UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

MODESTO DIVISION CALENDAR

February 27, 2020 at 10:30 a.m.

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1. 12-92049-E-7 12-9032

ROBERT/KATHERINE MATTEUCCI

GRANT BISHOP MOTORS, INC. V. MATTEUCCI ET AL

CLOSED: 09/15/2014
DEBTOR DISMISSED: 08/28/2014

CONTINUED AMENDED MOTION FOR EXAMINATION (ROBERT A. MATTEUCCI)
1-6-20 [104]

Pursuant to the Order issued on January 6, 2020, Dckt. 106, the Motion for the Examination of Robert Anthony Matteucci was conducted at 10:30 a.m. on February 27, 2020, at this court, and **xxxxxxxxxx**.

On February 13, 2019, Defendant Robert Anthony Matteucci filed an Objection Production of Documents Demand contained within the Motion for Examination. Dckt. 110. Overall, Defendant objects on grounds that certain documents requests are not in his possession, the demand is unduly burdensome, and further that the judgment in this action is not against him and thus this process is not the proper method of post judgment examination. Defendant submits the following objections:

1. As to Request #1 for personal federal and state tax returns and all attachments for the years 2007 to 2017: Debtor objects on grounds that the documents are privileged and is unduly burdensome as it seeks documents for 10 years, the majority of which pre-date the bankruptcy filing and judgment.

Defendant cites *King v. Mobile Home Rent Review Bd.*, 216 Cal. App. 3d 1532, (1989); and *Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975). Looking at the cited federal authority, the Ninth Circuit Court of Appeals stated:

> Tax returns do not enjoy an absolute privilege from discovery. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 219, 7 L. Ed. 2d 240, 82 S. Ct. 289 (1961); *Trans World*

Airlines, Inc. v. Hughes, 29 F.R.D. 523 (S.D.N.Y. 1961), *aff'd*, 332 F.2d 602 (2d Cir. 1964), *cert.* dismissed, 380 U.S. 249, 85 S. Ct. 934, 13 L. Ed. 2d 818 (1965). Nevertheless, a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns. *Federal Savings & Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512 (N.D. Ill. 1972); *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y. 1964); cf. 26 U.S.C. §§ 6103, 7213(a). The district court, under the circumstances of this case, could reasonably have based its order to quash the subpoena of tax returns on the primacy of this policy.

Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F2d. at 229.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

2. As to request #2 for federal and state tax returns and all attachments of any business you owned for the years 2007 to 2017: Debtor objects on grounds that the documents are privileged and that such returns do not exist.

3. As to Request #3 for deeds to all property you currently own along with current mortgage balances: Debtor objects on grounds the request is unduly burdensome as Defendant has been unable to locate the deed and that such is equally available to Plaintiff at the Recorder's office.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

4. As to Request #5 for W-2s, 1099s, profit and loss reports, income and expense forms, commission checks and cash deposits for the years 2007 to 2018: Debtor objects on grounds that (1) the documents are privileged, (2) is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, (3) many such documents were previously produced, and (4) bank records dating back to 2016 have been produced at prior examination.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

5. As to Request #6 for bank statement(s) from each and every financial institution where you have done business for the years 2007 to 2018: Debtor objects on grounds that (1) request is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, (2) many such documents were previously produced, and (3) bank statements dating back to 2016 have been produced at prior examination.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

6. As to Request #7 for a current list of your assets and debts (i.e. mortgages, loan balances, liens, etc.): Debtor objects on grounds that (1) the request is unduly burdensome and requires the creation of a document which is not a proper

request for production and (2) Defendant can be asked about these issue but should not have to produce a document.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

7. As to Request #8 for a list of vehicles (automobiles, motorcycles, recreational vehicles, boats, ATVs) owned by you along with all outstanding loan balances for any financed vehicle: Debtor objects on grounds that (1) the request is unduly burdensome and requires the creation of a document which is not a proper request for production and (2) Defendant can be asked about these issue but should not have to produce a document.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

8. As to Request #10 for all documents evidencing your retirement account(s) and their balances: Debtor objects on the grounds that is unduly burdensome but that Defendant will produce documents showing current retirement account balances.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

9. As to Request #13 for all documents evidencing your current occupation(s): Debtor objects on the grounds that is unduly burdensome but that Defendant produced evidence of current income at examination which should be sufficient.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

10. As to Request #14 for all documents evidencing all income you have received from your employment or self-employment in the years 2007 to 2018: Debtor objects on grounds that (1) request is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, and (2) many such documents were previously produced.

Plaintiff Judgment Creditor responds **xxxxxxxxxx**

2. 12-92049-E-7 **ROBERT/KATHERINE MATTEUCCI** **CONTINUED AMENDED MOTION FOR EXAMINATION (KATHERINE S. MATTEUCCI)**
12-9032 **1-6-20 [105]**

GRANT BISHOP MOTORS, INC. V. MATTEUCCI ET AL

CLOSED: 09/15/2014
DEBTOR DISMISSED: 08/28/2014

Pursuant to the Order issued on January 6, 2020, Dckt. 106, the Motion for The Examination of Katherine Sherice Matteucci was conducted at 10:30 a.m. on February 27, 2020, at this court, and **xxxxxxxxxx**.

On February 13, 2019, Defendant Katherine Sherice Matteucci filed an Objection Production of Documents Demand contained within the Motion for Examination. Dckt. 112. Defendant submits the following objections:

1. As to Request #1 for personal federal and state tax returns and all attachments for the years 2007 to 2017: Debtor objects on grounds that the documents are privileged and is unduly burdensome as it seeks documents for 10 years, the majority of which pre-date the bankruptcy filing and judgment.

Defendant cites *King v. Mobile Home Rent Review Bd.*, 216 Cal. App. 3d 1532, (1989); and *Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225 (9th Cir. 1975). Looking at the cited federal authority, the Ninth Circuit Court of Appeals stated:

> Tax returns do not enjoy an absolute privilege from discovery. *St. Regis Paper Co. v. United States*, 368 U.S. 208, 219, 7 L. Ed. 2d 240, 82 S. Ct. 289 (1961); *Trans World Airlines, Inc. v. Hughes*, 29 F.R.D. 523 (S.D.N.Y. 1961), *aff'd*, 332 F.2d 602 (2d Cir. 1964), *cert.* dismissed, 380 U.S. 249, 85 S. Ct. 934, 13 L. Ed. 2d 818 (1965). Nevertheless, a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns. *Federal Savings & Loan Ins. Corp. v. Krueger*, 55 F.R.D. 512 (N.D. Ill. 1972); *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556 (S.D.N.Y. 1964); cf. 26 U.S.C. §§ 6103, 7213(a). The district court, under the circumstances of this case, could reasonably have based its order to quash the subpoena of tax returns on the primacy of this policy.

Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F2d. at 229.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

2. As to request #2 for federal and state tax returns and all attachments of any business you owned for the years 2007 to 2017: Debtor objects on grounds that the documents are privileged and that such returns do not exist.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

3. As to Request #3 for deeds to all property you currently own along with current mortgage balances: Debtor objects on grounds the request is unduly burdensome as Defendant has been unable to locate the deed and that such is equally available to Plaintiff at the Recorder's office.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

4. As to Request #5 for W-2s, 1099s, profit and loss reports, income and expense forms, commission checks and cash deposits for the years 2007 to 2018: Debtor objects on grounds that (1) the documents are privileged, (2) is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, (3) many such documents were previously produced, and (4) bank records dating back to 2016 have been produced at prior examination.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

5. As to Request #6 for bank statement(s) from each and every financial institution where you have done business for the years 2007 to 2018: Debtor objects on grounds that (1) request is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, (2) many such documents were previously produced, and (3) bank statements dating back to 2016 have been produced at prior examination.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

6. As to Request #7 for a current list of your assets and debts (i.e. mortgages, loan balances, liens, etc.): Debtor objects on grounds that (1) the request is unduly burdensome and requires the creation of a document which is not a proper request for production and (2) Defendant can be asked about these issue but should not have to produce a document.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

7. As to Request #8 for a list of vehicles (automobiles, motorcycles, recreational vehicles, boats, ATVs) owned by you along with all outstanding loan balances for any financed vehicle: Debtor objects on grounds that (1) the request is unduly burdensome and requires the creation of a document which is not a proper request for production and (2) Defendant can be asked about these issue but should not have to produce a document.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

8. As to Request #10 for all documents evidencing your retirement account(s) and their balances: Debtor objects on the grounds that is unduly burdensome but that Defendant will produce documents showing current retirement account balances.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

9. As to Request #13 for all documents evidencing your current occupation(s): Debtor objects on the grounds that is unduly burdensome but that Defendant produced evidence of current income at examination which should be sufficient.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

10. As to Request #14 for all documents evidencing all income you have received from your employment or self-employment in the years 2007 to 2018: Debtor objects on grounds that (1) request is unduly burdensome as it seeks documents for 11 years, the majority of which pre-date the bankruptcy filing and judgment, and (2) many such documents were previously produced.

Plaintiff Judgement Creditor responds **xxxxxxxxxx**

3. 18-90847-E-7 IMELDA PADILLA
MF-6 Thomas Gillis

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH THE ESTATE AND IMELDA PADILLA, DEBTOR
1-17-20 [127]

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 on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 17, 2020. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise 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 Approval of Compromise is granted.

Michael D. McGranahan, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Imelda Padilla ("Settlor"). The claims and disputes to be resolved by the proposed settlement are an interest in real property commonly known as 3912 Pheasant Lane, Modesto, CA and the Debtor's 2018 federal and state income tax return refund.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit 1 in support of the Motion, Dckt. 130:

A. The agreement is subject to the approval of the Bankruptcy Court and is of no force or effect until approved by the Bankruptcy Court. The agreement shall become immediately effective upon entry of an order of the Bankruptcy Court.

B. Debtor will pay the Trustee the total sum of $8,000.00. Trustee shall hold the Settlement Payment separate from the other assets of the estate pending Court approval of the sale. If the Bankruptcy Court does not approve the sale to Debtor, Trustee will refund this amount within three days of the final hearing on the motion.

C. Trustee's objection to Debtor's exemptions will be resolved, the Parties will seek entry of an order disallowing Debtor's exemption in the Tax Refunds to the extent it exceeds $3,188.00 and disallowing Debtor's exemption in the Residence pursuant to California Code of Civil Procedure § 703.140(b)(1). The balance of Debtor's exemptions will be allowed.

D. Debtor will dismiss, with prejudice, with a motion to convert the case to Chapter 13.

E. Both parties agree: (a) that the facts and circumstances considered by the Parties in making this Agreement are in dispute; (b) that this Agreement is not intended to conclusively establish the truth of any matter, including the value of any property or the amount of any claim; and (c) that each Party expressly denies any liability to the other Party and to third parties.

F. Each party agrees to the following releases: (a) Trustee releases Debtor and all persons, from any and all claims; (b) Debtor releases Trustee and the bankruptcy estate from any and all claims.

G. The Parties specifically waive the benefit of the provisions of Section 1542 of the Civil Code of the State of California.

H. The Agreement cannot be modified unless by a signed writing specifying that it amends this Agreement.

I. Each Party warrants and represents to the other Parties that (a) the releasing Party is the sole and lawful owner of all rights, title, and interest in the claims and liens which he, she or it is releasing; and (b) the releasing Party has not voluntarily, by operation of law or otherwise assigned transferred, any of the claims or liens which he, she or it is releasing.

J. The Parties shall indemnify the other Party from and against any third-party claim arising out of the breach of any warranty or representation contained in Paragraphs 12 and 13 of this Agreement.

K. The parties agree to bear their own attorneys' fees and costs in connection with the Agreement. However, in the event of a breach of this Agreement by another Party to this Agreement, the breaching Party will pay reasonable attorneys' fees and costs of the non-breaching party.

L. The Agreement shall be deemed to have been drafted by all parties.

M. Agreement shall be construed and enforced pursuant to the laws of the State of California.

N. Parties agree that any claim or dispute between them regarding the enforcement or interpretation of this Agreement must be resolved by the Bankruptcy Court. In the event the Bankruptcy Court declines jurisdiction, the parties agree that any such claim or dispute shall be resolved by the United States District Court for the Eastern District of California. In the event the District Court declines jurisdiction, the Parties agree that any such claim or dispute shall be resolved by a court of competent jurisdiction located in the State of California.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

The Trustee asserts he sees substantial risks in moving forward with the litigation. Trustee explains that Debtor is not on the legal title to the residence and that the non-filing spouse purchased the residence in 1999. Additionally, it will be difficult to prove when the Debtor began living in the residence and to what extent her income was used to pay the mortgage or improvements to the residence.

With respect to the tax refunds, Trustee believes Debtor is estopped from making adjustments to her exemptions. Further, Debtor's interest in the tax refunds are less than the wild card exemption under California Civil Procedure Code Section 703.140(b)(5).

Difficulties in Collection

Trustee states collection is a major concern. Further, forcing the non-filing spouse to surrender his interest in the Property will likely require an adversarial proceeding that might find Debtor's interest to be minimal. In respect to the tax returns, Trustee claims Debtor has already spent the tax refunds and does not have cash to pay the full balance to Trustee. Trustee also states, it is unclear if the Debtor is currently employed, thus any judgment obtained against Debtor may not come to fruition if the Debtor cannot make payments.

Expense, Inconvenience, and Delay of Continued Litigation

Trustee asserts that litigation against the Debtor will be factually intensive and will potentially require reviewing two decades of financial records. Further, the Estate would have to incur substantial legal fees in order to obtain possession of the residence from the non-filing spouse.

Paramount Interest of Creditors

Trustee believes this Agreement provides a benefit to the Estate's Creditors. The Agreement provides Trustee the ability to swiftly move forward with preparation of his final report and making distributions on allowed claims.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the Agreement outweighs the costs of litigation, allowing the parties to resolve this dispute in an economically rational manner. The Motion is granted.

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 Approve Compromise filed by Michael D. McGranahan, the Chapter 7 Trustee, ("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 Motion for Approval of Compromise between Movant and Imelda Padilla ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 1 in support of the Motion (Dckt. 130).

4. **11-91064-E-7** **THOMAS WASHBURN** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH THOMAS WASHBURN**
MHK-2 **Patrick Greenwell**
1-24-20 [34]

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 on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, and Office of the United States Trustee on January 24, 2020. By the court's calculation, 34 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise 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 Approval of Compromise is granted.

Eric J. Nims, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Archer Systems, LLC ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a products liability claim which arose pre-petition and is thus property of the bankruptcy estate.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit C in support of the Motion, Dckt. 38):

A. The gross settlement for Debtor's product liability claim was $145,000.00

B. Debtor's product liability claim also includes an additional $2,939.89 for administrative costs, generating a total a total gross settlement amount of $147,939.89.

C. Debtor's attorney in this matter, Tom T. Washburn, took the case on 40% continency. From this contingency fee, Debtor's attorney will receive $59,175.96. The court would like to note, in the Motion, it states, Debtor's counsel took a total amount of $48,944.20. Dckt. 34. Upon review Exhibit C, the closing statement clearly states "Contractual Attorneys' Fees" and lists $59,175.96 as the compensation to be received. Dckt. 38. The Trustee states that the legal services were provided to the Debtor pre-petition.

D. Case-specific fees and expenses in the amount of $1,499.18 are to be paid from the Gross Settlement Proceeds. Shared costs and expenses of the Settlement in the amount of $3,626.79.

E. Debtor's share of the Administrative Cost fund is $2,939.89 and is to be paid back from the Gross Settlement Proceeds.

F. Liens against the Gross Settlement Proceeds for specific medical costs total $567.92 and are to paid from the Gross Settlement Proceeds.

G. The net remaining proceeds of the Products Liability Claim are estimated to be $80,130.15. These monies will be disbursed directly to the Chapter 7 Trustee.

H. The Settlement includes a general release of rights of claims by the Debtor, Trustee and the bankruptcy estate which permanently enjoining the parties from asserting or prosecuting any claims related to or arising from the settled claim.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Trustee argues this factor is not applicable in this case. Trustee asserts the Agreement was reached under an agreed settlement procedure. Trustee is not certain if the Products Liability Claim is viable outside of this procedure.

Difficulties in Collection

Trustee is uncertain if the medical device company would be found liable for this claim if the Estate were to pursue the claim outside of settlement procedure. Rather, the funds for the payment for the claim are immediately available through the settlement trust, thus the Agreement does not present an issue with collection for the Estate.

Expense, Inconvenience, and Delay of Continued Litigation

The Trustee asserts the expense in product liability litigation would be complex, expensive, and time consuming. Further, Trustee states neither him or the Debtor has the "economic wherewithal" to finance litigation.

Paramount Interest of Creditors

Trustee states the Agreement is in the best interest of the creditors because the payment will "yield a significant dividend" to unsecured claims after payment of administrative expenses.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the settlement provides the Estate money to distribute to Creditors immediately. The Motion is granted.

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 Approve Compromise filed by Eric J. Nims, the Chapter 7 Trustee, ("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 Motion for Approval of Compromise between Movant and Archer Systems, LLC ("Settlor") is granted, and the respective rights and

interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit 38 in support of the Motion (Dckt. C).

5.	**19-90400-E-7** **SSA-1**	**JUSTAN JOHNSON** **Steven Altman**	**CONTINUED MOTION TO DISMISS CASE** **8-9-19 [24]**

No 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 on Debtor, Debtor's Attorney, Chapter 7 Trustee, Trustee's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on August 9, 2019. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss 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 to Dismiss the Case is xxxxx.

FEBRUARY 6, 2020 HEARING

The Parties reported that they are continuing to negotiate and requested a continuance. The court addressed with the Parties that the dismissal order could include a mandatory injunction that the Debtor pay specified claims and transfer to the Trustee for payment of Trustee and professional fees from the loan escrow. Debtor would stipulate to such mandatory injunction, waiving the provisions of Federal Rule of Bankruptcy Procedure 7001 and consenting to such relief by motion. If Debtor were to violate the mandatory injunction, in addition to compensatory damages, Debtor would be subject to not only the corrective sanction power exercised by a bankruptcy judge, but the punitive sanction power of an Article III district court judge.

Debtor's counsel repeated that it is urgent that Debtor get this loan completed, and the lenders will not do so while the Debtor is in bankruptcy or if Debtor gets a discharge.

JANUARY 23, 2020 HEARING

The parties reported that this matter is moving to a conclusion, with the Trustee and Debtor to structure the judicial methodology for the post dismissal documentation of the Trustee that the claims have been paid by the Debtor through the refinance and that documenting the allowance of Trustee and professional fees.

The parties requested and the court that the discharge of the Debtor's entered until after April 30, 2020.

October 17, 2019 Hearing Continuance

At the hearing, Counsel for the Debtor reported that the Parties want to keep this case open, with the hearing continued to January 2019. The Debtor will not be inheriting the property until December 2019. There is also a judgement obtained by a collection agency and the Debtor is working to make sure there is not an abstract of judgment that would complicate the financing to pay all creditors in full.

REVIEW OF MOTION

The debtor, Justan A. Johnson ("Debtor"), filed this Motion seeking to dismiss the Chapter 7 case pursuant to 11 U.S.C. § 707. Debtor's reason for wanting dismissal is straightforward: in less than a month after filing this case, Debtor's grandmother passed away, and Debtor learned he will inherit real property valued at approximately $300,000.00. Declaration, Dckt. 28.

The Debtor argues that with this significant change in financial circumstances, Debtor can procure a secured loan for roughly $50,000.00 to pay all claims in this case, as well as any administrative expenses the Chapter 7 trustee has incurred thus far.

In support of the Motion, Debtor filed the Declaration of Chris Harringfeld, the president and owner of California Mortgage Associates. Declaration, Dckt. 27. Harringfeld testifies that it will be difficult to obtain a loan on the Debtor's new property while in a Chapter 7, and that even in a chapter 13 it would take approximately one year before Debtor is eligible for a loan. *Id*.

CHAPTER 7 TRUSTEE'S OPPOSITION

Garry Farrar, the Chapter 7 Trustee ("Trustee") filed an Opposition on September 5, 2019. Dckt. 30. Trustee argues that despite the Debtor's representations, there is nothing requiring Debtor to pay creditors in the event the case is dismissed.

Trustee argues further that despite Debtor's arguments, Debtor could receive a loan despite being in bankruptcy. The Declaration of Trustee provides testimony that he would be able to get a loan secured by the property for $50,000.00 at 9.75% APR and 3 points over a 10 year term. Declaration, Dckt. 31.

Trustee concludes that allowing him to administer the property would pay all claims in this case and avoid "plain legal prejudice" to creditors.

DEBTOR'S REPLY

Debtor filed a Reply on September 11, 2019. Dckt. 34. Debtor argues the following:

1. Information about a potential loan brought in through Trustee's Exhibit B is inadmissable hearsay.

2. The loan proposed by Trustee is more akin to a "hard money loan."

3. There is no prejudice to any creditor through dismissal of the case because creditors are free to assert their rights outside of bankruptcy. No creditor has filed an opposition to the Motion.

4. Debtor wishes to proceed outside of bankruptcy to preserve his credit and to avoid further administrative costs.

SEPTEMBER 19, 2019 HEARING

At the September 19, 2019 hearing, the parties requested the hearing be continued so they can work out a stipulated order to address the Trustee's concerns. Civil Minutes, Dckt. 38.

DISCUSSION

The court may dismiss a case under Chapter 7 only after notice and a hearing and only for cause. 11 U.S.C. § 707. Colliers provides the following discussion regarding voluntary dismissal:

> When the debtor seeks dismissal of a voluntary case, the relevance of the "cause" requirement has been questioned. Most cases, however, seem to require some cause for dismissal even in this situation, although the cause may simply be that dismissal is in the best interest of the debtor and not prejudicial to creditors. The debtor's best interest lies generally in securing an effective fresh start upon discharge and in the reduction of administrative expenses, leaving resources to work out debts; for creditors, if delay is said to have prejudiced them, the court must determine whether, as section 707(a) provides, the delay has been unreasonable. Thus, for example, the Court of Appeals for the Second Circuit, in Smith v. Geltzer, held that the bankruptcy court must consider whether dismissal would benefit creditors and whether it would enable the debtor to secure an effective fresh start, as well as the costs to the debtor, both in administrative expenses and the possible harm to a debtor's ability to obtain credit or seek bankruptcy relief in the future.
>
> When the debtor seeks dismissal, courts must take care to assure that creditors will not be prejudiced by a dismissal. Debtors are not generally permitted to dismiss cases over the objections of creditors or the trustee in order to refile to gain the benefit of exemptions that had been improperly claimed in the first case. Some courts have refused dismissal of a voluntary petition when the primary purpose was to file a fresh petition that would include debts incurred since the petition sought to be dismissed was filed. Similarly, dismissal may be denied when it is sought because property has been obtained or is expected that could satisfy the debtor's debts, to transfer the case

> to a different district, to render dischargeable a previously nondischargeable debt, or because fraud on the part of the debtor is discovered. The fact that the debtor has changed his or her mind about invoking bankruptcy jurisdiction to seek relief from debts and giving up the Seventh Amendment right to a jury trial on a claim that has passed to the bankruptcy estate is not, by itself, cause for dismissal.
>
> Generally, it has been held that the trustee has standing to object on behalf of the unsecured prepetition creditors of the debtor, even if no creditor objects. However, some courts have held that the trustee may object only for the purpose of securing the trustee's own costs and expenses.

6 Collier on Bankruptcy P 707.03 (16th 2019).

Here, the cause for dismissal is arguably that payment of claims would be easier and cheaper outside of bankruptcy given Debtor's post-petition change in circumstances. This argument is well-taken. Dismissing the bankruptcy would reduce administrative expense, avoid more significant detriment to Debtor's credit, and possibly allow for more favorable loan terms.

At the same time, allowing Debtor to dismiss the case would permit Debtor to increase the delay and expense to creditors before recovering on their claims (in the event creditors are forced to seek enforcement themselves, Debtor deciding not to voluntarily pay claims as represented).

Debtor commenced this case with the May 1, 2019 *pro se* filing of his Voluntary Petition. On Schedule D Debtor lists one creditor with a claim of ($13,384.00) secured by Debtor's vehicle stated to have a value of $14,000.00. Dckt. 1 at 19.

Debtor lists having general unsecured claims of ($30,447.00), of which ($17,433) is Capital Bank for credit card debt, ($5,751.00) to Chase Bank for credit card debt, and ($2,485.00) to Chase Card for credit card debt. Schedule D/E, *Id.* at 20-21. Thus, at least 84% of Debtor's unsecured obligations are for credit card debt.

Going to Schedule I Debtor listing having monthly take home income of $2,735. *Id.* at 26-27. On Schedule J Debtor lists having ($2,842.00) in month obligations, leaving him a negative ($106.21) a month after his reasonable and necessary expenses. This includes ($700) a month for rent.

In his Reply Debtor bemoans that the loan the trustee suggests is a "hard money loan" and not reasonable. Given Debtor's income, one questions what other loan he could obtain. This "get a loan and pay creditors" solution is the one given to the Debtor why the case should be dismissed and creditors be left to Debtor voluntarily paying everyone.

The Trustee filed a Reply Declaration to the Reply filed by the Debtor to the opposition addressing the lack of a declaration by a representative of the hard money lender. Dckt. 36. This provides confirmation of a loan to Debtor.

It appears that given Debtor having engaged experienced counsel and there being an experienced, reasonable Chapter 7 Trustee, a possible resolution based on a realistic repayment method could be established. It may be, if the Debtor investigates other lenders that his post-bankruptcy dismissal rate may

be better, but only slightly better, given his income and expenses. It may be a year or two after dismissal he could refinance.

Or it may be that a lien or other encumbrance can be placed on the property to insure that the monies from the property, loan or sale, will be used to pay the claims that would be paid through this bankruptcy case filed by Debtor.

6. 19-90109-E-7 ICE-1 | **BRIAN GILE** **James Mootz** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH BRIAN PAUL GILE AND JOHN PATRICK GILE** **1-17-20 [19]**

No 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 on Debtor, Debtor's Attorney, creditors, parties requesting special notice, and Office of the United States Trustee on January 17, 2020. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise 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 Approval of Compromise is xxxxxxxxxx.

Irma Edmonds, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with John Patrick Gile ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a preferential payment or fraudulent conveyance by Debtor.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court:

A. A gross settlement of the claim in favor of the Debtor's estate for $5,000.00.

B. Release by the Estate and any other and further claims against John Patrick Gile in their entirety.

As discussed below, the language of the motion appears to state that the Trustee is releasing John Patrick Gile of each and all other claims, for whatever right or theory, related or unrelated to the present motion. The court cannot tell what is being given up for the $5,000.00 payment to recover an alleged $5,000.00 preferential payment.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

While the Trustee believes the success of litigation is high, Trustee states litigation is not needed because the Agreement provides the estate with as much money as the Trustee contends was owed at filing.

Difficulties in Collection

Trustee asserts that prompt payment of $5,000.00 resolved the need for continued litigation. Thus, with the Agreement, collection will not be an issue and the settlement saves the Estate litigation costs.

Expense, Inconvenience, and Delay of Continued Litigation

Trustee states having received full settlement funds the need for litigation is circumvented.

Paramount Interest of Creditors

Trustee believes the settlement is economically advantageous for the Estate because the settlement is for the full amount requested by the Trustee.

However, it appears from the Motion, there being no settlement agreement provided, that the Trustee is purporting to grant a general relief of any and all claims, whatever theory, basis, or obligation for the $5,000.00 payment.

At the hearing, **xxxxxxxxxx**

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest ~~of the creditors and the Estate because the Estate is receiving full value of the claim with the settlement funds. The Motion is granted.~~

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 Approve Compromise filed by Irma Edmonds, the Chapter 7 Trustee, ("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 Motion for Approval of Compromise between Movant and John Patrick Gile ("Settlor") is ~~granted, and the respective rights and interests of the parties are settled on the terms that payment of $5,000.00, which the Trustee has reported has been received, and the Trustee releasing any other and further claims against John Patrick Gile in their entirety relating to the $5,000.00 transfer.~~

7. **18-90975-E-7** **JIMMIE/HEATHER DRAKE** **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH JIM DRAKE, SR. AND GEORGIA DRAKE**
ICE-1 **Martha Passalaqua** **1-17-20 [15]**

No 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 on Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on January 17, 2020. By the court's calculation, 41 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Approval of Compromise 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 Approval of Compromise is xxxxxxxxxx.

Irma Edmonds, the Chapter 7 Trustee, ("Movant") requests that the court approve a compromise and settle competing claims and defenses with Jim Drake, Sr. And Georgia Drake ("Settlor"). The claims and disputes to be resolved by the proposed settlement are a preferential payment or fraudulent conveyance by Debtor within one (1) year preceding the bankruptcy case.

Movant and Settlor have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court:

A. A gross settlement of the claim in favor of the Debtors' estate for $1,500.00.

B. Release by the estate and any other and further claims against Jim Drake, Sr. and Georgia Drake in their entirety.

As discussed below, the language of the motion appears to state that the Trustee is releasing John Jim Drake, Sr. and Georgia Drake of each and all other claims, for whatever right or theory, related or unrelated to the present motion. The court cannot tell what is being given up for the $5,000.00 payment to recover an alleged $5,000.00 preferential payment.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Probability of Success

Trustee states she believes the probability of success in litigation would be high. However, Trustee asserts that the Agreement provides the Estate as much money as what was owed at the time of filing in this matter and thus there is no need for litigation.

Difficulties in Collection

Trustee asserts the prompt payment of the Agreement achieves the Trustee's goal of placing the amount of residual monies in the Estate at which should have been at the time of filing. Further, payment has already been tendered and as such it saved the Estate litigation costs.

Expense, Inconvenience, and Delay of Continued Litigation

The need for litigation is circumvented by having received full settlement funds for the full amount of the asserted preference.

Paramount Interest of Creditors

Trustee claims, the Agreement is economically advantageous for the bankruptcy estate. Trustee asserts the Agreement should be met with no opposition from creditors because the Agreement provides for the full amount requested by Trustee.

However, it appears from the Motion, there being no settlement agreement provided, that the Trustee is purporting to grant a general relief of any and all claims, whatever theory, basis, or obligation for the $1,500.00 payment.

At the hearing, **xxxxxxxxxx**

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing **----------**.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest ~~of the creditors and the Estate because the Estate is receiving full value of the claim with the settlement funds. The Motion is granted.~~

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 Approve Compromise filed by Irma Edmonds, the Chapter 7 Trustee, ("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 Motion for Approval of Compromise between Movant and Jim Drake, Sr. and Georgia Drake ("Settlor") is ~~granted, and the respective rights and interests of the parties are settled on the terms that payment of $1,500.00, which the Trustee has reported has been received, and the Trustee releasing any other and further claims against Jim Drake, Sr. and Georgia Drake, and each of them, in their entirety relating to the $1,500.00 transfer.~~

8. 17-90492-E-7 **JED GLADSTEIN** **MOTION TO DISMISS ADVERSARY**
17-9020 **USA-1** **PROCEEDING/NOTICE OF REMOVAL**

GLADSTEIN V. DEPARTMENT OF EDUCATION

1-29-20 [92]

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 on Plaintiff-Debtor, and Plaintiff's Attorney on January 29, 2020. 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 Motion to Dismiss Adversary Proceeding is denied.

United States Department of Education ("Defendant") moves for the court to dismiss all claims against it in Jed Gladstein's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. On or about September 5, 2000, Debtor incurred student loans to Defendant in the amount of $21,976.33 and $27,103.86. Dckt.71, at ¶ 6. Debtor also has other federally guaranteed student loans; the current balance on all loans is approximately $108,000.00. *Id.*

B. In or about 2001, Debtor obtained employment with Mendocino County Department of Education. *Id.* at ¶ 7. In or about 2005, Debtor was laid off due to statewide budget cuts. *Id.* at ¶ 8.

C. Debtor has attempted to work and make payments on this debt since that time, but has mainly been reliant on his Social Security for income since 2009. *Id.* at ¶ 9.

D. Debtor cannot handle any full-time employment anymore, is disabled, and has: advanced arthritis in both knees, a bilateral ablation (two bulging discs in his lower back that pinch Debtor's nerves), severe arthritis in his neck and shoulders. *Id.* at ¶ 10. Due to these disabilities, Debtor cannot sit, walk, stand or climb for prolonged periods of time and cannot lift significant weights at all. *Id.*

E. Due to Debtor's advanced age (72 years old) and his disabilities he will not be employable for the remainder of his life. *Id.* at ¶ 5, 11, 14.

F. Debtor's meager income is not sufficient to sustain him. *Id.* at ¶ 13.

G. Debtor has made at least 42 regular monthly payments on his student loan debt. *Id.* at ¶ 15. Debtor has tried several times to negotiate this student loan debt, including unsuccessful attempts to have the interest rate reduced after he was laid off from work. *Id.* at ¶ 16.

H. As to the first claim for relief, Debtor asserts repayment of any part of this student loan debt would constitute undue hardship to Debtor. *Id.* at ¶ 18.

I. Debtor cannot maintain, based on current income and expenses, a minimal standard of living for himself if forced to repay the loans. *Id.* at ¶ 19.

J. Debtor's age and disability insure that his current dire financial condition will persist throughout the life of the loans. *Id.* at ¶ 20.

K. Debtor has made good faith efforts to repay these loans. *Id.* at ¶ 21.

Prayer for Relief

Debtor requests judgment declaring the Department of Education debt discharged pursuant to 11 U.S.C. 523(a)(8) as clarified by *Brunner v. New York State Higher Education Services Corp*. 831 F.2d 395 (2nd Cir. 1987).

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).

Exceptions to Discharge

Under 11 U.S.C. § 523(a), a debtor may discharge education loans if paying such debt would cause undue hardship. Specifically:

> (a)A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> > (8)unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)
(i)an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
(ii)an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B)any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on February 10, 2020. Dckt. 97. Plaintiff-Debtor ("Debtor") states his counsel has passed away and Debtor is not in a position to hire a new attorney. Debtor asserts Defendant's Motion is untimely. Debtor served Defendant on October 28, 2019 in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(4). Thus, Defendant had 35 days after notice was provided to file a responsive pleading or motion pursuant to Federal Rule of Bankruptcy Procedure 7012, but the motion was not filed until January 29, 2020.

DEFENDANT'S REPLY

Defendant filed a Reply on February 20, 2020. Dckt. 101. Defendant replies as follows:

1. Defendant's present motion is timely as it was filed before filing an answer. *Id*. at 2.

2. Defendant states Debtor's Complaint failed to disclose his current monthly payment on his student loans is zero or allege future tax liability. *Id*.

3. Further, Defendant states Debtor cannot rely upon post-discharge circumstances to establish the first prong of the *Brunner* test. *See Zygarewicz*, 423 B.R. 912-913. *Id*.

4. Debtor claims that a debt forgiveness income of $8,000 will result from the 3-year TPD discharge. This is based upon hearsay from a neighbor who is a CPA tax accountant and not from any legal authority. *Id*. at 2, 3.

5. Plaintiff's assertion regarding California tax form 540 and instructions from 2018 is misleading.

6. Defendant asserts pursuant to 26 U.S.C. section 108(f)(5)(iii) gross income does not include any amount which would be includible in gross income for such taxable year by reasons of the discharge on account of the death or total and permanent disability of the student.

7. In respect to the State of California, Defendant cites California Revenue and Tax Code section 171444.8 which was adopted on July 1, 2019. As stated in the California legislative history for this statute that California would provide an exclusion from gross income for the amount of student loan indebtedness repaid or canceled to a specific federal law. Loophole Closure and Small Business and Working Families Tax Relief Act of 2019, § 3, Cal. Legis. Serv. Ch. 39 (A.B. 91) (WEST).

8. Thus, Defendant contests Debtor has not explained how he would incur any debt forgiveness income tax liability arising form the discharge of his student loans.

9. Defendant states Debtor may bring an adversarial proceeding at any time pursuant to Federal Rule of Bankruptcy Procedure 4007(b). Thus, Debtor's filing of this adversarial proceeding is premature because he could re-file his complaint if he incurs any future tax liability.

10. Defendant asserts student loan obligations are presumed to be nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(8). Defendant states the difference between a TPD discharge and a bankruptcy discharge is significant because a person who has received a discharge under TPD is no longer eligible for additional loans Title IV aid.

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. The Complaints fails to state a claim of undue hardship under any of the three prongs of the Brunner test. Motion at 4.

B. To determine if excepting student loans from discharge will create an undue hardship on a debtor, the Ninth Circuit has adopted the three-part test established by the Second Circuit in *Brunne*r. *See Pena*, 155 F.3d at 1112; *Rifino v. United States, et. al.* (*In re Rifino*), 243 F.3d 1083, 1086 (9th Cir. 2001). *Id*.

C. To obtain a discharge of a student loan obligation, the debtor must prove: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Brunner*, 831 F.2d at 396. *Id*.

D. The Complaint claims Debtor's loans are held by Sallie Mae, which is a distinct entity from the Department of Education. *Id*.

E. The Complaint does not address whether Debtor received a TPD discharge or if any loan payments are required. *Id*.

F. Debtor's current payment is zero. *Id*.

G. Complaint is conversational and includes misleading statements about student loans. *Id*.

H. The first prong of the Brunner test requires the debtor to prove that he cannot maintain a minimal standard of living for himself and dependant if forced to repay the loans based on current income and expenses. *Rifino*, 245 F.3d at 1088. *Id*.

I. Debtor fails to state his current income or expenses. Debtor does not state his current loan payment of zero. *Id*.

J. Thus, the Complaint only shows tight finances and fails ro state a plausible claim under prong one of the test. *Id*.

K. The second prong of the Brunner test requires the debtor to prove additional circumstances exist indicating that his or hers state of affairs are likely to continue for a significant portion of the repayment period of the student loans. *Rifino*, 245 F.3d at 1088. *Id*. at 5.

L. Debtor received a bankruptcy discharge of non-student loan unsecured debt and has been granted a TPD discharge and his student loan payment is zero. *Id*.

M. Because Debtor fails to show a claim that his condition will not improve as required under the second prong, the complaint should be dismissed. *Id*.

N. As to the third Brunner prong, Debtor must show that he or she has made a good faith effort to repay the student loans. Its main goal being that of discouraging students from abusing the bankruptcy system. *Pena*, 155 F.3d at 1110. Courts may look at whether a debtor has made efforts to renegotiate a repayment plan, including considering evidence regarding the Department of Education's various repayment option and whether the debtor considered them in good faith. *See Educ. Credit Mgmt. Corp. v. Mason*, 464 F.3d 878, 884 (9th Cir.2006); *see* also *Nys*, 446 F.3d 938. *Id*. at 5, 6.

O. Debtor failed to allege sufficient facts to show that he considered all of the administrative programs to address his student loans. *Id*. at 6.

P. Debtor failed to allege that his current monthly payment is zero and has failed to state how this condition would be undue hardship. *Id*.

Q. Debtor failed to fairly address his actual circumstances and the Ninth Circuit requires far more in terms of good faith. *Id*.

DISCUSSION

The standard for a Motion to Dismiss for failure to state a claim is whether a plaintiff has failed to adequately plead in his Complaint plausible grounds for relief. In this instance, Debtor claims repayments of his student loans would result in undue hardship.

In his Complaint, Debtor explains in detail that: Debtor has attempted to work since 2001 and make payments on this debt since 2005, but after being laid off in 2005, he has mainly been reliant on his Social Security for income since 2009. *Id.* at ¶ 9. [FN. 1.]

FN. 1. Though not part of a Motion to Dismiss, which is based on the pleadings, Debtor has provided Defendant with a Declaration providing information that one would be reasonably expected to obtain through discovery. In the Declaration Debtor states that his income is $1,38900 a month in Social Security Benefits. Dec. p. 1:27 -2:2. Of this income, $800.00 a month goes to rent, with a remaining $589.00 a month to cover food, medicines, toiletries, clothing and other expenses in a normal month. *Id.* at 2:8.

Additionally, Debtor alleges in his Complaint that Debtor cannot handle any full-time employment anymore due to his disability. *Id.* at ¶ 10. Debtor has advanced advanced arthritis in both knees, a bilateral ablation (two bulging discs in his lower back that pinch Debtor's nerves), severe arthritis in his neck and shoulders. *Id.* Due to these disabilities, Debtor cannot sit, walk, stand or climb for prolonged periods of time and cannot lift significant weights at all. *Id.*

Further, Debtor includes his age. Debtor is 72 years old. Debtor states that due to his advanced age and his disabilities he will not be employable for the remainder of his life. *Id.* at ¶ 5, 11, 14. Debtor also alleges that his CalFresh Benefits have been eliminated. *Id.* at ¶ 12. Finally, Debtor alleges that his "meager income" is not sufficient to sustain him. *Id.* at ¶ 13.

The court does not agree with Defendant that the Second Amended Complaint is merely "nothing more than a series of generalized grievances and a formulaic recitation of elements of a cause of action and does not contain enough facts to state a claim for relief that is plausible on its face." Motion to Dismiss, p. 1:23 - 2:1; Dckt. 92. To the contrary, the Debtor provides the Defendant with specific factual grounds upon which the relief is requested. From these, Defendant could reasonably be expected to conduct discovery to nail down that evidence of such exists.

With respect to "formulaic recitation," the Motion to Dismiss is based on an rote recitation of a, now, twenty-five year old standard. While much of this is worthy of consideration, it was stated in a time when a student loan obligation could be discharged as a matter of right a mere five (5) years after it first came due. The debtor in *Brunner*, having obtained her Bachelor of Arts degree in 1979 and then a Master's degree in Social Work in 1982, having amassed a mountain of student loan debt $9,000 high, found the need to file bankruptcy and try to discharge the student loan debt. This need to file bankruptcy was a merely seven months after receiving her Master's degree, and during the nine-month grace period which suspended any repayment on the student loans. It is obvious why a critical eye as to what constituted an "undue hardship" was placed on the student loan obligation that could have been discharged as a matter of right a mere five years later.

The court denies the Motion to Dismiss the Second Amended Complaint, the court determining that said complaint states sufficient grounds for the relief sought for purposes of this Motion.

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 Department of Education ("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 to Dismiss is denied.