UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 21, 2019 at 11:00 a.m.

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1. 15-28908-E-13 18-2053 DKM-3 **WILLIAM/SARAH MCGARVEY** **MOTION FOR SUMMARY JUDGMENT 1-16-19 [41]**

MCGARVEY V. USAA SAVINGS BANK

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served only on Plaintiff's counsel on January 16, 2019. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Judgment on the Pleadings has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Judgment on the Pleadings is denied without prejudice.

Sarah McGarvey ("Plaintiff") filed the instant case on April 27, 2018, against USAA Savings Bank ("Defendant"). On July 6, 2018, Plaintiff filed an Amended Complaint. Dckt. 18.

Plaintiff seeks claims for willful violation of the automatic stay. The grounds (stated in the Amended Complaint) upon which these claims are based are as follows:

A. The Consumer Data Industry Association (the "CDIA") sets the industry

standard for credit reporting. *Id.* , ¶ 12.

B. A guide published by the CDIA recommends creditors not report ongoing delinquencies after a bankruptcy is filed. *Id.* , ¶ 15.

C. A guide published by the CDIA recommends creditors fill out a Consumer Information Indicator ("CII") where a consumer has a special condition such as bankruptcy. *Id.* , ¶ 14–19.

D. The CDIA recommends using CII designation "D" to indicate a consumer has filed bankruptcy to indicate that creditors are not free to collect against the consumer. *Id.* , ¶ 20–24.

E. Creditors use credit reporting as a means to coerce payment from debtors; "Specifically, when consumers become delinquent on their debts creditors will often warn consumers that failure to pay their delinquent balance will result in their delinquency being reported to the major credit reporting agencies." *Id.* , ¶ 26–27.

F. Defendant "as a policy to enhance collection activities will call and send letters to debtors warning that failure to pay a debt will result in a delinquency being reported to the main credit bureaus." *Id.* , ¶ 35.

G. Defendant reports delinquencies for the purpose of coercing debtors to pay. *Id.* , ¶ 34.

H. Defendant knows that by failing to report the CCI "D" designation to indicate a consumer filed bankruptcy, together with continued reporting of the delinquency, that the Plaintiff-Debtor would be coerced into making payments because Defendant "knows that such reporting alerts other lenders that this debt SHOULD be paid but has not been paid." *Id.* , ¶ 36.

I. Defendant was sent actual notice of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. *Id.* , ¶ 9–10; Dckt. 1.

J. Post-filing, Defendant continued to report on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. *Id.* , ¶ 11.

K. Defendant filed two separate claims in Plaintiff-Debtor's Chapter 13 bankruptcy case on January 26, 2016. *Id.* , ¶ 15.

L. Defendant, by failing to update its reporting on Plaintiff-Debtor's credit

report, acted with intent and Plaint-Debtor believes the collections notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. *Id.* , ¶ 20–21.

M. Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. Id. , ¶ 22.

N. Defendant's employee Beverly Bain ("Bain") received notice of Plaintiff-Debtor's dispute over the credit reporting and her bankruptcy filing, but intentionally failed to update the CII and continued reporting delinquency in an attempt to coerce payment. *Id.* ¶ 46–51.

O. Plaintiff-Debtor argues Defendant willfully violated the automatic stay under 11 U.S.C § 362(a)(6) by reporting Plaintiff-Debtor delinquent and in collections on her credit report, by failing to report that the account was included in bankruptcy, and by continuing to report that information after Plaintiff disputed it with the credit reporting agencies. *Id.* , ¶¶ 48-54.

12(b)(6) Motion To Dismiss & Remaining Cause of Action

Defendant filed a Motion To Dismiss for failure to state a claim on July 18, 2018. Dckt. 22. After a hearing, the court issued an Order granting the Motion To Dismiss and dismissing all claims with the exception of:

> The claim stating relief for the alleged failure of Defendant to update, correct, or include in the information reported to the consumer reporting agencies that the asserted obligation owed to Defendant is included in or subject to Plaintiff-Debtor's bankruptcy case.

Motion for Judgment on the Pleadings

On January 16, 2019, Defendant filed the instant Motion for a Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). Dckt. 41. Movant asserts the following:

1. The Fair Credit Reporting Act limits but does not require a creditor to report a bankruptcy filing to credit bureaus. Dckt. 41 at 2:18.5-23.5.

2. Until the debt has been discharged in bankruptcy, the delinquent debt still exists. Because indicating a bankruptcy has been filed does not affect the existence of a debt (without a discharge), neither reporting or not reporting the bankruptcy are an act to collect debt.

DEFENDANT'S SUPPLEMENTAL REPLY

Defendant filed a Reply and Notice of Non-Opposition on February 14, 2019. Dckt. 45. Defendant argues that Plaintiff failed to serve a reply by February 7, 2019, and therefore the Motion should be resolved without oral argument, with any subsequent opposition stricken. Defendant states he contacted counsel for Plaintiff on February 13, 2019 and learned Kyle Shumacher was no longer with the firm Sagaria Law, P.C.

This pleading raises an interesting question concerning Defendant providing incomplete information. The pleading is titled as a Reply and "**NOTICE OF NON-OPPOSITION**." Thus, it appears that there is an affirmative statement of non-opposition by the Plaintiff to Defendant's Motion. As shown by the Opposition filed, a statement giving Notice of Non-Opposition is clearly inaccurate and misleading.

Reading the pleading further, Defendant states that it affirmatively states the "**NOTICE OF NON-OPPOSITION**" based solely on the ability of the court to enter a party's default when no opposition is filed and the court **may** decide the matter on the pleadings. Such discretion of the court is not a mandated "**NOTICE OF NON-OPPOSITION**."

At the hearing, Defendant's counsel addressed filing an affirmative "NOTICE OF NON-OPPOSITION" and the basis therefore (beyond merely that the court **may** decide a contested matter on the pleadings if no opposition is filed), stating xxxxxxxxxxxxxxx.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on February 14, 2019. Dckt. 47. Plaintiff states that she filed an untimely response because the counsel of record Kyle Shumaker left the Sagaria Law firm in December 2018 after Scott Sagaria passed away. Plaintiff consents to moving the hearing date to provide more time for Defendant to reply to Plaintiff's grounds for opposing the Motion.

Plaintiff argues in its Opposition that Defendant is relitigating the same issue decided by this court in a prior Motion To Dismiss. *See* Dckt. 22. Plaintiff disputes Defendant's assertion there is no requirement to report a bankruptcy filing to credit reporting agencies.

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION

Defendant filed a Reply to Plaintiff's Opposition on February 15, 2019. Dckt. 48. Defendant argues the present Motion is aimed at the issue remaining from the prior Motion To Dismiss, specifically whether Defendant has a legal obligation to report a bankruptcy filing. Defendant asserts that the following in its Reply:

1. The Opposition is untimely and should be stricken.

2. The case law cited by McGarvey does not address whether USAA SB

has a legal obligation to report a bankruptcy filing.

3. Plaintiff ignores the distinction between a bankruptcy filing and discharge.

4. The Fair Credit Report Act ("FCRA") does not require a creditor to report a bankruptcy filing

5. A credit report is not inaccurate because a bankruptcy filing is not reported in the tradeline

APPLICABLE LAW

Federal Rule of Civil Procedure 12(c) Standard

On a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), the allegations of the non-moving party must be accepted as true, while the allegations of the moving party, which have been denied, are assumed to be false. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* Dismissal is proper only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle him to relief. *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004). While the court must construe the complaint and resolve all doubts in the light most favorable to the plaintiff, the court does not need to accept as true conclusory allegations or legal characterizations. *Id*. (*citing General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church*, 887 F.2d 228, 230 (9th Cir. 1989); *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988)).

A motion for judgment on the pleadings based on Federal Rule of Civil Procedure 12(c) is a functional equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b), requiring the same underlying analysis. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). Thus, for a complaint to withstand a Rule 12(c) motion for judgment on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal,* 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint and whether it contains the necessary detail to state a plausible claim for relief. *Id.* at 679. The factual content on the face of the complaint—not conclusory statements in the pleading—and reasonable inferences drawn from those facts must plausibly suggest that the plaintiff could be entitled to relief for the pleading to survive a Rule 12(c) motion. *See id.* at 677.

FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (the "FCRA") provides the following:

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C § 1681.

The FCRA also provides:

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person

knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if–

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

. . .

(2) Duty to correct and update information. A person who--

(A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and

(B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.

15 U.S.C. § 1681s-2.

DISCUSSION

Defendant seeks to make the sole remaining claim in the Amended Complaint a legal issue, where there is clearly a dispute of fact.

The Amended Complaint alleges:

Defendant was sent actual notice of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. Dckt. 18 , ¶ 9–10.

> Post-filing, **Defendant continued to report** on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. *Id.* , ¶ 11.
>
> **Defendant, by failing to update its reporting on Plaintiff-Debtor's credit report, acted with intent** and Plaintiff-Debtor believes the collections notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. *Id.* , ¶ 20–21.
>
> Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. Id. , ¶ 22.
>
> **Defendant's employee Beverly Bain** ("Bain") received notice of Plaintiff-Debtor's dispute over the credit reporting and her bankruptcy filing, but **intentionally failed to update the CII and continued reporting delinquency in an attempt to coerce payment**. *Id.* ¶ 46–51.
>
> Plaintiff-Debtor argues Defendant willfully violated the automatic stay under 11 U.S.C § 362(a)(6) by reporting Plaintiff-Debtor delinquent and in collections on her credit report, by failing to report that the account was included in bankruptcy, and by continuing to report that information after Plaintiff disputed it with the credit reporting agencies.

Id. , ¶¶ 48-54(emphasis added).

The Amended Complaint extensively discussed the industry standard with respect to reporting. *See Id.*, ¶¶ 12-24. As addressed above, 15 U.S.C. § 1681s-2(a)(2) provides that if a furnisher of information learns that information is not complete or accurate, the furnisher "shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate. . . ." Plaintiff asserts that failing to include reporting that the obligation was subject to Plaintiff's bankruptcy case rendered the reported information "not complete" and "not accurate."

The court notes that in connection with the prior Motion To Dismiss already noted there does not appear to be an obligation to report bankruptcy filings, the court stated:

> On its face, 15 U.S.C. § 1681s-2 does not require the reporting when a consumer files bankruptcy. 15 U.S.C. § 1601c(d) does require the consumer reporting agency to include the chapter under which a consumer has or had a bankruptcy case, if the consumer reporting agency includes information about the filing of a bankruptcy case by the consumer. But this provision does not mandate the reporting of the bankruptcy.

Civil Minutes, Dckt. 29. While not mandating reporting the bankruptcy information, that Code section is written in the negative, prohibiting furnishing inaccurate information.

Assuming Plaintiff's allegations are true (as is required), Defendant failed to update credit reporting to reflect a bankruptcy filing with the specific intent to coerce Plaintiff into paying on the underlying obligation. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1548 (9th Cir. 1989). This claim is substantiated with allegations that it is industry practice to update filings, and that businesses are generally knowledgeable that failing to update a credit report could exert pressure on a debtor.

On the pleadings, Defendant does not prevail on the law, the question existing as to whether failing to report the bankruptcy rendered the information furnished incomplete or inaccurate. The court can anticipate a number of witnesses addressing the standards of the credit furnishing and reporter industries and the effect of including and not including information that a debt is included in a bankruptcy case.

Defendant makes an "interesting argument" that may manifest a shortcoming in appreciating the FCRA. In contending that failing to include information that a reported debt is the subject of a pending bankruptcy case cannot be inaccurate information about the debt reported, Defendant argues:

> Fourth, a credit report is not inaccurate because a bankruptcy filing is not reported in the tradeline. If a lender needs to know exactly what credit accounts are included in the bankruptcy, that information is public information that is not subject to any sort of imagination.

Reply, p. 2:23.5-26.5. No authority is shown for the proposition that Congress intends that information is not "inaccurate" so long as some other user of information can spend time and money completing incomplete information provided by a furnisher to a consumer reporting agency.

Movant

The Motion is denied.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Judgment on the Pleadings filed by USAA Savings Bank ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

2. **18-27039-E-13** **NADIA KOSTYUK** **MOTION TO DISMISS ADVERSARY PROCEEDING**
18-2195
JKL-1 **1-23-19 [9]**

KOSTYUK V. BBV PROFIT SHARING PLAN ET AL

Final Ruling: No appearance at the February 21, 2019 Hearing is required.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided - Opposition Filed. The Proof of Service states that the Motion and supporting pleadings were served solely on Defendant's attorney(s) on January 23, 2019. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 11:00 a.m. on March 14, 2019.

REVIEW OF MOTION

BBV Profit Sharing Plan, Milestone Financial, LLC, Bear Bruin Ventures, Inc., and William R. Stuart ("Defendant") moves for the court to dismiss all claims against it in Nadia Kostyuk's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

The Defendants have filed a Motion to Dismiss which merely states the legal conclusion that each of the claims should be dismissed. Motion, Dckt. 9. Federal Rule of Civil Procedure 7(b)(1)(B), as incorporated by Federal Rule of Bankruptcy Procedure 7007 requires that the motion itself must state with particularity the grounds, not merely the relief requested. Defendants have filed a Points and Authorities that may state grounds; among the legal authorities, arguments, and contentions; but the court is reluctant to try and state for the parties the required grounds that it may mine from those buried in a points and authorities.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on February 6, 2019. Dckt. 22. Plaintiff-Debtor does not oppose the dismissal of claims #1, 2, 4-7, and 10-12. However Plaintiff-Debtor argues the foreclosure

sale on her residence is void. Plaintiff-Debtor requests time to amend the complaint to add allegations of violation of the automatic stay, breach of contract, rescission, quiet title, and wrongful foreclosure.

DEFENDANT'S RESPONSE

Defendant filed a Memorandum in response to Plaintiff's Opposition on February 12, 2019. Dckt. 29. Defendant notes Plaintiff does not oppose dismissal of claims #1, 2, 4-7, and 10-12, and asserts the remaining claims are 3–recision, 8–quiet title, and 9–wrongful foreclosure.

As to those remaining claims, Defendant argues :

1. Recision is not its own claim, but is rather a remedy.

2. Plaintiff is not on title and therefore lacks standing to bring quiet title.

3. A wrongful foreclosure claim is without merit because: (1) impacts to Plaintiff's credit are not grounds for wrongful foreclosure; (2) Plaintiff defaulted on her loan; (3) Plaintiff has not offered tender and therefore cannot bring a wrongful foreclosure action.

DISCUSSION

As the court discussed in connection with the February 20, 2019 Status Conference for this Adversary Proceeding, various counsel of Plaintiff-Debtor have provided conflicting information concerning this Complaint. The former counsel said that it was to be amended. Replacement counsel now advocates for a May 2019 trial - notwithstanding no answer yet having been filed.

The court also conducted a hearing on the Chapter 13 Trustee's Motion to Dismiss the Plaintiff-Debtor's Chapter 13 case. The court's tentative decision was to grant the motion and dismiss the case.

Given that a dismissal of the Plaintiff-Debtor's bankruptcy case may render this proceeding inappropriate, before the court expenses judicial time and resources in trying to navigate the Complaint (which it has been represented is to be amended) and having Defendants amend their Motion, the court continues the hearing on the Motion to Dismiss.

The continuance also allows Debtor and Debtor's Replacement Counsel to consider whether this is the Complaint and the causes of action they really intend to pursue, the discovery they require, and when they actually will be ready to go to trial.

Additionally, Defendants can review their Motion and determine, after considering the applicable Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, whether their Motion is sufficient or it needs to be amended to avoid having it denied.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by BBV Profit Sharing Plan, Milestone Financial, LLC, Bear Bruin Ventures, Inc., and William R. Stuart ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 11:00 a.m. on March 14, 2019.

3. **16-22163-E-7** **SYLVIA KINERSON** **ORDER TO SHOW CAUSE**
16-2137 **2-4-19 [60]**
RHS-1

KINERSON V. KINERSON

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Defendant, Plaintiff, Chapter 7 Trustee, and Office of the U.S. Trustee as stated on the Certificate of Service on February 6, 2019. The court computes that 15 days' notice has been provided.

The Order to Show Cause is sustained, and the Adversary Proceeding is dismissed.

On July 5, 2016, Mick Kinerson, as Administrator of the Estate of Lawrence Edward Kinerson, the Plaintiff, commenced this Adversary Proceeding against Sylvia Mae Kinerson, the Defendant-Debtor. In the Complaint, Plaintiff seeks to have obligations arising under a state court judgment (Family Court proceeding) determined nondischargeable. Complaint, Dckt. 1. Defendant-Debtor has answered. Answer, Dckt. 7.

The Status Conference in this Adversary Proceeding has been continued multiple times, with it ultimately being removed from the calendar. December 13, 2017 Civil Minutes, Dckt. 58. Nothing further has been filed with the court in this Adversary Proceeding since that time. The audio recording from the December 13, 2017 Status Conference (Dckt. 59) includes the statement that the discharge of the Defendant-Debtor will be denied in this case, which would then render the relief sought in this Complaint as moot. Plaintiff's counsel stated that the court having noted the Defendant-Debtor's discharge had been denied, this Adversary Proceeding would be dismissed.

With the denial of Defendant-Debtor's discharge having been entered, the requested relief in this Adversary Proceeding being rendered moot, the court issued this Order to Show Cause on February 4, 2019, requiring Plaintiff Mick Kinerson, Administrator of the Estate of Lawrence Edward Kinerson, and Defendant-Debtor Sylvia Mae Kinerson, to show cause why the court does not dismiss the adversary proceeding without prejudice. The Order further provided that any response shall be filed on or before February 14, 2019 (no response being required if the parties do not oppose dismissal).

No party in interest has filed any response. Therefore, the Order To Show Cause is sustained and the Adversary Proceeding is dismissed without prejudice.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the Adversary Proceeding is dismissed without prejudice.

4. **18-27720-E-13** **DAVID RYNDA** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO COMPEL ABANDONMENT, MOTION FOR ADEQUATE PROTECTION1-15-19 [25]**
ASM-1

ELINA MACHADO VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Not Notice Provided. The Proof of Service states that the Motion and supporting pleadings were only served on Debtor's Attorney on January 15, 2019. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further.

Debtor has filed Opposition to the Motion.

Pursuant to the Motion for Relief from the Automatic Stay, the court issues an adequate protection order and continues the hearing to allow the parties to focus on the underlying dispute about what is property of the bankruptcy estate and continues the hearing to monitor the progress of Debtor with the Plan and adequate protection payments, and the Parties diligent prosecution of the litigation necessary to determine the interests, if any, of the bankruptcy estate in the Property at issue.

The hearing is continued to 1:30 p.m. on August 27, 2019.

REVIEW OF MOTION

This Motion brings to the court a full plate of bankruptcy and non-bankruptcy issues. As discussed below, while Debtor seeks relief to stop the foreclosure sale and the enforcement of several state court orders and judgments (not all of which have been provided to this court) concerning the ownership of real property commonly known as 9436 Windrunner Lane, Elk Grove, California.

It appears that there has been extensive state court litigation to this point in time, for which various orders and judgments are on appeal. The Third Amended Plan in this case appears to provide a vehicle to cure the default on the property and forestall the foreclosure while the parties litigate their dispute. However, it appears that there is a decision, for which Debtor has file an appeal in pro se, determining that Debtor has no interest in the Property and that Movant is to sell the Property.

REVIEW OF MOTION

Elina Machado ("Movant") seeks relief from the automatic stay with respect to David J Rynda's ("Debtor") real property commonly known as 9436 Windrunner Lane, Elk Grove, California ("Property"). Movant has provided the Declaration of Armando S. Mendez, Movant's counsel, to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Mendez Declaration introduces the following evidence:

1. The Property is scheduled for a foreclosure sale February 15, 2019. Dckt. 27 at ¶¶ 1-2.

2. In state court ligation between Movant and her husband Gabriel Machado, *In Re The Marriage Of Machado*, Superior Court for the County of Sacramento, Case No. 17FL02730 (the "State Court Litigation"), Debtor was ordered to vacate the Property within 30 days of October 16, 2018. Id. at ¶¶ 3-4.

3. Debtor has appealed the State Court Litigation.

Id. at ¶ 5.

The Mendez Declaration also authenticates three exhibits: (1) Exhibit A, a Notice of Trustee's Sale; (2) Exhibit B, a copy of the Findings and Order After Hearing in the State Court Litigation; and (3) Exhibit C, a copy of the Notice of Filing/Notice of Appeal in the State Court Litigation. Dckt. 27.

Grounds Stated in Motion With Particularity

The Motion states with particularity the following grounds:

1. Debtor does not have equity in the Property because the State Court Litigation has already determined that he has no ownership interest. Dckt. 25 at p. 5:1-2, 6:9.5-13.

2. Debtor has appealed the State Court Litigation. *Id.* at 5:3-4.

3. Resolution of the pending State Court Litigation will determine Debtor's interest in the Property; this Chapter 13 case has no connection with the ownership disputes. *Id.* at 5:6.5-12.

4. The State Court Litigation determined Debtor's interest in the Property is merely possessory. Debtor is not obligated on the mortgage secured by the Property. *Id.* at 5:17-20.5

5. Movant is at risk of losing her the Property to foreclosure if the Automatic Stay is not lifted. *Id.* at 5:20.5-21.5. Movant's credit is being harmed by Debtor's failure to pay the mortgage which only Movant is obligated to pay. *Id.* at 5:21.5-6:2.

6. Debtor will be unable to demonstrate that the Property is necessary for an effective reorganization as the property is being used solely as a residence and Debtor is not attempting a reorganization. Debtor's bankruptcy petition seeks to re-litigate the issue of ownership in bankruptcy court not reorganize his debts. *Id.* at 6:20.5-7:4.

7. Debtor's only hope in establishing an ownership claim in The Real Property is successfully prosecuting the pending appeal. This can only be accomplished if the Court's lifts the automatic stay to allow the Parties to continue with the State court action. If Debtor is unsuccessful, Property will be of no consequence to the Bankruptcy Estate. *Id.* at 7:7.5-12.

8. If relief from the automatic stay is granted, the court should waive the 14-day stay of Bankruptcy Rule 4001(a)(3) to allow Movant to prevent foreclosure of the Property. *Id.* at 7:20.5-22.5.

In the Motion's request for relief, Movant requests an order "[g]ranting relief from the automatic stay to allow Movant to exercise all available rights and remedies with respect to the Property pursuant to the State court order and applicable nonbankruptcy law; including but not limited to proceeding with eviction proceedings, selling the Property and **allowing the State court to determine Debtor's monetary interest in the proceeds, if any**. Dckt. 25 at p. 8, ¶ a(emphasis added).

JANUARY 29, 2019 HEARING

At the January 29, 2019 hearing the parties addressed Movant's insufficient service (made

only on Debtor's attorney), and agreed to continue the hearing with counsel for Debtor confirming that service was sufficient. Dckt. 62. The court continued the hearing on the Motion to February 12, 2019.

Furthermore, at the hearing the parties addressed with the court the underlying dispute and how that would be made part of this bankruptcy case. The Debtor making the current mortgage payments, current HOA payments, and cure payments through the plan pending completion of the litigation can be a form of adequate protection/protection from improperly being enjoined.

FEBRUARY 12, 2019 HEARING

The court originally continued the hearing to February 12, 2019, to allow the parties to address the adequate protection Chapter 13 Plan provisions and how they were going to litigate the underlying dispute of ownership. When the continued hearing was conducted, it was clear that the parties had not communicated, no adequate protection plan for the Debtor to use the automatic stay in lieu of an injunction, and no prosecution of this Chapter 13 case were being advanced. The Parties appeared to be entrenched in their personal attack positions, with the resolution of the underlying dispute and addressing the orders/judgments issued in the state court a minor side issue (at least for the Debtor).

The respective counsel argued about the state court proceeding and the order of the family law court determining that there was not a "contact" between the Debtor and Ms. Machado. That order also states that the interests of Debtor, if any, would have to be determined in a subsequent proceeding. Ms. Machado appears to advance the argument that the State Court has determined that Debtor has not interest in the Property. Debtor advanced the argument that the federal court was not bound by an order/judgment of the State Court and could litigate the issues anew. Debtor further has argued that the State Court order/judgment is "void," the State Court judges did not properly adjudicate the issues, and that the State Court process has been biased against Debtor.

Debtor has now commenced an Adversary Proceeding, No. 19-02023. At the hearing, Debtor's counsel advised that upon further investigation the Complaint would have to be amended. However, Debtor's Counsel referenced the Complaint as a source of information about the State Court proceedings.

The Complaint states that it seeks to Quiet Title and as an "Objection to Defendant's Motion for Relief From the Stay." 19-02023; Complaint ¶ 1, Dckt. 1. The Complaint then states that it seeks recovery of sanctions pursuant to 11 U.S.C. § 105(a) for Defendant having filed a "false and fraudulent Motion for Relief From the Stay violation of Section 501 of the Code and Rules 3001(c) and 3001(d) of the Bankruptcy Rules."

An initial observation of this Complaint is that it seeks to expand the incendiary litigation and attack contested matter proceedings before the court in the Bankruptcy Case. The court is unsure of the basis for a collateral opposition to a motion for relief stated as a cause of action in a complaint, as well as seeking relief under 11 U.S.C. § 105(a) regarding pleadings that are filed subject to the certifications made under Federal Rule of Bankruptcy Procedure 9011. The Complaint continues stating an "objection" to the Motion for Relief based on Debtor claiming that he has "owned" the disputed property for more than four years and that the motion for relief is barred by the California statutes of limitations

on oral or written contracts. The court is unaware of a basis for asserting that a state statute of limitations on contract bars someone from seeking relief arising under the federal Bankruptcy Laws, including 11 U.S.C. § 362.

In ¶ 17 of the Complaint Debtor alleges "However, the Motion leaves out many important facts, and includes outright fabrications as well." If so, Debtor defends the Motion and if the certifications made under Federal Rule of Bankruptcy Procedure 9011 have been breached, seeks relief pursuant thereto.

The Complaint then makes specific allegations as to how Debtor asserts he obtained tile to the Property at issue, payments he made, how the deed was lost (Debtor's prior attorney handling the matter having been suspended by the State Bar as the transaction was being conducted, and asserting that a duplicate original was stolen by Defendant's then husband), and the dissolution proceedings and unlawful detainer proceedings prosecuted by Defendant. Such all sound in the nature of the Quiet Title Claim.

The Complaint continues, asserting misconduct by Ms. Machado's attorney and manipulation of the State Court process and judges. He then continues, alleging that the State Court Commissioner was "obviously biased toward men, and men in pro per, even more, obviously favored women in divorce, ethnic women and attorneys even more, vs an Anglo man in pro per, Mr. Mendez had the family law commissioner fooled very easily, and was able to have a judge rubber stamp whatever he placed before her." *Id.*; Complaint ¶ 38. He then alleges Debtors' suspended attorney of failing to advise Debtor of State Court hearing dates, which resulted in a default being entered.

It is further alleged that Ms. Machado's counsel had agreed in open court to vacate the default in the State Court, but has refused to so do. *Id.*; Complaint ¶ 47.

The Complaint includes further allegations that the State Court Commissioners:

1. "The commissioner showed no interested in hearing from Mr. Rynda."

2. "The commissioner scoffed, stating: "no one can buy a home for that, and "obviously there was no adequate consideration," and she refused to look at Mr. Rynda's copy of his original quitclaim."

3. "The commissioner demonstrated bias and prejudice toward Mr. Rynda when she assumed had not paid adequate consideration."

4. "The family law judge failed to follow civil code and case law that consideration does not necessarily require money, and is presumed, and lack of consideration can only be raised as an affirmative defense in an answer to complaint."

5. "The family law commissioner then told Mr. Rynda . . .to vacate . . .his home, and issued an order that lacks the address of the property to be

vacated, states the contract is void for lack of consideration, without examining any evidence, without requiring Mrs. Machado to file a complaint for breach of contract or quiet title, which were both time barred and barred by bankruptcy estoppel by this point, and states that the default joining Mr. Rynda to the case is set aside, and Mr. Rynda is free to file an objection."

6. "The order is absurd, because the property was not community property, and therefore the family law court cannot exercise any jurisdiction over him or his property, and if the default joining Mr. Rynda is set aside, as she said in the order, then Mr. Rynda is not joined, and if he is not joined, how can the court issue orders as to him or his property?"

Id.; Complaint ¶¶ 49, 51, 52, 53. As stated, these grounds sound in the nature of an appellate review of a trial court decision.

The Complaint then contains allegations concerning Ms. Machado's prior bankruptcy case she filed in this court. Chapter 13 Case No. 15-21423. The Complaint includes contentions of fraud and misrepresentations by Ms. Machado in that Chapter 13 case. It is asserted that during that case Ms. Machado had the Debtor make her Chapter 13 Plan payments to the Trustee. *Id.*; Complaint ¶ 62.

The Complaint states that there is an appeal pending from the State Court Family Law Division order, as well as Debtor filing a state court Quiet Title Action, in which no action has been taken.

The court has further continued the hearing for the court to review the various state court documents and to determine what has, and what has not, been determined in the State Court Action. The Parties conflicting interpretation of those proceedings necessitates the court's further review.

Additionally, and more significantly, the final continuance is to allow the Debtor to file a plan that properly provides adequate protection for Ms. Machado's asserted interests when using the automatic stay in lieu of an injunction or stay pending appeal.

Elina Machado (the Defendant) Chapter 13 Case

Ms. Machado filed her own Chapter 13 case on February 25, 2015, which was dismissed on September 9, 2016. On Schedule A, Debtor lists owning the 9436 Windrunner Lane Property, with title held by "Husband and Wife." 15-21423; Schedule A, Dckt. 14 at 15. Debtor is not listed on the Schedules or Statement of Financial Affairs, and is not listed on the Master Mailing List (*Id.*; Dckt. 4).

On the Bankruptcy Petition, Ms. Machado lists the 9436 windrunner Lane Property as her residence. *Id.*, Dckt. 1 at 1.

On Schedule I Ms. Machado lists having $3,610 in wage income, an additional $1,000 in family support payments, and $384 in tax refund. *Id.*; Dckt. 14 at 27-28. No income is shown as coming

from Debtor, which is alleged to have been made by Debtor, including the mortgage payment. However, Ms. Machado's Chapter 13 Plan provided for the mortgage payment, and arrearage, to be made by the Chapter 13 Trustee through the Chapter 13 Plan and Amended Plan. *Id.*; Plan ¶ 2.08, Dckts. 12, 53.

DISCUSSION

MOTION FOR RELIEF

All Movant's grounds share a common basis: that Debtor was determined in the State Court Litigation to have no interest in the Property.

From the evidence provided to the court, and contrary to the assertions of Movant, Debtor has some to be determined interest in the Property. Among the findings in the State Court Litigation are the following:

1. There was no valid contract for a sale of the real property to Mr. Rynda (joinder) because there is nothing in writing and there was inadequate consideration.

2. Mr. Rynda is ordered to vacate the property within 30 days.

3. That **Mr. Rynda made payments to Elina and Gabriel Machado in 2014 and made payments on the purchase mortgage to the bank. His interest is to be determined at a later time by the court**.

4. Wife may prepare the property for sale and list the property. The proceeds of the sale shall be placed in attorney, Armando Mendez's trust fund for later distribution.

Exhibit B, Dckt. 27(emphasis added).

What was determined during the State Court litigation was that there was no valid contract and no adequate consideration paid by Debtor for the Property. The court specifically reserved the issue of what interest Debtor has in the Property.

REVIEW OF BANKRUPTCY CASE

Review Fourth Amended Plan

The Debtor now has filed a Fourth Amended Plan filed on January 27, 2019. Dckt. 50. Under the terms of the Plan Debtor proposes:

Monthly Plan Payments.....$2,197.19
Term of Plan.....36 Months

Administrative Expenses

Debtor Counsel Fees.....($ 111.11) per Month
Chapter 13 Trustee Fees.....($ 175.78) per Month

Class 1 Claims

Windrunner Property Secured Claim

Current Monthly Payment.....($1,280.42) per Month

($14,500) Arrearage Payment.....($ 467.743) per Month

Class 2 Claims

Lakeside HOA

($4,731.00) Arrearage Payment.....($ 152.61) per Month

Class 3 Surrender Claims.....None

Class 4 Direct Payments

Erika Leyva.....($100)

Erika Leyva.....($100)

John Rynda.....($100)

U.S. HUD.....($- 0-)

Class 5 Priority.....None

Class 7 General Unsecured Claims

($98,358.09) Claims.....0.00% Dividend

Missing Plan Term

The Fourth Amended Plan (as was the Third Amended Plan as addressed in this court' tentative ruling for the January 29, 2019 prior hearing on this Motion) is silent on the pending litigation over the ownership of the Windrunner Property. As shown from the Motion, there is pending litigation over ownership.

On the Amended Statement of Financial Affairs filed on January 27, 2019, (Dckt. 51), the

Debtor identifies the following pending litigation that is not provided for in the Chapter 13 Plan:

Marriage of Carolina C. Rynda and David J. Rynda. Creditor is David Hicks HF04 150159	Divorce	Sup. Court. California, Alameda County	Concluded

Marriage of Elina Machado and Gabriel Machado 17FL02730	Family law court lacked jurisdiction over debtor and his home. Family court ignored lack of jurisdiction, refused to look at quitclaim presented by debtor, ordered debtor vacate.	Sup. Court California, Sacramento County	On Appeal Appeals kick out order by family court for lack of subject matter and personal jurisdiction over debtor

David J Rynda v Elina Machado and Gabriel Machado	Quiet Title for debtor's home located at 9436 Windrunner Ln., Elk Grove, CA.	Superior Court, Sacramento County	On Appeal Debtor appeals kick out order by family court for lack of subject matter and personal jurisdiction over debtor.

The Fourth Amended Plan assumes that Debtor owns the Windrunner Property, Debtor will make the mortgage payments on the Windrunner Property, and Debtor makes no provision to litigate his asserted rights and interests. While the bankruptcy case appears to be holding the foreclosure at bay, it does not addressing the substantive dispute.

Absence of Motion
(as required under federal law and procedure)
to Confirm Chapter 13 Plan

On January 31, 2019, Debtor's counsel filed a pleading titled "Notion of Motion and Motion to Confirm Debtor's Fourth Amended Plan. Dckt. 65. The footer at the bottom of this Notice and Motion form is that for Best Case Software.

As provided under the Local Bankruptcy Rules, the notice, the motion, each declaration, and

the exhibits (which may be combined into a unified exhibit document) must be filed as separate pleadings. L.B.R. 9004(c), (d); 9014(d)(4).

A motion filed in federal court must state with particularity the grounds upon which the requested relief is based, as well as the relief itself. FED. R. BANKR. P. 9013. Here, the Motion, which is a combined notice and motion, states the following grounds with particularity:

A. Debtor has filed papers with the court to confirm the Fourth Amended Plan.

B. Your rights may be affected.

C. If you do not want the Fourth Amended Plan to be confirmed, you must file a written opposition at least fourteen days before the March 12, 2019 hearing on the motion to confirm.

D. If you do not take such steps to oppose, the court may grant the relief sought in the motion.

Notice of Motion and Motion, Dckt. 65.

The "grounds" stated in the Motion are insufficient to grant the relief requested - Confirmation of the Fourth Amended Plan. The pleading filed is not a motion, but merely a notice. A review of the docket discloses that:

- No motion stating grounds requesting relief has been filed;
- No declaration or documentary evidence has been filed in support of confirming the Fourth Amended Plan;
- No points and authorities has been filed in support of confirming the Fourth Amended Plan.

Nothing more has been done other than filing a document with a title that includes the word "Motion" in it.

Debtor is not prosecuting a Chapter 13 Plan to be confirmed in this case. Rather, it appears that Debtor is seeking to use a form of state court practice in which a mere notice is given and the parties are then forced to construct for the "movant" the motion and supporting pleadings. Though some may in some circumstances get away with such practices in state court, such is not permitted in federal court.

Absence of Provisions For Adequate Protection For Use of Bankruptcy Stay in Lieu of State or Federal Court Injunction

At the prior hearing the court had an extensive discussion with the respective counsel for the parties concerning the use of a bankruptcy stay in lieu of getting an injunction in a state or federal (Fed.

R. Civ. P. 65/Fed. R. Bankr. P. 7065) lawsuit . Possibly, paying the current mortgage payments, curing the arrearage, paying the current HOA fees, and curing the HOA arrearage could be terms of a plan that would provide adequate protection while the automatic stay was used in lieu of the injunction (and required injunction bond). Such adequate protection provisions would be placed in the Additional Provisions - no such provisions are made by Debtor.

Additionally, the provisions would address what would happen in the event that the Debtor loses on appeal, the effect of any bankruptcy stay under the Plan, and termination of such stay under the Plan. No such provisions are made by Debtor.

The Plan, as discussed below, seeks to treat the Property in dispute as being the Debtor's property, ignoring the asserted rights and interests (which so far have been determined to exist by the State Court). The Plan could be misconstrued, and possibly misused in the State Court proceedings, to misrepresent that there is some sort of federal order that determines the rights and interests of the Property as being the Debtor's, and after the Plan is completed, there can be no dispute of such "rights."

COURT'S RE-REVIEW OF STATE COURT LITIGATION

While arguing that the State Court has determined the rights of the Debtor in the Property, Movant has not been able to provide the court with any clear judgment determining such rights. The Debtor has equally been unsuccessful in showing the court how such rights were not determine, but repeatedly argues that the State Court orders should be reversed on appeal for various reasons - making it sound like there is some form of State Court judgment determining that Debtor has no interest in the Property.

Movant did not provide copies of any such orders or judgment as exhibits filed with the Motion.

Debtor has provided as Exhibit I in opposition a copy of a Notice of Appeal to which is attached the Findings and Order of the California Superior Court in the family law Dissolution proceeding In Re The Marriage of Machado, Case No. 17-FL-02730. Dckt. 45 at 15. The Findings and Order states, in pertinent part, the following:

1. Petitioner is Elina Machado and Respondent is Gabriel Machado.

2. An "Other Attendee" is David Rynda.

3. The Superior Court Judge made the following findings:

    a. "There was no valid contract of the sale of the real property to Mr. Rynda (joinder) because there is nothing in writing and there was inadequate consideration."

On this point, the State Court makes no finding that Mr. Rynda did not have an interest in the Property, but only that there was no "valid" contract because: (1) it was not in writing and (2)there was inadequate

consideration. Debtor will have to determine how such an order, if not reversed on appeal, is addressed in the bankruptcy court.

> 4. "Mr Rynda is ordered to vacate the property within 30 days."

While not determining that the Debtor did not have an interest in the Property, he was ordered to vacate the Property. While the automatic stay may interfere with the enforcement of such an order, Debtor will have to determine how such an order, if not reversed on appeal, is addressed in the bankruptcy court.

> 5. "That Mr. Rynda [Debtor] made payments to Elina and Gabriel Machado in 2014 and make payments on the purchase mortgage to the bank. His interest is to be determined at a later time by the Court."

This finding is that made payments on a "purchase mortgage" and appears to indicate that the State Court Judge believed that some rights and interests were obtained by Debtor in the Property. Further, the State Court judge clearly states that Debtor's interests have not been determined in the proceeding which resulted in this Order.

> 6. "Wife may prepare the property for sale and list and sell the property. The proceeds of the sale shall be placed in attorney Armando Mendez's trust fund for later distribution."

This finding sounds in the nature of co-owners of property who cannot agree on management and control of the property, with the court having to order a supervised sale of the property. Such a sale of property co-owned by a debtor and a non-debtor is expressly provided for as a matter of federal law. See 11 U.S.C. § 363(h).

> 7. "The [State] Court reserves jurisdiction over all remaining issues."

The retention of state court jurisdiction does not override the grant of federal court jurisdiction over all property of a bankruptcy estate, what is property of a bankruptcy estate, and the administration of property of a bankruptcy estate. U.S. Const. Art. I, Sec. 8, Clause 4; 28 U.S.C. § 1334(a), (e) and § 157; 11 U.S.C. § 363 and § 541.

While creating exclusive federal court jurisdiction over property of the bankruptcy estate and original federal court jurisdiction for the determination and administration of property of a bankruptcy estate, Congress did not create special bankruptcy only property rights (though Congress has created special rights concerning property, such as 11 U.S.C. §§ 522(f), 544, 547, 547 and 550, but the substantive non-bankruptcy law of the state is applied by the federal courts. This is done every day and bankruptcy and district court judges are well equipped and educated on, and how to ascertain, the applicable state law.

> 8. "Mr. Rynda's default on joinder is to be set aside. He is to file a Response within 30 days."

This indicates that whatever litigation there is involving the Debtor is in the early stages, with the initial

response to still be filed (as of the October 16, 2018 date of the State Court Judge's Order).

No other State Court orders or judgment purporting to determine Debtor's interests in the Property have been provided to this court.

Supplemental Opposition Documents and Nature of Litigation Between the Parties

It has been clear during these proceedings that the two attorneys, in zealously representing their clients, have developed a disdain for each other and the opposing party. This appears to have bled over into not only the State Court proceeding but into this bankruptcy case.

DECISION

Relief From Stay as to the State Court Litigation

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine "whether cause exists to allow litigation to proceed in another forum, 'the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.'" *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int'l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass'n v. Sanders (In re Santa Clara Cty. Fair Ass'n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

Here, Movant is primarily seeking relief as to the Property. However, in its Motion Movant requests an order "Granting relief from automatic stay to allow . . . allowing the State court to determine Debtor's monetary interest in the proceeds, if any." Dckt. 25 at p. 8, ¶ a.

Such request does not accurately state what the State Court has determined. As part of the dissolution action, the State Court Judge saw a need to have the property sold rather than linger during the litigation over Debtor's interest in the Property. Though not stated by the State Court Judge, it is obvious in the context of this bankruptcy case - the pending foreclosure sale on the property due to defaults in payments by Debtor (to the extent he contends to be an owner) and the other asserted owners.

If not sold, then Debtor and other asserted owners of the Property would have an interest in nothing.

Debtor has filed the present bankruptcy case to save the property from foreclosure, cure the arrearage, maintain the current mortgage payment, cure and keep current property taxes, and have the rights and interests of the bankruptcy estate (Debtor's interests). Such is often done in the bankruptcy court, especially during the Great Recession in the past decade.

Chapter 13 Plan

As discussed above, Debtor has fumbled through four proposed plans, unable to put forth one to provide for the litigation, payment of the mortgage and taxes, and adequately protecting the interests of asserted co-owners and creditors having liens on the Property.

The court notes that Debtor and his litigation counsel, who is trying to serve as his bankruptcy counsel, have now filed a proposed Fifth Amended Plan. Dckt. 93. In this Fifth Amended Plan Debtor has included an extensive set of Additional Provisions. Much of this includes a narrative of the ongoing dispute and appeal. It does also include a detailed set of adequate protection provisions. Fifth Amended Plan, Additional Provision § 7.02. These provision make reference to having the property rights determined in the federal court through this bankruptcy case.

The court has not reviewed these provisions for confirmation purposes, leaving it to the parties addressing, in good faith, such issues and working to diligently prosecuting an adversary proceeding to determining the interests of the bankruptcy estate and others in the Property (commonly called a quiet title action).

Continuance of Request for Relief From Automatic Stay – Adequate Protection Ordered

Congress has provided the bankruptcy court, bankruptcy judges, and the Bankruptcy Code to afford a debtor and others to have their rights and interests promptly adjudicated. While in State Court it may take four or five years to get to trial, and it is becoming the same in District Court, the federal judges in a bankruptcy court can get parties who are diligently prosecuting their adversary proceedings to trial within twelve to eighteen months of the filing of a complaint.

Though Debtor has stumbled, Debtor and Debtor's Counsel have demonstrated an ability to properly and diligently prosecute a Chapter 13 Plan that includes the necessary litigation to determine the interests of the bankruptcy estate and others, if they so choose. In doing so, the interests of Movant will not only be adequately protected, but Movant will have the benefit of having her interests vindicated much sooner and at (most likely) a significantly lower monetary cost. In some cases as this, the party in the Movant's position works to "force" the active prosecution of the adversary proceeding and the expeditious determination of her rights and interests in a federal court established for the prompt adjudication of such rights and interests (federal bankruptcy judges not having criminal matters, family law matters, immigration matters, states suing the federal government and the like).

The State Court litigation to adjudicate the bankruptcy estate's rights in the property and Machado's has not yet commenced. Such adjudication was expressly acknowledged for another day,

another action.

Debtor's Chapter 13 Plan is getting to the point of providing adequate protection while litigating the Estate's rights and interests. But as discussed above, the road has not been smooth nor straight. The court has previously ordered that the Chapter 13 Trustee is authorized to make the Class 2 HOA arrearage payments prior to confirmation of the Plan. Order, Dckt. 68. The Trustee is also making the current monthly mortgage payment to Ocwen Loan Servicing, LLC for the obligation secured by the Property in dispute, as well as the monthly arrearage payment as provided in the proposed Chapter 13 Plan. The Fifth Amended Plan requires the currently monthly mortgage payment of $1,493.37 and an arrearage payment of $375.06. Fifth Amended Plan ¶ 3.07(c), Dckt. 93. The arrearage cure amount in the Fifth Amended Plan is consistent with the $21,753.56 arrearage ($21,753.56/60 months = $362.60) and the $1,493.37 current monthly mortgage payment stated in Proof of Claim No. 4-1.

As a condition of not granting the Motion at this time, the court orders that these payments continue, as well as the current HOA fees, until further order of the court.

Denial of Motion to Abandon Property of the Estate

After notice and hearing, the court may order a trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(a). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000). In a Chapter 13 case, Debtor has the rights and powers of a trustee. 11 U.S.C. § 1303.

Colliers is an authority discussing the effect of abandonment pursuant to 11 U.S.C. § 554:

> **Upon abandonment under section 554, the trustee is divested of control of the property because it is no longer part of the estate.** Thus, abandonment constitutes a divesture of all of the estate's interests in the property. **Property abandoned under section 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed**. Although section 554 does not specify to whom property is abandoned, **property may be abandoned by the trustee to any party with a possessory interest in it.** Normally, the debtor is the party with a possessory interest. However, in some cases, it may be some other party, such as a secured creditor who has possession of the property when the trustee abandons the estate's interest. In any event, property abandoned under subsection (c) (scheduled but not administered property) is deemed abandoned to the debtor.
>
> . . .

5 COLLIER ON BANKRUPTCY P 554.02 [3] (16th 2018)(emphasis added).

Movant here requests an order "that the Debtor and the Bankruptcy Trustee abandon The

Real Property under 11USC 554." Dckt. 25 at p. 8, ¶ e. Movant argues this abandonment order is warranted because Debtor has no interest in the property and is not obligated on the mortgage.

From the plain language of the request for relief, it seems Movant misunderstands 11 U.S.C. § 554. That provision is not for the eviction of debtors and trustees. Rather, 11 U.S.C. § 554 permits the trustee to abandon Property of the Estate to any party with a possessory interest–generally the debtor. In effect, Movant here is requesting a federal ruling that Debtor is entitled to possession of the Property.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

If grounds had been shown and evidence provided, the court could have easily made such determination and granted fees (assuming there is a contractual or statutory basis). If an amount of such fees had been included in the motion and prayer, the court and all parties in interest would fairly have been put on notice of the upper limit of such amounts, and the court could have taken the non-opposition and non-response as defaults.

While the court could consider the award of attorneys' fees as a post-judgment motion (Federal Rule of Civil Procedure 52(b) and Federal Rule of Bankruptcy Procedure 7052, 9014), the otherwise unnecessary cost and expense of Movant having to file a motion for an award of attorneys' fees for the unopposed Motion in which it made reference to wanting attorneys' fees would well exceed any attorneys' fees that the court would award for a motion such as this. Movant's strategic decision not to provide the court with grounds for and evidence of attorneys' fees has rendered it useless to proceed with a post-judgment motion that would cost more in unawarded (as in unnecessary and unreasonable fees) attorneys' fees.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Relief from the Automatic Stay filed by Elina Machado ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the request for relief from the Automatic Stay is denied without prejudice on an interim basis, subject to the adequate protection terms of this Order and further hearing.

IT IS FURTHER ORDER that to provide adequate protection for the interests of Elina Machado (to the extent such are determined to exist), David Rynda, the Debtor, shall make through the Chapter 13 Plan, prior to confirmation, the following payments, which the Chapter 13 Trustee is authorized to disburse monthly:

1. Current Monthly Mortgage Payment to Ocwen Loan Servicing., Claim flied as Proof of Claim No. 4-1 in the amount of $1,493.37 as state in said Proof of Claim;

2. Monthly Mortgage Arrearage cure payments of $375.06 for the Ocwen Loan Servicing, LLC claim (Proof fo Claim 4-1);

3. Monthly Home Owners Association dues and fees arrearage payments of $116.18, for the secured arrearage claim of Lakeside Community Owners Association, Proof of Claim No. 6-1. This amount is $25 months higher then stated in the Plan and is based on the secured claim stated by this creditor in Proof of Claim No. 6-1 ($6,971.97 secured claim/60 months = $116.18 a month).

IT IS FURTHER ORDERED that Debtor shall timely make all post-petition regular payments for Home Owners Association fees, due, and other amounts, which are stated to be $68.33 a month on the Third Amended Schedule J filed by Debtor (Dckt. 91 at 1).

IT IS FURTHER ORDERED that Debtor shall commence by March 8, 2019, the adversary proceeding or other appropriate litigation in this court for the adjudication of the rights of the bankruptcy estate (rights of the Debtor when the case was commenced or subsequently acquired by the bankruptcy estate, 11 U.S.C. § 541), Elina Machado, Gabriel Machado, and any other person Debtor believes may assert an interest in the real property commonly known as 9346 Windrunner Lane, Elk Grove, California.

If such adversary proceeding or other appropriate litigation in this court is not timely commenced by Debtor, Elina Machado may commenced such litigation in this court as she and her counsel determine appropriate. The commencement of such litigation by Ms. Machado does not limit the requirement for the adequate protection payments by the Debtor required by this Order.

IT IS FURTHER ORDERED that the Motion to Abandon is denied.

IT IS FURTHER ORDERED that the hearing on the Motion for Relief From the Automatic Stay is continued **to 1:30 p.m on August 27, 2019** for consideration of adequate protection issues and whether further relief is necessary.

5. **18-27720-E-13** **DAVID RYNDA** **MOTION TO DISMISS CASE**
DPC-2 **Tracy Wood** **1-30-19 [57]**

Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 30, 2019. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion to Dismiss is denied without prejudice.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the bankruptcy case of David Jerome Rynda ("Debtor") on the basis that Debtor has not provided 60 days of employer pay advices, has not provided a copy or transcript of his tax return for the most recent prepetition filing year, and has not served and set for confirmation the Fourth Amended Plan.

DISCUSSION

A review of the docket shows Debtor served the Amended Plan and set the confirmation

hearing by Motion on January 31, 2019. Dckts. 65-67. Furthermore, Debtor filed a Certificate of Service indicating Debtor's 2015 and 2016 tax returns and pay advices for the 60 days preceding filing were provided to Trustee. Dckt. 70.

The Debtor has now filed his Fifth Amended Plan and the court is entering an adequate protection order for the interests of Elina Machado, the estate, and anyone else asserting an interest in the real property commonly known as 9346 Windrunner Lane, Elk Grove, California ("Property").

While "struggling," it appears that Debtor and Debtor's counsel are moving forward on a plan which takes into account the necessary litigation to determine the rights and interests of the bankruptcy estate (11 U.S.C. § 541) in the Property.

RULING

The prosecution of this case has been off to a rocky start. In some respects, the worst of state court practices are alleged by each of the attorneys (Ms. Machado's and the Debtor's) against the other. It may well be that the parties, and their attorneys, will be well served in having a federal court system created by Congress to address these types of property issues concerning a bankruptcy estate serve them, rather than a court overburdened with endless family law, criminal law probate, general civil, and other forms of litigation. [FN. 1]

FN.1. Congress grants original jurisdiction for all core matters and bankruptcy cases to the District and Bankruptcy Courts. 28 U.S.C. § 1334(a) and § 157. The federal courts have exclusive jurisdiction over all property of the bankruptcy estate. The issue of what is property of the bankruptcy estate is a matter of federal law 11 U.S.C. § 541, for which the federal courts have original jurisdiction, 28 U.S.C. § 1334(a).

In creating the bankruptcy courts, Congress created a federal judicial system that, while applying all of the Federal Rules of Procedure (bankruptcy and civil rules as specified by the Supreme Court) and insuring that all rights and interests are properly adjudicated in the same manner whether in district court or bankruptcy court, the bankruptcy court judges are focused only on the bankruptcy and bankruptcy related matters – freed from the diversions of criminal, administrative, immigration, family, and other matters. Parties who might wait four or five years to get to trial in a state court or district court can have their day in federal court if it is a bankruptcy or bankruptcy related matter in months if a Contested Matter or eighteen months or less if an Adversary Proceeding.

Both sides have much to gain by diligently and in good faith prosecuting their respective asserted rights and interests. If not, rather than dismissal it appears that conversion to Chapter 7 may be the option for the estate's rights and interests, whatever they may, or may not, be, and a Chapter 7 trustee and that trustee's counsel take up litigating the issues - though such may be more expensive than the Debtor diligently prosecuting such litigation in this court.

At the hearing, the Trustee confirmed that he ~~had/had not~~ received the tax returns and pay

advices as represented by Debtor.

The Motion to dismiss is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by David Cusick ("the Chapter 13 Trustee") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is denied without prejudice.