

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, February 24, 2021
Place: Department B - Courtroom #13
Fresno, California

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

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 AM

1. [20-13904](#)-B-13 IN RE: LINDA TODD
[APN-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY CREDITOR THE BANK OF
NEW YORK MELLON
1-22-2021 [16]

THE BANK OF NEW YORK MELLON/MV
AUSTIN NAGEL/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition, whether further hearing is proper pursuant to LBR 9014-1(f)(2) and issue an order if a further hearing is necessary.

First, LBR 9004-2(c)(1) requires that notices, exhibits, certificates of service, and other specified pleadings are to be filed as separate documents. LBR 9004-2(e) requires proofs of service, in the form of a certificate of service, to be filed separately. Copies of the pleadings "SHALL NOT be attached to the proof of service filed with the court." LBR 9004-2(e)(2). Here, the notice, exhibit index, and certificate of service were combined into one document and not filed separately. Doc. #17.

Second, LBR 9004-2(d) requires exhibits to be filed as a separate document with an index and consecutively numbered pages. Here, the exhibits were filed separately but did not contain an exhibit index or consecutively numbered pages.

Typically, failure to comply with the local rules is grounds for overruling the objection without prejudice. However, because this a LBR 3015-1(c)(4) objection, it would be untimely if overruled and refiled because the deadline—which is seven days after the first date set for the § 341(a) meeting of creditors—has already lapsed. The court could continue the matter, but looking at the plan and

objection, it is obvious on its face that the debtor will need to file an amended plan. For this reason, and in the interest of a just and speedy adjudication, the court will *sua sponte* overlook these procedural deficiencies under LBR 1001-1(f) and the objection will be SUSTAINED. Future violations of the local rules may result in the motion or objection being denied or overruled without prejudice.

The Bank of New York Mellon FKA The Bank of New York, as trustee of The CWABS Inc., Asset-Backed Certificates, Series 2004-6 ("Creditor"), as serviced by NewRez LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") objects to Linda Beverly Todd's ("Debtor") plan confirmation because the plan does not account for the entire amount of the pre-petition arrearages that Debtor owes to Creditor and does not promptly cure Creditor's pre-petition arrears as required by 11 U.S.C. § 1322(b)(5). Doc. #16.

Section 3.02 of the plan provides that it is the proof of claim, not the plan itself, that determines the amount that will be repaid under the plan. Doc. #7, ¶ 3.02. Creditor's proof of claim deadline is March 3, 2021. Doc. #12. Creditor states that it has not yet filed a proof of claim but intends to do so before the deadline with an arrearage in the amount of \$60,472.20. Doc. #16. This claim is classified in Class 1 - paid by the chapter 13 trustee. Plan section 3.07(b)(2) states that if a Class 1 creditor's proof of claim demands a higher or lower post-petition monthly payment, the plan payment shall be adjusted accordingly.

Debtors' plan understates the amount of arrears on the claim. The plan states arrears of \$58,930.39. Doc. #7, ¶ 3.07(c). Creditor states its arrears are \$60,472.20. Though plan section 3.02 provides that the proof of claim, and not the plan itself, determines the amount that will be repaid, section 3.07(b)(2) requires that the payment be adjusted accordingly for a Class 1 claim. The plan will need to be modified.

Therefore, this objection will be SUSTAINED.

2. [19-13411](#)-B-13 **IN RE: ADAM CHAVEZ**
[NES-1](#)

MOTION FOR COMPENSATION FOR NEIL E. SCHWARTZ, DEBTORS
ATTORNEY(S)
1-13-2021 [[64](#)]

NEIL SCHWARTZ/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion was filed on 28 days' notice under Local Rule of Practice ("LBR") 9014-1(f)(1). Neil E. Schwartz of the Law Offices of Neil E. Schwartz ("Movant"), counsel for Adam Chavez ("Debtor"),

requests fees of \$10,850.00 and costs of \$423.00 for a total of \$11,263.00 in compensation for services rendered from October 13, 2018 through December 29, 2020. Doc. #64.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the local rules.

LBR 9014-1(e)(1) requires service of all pleadings and documents filed in support of a motion on or before the date they are filed with the court. LBR 9014-1(e)(2) requires the movant to file a proof of service, in the form of a certificate of service, with the Clerk concurrently with the pleadings or documents served, or not more than three days after they are filed. The proof of service shall identify the title of the pleadings and documents served. LBR 9014-1(e)(3).

Here, Movant filed his motion documents on January 13, 2021. Docs. ##64-67. The original notice of hearing (Doc. #65) stated that the hearing would occur on February 24, 2021 at 11:00 a.m., which was erroneous because our chapter 13 calendar for February 24, 2021 begins at 9:30 a.m. The certificate of service indicates that all parties on the master address list—including Debtor, the chapter 13 trustee, and U.S. trustee—were served the (1) notice of hearing (Doc. #65); (2) fee application (Doc. #64); (3) Exhibits (Doc. #66); and (4) the certificate of service (Doc. #67). Doc. #67.

Later that day, Movant filed an amended notice clarifying that the hearing was scheduled for February 24, 2021 at 9:30 a.m. Doc. #68. Although this notice was substantively correct, no certificate of service was filed.

The following day, a second amended notice was filed. The caption page lists the scheduled hearing for February 24, 2021 at 9:30 a.m., but the first sentence states that the hearing will take place on "**February 24, 2021, at the hour of 11:00 a.m.**" Doc. #69 (*emphasis in original*). This notice is therefore erroneous and ambiguous because it states conflicting times for the scheduled hearing. No certificate of service was provided for this notice either.

Thus, Movant has failed to either (1) serve all pleadings and documents in support of the motion on the required parties or (2) file a certificate of service evidencing the same as required by LBR 9014-1(e). Potential respondents only received the first notice, but not the second (correct) notice or third (incorrect) notice.

Moreover, LBR 9004-2(b)(5) and 9014-1(d)(2) requires the caption page in each pleading to contain the date and time of the hearing. The first notice, which is what potential respondents received, did not contain the correct time of the hearing. The second notice complied with the local rules. The third notice did list the correct time, but contradicted itself in the opening sentence, thereby creating an ambiguity.

For the foregoing reasons, this motion will be DENIED WITHOUT PREJUDICE.

3. [20-13217](#)-B-13 **IN RE: LARRY/DOLORES SYRA**
[MHM-1](#)

MOTION TO DISMISS CASE
1-27-2021 [\[50\]](#)

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to March 10, 2021 at 9:30 a.m.

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

This motion was filed on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c) for unreasonable delay by the debtors that is prejudicial to creditors and failure to confirm a chapter 13 plan. Doc. #50.

Larry N. Syra and Dolores G. Syra ("Debtors") filed a response on February 12, 2021, but opposition was due not later February 10, 2021, so it was not timely. Debtors state that a motion to value a 2014 Audi A4 encumbered by Ally Bank (MAZ-3) was filed on January 27, 2021 and set for hearing on March 10, 2021. Doc. #60. Thus, Debtors request that their case not be dismissed.

This matter will be called as scheduled. Debtors shall address the reasons this court should not strike the opposition as untimely. In the absence of further opposition, the court may be inclined to continue this matter to March 10, 2021 at 9:30 a.m. to be heard in connection with the motion to value collateral.

4. [21-10124](#)-B-13 **IN RE: KIRK/JAYCEE KILLIAN**
[MHM-1](#)

MOTION TO DISMISS CASE
1-22-2021 [\[11\]](#)

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: Granted. Case dismissed with prejudice.

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

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

Chapter 13 trustee Michael H. Meyer ("Trustee") moves to dismiss this case under 11 U.S.C. §§ 1307(c) and 109(h). Doc. #11. Trustee alleges bad faith, contending that Kirk P. Killian and Jaycee M. Killian ("Debtors") filed two doctored certificates of credit counseling on January 20, 2021 by modifying prior certificates filed in their previous, dismissed bankruptcy case. Doc. #13. Trustee argues that Debtors altered the dates that the certificates were allegedly issued and signed. *Id.* Debtors did not timely file written opposition and their defaults will be entered.

The court notes the United States Trustee requested the court retain jurisdiction if this case was dismissed to resolve an adversary proceeding: *U.S. Trustee v. Killian, et al.*, adv. proc. no 21-01005. The court entered that order February 11, 2021. Doc. #26.

This motion will be GRANTED.

Debtors filed bankruptcy on March 6, 2020. *See In re Kirk P. Killian and Jaycee M. Killian*, case no. 20-10886, Doc. #1. This case was heard by the Honorable Jennifer E. Niemann and dismissed on November 11, 2020 for plan payment delinquency under LBR 3015-1(g). *Id.*, Docs. #78; #87. As part of this case, Debtors filed two certificates of financial counseling, one for each joint debtor. Doc. #14, Ex. A.

After their case was dismissed, Debtors filed bankruptcy again on January 20, 2021. Doc. #1. Debtors reused the same two certificates, but first altered the dates the counseling was supposedly completed, and the certificates were signed. *Id.*; *cf.* Doc. #14, Ex. B. Debtors also retained the signatures of the Cricket Debt Counseling Agents who certified to their completion of the counseling, essentially forging their signatures in the process: Ashlie Ward for Mr. Killian and Tiffany Terrell for Ms. Killian.

These certificates bear the following properties:

Case	Debtor	Certificate Number	Date/Time Completed Counseling
20-10886	Kirk P. Killian	34101128	02/17/2020 / 8:51 AM PST
21-10124	Kirk P. Killian	34101128	01/15/2021 / 8:51 AM PST
20-10886	Jaycee M. Killian	34096913	02/15/2020 / 4:32 PM PST
21-10124	Jaycee M. Killian	34096913	01/15/2021 / 4:32 PM PST

Id., Ex. A; *cf.* Ex. B. Thus, it is clear that Debtors altered their prior credit counseling certificates to avoid completing the course a second time. Their original certificates were issued in February 2020, more than 180 days before the second bankruptcy was filed in January 2021. Therefore, Debtors were not eligible to be chapter 13 debtors under § 109(h).

To circumvent this issue, Debtors took their old certificates and changed the dates. Debtors neglected to change the certificate number, the time the certificates were issued, and the certifier. Both of Mr. Killian's certificates bear certificate number 00134-CAE-CC-34101128, issued at 8:51 a.m. by Ashlie Ward, and both of Ms. Killian's certificates bear certificate number 00134-CAE-CC34096913 issued at 4:32 PM by Tiffany Terrell.

11 U.S.C. § 1307(c) permits dismissal or conversion of a chapter 13 case for "cause." Bad faith based on a review of the "totality of the circumstances" is "cause" for dismissal under § 1307. *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir. 1982)

The bankruptcy court should consider the following factors:

- (1) whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner," *id.* (citing *In re Goeb*, 675 F.2d 1386, 1391 (9th Cir. 1982));
- (2) "the debtor's history of filings and dismissals," *id.* (citing *In re Nash*, 765 F.2d 1410, 1415 (9th Cir. 1985));
- (3) whether "the debtor only intended to defeat state court litigation," *id.* (citing *In re Chinichian*, 784 F.2d 1440, 1445-46 (9th Cir. 1986)); and
- (4) whether egregious behavior is present, *Tomlin*, 105 F.3d at 937; *In re Bradley*, 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984)

In re Leavitt, 171 F.3d 1219, 1224 (9th Cir. 1999) (citing *Eisen v. Curry (In re Eisen)*, 14 F.3d 469, 470 (9th Cir. 1994)); see also *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 445 B.R. 904 (B.A.P. 9th Cir. 2011).

11 U.S.C. § 109(h) requires prospective chapter 13 debtors to receive an approved credit counseling briefing during the 180-days before filing.

Here, Debtors were not eligible to be Debtors under § 109(h). To address this, Debtors intentionally altered their old certificates to mislead the court and interested parties as to their compliance with § 109(h).

Bankruptcy relief is intended for the "honest but unfortunate debtor." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Debtors have demonstrated dishonesty by misrepresenting facts in their petition, which were filed in an inequitable manner. Debtors also have a previous filing and dismissal, but it is unclear whether they filed bankruptcy solely to defeat state court litigation. Nonetheless, egregious behavior is present with Debtors' material misrepresentations and forgery.

Trustee seeks dismissal with prejudice to preclude Debtors from seeking discharge of debts that would have been discharged if the plan had been confirmed and completed. *Id.*, 11. This requires a two-step process: the court must dismiss or convert, whichever is in the best interests of creditors, and then may dismiss with prejudice. *Ellsworth*, 455 B.R. at 922. "A dismissal with prejudice is equivalent to a judgment under § 523(a) that each debt that would have been discharged under the debtor's plan is thereafter nondischargeable." *Id.*, at 921-22. Dismissal with prejudice is a "drastic remedy reserved for extreme situations," but Trustee contends this action is warranted due to Debtors' egregious misconduct. *Ibid.*; Doc. #11.

As noted above, Debtors did not timely file written opposition. Their defaults will be entered.

The court agrees with Trustee. This motion will be GRANTED. The case will be DISMISSED WITH PREJUDICE due to Debtors' bad faith by altering their previous credit counseling certificates and misrepresenting their eligibility to be chapter 13 debtors under § 109(h). The order shall specifically reference the court's retention of jurisdiction of the above-described adversary proceeding.

5. [19-15027](#)-B-13 **IN RE: JUAN SILVAR**
[PBB-1](#)

MOTION TO MODIFY PLAN
1-8-2021 [[21](#)]

JUAN SILVAR/MV
PETER BUNTING/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Juan Mendiola Silvar ("Debtor") indicates that his non-filing spouse is currently receiving disability payments and is expected to return to work on or after January 11, 2021. Doc. #24, ¶ 9. Upon request by the chapter 13 trustee, Debtor shall amend Schedule I and J to reflect his wife's restored income after returning to work. If Debtor is otherwise unable to make the plan payments, he shall file, serve, and set for hearing a motion to modify the plan.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed. The order may reference the debtor's obligation to update Schedules I and J at the Trustee's request.

6. [20-13727](#)-B-13 **IN RE: ADOLFO/AURELIA HERNANDEZ**
[ETW-1](#)

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY PELICAN HOLDINGS, LLC
12-15-2020 [[14](#)]

PELICAN HOLDINGS, LLC/MV
SCOTT LYONS/ATTY. FOR DBT.
EDWARD WEBER/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection was filed within seven days after the first date set for the § 341(a) meeting of creditors pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and 9014-1(f)(2).

The objection was previously continued from January 27, 2021 to February 24, 2021 so that the movant could file an amended notice and amended certificate of service complying with the local rules.

Doc. #27. The movant filed an amended notice and certificate of service on January 28, 2021. Docs. #28; #29. Although the notice still states that the objection is being heard on 28 days' notice pursuant to LBR 9014-1(f)(1), which is incorrect, it at least states that written opposition is not required and may be presented at the hearing and is therefore sufficient. Doc. #28.

On February 9, 2021, Adolfo Hernandez and Aurelia Hernandez filed an amended plan, which is set for hearing on March 17, 2021. See SL-1. Accordingly, this objection will be OVERRULED AS MOOT because the debtors filed a new plan, mooted the previous plan to which this objection relates.

7. [20-13430](#)-B-13 **IN RE: RAUL/JESSICA SANCHEZ**
[MHM-1](#)

MOTION TO DISMISS CASE
1-27-2021 [\[15\]](#)

MICHAEL MEYER/MV
JEFFREY ROWE/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to March 10, 2021 at 9:30 a.m.

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

This motion was filed on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c) for unreasonable delay by the debtors that is prejudicial to creditors and failure to confirm a chapter 13 plan. Doc. #15.

Raul Sanchez and Jessica Lee Sanchez ("Debtors") timely responded on February 8, 2021 stating that a motion to avoid lien of Cavalry Investments, LLC (JDR-1), is set for hearing on March 10, 2021. Doc. #29. Debtors request that this motion be denied or, in the alternative, continued to March 10, 2021. *Id.*

This matter will be called as scheduled. In the absence of further opposition, the court is inclined to continue this matter to March 10, 2021 at 9:30 a.m. to be heard in connection with the motion to avoid lien.

8. [19-11740](#)-B-13 **IN RE: RICHARD/VERONICA ESPINOZA**
[TCS-2](#)

MOTION TO MODIFY PLAN
1-20-2021 [\[44\]](#)

RICHARD ESPINOZA/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

9. [20-13542](#)-B-13 **IN RE: PEDRO SILVA RAMIREZ AND ROSA PRECIADO**
[JBC-2](#) **DE SILVA**

MOTION TO CONFIRM PLAN
1-14-2021 [\[34\]](#)

PEDRO SILVA RAMIREZ/MV
JAMES CANALEZ/ATTY. FOR DBT.
RESPONSIVE PLEADING WITHDRAWN,

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

DISPOSITION: Granted.

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

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

The chapter 13 trustee ("Trustee") timely opposed confirmation under 11 U.S.C. § 1325(a)(6) because plan payments are delinquent \$3,195.00 through January 2021. Doc. #44. Trustee withdrew this opposition on February 5, 2021. Doc. #47.

Accordingly, this motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

10. [20-13846](#)-B-13 **IN RE: RACHEL ROBERTS**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H.
MEYER
2-3-2021 [\[21\]](#)

SCOTT LYONS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

ORDER: The minutes of the hearing will be the court's findings and conclusions. Preparation of the order will be determined at the hearing.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to Rachel Roberts' ("Debtor") plan confirmation under 11 U.S.C. § 1325(b)(1) on the grounds that the plan does not provide for all of Debtor's

disposable income to be applied to unsecured creditors under the plan. Doc. #21.

The court notes that Capital One Auto Finance ("Creditor") also timely objected under LBR 3015-1(c)(4) and 11 U.S.C. § 1325(a)(5)(B) to Debtor's plan confirmation because the plan does not provide Creditor the full value of its secured claim. Doc. #24. This second objection is not on calendar because it did not contain a hearing date. The court will call this second objection in connection with this matter because both objections relate to the same plan confirmation.

Trustee's Objection

Under 11 U.S.C. § 1325(b)(1), if the trustee objects to confirmation of the plan, then the court may not approve the plan unless (A) the value of property distributed under the plan exceeds the amount of allowed unsecured claims; or (B) the plan provides that all of the debtor's projected disposable income is to be applied to allowed unsecured claims. Debtor carries the burden by a preponderance of the evidence that the plan complies with the criteria set forth in § 1325 for confirmation. *In re Arnold and Baker Farms*, 177 B.R. 648, 654 (B.A.P. 9th Cir. 1994); *In re Warren*, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (*superseded by statute on other grounds*).

Debtor's plan provides for a 42% (\$72,251.76) distribution to unsecured creditors and estimates approximately \$172,028.00 in general unsecured claims. Doc. #4, ¶ 3.14. Meanwhile, Debtor has monthly disposable income of \$2,903.33 under § 1325(b)(2). Doc. #17, Form 122C-2, at 7, ¶ 45. Multiplying \$2,903.33 per month by 60 months results in \$174,199.80 in total disposable income throughout the plan. Trustee therefore contends that the plan does not provide for all of Debtor's disposable income. The court agrees.

Creditor's Objection

Creditor filed two proofs of claim. Claim #4 was filed on December 27, 2020 in the amount of \$4,104.06 for a 2014 Honda Civic LX Sedan 4D ("Honda"). Claim #11 was filed on January 27, 2021 in the amount of \$31,061.26 for a 2018 Jeep Grand Cherokee Laredo Sport Utility 4D ("Jeep") and is the claim to which Creditor's objection relates. Both Honda and Jeep are listed in the schedules. Doc. #19, Am. Schedule A/B, ¶¶ 3.2, 3.3. Honda is exempted for \$4,951.00 under California Code of Civil Procedure ("C.C.P.") § 703.140(b)(2) and Jeep is exempted for \$1,934.00 under C.C.P. § 703.140(b)(5). *Id.*, Am. Schedule C.

Creditor is listed in Schedule D for both vehicles. For the Jeep, Debtor indicates that Debtor and another owe this debt. Doc. #1, Schedule D, ¶ 2.2. Joshua David Wells is listed as a co-debtor with respect to Creditor and Jeep on Schedule H. *Id.*, Schedule H, ¶ 3.1. Only Debtor owes the debt for the Honda. *Id.*, Schedule D, ¶ 2.3.

Meanwhile, the Honda is provided for in the plan and listed in Class 2(A) for claims not reduced based on the value of collateral. Doc. #4; ¶ 3.08. The Jeep is not listed in the plan.

The court shall confirm a plan if, with respect to each allowed secured claim provided for by the plan, the plan provides that the value of property to be distributed under the plan is not less than the allowed amount of such secured claim. 11 U.S.C. § 1325(a)(5)(B). The allowed amount of the secured claim is determined based on the replacement value a retail merchant would charge for collateral of similar age and condition. 11 U.S.C. § 506(b).

However, a secured creditor's claim needs not be "provided for" by the plan. If it is provided for by the plan, § 1325(a)(5) governs its treatment. There is nothing in §§ 1322 or 1325 requiring that a secured creditor's claim be provided for in the plan. Section 3.11(b) of the plan states that a secured creditor whose claim is not provided for in the plan may seek stay relief. Doc. #4.

Section 3.01 of the plan provides that it is the proof of claim, not the plan itself, that determines the amount to be repaid under the plan. *Id.* If the plan were confirmed, Creditor would have stay relief. However, due to Trustee's objection, the plan will likely need to be amended. The court may continue the second objection if Creditor makes an appearance.

Conclusion

The plan as currently proposed does not provide for all of Debtor's disposable income and therefore cannot be confirmed. Unless opposition is presented at the hearing, the court is inclined to SUSTAIN Trustee's objection. Debtor must file, serve, and set for confirmation hearing another plan.

Trustee's objection will be SUSTAINED.

11. [15-14849](#)-B-13 **IN RE: FREDERICK SOLMS AND CONNIE HILL**
[FW-4](#)

MOTION TO WAIVE SECTION 1328 CERTIFICATE REQUIREMENT, AS TO
DEBTOR
1-22-2021 [[74](#)]

FREDERICK SOLMS/MV
PETER FEAR/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of

any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Joint Debtor Frederick Mark Solms died on December 13, 2019 and is survived by his wife, Connie Sue Hill ("Debtor"). Doc. #77, Ex. A.

Debtor asks this court to excuse Mr. Solms from being required to complete and file a certification under § 1328 and to allow the case manager to enter a discharge on behalf of both Debtor and Mr. Solms after the chapter 13 trustee, Michael H. Meyer ("Trustee"), certifies that the case has been fully administered. Doc. #74.

This motion will be GRANTED.

LBR 1016-1 states:

(a) In a bankruptcy case which has not been closed, a Notice of Death of the debtor [Fed. R. Civ. P. 25(a), Fed. R. Bankr. P. 7025] shall be filed within sixty (60) days of the death of a debtor by the counsel for the deceased debtor or the person who intends to be appointed as the representative for or successor to a deceased debtor. The Notice of Death shall be served on the trustee, U.S. Trustee, and all other parties in interest. A copy of the death certificate (redacted as appropriate) shall be filed as an exhibit to the Notice of Death.

. . .

(b) When the debtor has died or has become incompetent prior to a closing of a bankruptcy case, the provisions of Federal Rule of Civil Procedure 18(a) [Fed. R. Bankr. P. 7018, 9014(c)] apply to the following claims for relief which may be requested in a single motion:

- 1) Substitution as the representative for or successor to the deceased or legally incompetent debtor in the bankruptcy case [Fed. R. Civ. P. 25(a), (b); Fed. R. Bankr. P. 1004.1 & 7025];
- 2) Continued administration of a case under chapter 11, 12, or 13 [Fed. R. Bankr. P. 1016];
- 3) Waiver of post-petition education requirement for entry of discharge [11 U.S.C. §§ 727(a)(11), 1328(g)]; and
- 4) Waiver of the certification requirements for entry of discharge in a Chapter 13 case, to the extent that the representative for or successor to the deceased or incompetent debtor can demonstrate an inability to provide such certifications [11 U.S.C. § 1328].

LBR 1016-1. Pursuant to LBR 1016-1(a), Debtor filed a Notice of Death with a redacted death certificate on April 20, 2020. Docs. #55; #56, Ex. A. The court notes that this document should have been filed not later than February 11, 2020 under LBR 1016-1(a).

Federal Rule of Bankruptcy Procedure 1016 provides:

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Fed. R. Bankr. P. 1016. Courts have held that chapter 13 cases do not need to be dismissed and may continue if (1) the debtor proposed a confirmable plan before the debtor's death; and (2) the plan is feasible after the debtor's death. *In re Perkins*, 381 B.R. 520, 537 (Bankr. S.D. Ill. 2007); *cf. In re Spiser*, 232 B.R. 669, 674 (Bankr. N.D. Tex. 1999) (further administration deemed not possible because the debtors' chapter 13 plan was not confirmed before death); *In re Stewart*, 2004 Bankr. LEXIS 1042 (Bankr. D. Or. Mar. 2, 2004) (continued administration allowed if a personal representative is appointed and the confirmed chapter 13 plan payments are made current and paid through completion of plan).

This case was filed on December 18, 2015. Doc. #1. A plan was confirmed on May 11, 2016. Doc. #39. The current plan provides for payments of \$400.00 for months 1-3, \$432.09 for months 4-60. *Id.* Trustee issued a Notice of Completed Plan Payments on December 23, 2020, and therefore current administration is possible because the plan has been completed. Doc. #70. Trustee's notice requires completion of the § 1328 certificate and financial management course by January 22, 2021. Doc. #70. Debtor states that Mr. Solms completed his personal financial management course prior to passing away. Doc. #76, ¶ 5; see also Doc. #77, Ex. C.

Debtor's declaration also states that Mr. Solms: (1) had not received a discharge in a chapter 7, 11, or 12 case within four years prior to filing the case; (2) had no domestic support objections; (3) did not owe any of the debts described in 11 U.S.C. § 522(q). Doc. #76, ¶¶ 6-9. Debtor also included the § 1328 certificate pertaining to herself. Doc. #77, Ex. B. Therefore, Debtor contends that she and Mr. Solms have complied with § 1328(a) and LBR 5009-1(c) and are entitled to a discharge. Doc. #76, ¶¶ 10-11.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. Mr. Solms will be excused from

completing the § 1328 certificate because Debtor's declaration is sufficient. The clerk's office is to treat this case as it would if Joint Debtor Frederick Mark Solms had completed the § 1328 certificate.

12. [18-11770](#)-B-13 **IN RE: DAVID/DELIA HAYES**
[SLL-3](#)

MOTION TO MODIFY PLAN
1-12-2021 [[81](#)]

DAVID HAYES/MV
STEPHEN LABIAK/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

David Lee Hayes and Delia Marie Hayes ("Debtors") filed this motion on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Doc. #81. The chapter 13 trustee ("Trustee") filed an objection to Debtors' fully noticed motion to confirm a chapter 13 plan. Doc. #87. On February 18, 2021, Debtors withdrew this motion. Doc. #90. Therefore, the matter will be dropped from calendar.

13. [20-13579](#)-B-13 **IN RE: ISMAEL SPINDOLA**
[JBC-2](#)

MOTION TO CONFIRM PLAN
1-14-2021 [[30](#)]

ISMAEL SPINDOLA/MV
JAMES CANALEZ/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was already entered on February 10, 2021. Doc. #51. Accordingly, this motion will be DENIED AS MOOT.

14. [20-13579](#)-B-13 **IN RE: ISMAEL SPINDOLA**
[MHM-2](#)

MOTION TO DISMISS CASE
1-26-2021 [41]

MICHAEL MEYER/MV
JAMES CANALEZ/ATTY. FOR DBT.

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was already entered on February 10, 2021. Doc. #51. Accordingly, this motion will be DENIED AS MOOT.

15. [20-12691](#)-B-13 **IN RE: SAMUEL/ANA LOPEZ**
[AVN-2](#)

MOTION TO CONFIRM PLAN
1-4-2021 [48]

SAMUEL LOPEZ/MV
ANH NGUYEN/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Samuel Alexander Lopez and Ana Miriam Lopez ("Debtors") ask the court to confirm their chapter 13 plan. Doc. #48. Chapter 13 trustee Michael H. Meyer ("Trustee") timely opposed confirmation under 11 U.S.C. § 1325(a)(6) because Debtors are delinquent \$5,500.00 through January 2021. Doc. #59. Trustee withdrew this opposition on February 22, 2021. Doc. #61.

This motion will be DENIED WITHOUT PREJUDICE.

The certificate of service indicates that the moving papers were not properly served on the United States Trustee ("UST") at the correct address in Fresno, California. Doc. #52. Debtors served the wrong UST division at the Sacramento office located at 501 I Street, Rm 7-500, Sacramento, CA 95814. *Id.* The UST should have been served at the Fresno division located at 2500 Tulare Street, Suite 1401, Fresno, CA 93721. See also www.justice.gov/ust-regions-r17/region-17-eastern-district-california-fresno-division.

For the foregoing reason, this motion will be DENIED WITHOUT PREJUDICE.

16. [20-12691](#)-B-13 **IN RE: SAMUEL/ANA LOPEZ**
[MHM-3](#)

MOTION TO DISMISS CASE
1-19-2021 [\[55\]](#)

MICHAEL MEYER/MV
ANH NGUYEN/ATTY. FOR DBT.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

On February 22, 2021, the chapter 13 trustee withdrew this motion. Doc. #63. Accordingly, the matter will be dropped from calendar.

11:00 AM

1. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#)

STATUS CONFERENCE RE: AMENDED COMPLAINT
12-23-2020 [\[92\]](#)

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

2. [20-13855](#)-B-11 **IN RE: MOHOMMAD KHAN**
[20-1068](#)

STATUS CONFERENCE RE: COMPLAINT
12-30-2020 [\[1\]](#)

U.S. TRUSTEE V. KHAN
JUSTIN VALENCIA/ATTY. FOR PL.

NO RULING.

The court notes defendant's answer does not comply with Federal Rules of pleading and is subject to being stricken on the appropriate motion. See Fed. R. Civ. P. 8 (b) (incorporated in Fed. R. Bankr. P. 7008).

3. [19-14170](#)-B-7 **IN RE: JOHNNY GONZALES**
[21-1002](#) [FW-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
1-26-2021 [\[12\]](#)

GONZALES V. FEAR
PETER SAUER/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted with leave to amend.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice 9014-1(f)(1).¹ The failure of any party in

¹ Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rule" will be to the Federal Rules of Bankruptcy Procedure;

interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f) (1) (B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Plaintiff did not oppose. Therefore, the plaintiff's default will be entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Plaintiff Johnny Gonzales ("Plaintiff") filed a chapter 7 bankruptcy petition on October 1, 2019 and Defendant Peter L. Fear ("Defendant") was appointed as the chapter 7 trustee. See Doc. #15, Ex. A; B. Plaintiff filed a lawsuit against Defendant in Fresno County Superior Court on November 10, 2020 alleging breach of an oral contract to sell Plaintiff and his non-filing spouse real property located at 4767 E. Braly Avenue, Fresno, CA 93702 ("4767 Braly") for \$180,000.00. Doc. #3, Ex. A, at 5.

Defendant moves to dismiss this case with prejudice pursuant to Civil Rule 12(b)(6). Plaintiff did not timely file written opposition, but the court notes his opposition to a related employment motion filed January 22, 2021 and a copy of a letter and request for dismissal filed February 8, 2021. See *In re Johnny Gonzales*, case no. 19-14170, Docs. #173; #179.

The state court form of dismissal is dated January 20, 2021. There is no filing date on the copy the court received. The case was removed to this court by the Defendant six days earlier on January 15, 2021. So, the state court no longer had jurisdiction over this adversary proceeding on January 20, 2021 even if the dismissal was filed in the state court on that date.

This motion will be GRANTED with leave to amend.

Complaint

Plaintiff filed a state civil complaint for breach of oral contract against Defendant on November 10, 2020 in Fresno County Superior Court entitled *Johnny Gonzales vs. Peter L. Fear*, case no. 20-CECG-03309. Doc. #3. The complaint alleges that on or about February 5, 2020, Defendant, Plaintiff, and Plaintiff's non-filing spouse, Minerva Gonzales, came to an oral agreement. *Id.*, at 10, ¶ BC-1. The essential terms of this supposed agreement were that Defendant would list 4767 Braly for \$180,000 and lower the price until it sold. *Id.*, at 11, ¶ 1. Plaintiff alleges that he contacted Defendant, informed him he wished to buy the house back for \$200,000, to which Defendant "shouted loudly, 'NO!'" *Id.*, ¶ 2. Plaintiff accuses Defendant of racism, ageism, and elderly abuse. *Ibid.*

"Civil Rule" will be to the Federal Rules of Civil Procedure; and all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

Next, Ms. Gonzales contacted Robert Casey of Berkshire Hathaway Real Estate, Defendant's broker, seeking to purchase 4767 Braly for \$200,000. *Id.*, ¶ 3. Before she could even name her price, Plaintiff alleges, she was refused as his spouse because they were not allowed to sell to either of them. "These two prejudicial refusals to allow me or my wife to buy . . . [4767 Braly] shows that [Defendant] only wanted to take [4767 Braly]." *Ibid.*

Then, on or about May 27, 2020, Defendant breached the oral agreement. "[Defendant] secretly transferred the Deed to [4767 Braly] to a company named Drank Equity [sic] without [Plaintiff's] knowledge or written consent for an amount under \$200,000." *Id.*, ¶ 4. Plaintiff accuses Defendant of prejudice towards him and his wife, calling his acts "unjust and fraudulent[.]" *Id.*, ¶ 5. Defendant "operated deceitfully behind [Plaintiff's] back using bad faith business practices by being biased, racist, and prejudicial and using elderly abuse to cheat [Plaintiff] out of [4767 Braly]." *Id.*, BC-4, ¶ 1.

As result of this breach, Plaintiff is seeking \$100 million dollars in damages, though later requests \$1 million dollars in damages, which were incurred due to Defendant's false statements causing Plaintiff extreme emotional distress. *Id.*, at 12, ¶¶ 2-4; *cf. id.*, at 9, ¶ 10.

Removal and Dismissal

On January 15, 2021, Defendant removed this case to the United States Bankruptcy Court for the Eastern District of California under 28 U.S.C. § 1452(a) and Rule 9027(a). Doc. #1.

Defendant moved to dismiss this case under Civil Rule 12(b)(6) for Plaintiff's failure to state a claim upon which relief can be granted on the basis that Defendant has both qualified and quasi-judicial immunity for duly authorized actions taken pursuant to a bankruptcy court order. Doc. #12. Moreover, even if Defendant did not have immunity, he contends that the claims are barred by the statute of frauds. *Id.*

Meanwhile, Defendant filed a motion to employ Fear Waddell, P.C., as general counsel for the adversary proceeding. *Gonzales*, 19-14170, FW-1. On January 22, 2021, Plaintiff opposed the employment motion on the basis that it was no longer necessary as the case had already been dismissed. *Id.*, Doc. #173. Attached, Plaintiff included a Request for Dismissal referencing the state court case number. *Ibid.* The form is not signed by the clerk and does not appear to be filed, but it is signed by Plaintiff. *Ibid.* No such notice of dismissal was filed in this adversary, but a copy was filed in the underlying bankruptcy on February 8, 2021. *Id.*, Doc. #179. This letter also contained a statement signed by Plaintiff under penalty of perjury declaring that the employment motion is moot because the superior court case was dismissed without prejudice on January 20, 2021. *Ibid.* But no such notice has been filed in this adversary proceeding.

Rule 9027 governs removal of non-bankruptcy actions to bankruptcy court. A removed claim or cause of action may be removed back to non-bankruptcy court under Rule 9027(d), which provides that a motion to remand may be filed under Rule 9014 and served on all parties to the removed claim or cause of action. No such motion has been filed.

Civil Rule 41 (incorporated by Rule 7041) allows for voluntary dismissal by the plaintiff without a court order if the plaintiff files a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Civil Rule 41(a)(1)(A)(i). However, the dismissal form references the state court action, not the adversary proceeding, and no such notice of dismissal has been filed in this case. The only thing before the court is Defendant's motion to dismiss. Thus, the court will consider the merits.

Motion to Dismiss Standard

Civil Rule 12(b)(6) states dismissal is warranted "for failure to state a claim upon which relief can be granted." Courts may dismiss a complaint if it "fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016) (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)); see also *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "A complaint need not state 'detailed factual allegations,' but must contain sufficient factual matter to 'state a claim to relief that is plausible on its face.'" *Doan v. Singh*, 617 F.App'x. 684, 685 (9th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544-55 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

When considering a motion to dismiss, all material facts of the complaint are to be taken as true and should be viewed in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 555). The court may also draw on its "judicial experience and common sense." *Id.*, at 679.

Sale of 4767 Braly

Plaintiff's complaint hinges on the sale of 4767 Braly. In Plaintiff's underlying bankruptcy, Defendant moved to sell 4767 Braly free and clear of liens under § 363(f) on May 6, 2020. Doc. #15, Ex. N, O. This motion was granted on May 27, 2020 and the order entered June 2, 2020. *Id.*, Ex. Q, R. The order provided:

1. The defaults of all non-objecting parties are entered;

2. The motion is granted;
3. The notice of hearing provided sufficient notice to all interested parties;
4. The sale of 4767 Braly and a related property, 4755 E. Braly Avenue, Fresno CA 93702 ("4755 Braly"), is in good faith under § 363(m);
5. Defendant is authorized to sell the two properties to Drake Equity, Inc. as follows:
 - a. 4755 Braly for \$125,000,
 - b. 4767 Braly for \$130,000,
 - c. \$255,000 in total;
6. The sale is free and clear of interests junior to the Bail Bond deed of trust and Mid Valley Services, Inc., deed of trust under § 363(f) (3) and (4), with the following disputed interests:
 - a. \$1,451.12 Francis Wright abstract of judgment,
 - b. \$2,573.62 IRS federal tax lien,
 - c. \$19,715.41 IRS federal tax lien,
 - d. \$1,451.12 Francis Wright abstract of judgment,
 - e. \$4,373.47 Patricia Ann Ramirez abstract of judgment,
 - f. \$6,000.00 Director of Industrial Relations penalty lien,
 - g. \$467.74 City of Fresno lien,
 - h. \$588.74 City of Fresno lien,
 - i. \$500.00 State Labor Commission abstract of judgment,
 - j. \$2,937.93 State Labor Commission abstract of judgment,
 - k. \$2,917.01 State Labor Commission abstract of judgment,
 - l. \$2,936.52 State Labor Commission abstract of judgment,
 - m. \$5,102.64 State Labor Commission abstract of judgment,
 - n. \$269.00 City of Fresno lien, and
 - o. \$7,737.95 State Franchise Tax Board abstract of judgment;
7. In addition to selling free of the above interests, the sale is free and clear of the disputed joint tenancy interest held by Minerva C. Gonzales;
8. The disputed liens and interests attach to the sale proceeds;
9. Defendant is authorized to pay closing costs, including title, escrow, and incidental fees at Defendant's discretion;
10. Defendant is authorized to pay 6% brokerage fees;
11. Defendant is authorized to execute documents as reasonable and necessary to document the transaction and effectuate the transfer; and
12. There is good cause to waive the Rule 6004(h) stay.

Doc. #15, Ex. R. As noted in the order, Plaintiff's default was entered, and the sale was conducted pursuant to this court's order.

According to the proof of service, Plaintiff and his wife were served the (1) notice of hearing; (2) motion to sell free and clear of interests; (3) memorandum of points and authorities in support; (4) Defendant's declaration; (5) declaration of Defendant's counsel; and (6) exhibits, on May 6, 2020 at the following addresses:

Johnny Gonzales
P.O. Box 15058
Fresno, CA 93702-5058

Johnny Gonzales
757 S. Burgan
Fresno, CA 93727

Johnny Gonzales
4755 E. Braly Ave.
Fresno, CA 93702

Minerva Gonzales
757 S. Burgan
Fresno, CA 93727

Id., Ex. P, at 3. Plaintiff therefore received adequate notice of the sale before the order was entered.

Qualified Immunity

First, Defendant contends that the complaint must be dismissed because he has qualified immunity from acting pursuant to an order of this court. Doc. #14.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87.

Defendant insists qualified immunity is applicable in this case because chapter 7 trustees are government officials for the purposes of *Harlow*. *In re J&S Properties, LLC*, 872 F.4d 138 143 (3rd Cir. 2017). "[A] trustee in bankruptcy or an official acting under the authority of the bankruptcy judge, is entitled to derive judicial immunity because he is performing an integral part of the judicial process." *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986). Failure to plead *ultra vires* actions outside of the scope of Defendant's immunity renders the complaint conclusory and warranting dismissal. *Ibid*.

Plaintiff has not plead any acts of the Defendant that were *ultra vires*. The allegations of discrimination in the complaint have no factual basis. The Defendant can choose to whom he wishes to sell the estate property. The sale was noticed for "higher and better" bids. So, at the hearing additional bids—including those of the plaintiff or his spouse—could have been entertained.

Conclusion

As noted above, Defendant was specifically authorized to sell 4767 Braly on June 2, 2020. Plaintiff received adequate notice of the sale and was properly served on May 6, 2020. Opposition was not presented at the hearing on May 27, 2020 and Plaintiff's default was entered. No appeal was taken from the sale order. The order is now final. Thus, Defendant was acting within his official capacity as chapter 7 trustee and executing his duties under the Bankruptcy Code. Plaintiff has not pleaded anything outside of the scope of Defendant's trustee duties and therefore Plaintiff has failed to state a cause of action upon which relief can be granted.

The remaining reasons for dismissal, quasi-judicial immunity and the statute of frauds, are therefore moot. The court is not ruling that these challenges to the complaint are meritless.

Accordingly, this motion will be GRANTED, and the adversary proceeding will be DISMISSED with leave to amend. Plaintiff to file and serve an amended complaint within 14 days of entry of the order.

4. [20-13672](#)-B-7 **IN RE: SHAWN SOSA**
[20-1067](#)

STATUS CONFERENCE RE: COMPLAINT
12-21-2020 [[1](#)]

SOSA V. VALLEY FIRST CREDIT
UNION
TIMOTHY SPRINGER/ATTY. FOR PL.
DISMISSED 1/28/21

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Shawn Sosa ("Plaintiff") filed a Notice of Settlement and Request for Dismissal on January 28, 2021, which stated that the parties reached a settlement and requested that the adversary proceeding be dismissed with prejudice pursuant to Fed. R. Civ. P. 41 (incorporated by Fed. R. Bankr. P. 7041). Doc. #8. The case was subsequently closed on February 16, 2021. Accordingly, this status conference will be dropped from calendar because the case has already been dismissed.

5. [17-13797](#)-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
[19-1123](#)

FURTHER STATUS CONFERENCE RE: AMENDED COMPLAINT
12-19-2019 [[11](#)]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL WILHELM/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.