. 'The inquiry is on the viability of the reorganized debtor, and its ability to meet its future obligations, both as provided for in the plan and as may be incurred in operations.' 'In this respect, section 1129(a)(11) requires the plan proponent to show concrete evidence of a sufficient cash flow to fund and maintain both its operations and obligations under the plan.'" *In re Sagewood Manor Assocs. Ltd. P'ship*, 223 B.R. 756, 762 (Bankr. D. Nev. 1998) (internal citations omitted). "Feasibility is the heart of every Chapter 11 reorganization case. It is the most important element of § 1129(a)." *In re Linda Vista Cinemas, L.L.C.*, 442 B.R. 724, 737 (Bankr. D. Ariz. 2010).

For the reasons outlined below, the Debtor has failed to carry his burden of

demonstrating that the Amended Plan is feasible. Therefore, the Court finds that the Amended Plan does not satisfy § 1129(a)(11).

i. Absence of Critical Financial Information

The Amended Plan will be funded by contributions from the Non-Debtor Entities. Per the Confirmation Motion, four of the Non-Debtor Properties are in escrow for a total of approximately $36 million. Additional Non-Debtor Properties are currently being marketed for sale or refinancing. The proceeds of the Pending Sales will be used to satisfy/reduce the Senior Blanket Liens, which will free up cash flow on the remaining retained Non-Debtor Properties. The net proceeds of the Pending Sales/refinancings (after the payment of the Senior Blanket Liens) will be used to fund the Amended Plan.

In the Reply, the Debtor provides a first glimpse into the Non-Debtor Properties' secured debt, which the Debtor himself characterizes as significant. The Non-Debtor Properties are encumbered by the Senior Blanket Liens in the approximate amount of $51.2 million. An additional Non-Debtor Property is encumbered by an $8 million lien. The Debtor further notes that the Non-Debtor Entities have other liabilities that need to be satisfied and that there will be closing costs associated with the Pending Sales and refinancings.

Per the Reply, the net proceeds of the Pending Sales and the refinancing of the remaining Non-Debtor Properties, which are currently being negotiated, cannot be ascertained with reasonable certainty at this time. The net proceeds are unknown until the sales/refinancing are completed and closed, the liabilities of the applicable Non-Debtor Entities settled, and the taxable income determined and paid. As the Debtor's interest is junior to senior secured interests in the Non-Debtor Properties, such creditors must be paid before the Debtor receives any distribution.

Additionally, the Debtor notes that the Non-Debtor Properties subject to the lien of Lone Oak are being managed by a receiver. A foreclosure proceeding was also instituted by RTI, although it has been continued as the parties work to market and sell/refinance the assets.

The Amended Plan will also be funded by the rental revenues generated from the retained Non-Debtor Properties. Per the Amended Disclosure Statement, prior to the sale of any of the Non-Debtor Properties, the Non-Debtor Entities are projected to provide the Debtor with an average monthly income of $133,842.18. The Debtor also reserves the right, in his sole and absolute discretion, to sell or lease any of the Personal Properties.

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The Courts notes that, as the Oppositions point out, the Amended Plan is severely wanting in critical information related to the validity and feasibility of the Debtor's financial projections. In fact, the pleadings provided raise more questions than answers. Most critical is the lack of any substantive information related to the Pending Sales, which are supposedly a major funding source of the Amended Plan. However, given the Senior Blanket Liens, is there any equity remaining in the Non-Debtor Properties and, if so, how much? After reviewing the information disclosed in the Reply related to the Senior Blanket Liens, the Court is concerned as to the amount of equity remaining in the Non-Debtor Properties and their ability to realize funds for payments under the Amended Plan. Relatedly, what are the projected net proceeds of the Pending Sales/refinancings, after all necessary payments are made (*e.g.*, the Senior Blanket Liens), that will be available to fund the Amended Plan? Excluding those properties involved in the Pending Sales, which account for over half of the projected net income of the Debtor, what is the projected monthly income generated from the retained Non-Debtor Properties to be used to fund the Amended Plan? What are the terms in the potential refinancings of the Non-Debtor Properties? What information is available regarding the purchaser involved in the Pending Sales? What are the tax implications with respect to the Pending Sales and the resulting effect on the net proceeds available to fund the Amended Plan?

At this stage of confirmation, the Debtor bears the burden of proof with respect to feasibility of the Amended Plan. Given the extent of the estate and its creditors and the failure of the First Plan, the Debtor must provide detailed projections and financial figures supported by admissible evidence. The Court notes that the Debtor's declarations attached to the Confirmation Motion and the Amended Disclosure Statement do not include any attestation with respect to the accuracy or formulation of the financial projections provided in the Amended Plan. Who prepared the financial projections? Without the above information, the Court notes a serious concern regarding the unknown extent of the benefit of the Pending Sales to the estate and/or whether the Pending Sales are illusory. During the pendency of the instant case, which has been open for almost one year, the Debtor has had the ability to answer the vast series of questions highlighted above, however, he failed to do so. Therefore, the Court finds that the Debtor has failed to meet his burden of proof with respect to feasibility.

Lastly, the Court notes that the Amended Plan does not contain any estimate of the quarterly payments to be made to Class 19's general unsecured creditors. Also, the fact that the Non-Debtor Properties subject to the lien of Lone Oak are being managed

under a receivership further calls into question the feasibility of the Amended Plan.

In the absence of critical, concrete information related to the financials of the Debtor noted above, the Court is unable to determine whether the Debtor is likely to be able to fulfill his financial obligations under the Amended Plan. Therefore, the Amended Plan infeasible.

ii. Substantial Similarity to the First Plan

At the time the First Plan was confirmed, the Debtor owed arrearages ranging from between approximately $25,000 to $130,000 to certain of the lenders holding claims secured by the Personal Properties. The First Plan required the Debtor to make monthly payments over a five-year period to these secured lenders to cure the arrearages. In addition to these cure payments, the Debtor was also required to make monthly payments to the lenders until the maturity date of their loans.

On May 3, 2016, the Debtor filed a motion for entry of a final decree and an order closing the First Case. On June 1, 2016, the Court granted the Debtor's motion for entry of a final decree, but denied the Debtor's request for entry of a discharge because not all payments required under the First Plan had been made. To date, no discharge has been entered in the First Case.

The Debtor is admittedly in default under the First Plan. In lieu of seeking to modify the First Plan, the Debtor filed the instant bankruptcy case, his third filing. The Court's concern is that the First Plan and the Amended Plan are substantially similar. Mirroring the Amended Plan, the First Plan was funded by the Debtor's earnings from the Non-Debtor Entities. The Debtor has provided no evidence of any meaningful change in his business operations to suggest that the Amended Plan is now feasible. There is no evidence to show that the Debtor's failure under the First Plan will be avoidable under the Amended Plan. On the contrary, the economic market, specifically borrower-favorable interest rates, has notably declined since the First Plan. The Debtor was in a more borrower-friendly interest rate market during the First Plan, under which he defaulted, than he finds himself in today.

Additionally, like the First Plan, the Debtor continues to resist monetizing the Personal Properties and various luxury vehicles. Under the Amended Plan, while the Debtor states an intention to list for sale or lease three of the six Personal Properties commencing six or twelve months (depending on the condominium) from the Effective Date, such a decision is "…subject to consultation with his tax advisor…[and] at his option and in his sole and absolute discretion…" No basis for the six-to-twelve-month delay is provided. Similarly, as was the case in the First Case,

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the Debtor continues to be accused of failing to collect rental income for various Personal Properties, including allowing family members to live rent-free.

iii. Significant Uncertainty Regarding the Size of Class 19 Caused by Potential Objections

Under the Amended Plan, the Debtor estimated Class 19 – general unsecured creditors – to be between approximately $300,000.00 and $1,226,186.88; however, per the Reply, the Debtor updated the estimate of Class 19 to be between approximately $426,000.00 and $2,226,000.00, depending on the outcome of various claim objections. Two of the largest unsecured creditors – City and Hankey – are subject to the Debtor's stated intention to object.

Under the Amended Plan, the Debtor states an intention to file objections to City's general unsecured claim in the amount of $926,186.88 and Hankey's amended unsecured claim in the amount of $1,883,445.06. The Debtor has not provided any basis for objecting to either City or Hankey's claim. As the allowability of City and Hankey's claims significantly impacts the size of Class 19 and the related payouts to its members, the absence of any information regarding the basis for objecting to their claims calls into question the feasibility of the Amended Plan.

Adding further strain to Class 19, on March 30, 2023, Bronzetree Terraces, LLC and AMG Private Custody Services, Inc. filed a motion to deem their unsecured claim in the amount of $195,015.00 (the "Claim") as timely filed [Doc. No. 210] (the "Motion"). The Claim is not included in the Amended Plan. On May 3, 2023, the Court granted the Motion and deemed the Claim timely filed [Doc. No. 232]. Per the opposition to the Motion, the Debtor admittedly characterized the Claim as of significant value.

iv. Ongoing Litigation Involving Alvarado, LLC, a Non-Debtor Entity

In addition to the litigation disclosed in the Amended Disclosure Statement, Alvarado, LLC ("Alvarado") – a Non-Debtor Entity – is currently subject to litigation.

On March 13, 2023, Silvia Mejia, et al. (collectively, the "Plaintiffs") filed a motion seeking an order confirming that the automatic stay does not apply to Alvarado in a state court action bearing the caption *Silvia Mejia, et al. v Alvarado, LLC*, Case No. 20STCV22869 (the "State Court Action"), pending in Los Angeles County Superior Court [Doc. No. 198].

The State Court Action commenced on June 17, 2022 by filing a complaint against Alvarado asserting claims for failure to provide habitable dwelling, breach of

covenant and right to quiet enjoyment and possession of the property, nuisance, negligence, and violation of Civil Code Section 1942.4 (the "Complaint"). Trial was scheduled to begin on April 23, 2023.

On April 10, 2023, the Court entered an order confirming that Alvarado is not a debtor in the Debtor's instant bankruptcy case, allowing the State Court Action to proceed against Alvarado [Doc. No. 223].

Per the Amended Disclosure Statement, the Debtor's projected monthly includes approximately $180,000.00 per month derived from Alvarado. Alvarado is one of the projected Non-Debtor Entities used to fund the Amended Plan. As the Debtor's monthly projections include Alvarado, which is now subject to the State Court Action and the possibility of a sizable judgment being levied against it, the Amended Plan's feasibility is called into question.

v. History of Foreclosure in Summit, LLC

On July 15, 2022, Summit, LLC ("Summit") filed a voluntary Chapter 11 petition, Case No. 2:22-bk-13853-ER. The Debtor, who formed Summit, is the sole managing member of Summit. Summit's primary asset was a 47-unit apartment complex located at 324 S. Catalina St., Los Angeles, CA 90020 (the "Summit Property"). The Summit Property was encumbered by a First Deed of Trust in favor of Hankey.

Hankey moved for relief from the automatic stay, pursuant to § 362(d)(3), based upon Summit's failure to timely pay in full the monthly post-petition non-default interest owed to Hankey. On December 22, 2022, the Court granted Hankey's motion for relief from stay with respect to the Summit Property [Doc. No. 104, 2:22-bk-13853-ER]. Subsequently, Hankey foreclosed on the Summit Property. On May 17, 2023, the Summit case was dismissed pursuant to the Court's order [Doc. No. 124, 2:22-bk-13853-ER].

The Court notes that as the Debtor was the sole managing member of Summit, Hankey's foreclosure on the Summit Property is indicative of the questionable feasibility of the Debtor's instant case and the Amended Plan.

B. The Amended Plan is Not Proposed in Good Faith Pursuant to § 1129(a)(3)

Pursuant to § 1129(a)(3), a Chapter 11 plan must be proposed "…in good faith and not by any means forbidden by law." Good faith requires that a plan achieve a result consistent with the objections and purposes of the Code and the fundamental fairness in dealing with one's creditors. *In re Stolrow's Inc.*, 84 B.R. 167, 172 (B.A.P. 9th Cir. 1988).

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Per the City Opposition, City holds a general unsecured claim in the amount of $926,186.88 based upon its allowed Proof of Claim in the First Case, less certain payments made under the First Plan (the "City Claim"). The City Claim is based on the Debtor's personal guarantee with respect to real property located at 5890 Highland Hills Drive, Dallas, TX 75241 (the "City Property"). The City Property had subsequently been subject to a receivership and a short sale, which left a deficiency on which City claimed that the Debtor, as guarantor, was liable.

During the First Case, the Debtor objected to the City Claim. Through various arguments, the Debtor maintained that he was not liable on the City Claim with respect to the City Property. However, after reviewing the Debtor's arguments, the Court issued the *Order Denying Debtor's Objection to Claim of City National Bank and Allowing Proof of Claim No. 35, in its Entirety* [Doc. No. 663, 2:10-bk-54460-ER] (the "City Order"), which incorporates the Court's detailed tentative ruling. While overruling the Debtor's objection and allowing the City Claim, in its entirety, the Court found the Debtor liable, as guarantor, on the City Claim in the First Case. Among the various findings and conclusions, "…the Court concludes that California law controls the parties' obligations under the Guarantee, the Debtor does not dispute that, under California law, the Claim is enforceable… Alternatively, even if the Texas law is applied… the Court concludes that the Claim is not barred by the two year statute of limitations provided in Texas Property Code section 51.003 (a)."

However, under the Amended Plan, the Debtor has stated an intention to file an objection to the City Claim. Per the Reply, the Debtor reaffirmed such an intention and stated that City would have the opportunity to litigate the amount of its claim. City contends that because the Debtor's objection was already overruled in the First Case and the City Claim was allowed, the Debtor's plan to object to the City Claim under the Amended Plan is a testament to the Debtor's lack of good faith.

The Court agrees with City's position. The allowability of the City Claim has already been adjudicated by the Court in the First Case – the Debtor was obligated to pay the City Claim under the First Plan. As noted above, the Court issued the City Order and a related detailed tentative ruling, which outlined substantial findings regarding why the Debtor's objection was overruled and why the City Claim was allowed. Therefore, the stated and reaffirmed intention to object to the City Claim, which makes a material difference to the size of Class 19, under the Amended Plan amounts to (i) the Debtor's attempt to obtain reconsideration of the Court's order, (ii) an improper attempt to modify the treatment of the City Claim under the First Plan, and (iii) an indication of bad faith.

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In addition to the lack of good faith evidenced with respect to the City Claim, the instant case is the Debtor's third Chapter 11 filing. As noted above, the First Case, which remains open today, includes the First Plan, which is currently under default. Between the series of Chapter 11 filings, the continued pendency of the First Case and failure of the First Plan, and the serious issues with the Amended Plan outlined in this tentative ruling, the Debtor has evidenced an inability to effectively administer a case under Chapter 11 of the Bankruptcy Code.

For the foregoing reasons, the Court finds that the Amended Plan is not proposed in good faith pursuant to § 1129(a)(3).

C. The Amended Plan Does Not Satisfy the Best Interests Test Pursuant to § 1129(a)(7)

Section 1129(a)(7), known as the "best interests of creditors test," provides in relevant part: "With respect to each impaired class of claims or interests, each holder of a claim or interest of such class has accepted the plan; or will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date."

Originally, the Debtor anticipated Class 19 general unsecured creditors receiving between 12% and 52%, depending on whether an objection to the City Claim was filed, in a hypothetical Chapter 7 liquidation. In the Confirmation Motion, the Debtor revised the liquidation analysis and concluded that Class 19 would receive zero distribution in a Chapter 7 case. In the Reply, the Debtor notes that his interests in the Non-Debtor Entities are junior to the Non-Debtor Entities' senior secured creditors, which are significant and must be paid before the Debtor receives any distribution. Therefore, the Debtor asserts that his liquidated interests in the Non-Debtor Entities likely amounts to $0.00.

The Court is not persuaded that Class 19 general unsecured creditors would receive $0.00 in a Chapter 7 context. The Debtor's Chapter 7 liquidation analysis contains figures that are unrealistic and rely on questionable assumptions. The Chapter 7 liquidation analysis also contains a major contradiction: the value of the Debtor's interests in the Non-Debtor Entities in Chapter 7 versus Chapter 11.

In Chapter 7, the Debtor contends that his interests in the Non-Debtor

Entities amounts to $0.00 because of significant senior creditors who must be paid off before the Debtor is entitled to any distribution. As noted above, the Debtor has revealed significant encumbrances held against the Non-Debtor Properties, including the Senior Blanket Liens in the amount of approximately $51.2 million, an $8 million lien against an additional Non-Debtor Property, and other liabilities.

Interestingly, in Chapter 11, the Debtor's interests in the Non-Debtor Entities, including the Pending Sales/refinancings, are essentially the sole source of funding of the Amended Plan. In the Reply, the Debtor reaffirms his belief that the net proceeds from the Pending Sales/refinancings (taking into account the Senior Blanket Liens, other liabilities, and closing costs) of the Non-Debtor Properties will successfully fund the Amended Plan and its proposed 100% payments, plus interest, to the estate's creditors. The Debtor has not provided any credible reason as to why his interests in the Non-Debtor Entities, which are admittedly secured by substantial debt, have zero value in Chapter 7 but enough equity to carry the entire Amended Plan in Chapter 11.

Due to the significant contradiction and lack of a persuasive reason, the Debtor has not established that the Amended Plan is in the best interests of the general unsecured creditors.

D. The Debtor's Request for an Extension of the Confirmation Deadline is Denied

Pursuant to the *Order: (1) Denying Without Prejudice Motions to Convert or Dismiss Chapter 11 Case and (2) Fixing May 31, 2023 as the Deadline for the Debtor to Obtain an Order Confirming a Plan* [Doc. No. 119], the Confirmation Deadline "will not be extended absent exceptionally compelling circumstances."

Per the Reply, the Debtor requests that the Confirmation Deadline be extended to at least June 30, 2023 so that the Pending Sales, which are being held up by negotiations with the secured creditors of the Non-Debtor Properties, may close and the additional sales/refinancing of the remaining Non-Debtor Properties may advance. The Debtor believes that such an extension would result in greater certainty regarding the net proceeds available to the estate to fund the Amended Plan.

The Court's order setting the Confirmation Deadline was entered on October 19, 2022 – over seven months ago. The Debtor was aware of the importance of the sales and refinancings of the Non-Debtor Entities to fund the Amended Plan. The Debtor was similarly aware of the necessity to provide concrete financial figures with respect

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to such sales and refinancings by the Confirmation Deadline in order for the Court to evaluate the feasibility of the Amended Plan. The Court finds that the Debtor's reasons for an extension of the Confirmation Deadline do not amount to exceptionally compelling circumstances. Therefore, the request for an extension of the Confirmation Deadline is denied.

III. Conclusion

Based upon the foregoing, the Confirmation Motion is **DENIED**. As the Debtor has failed to obtain confirmation of the Amended Plan by May 31, 2023, pursuant to the *Order: (1) Denying Without Prejudice Motions to Convert or Dismiss Chapter 11 Case and (2) Fixing May 31, 2023 as the Deadline for the Debtor to Obtain an Order Confirming a Plan* [Doc. No. 119], the case is hereby converted to Chapter 7 without further notice or hearing. The Court will prepare the order.

No appearance is required if submitting on the Court's tentative ruling. If you intend to submit on the tentative ruling, please contact Evan Hacker or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the Court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1: The Court notes that the HOA advances a number of arguments that were previously addressed in its *Motion to Dismiss or Convert Chapter 11 Case* [Doc. No. 81]. These arguments will not be revisited at this stage of confirmation of the Amended Plan.

Party Information

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