UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, March 3, 2021
Place: Department B – 510 19th Street
Bakersfield, 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.

9:00 AM

1. 19-11408-B-13 **IN RE: DOUGLAS MCDANIEL**
RSW-6

MOTION FOR AUTHORITY TO NEGOTIATE CHECK RECEIVED FROM DAMAGES INCURRED AND FOR INSTRUCTIONS
2-17-2021 [164]

DOUGLAS MCDANIEL/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to April 7, 2021 at 9:00 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 and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. 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.

Douglas Krug McDaniel ("Debtor") asks this court for authorization to negotiate a check for $34,955.00 from his homeowner's insurance company for damages caused by a windstorm and made payable to Debtor and his mortgagors, Carrington Mortgage Services and Valley Strong Credit Union. Doc. #164. Debtor seeks to use $15,000.00 to complete repairs and wishes to use the rest to bring his mortgage payments current and pay the remaining amount to the chapter 13 trustee. Doc. #166.

The court notes that part of the relief requested is for the court to issue an advisory opinion. The court declines to do so. Should declaratory relief be requested an adversary proceeding is necessary.

Though not required, the Bank of New York Mellon f/k/a the Bank of New York as Trustee for Registered Holders of CWABS, Inc., asset-backed certificates, series 2005-13 ("New York Mellon") and Valley Strong Credit Union ("Valley Strong") objected to the motion on February 24, 2021 and February 27, 2021, respectively. Docs. #168; #171. New York Mellon filed Proof of Claim No. 5 in the amount of $287,144.46 on May 14, 2019 and is the holder of the first priority deed of trust encumbering real property commonly known as 21146

Perch Ave., Tehachapi, CA 93571-7848 ("Property"). Claim #5-1. Valley Strong filed Proof of Claim No. 8 in the amount of $25,364.64 on June 14, 2019 and holds the second priority deed of trust encumbering Property. Claim #8-1.

New York Mellon objects because there is no evidence that Debtor can do the repairs in a workmanlike manner or any itemization of the materials to be purchased with the $15,000.00. Doc. #168. Citing to the schedules, New York Mellon notes that Debtor works to repair air conditioners but is concerned that if Debtor fails to make the repairs and defaults under the plan, New York Mellon will be left with damaged real property and no ability to recover funds to make necessary repairs. *Id.* In the absence of an itemized list of material costs and a showing that Debtor possesses the necessary expertise to sufficiently repair Property, New York Mellon requests that this motion be denied.

Valley Strong shares similar concerns as New York Mellon: Debtor provides no evidence that he can complete the repairs in a workmanlike manner, no itemization of the materials to be bought with $15,000.00, or the time to make the repairs, and no details of the repairs or work to be completed, nor does Debtor specify that he has experience with the repairs to be made. Doc. #171. As with New York Mellon, Valley Strong has an interest in Property and fears that should Debtor fail to make the necessary repairs and default under the chapter 13 plan, both secured creditors may be left with damaged real property and no ability to recover funds to make the necessary repairs. *Id.*

Valley Strong also objects to Debtor's proposal to use the remaining funds to "bring his mortgage payments current and pay the remainder to the Chapter 13 Trustee for plan payments." *Id.* quoting Doc. #164, ¶ 4. Valley Strong contends that it has not received payments on its loan since February 1, 2011 and post-petition arrears alone total $7,222.00. Doc. #171. Valley Strong states that it was forced to internally charge off Debtor's loan in May 2011 because Debtor is "severely delinquent." *Id.*, ¶ 7. Therefore, Valley Strong insists that being brought "current" should apply to both pre- and post-petition arrears. As both secured creditors are listed as Class 4 claims and paid directly by the Debtor, Valley Strong claims its contractual rights have not been altered by confirmation of the chapter 13 plan. *Id.*; Doc. #136, ¶ 3.10.

Valley Strong contends that Debtor has provided no explanation, nor any authority, as to why excess insurance proceeds should be directed to other creditors under the plan other than New York Mellon and Valley Strong, which both have a security interest in the insurance proceeds by virtue of their respective notes and deeds of trust. Doc. #171. Both Valley Strong and New York Mellon are loss payees on the insurance policy, which is the reason that the check is made out to all three parties. Thus, Valley Strong argues that these proceeds should not be directed to the chapter 13 plan payments. On this basis, Valley Strong asks that the motion be denied. Alternatively, Valley Strong requests that Debtor be required to provide additional evidence of the proposed distribution, including specific, itemized amounts requested for

repairs, or otherwise to place the proceeds into an escrow account to be paid as work is completed and disbursed to the secured creditors thereafter. *Id.*

This matter will be called as scheduled to inquire about Debtor's position in response to the secured creditors' objections. This matter may be continued to April 7, 2021 so that Debtor can file and serve a written response not later than March 24, 2021. The response shall specifically address each issue raised in opposition to this motion, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. New York Mellon and Valley Strong shall file and serve a reply, if any, by March 31, 2021.

The court notes that New York Mellon states Debtor's loan modification has not yet been approved. Doc. #168. The modification, if approved, addresses the post-confirmation defaults, if any.

Additionally, the court notes that Valley Strong's objection (Doc. #171) was filed under the wrong docket control number (MBW-001, rather than RSW-6). *See* LBR 9004-2(a)(6), (b)(5), (b)(6), (e)(3) and 9014-1(c), (e)(3).

If Debtor does not timely file a written response as directed here, the motion will be denied on the grounds stated in the opposition without a further hearing.

2. 20-13208-B-13 **IN RE: ELIZABETH MARTIN AND AARON HAMPTON**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
2-16-2021 [36]

PHILLIP GILLET/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The minutes of the hearing will be the court's findings and conclusions.

ORDER: The court will issue an order.

This matter will proceed as scheduled. If the fees due have not been paid prior to the hearing, the case may be dismissed on the grounds stated in the OSC.

3. 16-10168-B-13 **IN RE: MOISES TURCIOS**
PK-3

MOTION TO MODIFY PLAN
1-27-2021 [125]

MOISES TURCIOS/MV
PATRICK KAVANAGH/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.

4. 18-11987-B-13 **IN RE: HECTOR CHAVEZ**
PK-5

MOTION TO MODIFY PLAN
1-4-2021 [70]

HECTOR CHAVEZ/MV
PATRICK KAVANAGH/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to April 7, 2021 at 9:00 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 set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Hector Manuel Chavez ("Debtor") seeks confirmation of his modified chapter 13 plan. Doc. #70. Chapter 13 trustee Michael H. Meyer ("Trustee") timely objects on grounds that Debtor will not be able to make all payments under the plan, comply with the plan, and the plan was not proposed in good faith under 11 U.S.C. §§ 1325(a)(3), (6). Doc. #81.

Trustee notes that additional provision 2.01 states: "[t]hrough 12/31/20, the debtor has paid a total of $66,403.17. Payments will be $1,557.00 per month in months 31-60." Doc. #79. But December 2020 is month 31 of the plan, so if the aggregate total of $66,403.17 includes the $1,557.00 December payment the payments are delinquent $426.03 through January 2021, and if it is not included, then payments are delinquent $1,983.03 through January 2021. Moreover, Trustee contends that Debtor has not met his burden that the plan was proposed in good faith because the plan now provides for 0% distribution—down from 100% distribution—to unsecured creditors and Debtor indicates he has received a job offer but provides no other information regarding his new employment. Failure to meet this burden is grounds for denial of confirmation.

Unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, Debtor shall file and serve a written response not later than March 24, 2021. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. Trustee shall file and serve a reply, if any, by March 31, 2021.

If the Debtor elects to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than March 31, 2021. If the Debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the opposition without a further hearing.

10:00 AM

1. 20-13420-B-7 **IN RE: CHRISTOPHER MARTENS**
DMG-4

MOTION TO EXTEND DEADLINE TO FILE A COMPLAINT OBJECTING TO DISCHARGE OF THE DEBTOR
1-29-2021 [52]

JEFFREY VETTER/MV
PETER FEAR/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 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 7 trustee Jeffrey M. Vetter ("Trustee") seeks to enlarge the time to file a complaint to deny discharge to March 11, 2021. Doc. #52. No party in interest timely filed written opposition.

This motion will be GRANTED.

Christopher Robert Martens ("Debtor") filed bankruptcy on October 28, 2020. Doc. #1. The first notice (Form 309A) filed October 31, 2020 scheduled the first § 341(a) meeting of creditors for December 4, 2020 at 1:30 p.m. and the deadline to object to discharge or challenge the dischargeability of certain debts for February 2, 2021. Doc. #7. This motion was filed on January 29, 2021, which was before the deadline to object expired.

Trustee states that Debtor and his counsel appeared at the December 4, 2020 meeting, which was continued to December 18, 2020. Doc. #54. The December 18, 2020 meeting was continued to January 8, 2021, and

further continued to January 22, 2021. Debtor's counsel appeared on January 22, 2021, but Debtor did not. The meeting was continued to February 5, 2021, where it concluded after Debtor appeared. *See* docket generally.

As of January 29, 2021, Trustee had not yet completed his investigation into Debtor's financial affairs. Doc. #54. Trustee received an offer from Debtor to purchase the estate's interest in certain assets, which is being evaluated and, subject to final negotiations, would conclude a settlement that would be noticed to creditors and sought for approval. *Id.* The last day to oppose discharge under 11 U.S.C. § 727 is February 2, 2021 and Trustee requests an extension for both the chapter 7 trustee and U.S. Trustee because the investigation has not yet been completed.

Fed. R. Bankr. P. ("Rule") 4004(a) states that a complaint objecting to the debtor's discharge under § 727(a) must be filed not later than 60 days following the first date set for the meeting of creditors. The court may extend the time for cause so long as the motion is made before such time has expired. Rule 4004(b).

Here, cause exists to extend the time because Trustee has not concluded his investigations and therefore entry of discharge is premature. Trustee anticipates that the investigation should be completed before February 28, 2021 and therefore requests enlargement of time to file complaints to deny discharge for both the chapter 7 trustee and U.S. Trustee up to and including March 11, 2021. Doc. #52, ¶ 9.

No party in interest timely filed written opposition. Accordingly, this motion will be GRANTED. The deadline for the chapter 7 trustee and U.S. Trustee only to file complaints to deny discharge under 11 U.S.C. § 727 will be extended to March 11, 2021.

2. 17-10624-B-7 **IN RE: REBECCA STARK**
PK-2

MOTION TO AVOID LIEN OF CALIFORNIA REPUBLIC BANK
2-17-2021 [21]

REBECCA STARK/MV
PATRICK KAVANAGH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 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 grant the motion. 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.

Rebecca Ann Stark ("Debtor") filed this motion seeking to avoid a judicial lien in favor of California Republic Bank, having been acquired by Mechanics Bank ("Creditor"), and encumbering residential real property located at 13014 Sunlight Star Street, Bakersfield, CA 93314 ("Property"). Doc. #21. Written opposition was not required and may be presented at the hearing. The court notes that Mechanics Bank acquired California Republic Bank by merger in 2016. Doc. #25, Ex. D. The President, CEO, or Person Authorized to Accept Service for Mechanics Bank was served by certified mail at the address listed on the FDIC website, along with Adam N. Barasch, the attorney representing Creditor in the state court case in 2015. Doc. #27.

In the absence of opposition, this motion will be GRANTED. In order to avoid a lien under 11 U.S.C. § 522(f)(1) the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003), quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd* 24 F.3d 247 (9th Cir. 1994).

Here, a judgment was entered against Debtor in favor of Creditor in the sum of $17,007.27 on June 15, 2015. Doc. #25, Ex. C. The abstract of judgment was issued on August 6, 2015 and recorded in Kern County on September 18, 2015, attaching to Debtor's interest in Property. *Ibid.* As of the petition date, Property had an approximate value of $281,000.00. *Id.*, Ex. A. The unavoidable liens totaled $181,481.00 on that same date, consisting of a deed of trust in favor of PennyMac Loan Services. Doc. #1, Schedule D, ¶ 2.2. Debtor claimed an exemption pursuant to California Civ. Proc. Code ("C.C.P.") § 704.730 in the amount of $99,519.00. Doc. #25, Ex. B. Property's encumbrances can be illustrated as follows:

Fair Market Value of Property on petition date		$281,000.00
Total amount of unavoidable liens	-	$181,481.00
Remaining equity available in Property	=	$99,519.00
Value of Debtor's exemption	-	$99,519.00
Creditor's judicial lien	-	$17,000.27
Extent Debtor's exemption impaired	=	($17,000.27)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is insufficient equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, the court is inclined to GRANT this motion.

3. 20-10259-B-7 **IN RE: JOSE URIBE RIZO AND LORENZA URIBE**
ORS-2

MOTION TO CONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
2-9-2021 [34]

OSCAR SWINTON/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 less than 28 days' notice under Local Rule of Practice ("LBR") 9014-1(f)(2). Jose Jaime Uribe Rizo and Lorenza Uribe ("Debtors") filed this motion to convert the case from chapter 7 to chapter 13 under 11 U.S.C. § 706(a). Doc. #34. The court previously denied two similar motions without prejudice for procedural defects. Docs. #27; #33.

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

The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules of Bankruptcy Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most up-to-date rules can be found at the court's website, www.caeb.uscourts.gov, towards the middle of the page under "Court Information," by selecting "Local Rules & General Orders." The newest rules came into effect on April 9, 2018. Counsel is advised to review the local rules before filing another motion.

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e), and LBR 9014-1(c) and (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require a unique DCN to be in the caption page on all documents filed in every matter with the court. Each new motion requires a new DCN.

The previous Motion to Convert Case From Chapter 7 to Chapter 13 (Doc. #28) was filed on December 21, 2020 and was denied February 3, 2021. Doc. #33. The DCN for that motion was ORS-2. This motion also has a DCN of ORS-2 and therefore does not comply with the local rules. Each separate matter filed with the court must have a different DCN.

Second, LBR 9014-1(f)(2)(C) states that motions filed on less than 28 days' notice, but at least 14 days' notice, require the movant to notify respondents that no party in interest shall be required to file written opposition to the motion. Opposition, if any, shall be

presented at the hearing on the motion. If opposition is presented, or if there is other good cause, the court may continue the hearing to permit the filing of evidence and briefs.

This motion was filed on February 9, 2021 and set for hearing on March 3, 2021. Doc. #34. March 3, 2021 is 22 days after February 9, 2021, and therefore this hearing was set on less than 28 days' notice under LBR 9014-1(f)(2). The notice stated that written opposition was required and must be filed at least 14 days preceding the date of the hearing. Doc. #35. That is incorrect. Because the hearing was set on 14 days' notice, the notice should have stated that no written opposition was required and included the language of LBR 9014-1(f)(2)(C).

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

The court notes that the motion documents were filed separately as required by LBR 9004-2(c)(1), which was an improvement over the last motion that was filed together with a declaration. The proof of service was also sufficient because it complied with LBR 9004-2(e).

4. 21-10164-B-7 **IN RE: SEAN/HAILEY STENGEL**
DJP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-12-2021 [12]

EDUCATIONAL EMPLOYEES CREDIT UNION/MV
SUSAN HEMB/ATTY. FOR DBT.
DON POOL/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Debtors filed non-opposition to the motion on February 17, 2021. Doc. #28. Unless opposition is presented at the hearing by the Ch. 7 Trustee, or any other party in interest, the court intends to enter the respondents' defaults and grant the motion. 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.

The movant, Educational Employees Credit Union ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to a 2019 Chevrolet Volt Premier Sedan 4D ("Vehicle"). Doc. #12.

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

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

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtors are at least 5 payments past due in the amount of $2,943.80 plus late fees of $70.65. Doc. #14.

The court also finds that the debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because debtors are in chapter 7. Debtors' Statement of Financial Affairs values the Vehicle at $20,000.00 and the amount owed to Movant is $35,036.14. Doc. #14, #26.

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

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtors have failed to make at least 5 payments to Movant and the Vehicle is a depreciating asset.

5. 21-10164-B-7 **IN RE: SEAN/HAILEY STENGEL**
DJP-2

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-12-2021 [19]

EDUCATIONAL EMPLOYEES CREDIT UNION/MV
SUSAN HEMB/ATTY. FOR DBT.
DON POOL/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Debtors filed non-opposition to the motion on February 17, 2021. Doc. #30. Unless opposition is presented at the hearing by the Ch. 7 Trustee, or any other party in interest, the court intends to enter the respondents'

defaults and grant the motion. 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.

The movant, Educational Employees Credit Union ("Movant"), seeks relief from the automatic stay under 11 U.S.C. §§ 362(d)(1) and (d)(2) with respect to a 2010 Eclipse Attitude Toy Hauler Series M-39TSG ("Property"). Doc. #19.

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

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

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtors are at least 5 payments past due in the amount of $2,272.40 plus late fees of $68.17. Doc. #21.

The court also finds that the debtors do not have any equity in the Vehicle and the Vehicle is not necessary to an effective reorganization because debtors are in chapter 7. Debtors' Schedule D values the Property at $23,000.00 and the amount owed to Movant is $39,277.83. Doc. #21, #27.

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

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because debtors have failed to make at least 5 payments to Movant and the Property is a depreciating asset.

6. 19-12674-B-7 **IN RE: ADRIAN PEREZ**
DMG-3

MOTION TO SELL
2-3-2021 [102]

JEFFREY VETTER/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
D. GARDNER/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed for higher and better bids only.

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). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will proceed for higher and better bids only. 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 7 trustee Jeffrey M. Vetter ("Trustee") asks this court for authorization to sell real property commonly known as 2717 Baylor St., Bakersfield, CA 93306 ("Property") to SSAM Investment, Inc. ("Proposed Buyer"), owned by Jorge Italo Medina Ramos, for $165,000.00 pursuant to 11 U.S.C. § 363(b), subject to higher and better bids at the hearing. Doc. #102. Francisco Martinez Castillo was originally named as the proposed buyer, but Trustee filed a notice of erratum on February 24, 2021 clarifying Proposed Buyer's identity. Doc. #112. The court also notes that an amended notice of hearing was filed on February 4, 2021, which is 27 days before the scheduled hearing. Doc. #109. Although this is less than 28 days before the hearing, the amended notice only corrected the location of the hearing from the Fresno to the Bakersfield courthouses. The LBR 9014-1(f)(1)(B) language was properly placed in both notices and all parties were adequately served all substantive details at least 28 days before the hearing. Both the amended notice and the notice of erratum were filed with conforming certificates of service. Docs. #110; #113.

This motion will be GRANTED. 11 U.S.C. § 363(b)(1) allows the trustee to "sell, or lease, other than in the ordinary course of business, property of the estate."

Proposed sales under 11 U.S.C. § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. *In re Alaska Fishing Adventure, LLC*, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) citing *240 North Brand Partners, Ltd. v. Colony GFP Partners, LP (In re 240 N. Brand Partners, Ltd.)*, 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996); *In re Wilde Horse Enterprises, Inc.*, 136 B.R. 830, 841 (Bankr. C.D. Cal. 1991). In the context of sales of estate property under § 363, a bankruptcy court "should determine only whether the trustee's judgment was reasonable and whether a sound business justification exists supporting the sale and its terms." *Alaska Fishing Adventure, LLC*, 594 B.R. at 889 quoting 3 Collier on Bankruptcy ¶ 363.02[4] (Richard Levin & Henry J. Sommer eds., 16th ed.). "[T]he trustee's business judgment is to be given great judicial deference.'" *Id.* citing *In re Psychometric Systems, Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo. 2007); *In re Bakalis*, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

It appears that the sale of the Property is in the best interests of the estate, for a fair and reasonable price, supported by a valid business judgment, and proposed in good faith.

It is unclear exactly how much in proceeds will remain after completion of the proposed sale. Trustee states that Dignified Home Loans' mortgage is approximately $81,000.00 and broker commission of 6%, split 3% for each broker, will be paid through escrow. Doc. #104. After costs of sale, taxes, and other fees, less than $74,100.00 will remain. The proposed sale can be illustrated as follows:

Proposed sale price of Property		$165,000.00
Approximate mortgage payoff	-	$81,000.00
Broker Commission (6% of sale price)	-	$9,900.00
Costs of sale, taxes, and fees	-	?
Net payable to the estate	<	$74,100.00

Other than Dignified Home Loans, the only other known creditor with a potential interest in Property is the Kern County Tax Collector, but real property taxes were current on the petition date. *Id.* Dignified Home Loans, LLC, was served notice of the hearing with information about the sale. Docs. #107; #110; #113.

Sales to an insider are subject to heightened scrutiny. *Alaska Fishing Adventure, LLC*, 594 B.R. at 887 citing *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold LLC)*, 558 B.R. 500, 516 (B.A.P. 1st Cir. 2016). No information is provided as to whether Proposed Buyer is an insider. The court will inquire at the hearing whether Proposed Buyer should be subjected to heightened scrutiny.

Any party wishing to overbid must deposit with Trustee's counsel certified monies in the amount of $6,000.00 plus the initial overbid prior to or at the time of the hearing. The first overbid shall be in the minimum amount of $5,000.00, and subsequent overbids shall be

in the minimum amount of $1,000.00. Unsuccessful bidders' deposits will be returned at the end of the hearing. The successful bidder's deposit will be applied toward the purchase price. Overbidders must provide written proof of the financial ability to cover the purchase amount and that they can close the sale within 30 days of the delivery of a certified copy of the court's order approving this motion and can execute a purchase agreement for the property.

Overbidders must be present at the hearing, make overbids in the amount of $1,000.00, except for the first overbid of $5,000.00, be aware that their deposit will be forfeited if they do not timely close the sale, and acknowledge that no warranties or representations are included with the property; it is sold "as-is."

No party in interest timely filed written opposition.

The motion does not request, nor will the court authorize, the sale free and clear of any liens or interests. Valid encumbrances will be paid through escrow.

If the above insider issue is clarified, the court is inclined to GRANT the motion. This matter will proceed as scheduled for higher and better bids only.

7. 20-13799-B-7 **IN RE: MICHAEL/LUPE FOGLESONG**
KEH-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-29-2021 [15]

BALBOA THRIFT & LOAN/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
KEITH HERRON/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

The motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

First, LBR 9004-2(c)(1) requires that motions, notices, and other specified pleadings are to be filed as separate documents. Here, the motion, notice, declaration, exhibits, and proof of service were combined into one document and not filed separately. Doc. #15.

Second, LBR 4001-1(a)(3) requires that the movant file and serve Form EDC 3-468, *Relief from Stay Summary Sheet*, with motions for relief from the automatic stay.

10:30 AM

1. 20-12642-B-11 **IN RE: 3MB, LLC**
LKW-10

MOTION TO ABSTAIN AND/OR MOTION FOR RELIEF FROM AUTOMATIC STAY
1-19-2021 [161]

3MB, LLC/MV
LEONARD WELSH/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 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.

3MB, LLC ("Debtor"), filed this motion to abstain and for relief from the automatic stay to proceed with a lawsuit filed by Alan Scott Hair and Mary Charles Hair ("Plaintiffs") in Kern County Superior Court. Doc. #161. No party in interest timely filed written opposition.

This motion will be GRANTED.

Plaintiffs filed their first amended complaint against Debtor and other non-debtor defendants in Kern County Superior Court on September 19, 2018 alleging general negligence and premises liability causing Plaintiffs to suffer wage loss, medical expenses, general damage, loss of earning capacity, and loss of consortium, and seeking punitive damages. Doc. #163, Ex. B. Debtor filed an answer on December 8, 2018. *Id.*, Ex. D. Plaintiffs amended the complaint on May 8, 2019 and the matter was stayed on August 24, 2020 pending Debtor's ongoing bankruptcy. *Id.*, Ex. C, E.

Debtor states that these claims are based on State law to which Kern County Superior Court is familiar. Doc. #164. Debtor seeks to liquidate these claims by permitting the litigation to proceed against Debtor and other non-debtor defendants. *Id.*

Allowance or disallowance of Plaintiffs' claims is a core proceeding. 28 U.S.C. § 157(b)(2)(B). The court may abstain from hearing a matter related to the bankruptcy case in the interest of justice or in the interest of comity with the State courts or respect for State law. 28 U.S.C. § 1334(c)(1); *New Eng. Power & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Power Equip. & Marine, Inc.)*, 292 F.3d 61, 68 (1st Cir. 2002). Abstention does not limit application of the automatic stay under 11 U.S.C. § 362. 28 U.S.C. § 1334(d). The court must modify the automatic stay so the Kern County Superior Court can resolve the dispute between Plaintiffs and Debtor and other defendants. *Pursifull v. Easkin*, 814 F.2d 1501 (10th Cir. 1987).

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

Debtor contends that cause exists to lift the automatic stay because litigation is pending in another forum before the filing of the bankruptcy case. Doc. #161 citing *In re Tucson Estates*, 912 F.2d 1162, 1166 (9th Cir. 1990).

When a movant prays for relief from the automatic stay to initiate or continue non-bankruptcy court proceedings, a bankruptcy court must consider the "Curtis factors" in making its decision to exercise permissive abstention under 28 U.S.C. § 1334(c)(1). *Kronemyer v. Am. Contractors Indem. Co. (In re Kronemyer)*, 405 B.R. 915, 921 (B.A.P. 9th Cir. 2009). The relevant factors in this case include:

> 1. Whether the relief will result in a partial or complete resolution of the issues;
>
> 2. The lack of any connection with or interference with the bankruptcy case;
>
> 3. Whether the foreign proceeding involves the debtor as a fiduciary;
>
> 4. Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
>
> 5. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
>
> 6. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;

7. Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;

8. Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);

9. Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);

10. The interests of judicial economy and the expeditious and economical determination of litigation for the parties;

11. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and

12. The impact of the stay on the parties and the "balance of hurt."

Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.), 311 B.R. 551 (Bankr. C.D. Cal. 2004) citing *In re Curtis*, 40 B.R. 795, 799-800; *see also Kronemyer*, 405 B.R. at 921.

Here, (1) modification of the automatic stay to permit this claim to proceed in Kern County Superior court will result in complete resolution of the issues by resolving Plaintiffs' claim against Debtor. (2) There is little connection between the State court case and this bankruptcy, other than the Debtor is a defendant in the underlying lawsuit. (3) The foreign proceeding does not appear to involve Debtor as a fiduciary. (4) The lawsuit involves multiple other non-debtor defendants and includes exclusively State law claims and issues. The State court is already familiar with the parties, lawsuit, and the issues involved. (5) No information is provided about Debtor's insurance carrier. (6) The action involves third parties, but there is no evidence that Debtor is functioning as a bailee or conduit for goods or proceeds. (7) Litigation in another forum will not prejudice the interests of other creditors. (8) Equitable subordination does not appear to be at issue. (9) Plaintiffs success in Kern County Superior Court could potentially result in a judicial lien. (10) Debtor contends judicial economy will be promoted by allowing Plaintiff's claims against Debtor and other defendants to be tried and liquidated in one forum and action. Doc. #161. Plaintiffs' claims against Debtor are inextricably connected with their claims against the other defendants. Doc. #164. Also, the liquidation of personal injury claims is not "core" under 28 U.S.C. § 157(b)(2)(B). A District Court could order the matter tried in District Court under 28 U.S.C. § 157(b)(5). But that is wasteful under these circumstances since the Superior Court is already exercising jurisdiction. (11) The lawsuit is ready to proceed with discovery and to trial. *Id.*, Doc. #163, Ex. F. (12) If the stay is not modified, the Plaintiffs and other non-debtor defendants will be prejudiced because the

lawsuit is currently stayed due to this bankruptcy. Modifying the automatic stay will allow the lawsuit to proceed and the claims to be resolved. Debtor knows of no party that would suffer prejudice if the stay were to be modified.

This motion will be GRANTED. The automatic stay will be modified only for the limited purpose of continuing with the State court action to liquidate the claim. Debtor is not authorized to make any payments in connection with ongoing litigation, other than what has already been approved in fee and employment applications. Further, no party in the Kern County Superior Court Action may seek to collect any judgment against the estate or a reorganized debtor without further order of this court.

11:00 AM

1. 20-13200-B-7 **IN RE: MICHAEL/JOYCE EDGAR**
21-1001

STATUS CONFERENCE RE: COMPLAINT
1-5-2021 [1]

FIRST NATIONAL BANK OF OMAHA V. EDGAR ET AL
CORY ROONEY/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

2. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1065

CONTINUED STATUS CONFERENCE RE: COMPLAINT
12-9-2020 [1]

ATCHLEY ET AL V. DHILLON
WILLIAM ALEXANDER/ATTY. FOR PL.

NO RULING.

3. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1065 PWG-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR SUMMARY JUDGMENT
1-25-2021 [8]

ATCHLEY ET AL V. DHILLON
PHILLIP GILLET/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied. Plaintiff to file an Answer within 14 days of entry of this order.

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 9014-1(f)(1) and will proceed as scheduled.[1]

[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; "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.

Debtor Jaspreet Dhillon ("Defendant") asks this court to dismiss or summarily adjudicate creditor Virginia Lee Atchley's ("Plaintiff") complaint for revocation of discharge under Civil Rule 12(b)(6) and 56 (made applicable by Rules 7012 and 7056) and attorney's fees pursuant to Rule 9011. Plaintiff timely opposed.

This motion will be DENIED.

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 (1009) (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 the 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. Additionally, the court may consider the following limited material without converting the motion to dismiss into a motion for summary judgment under Civil Rule 56 (made applicable under Rule 7056): (1) documents attached to the complaint as exhibits; (2) documents incorporated by reference into the complaint; and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*per curium*) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)).

Dismissal under Civil Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint. *ASARCO, LLC v. Union Pacific R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014).

If Plaintiff alleges fraud, Civil Rule 9(b) imposes a heightened pleading requirement. Under Civil Rule 9(b), a plaintiff is required to "state with particularity the circumstances constituting fraud or

mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The rule applies to claims arising under state law. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule." *Hayduck v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (*emphasis in original*).

Allegations of fraud must "be 'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (*internal citations omitted).* "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997).

Revocation of Discharge

Revocation of discharge is an extraordinary remedy because it runs contrary to the policy of providing debtors with a "fresh start." *Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925-26 (B.A.P. 9th Cir. 1994); *In re Trost*, 164 B.R. 740, 743 (Bankr. W.D. Mich. 1994). Section 727 is therefore construed liberally against the party seeking revocation. *In re Adeeb*, 787 F.2d 1339, 1342 (9th Cir. 1976). The "fresh start" is reserved only for honest but unfortunate debtors. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). The court has no discretion to refuse discharge revocation under § 727(d) after its grounds have been established and proven. *In re Markovich*, 207 B.R. 909, 912 (B.A.P. 9th Cir. 1997).

11 U.S.C. § 727(d) provides:

> On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge under subsection (a) of this section if—
>
> > (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
> > (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;
> > . . .

§§ 727(d)(1), (2).

Here, Plaintiff seeks revocation of discharge because (1) Defendant misrepresented his ownership interest in real property by failing to identify it on his schedules and Plaintiff only just discovered the

omission after his discharge was entered; and (2) the real property sold in October 2020 for over $600,000, meaning that Defendant became entitled to a share of sales proceeds that he failed to report or surrender to the trustee.

Background

On December 9, 2020, Plaintiff filed this adversary proceeding alleging Defendant's discharge in his related bankruptcy case was obtained through fraud by concealing his interest in real property by failing to include it in his original or amended schedules and denying that he transferred $450,000.00 to his ex-wife. Doc. #1.

Plaintiff previously filed an adversary proceeding against Defendant on October 7, 2020 alleging objection to discharge and seeking non-dischargeability of certain debts. *Atchley et al. v. Dhillon*, case no. 20-01059. The non-dischargeability claim under § 523(a)(6) was dismissed without leave to amend as time barred under Rules 4004(b)(1) and 4007(c). The fraudulent transfer claim under § 548(a) and conspiracy to commit fraudulent transfer claims were dismissed with leave to amend for standing issues and abstention from the pending lawsuit in Kern County Superior Court. No amended complaint was filed, and the case was dismissed and subsequently closed.

Mount Vernon Property

According to the complaint, Plaintiff and Defendant's relationship began around March 2017, when Plaintiff sold Defendant a parcel of real property located at 3801 Mount Vernon Avenue, Bakersfield, CA 93306 ("Mount Vernon Property"). *Id.*, ¶ 5. Plaintiff agreed to "carry back $168,000.00 of the purchase price." *Ibid.* Defendant's obligation was memorialized by a note and secured by a first deed of trust, which was executed by Defendant and recorded on March 10, 2017. *Ibid.*

The first deed of trust required Defendant to maintain fire insurance on Mount Vernon Property and to name Plaintiff as a loss payee under the insurance policy. *Id.*, ¶ 6. Plaintiff purports receipt of a document entitled "Evidence of Property Insurance" that provided: (1) the fire insurance policy was effective as to Mount Vernon Property on March 20, 2017, the date Defendant purchased Mount Vernon Property; and (2) Plaintiff was an additional insured under the policy. *Ibid.*

On December 10, 2017, Plaintiff alleges that Mount Vernon Property was significantly damaged by fire. *Id.*, ¶ 7. "For reasons then unknown to [Plaintiff], [Plaintiff] was apparently not listed or named as a loss payee or additional insured under the insurance policy." *Ibid.* Plaintiff believes that sometime after the fire loss, Defendant filed a claim under the insurance policy and signed a sworn affidavit that there was no loan or encumbrance on Mount Vernon Property. *Id.*, ¶ 8. On this basis, Plaintiff alleges that in May 2018, Defendant received a payout under the insurance policy for the fire loss in an amount of approximately $486,000.00. *Id.*, ¶ 9.

Plaintiff contends that Defendant ceased making payments on the note in July 2018, which provides for a principal balance of $168,000.00, plus 4% interest, $100 per month in late fees, and any legal fees and costs incurred as a result of any default under the note. *Id.*, ¶¶ 11-12. On March 22, 2019, Plaintiff filed an action alleging conversion, breach of contract, and judicial foreclosure in Kern County Superior Court. *Id.*, ¶ 13; *see also Virginia Lee Atchley v. Jaspreet Dhillon, et al.*, case no. BCV-19-100811.

Westbluff Property

Defendant also alleges that Defendant owned real property located at 120 Westbluff Court, Bakersfield, CA 93305 ("Westbluff Property"). Doc. #1, ¶ 14. Plaintiff believes Westbluff Property was purchased by Defendant in April 2017 for $195,000.00. *Id.*, ¶ 15. Plaintiff alleges that on April 1, 2019, Defendant sold Westbluff Property to non-parties Armando Garza III and Armando Escamilla Garza for $15,000.00. These non-parties are not defendants in this adversary proceeding, but Plaintiff filed a state court action naming both as defendants on April 7, 2020. *Virginia Lee Atchley v. Garza, III, et al.*, case no. BCV-20-100846.

Defendant's Bankruptcy and Cortez Property

Defendant filed bankruptcy on February 8, 2020. *See In re Jaspreet Dhillon*, case no. 20-10465, Doc. #1. Defendant received his discharge on October 13, 2020, which was prior to the conclusion of the § 341(a) meeting of creditors on November 6, 2020. *Id.*, Doc. #27.

Plaintiff alleges that Defendant did not disclose his ownership interest in either Mount Vernon Property or his recent sale of Westbluff Property, nor did Defendant disclose approximately $750,000.00 in insurance payouts. Doc. #1, ¶ 17. At the § 341(a) meeting, Defendant allegedly testified that he had lost all of the proceeds from the insurance payouts through gambling and stock trade losses. *Id.*, ¶ 18. As result, the chapter 7 trustee requested bank statements showing the deposits made from the insurance payouts, which Plaintiff alleges were provided in September 2020. *Ibid.* Plaintiff alleges that the bank statements indicate that Defendant received a $450,000.00 payment in May 2018 and transferred those funds to his then wife, Harjeet K. Randhawa. *Id.*, ¶ 19. Plaintiff alleges the bank statements show that the insurance proceeds were not returned to Defendant. *Ibid.*

Approximately two weeks after transferring the $450,000.00 to his wife, Plaintiff alleges that Ms. Randhawa purchased real property commonly described as 104 Cortez Court, Bakersfield, CA ("Cortez Property") for $275,000.00 in cash. *Id.*, ¶ 20. In late 2018, Plaintiff alleges that Defendant also transferred "all of his interest in nearly a dozen properties to his then wife." *Id.*, ¶ 21.

In March 2019, Ms. Randhawa filed a petition for dissolution of marriage. *Id.*, ¶ 22. Defendant allegedly did not appear at the action and the marriage was dissolved by default judgment. *Ibid.* Plaintiff believes that there were no prenuptial agreements,

property agreements, child custody agreements, child support payment agreements, or orders. *Ibid.*

As discussed above, Defendant provided his bank statements in September 2020 and received a discharge on October 13, 2020. Prior to receipt of discharge, Defendant conducted diligent public record searches but was unable to discover any interest in the Cortez Property. *Id.*, ¶ 26.

When asked at the § 341(a) meeting about additional real property interests, Defendant amended his schedules to include additional real property, but Cortez Property was not one of these additions. *Id.*, ¶ 27.

In October 2020, Plaintiff learned that (a) Ms. Randhawa purchased Cortez Property within weeks of receipt of the $450,000.00; and (b) Ms. Randhawa took title to Cortez Property as her sole and separate property, which is why Plaintiff was unable to locate it sooner. *Id.*, ¶ 28. In October 2020, Cortez Property sold for more than $600,000.00. *Id.*, ¶ 29.

On this basis, Plaintiff alleges that Ms. Randhawa either holds funds belonging to Defendant or Defendant has a community property interest in Cortez Property thus entitling him to a portion of the $600,000.00 in sale proceeds.

Fraudulent Concealment

Plaintiff alleges that Defendant's discharge was obtained through fraud because Defendant concealed his interest in the Cortez Property by failing to include the property in his original and amended schedules and denying that he transferred $450,000.00 to his ex-wife, Ms. Randhawa. *Id.*, ¶ 33.

Plaintiff contends that Defendant received the $450,000.00 payout for damage to Mount Vernon Property after he signed and delivered to his insurance carrier a sworn statement for proof of loss that indicates no other persons had any encumbrance on Mount Vernon Property, which Defendant knew was false. *Id.*, ¶ 34. After receiving this payout, Defendant transferred the proceeds to Ms. Randhawa, who used the funds to purchase the Cortez Property, taking title in her name only to conceal Defendant's ownership interest to shield it from creditors, including Plaintiff. *Id.*, ¶ 35. Had the $450,000.00 transfer to Ms. Randhawa and the purchase and concealment of Cortez Property in her name alone been known prior to the discharge, Plaintiff contends it would have barred Defendant's discharge. *Id.*, ¶ 36.

On this basis, Plaintiff contends that Defendant became entitled to acquire property that would have been property of the estate (the Cortez Property) if Defendant had not knowingly and fraudulently failed to report the acquisition of or entitlement to property or proceeds to surrender to the chapter 7 trustee. *Id.*, ¶ 37. Further, upon the sale of Cortez Property in October 2020, Defendant became entitled to a community property interest in the sales proceeds, which should have become property of the estate. *Id.*, ¶ 38.

Plaintiff claims she would have brought this case sooner but did not discover the transfer of $450,000.00 to Ms. Randhawa that was used to purchase Cortez Property until after Defendant's discharge because he represented at the meeting of creditors that he lost these proceeds through gambling and stock trade losses. *Id.*, ¶ 39.

Therefore, Plaintiff seeks revocation of Defendant's discharge, an award of costs incurred pursuing this action, and demands a trial by jury.

Defendant's Motion to Dismiss

Defendant filed this motion to dismiss Plaintiff's adversary proceeding for failure to state a cause of action on which relief can be granted under Civil Rule 12(b)(6) and 56. Doc. #10. Noting Plaintiff's previous adversary proceeding that was dismissed as time barred, Defendant argues that this complaint fails to allege with the particularity required for fraud and fails to allege the elements of § 727(d) and therefore should be dismissed. *Id.*

Defendant insists that Plaintiff has failed to allege facts showing due diligence prior to the discharge, including a request to extend the time to object or simply filing a complaint objecting to discharge sooner. Doc. #10, at 5. Defendant contends that Plaintiff missed the deadline to object to discharge because she relied on a legally insufficient time extension and cannot now resurrect her claim by revocation of discharge.

Section 727(d)(1)

To obtain relief under § 727(d)(1), the plaintiff must prove the debtor committed fraud in fact. *In re Bowman*, 173 B.R. at 925 citing *In re Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991). "The fraud must be proven in the procurement of the discharge and sufficient grounds must have existed which would have prevented the discharge. The plaintiff must also prove that it was unaware of the fraud at the time the discharge was granted." *Ibid.* (*citation omitted*).

"[D]ismissal of a § 727(d)(1) revocation action is proper where, before discharge, the creditor knows facts such that he or she is put on notice of a possible fraud. Thus, the burden is on the creditor to investigate diligently any possibly fraudulent conduct before discharge." *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991) citing *In re Arianoutsos*, 116 B.R. 116, 119 (Bankr. N.D. Ill. 1990); *In re Stein*, 102 B.R. 363, 368 (Bankr. S.D.N.Y. 1989); *In re Benak*, 91 B.R. 1008, 1009-10 (Bankr. S.D. Fla. 1988).

Defendant cites the complaint's indication that the bank statements showing the $450,000.00 transfer to Ms. Randhawa were disclosed in September 2020. Doc. #10, at 5. Defendant's discharge was not entered until October 13, 2020, and thus Defendant states that Plaintiff knew of the facts before the discharge was entered. Further, Defendant contends that what Ms. Randhawa did with the proceeds is irrelevant for determining fraud and "simply

transferring $450,000 to a third-party, without more, is not fraud." *Ibid.* Defendant claims his assertion of losing millions of dollars gambling and stock trading at the meeting of creditors should have put a reasonable creditor on notice to request an extension of time, file an objection to discharge within the time limits, or investigate the facts. Defendant also notes that neither the chapter 7 trustee nor U.S. Trustee are seeking revocation of discharge.

Defendant claims that Plaintiff's allegations of specific due diligence are checking public records, which would not show a transfer of cash to a third party. That is too simplistic. The allegation of fraud is that Defendant did not disclose Cortez Property, which was purchased by his ex-wife and not him. Citing § 521(a)(1)(B)(ii), Defendant contends that he is under no obligation to disclose assets that are not owned by him at the time of filing. But, the complaint itself pleads that the Cortez Property purchase occurred while the Defendant and Ms. Randhawa were still married. The complaint alleges Ms. Randhawa's petition for marital dissolution was filed in March 2019. The Cortez Property was purchased almost a year earlier. California is a community property jurisdiction, and the complaint alleges that the marriage was dissolved by default judgment. This creates a rebuttable presumption that all property acquired by Defendant and Ms. Randhawa during the marriage, such as Cortez Property, is community property. Cal. Fam. Code § 760.

Defendant claims that the complaint essentially attacks what could be a voidable transfer. This court previously ruled that Plaintiff did not have standing to pursue a voidable transfer in its prior adversary proceeding. In addition to Plaintiff being unable to pursue this voidable transfer, Defendant argues that the transfer occurred, and Cortez Property was sold, prior to entry of discharge on October 13, 2020, and thus Plaintiff's § 727(d)(1) claim should fail. But the pertinent issue is that the Cortez transaction was allegedly concealed. Plaintiff's lack of standing to avoid a transfer does not excuse a wrongful concealment if the latter is proven.

In response, Plaintiff claims that she has pled sufficient facts showing that Defendant failed to disclose substantial assets and attempted to conceal them. Doc. #15. Section 727(d)(1) allows a discharge to be revoked when the debtor obtained the discharge through fraud and the party requesting revocation did not learn of the fraud until after the discharge was granted. A debtor obtained a discharge through fraud when the debtor fails to disclose substantial assets in bankruptcy, gives a false oath on a bankruptcy schedule, or conceals material fraud that would have resulted in denial at the time of the discharge. *In re Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991); *Dean v. McDow*, 299 B.R. 133, 139 (E.D. Va. 2003); *Jones v. U.S. Tr.*, 736 F.3d 897, 900 (9th Cir. 2013).

Plaintiff claims she showed due diligence in investigating and responding to possible fraudulent conduct. Doc. #15. She argues that the complaint properly alleges that Defendant failed to disclose his interest in Cortez Property, which was valued at approximately $600,000. Defendant concealed his interest by falsely testifying he

had lost his insurance proceeds through a series of gambling and stock trade losses, when in fact he transferred them to his wife, who purchased Cortez Property with cash.

Further, Plaintiff notes that Defendant is a licensed real estate salesperson, and thus there is a reasonable inference that Defendant knew of his community property interest in Cortez Property and still intentionally omitted it from his schedules.

Plaintiff claims to have been diligent in investigating Defendant's assets and the fraud. She performed searches for property held by Defendant, but Cortez Property was not revealed because it was held in Ms. Randhawa's name. Moreover, Plaintiff only gained access to Defendant's bank statements one month before the discharge was entered. In reviewing the statements, Plaintiff discovered the $450,000 transfer to Ms. Randhawa and determined that these funds were never returned. Plaintiff sought to conduct a 2004 exam of Ms. Randhawa, noted that she claimed to reside at Cortez Property, and discovered that she purchased Cortez Property in May 2018, weeks after receiving the $450,000 transfer from Defendant. Plaintiff also discovered that Cortez Property sold for over $600,000 in October 2020, and at all times she was diligent in attempting to discover fraud.

The court is inclined to agree. Defendant's bank statements were not available until September 2020. Upon receiving access, it took some time for Plaintiff to investigate Defendant's transfers and Ms. Randhawa's property interests. In fact, Plaintiff filed a related adversary proceeding on October 7, 2020 after relying on a legally insufficient stipulated time extension for the chapter 7 trustee. Although Plaintiff's previous adversary proceeding was untimely, her allegations supply a reasonable inference she was diligent. Perhaps further evidentiary developments will prove otherwise. But that is not the issue now.

Section 727(d)(2)

Next, Defendant argues that Plaintiff has failed to prove that Defendant acted with knowing intent to defraud. Section 727(d)(2) provides for revocation of discharge if the debtor acquired or became entitled to acquire property of the estate and knowingly and fraudulently failed to report or deliver the property to the trustee. Both elements must be met, and Plaintiff must prove that Defendant acted with the knowing intent to defraud. *In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992). Fraudulent conduct requires actual fraudulent intent, but actual fraudulent intent may be inferred from all of the surrounding circumstances or the debtor's course of conduct. *In re Devers*, 759 F.2d 751, 753-54 (9th Cir. 1985).

"Knowingly and fraudulently" requires that the debtor be guilty of such acts as would sustain a civil action for fraud and deceit. The debtor's actions must have been taken with knowing intent to defraud the trustee or be so reckless as to justify a finding that he acted fraudulently. *In re Puente*, 49 B.R. 966, 969 (Bankr. W.D.N.Y. 1985); *In re Black*, 19 B.R. 468, 470 (Bankr. M.D. Tenn. 1982); *In re Dietz*,

941 F.2d 161, 164 (9th. Cir. 1990) (more than knowledge of asset is necessary; knowledge that property is an estate asset is needed).

Defendant contends Plaintiff cannot allege any facts that support Defendant retained a community property interest in the $450,000.00 transferred to Ms. Randhawa while they were married. Doc. #10. Defendant contends that no facts are alleged that would make Cortez Property a community property asset and therefore property of the estate. Notably, Defendant did not specifically deny that he had a community property interest in Cortez Property.

Plaintiff's response contends that the complaint alleges that Cortez Property was sold in 2020 for over $600,000 and Defendant had a community property interest in Cortez Property because it was purchased in 2018 and Defendant and Ms. Randhawa did not dissolve their marriage until March 2019. Doc. #15. Further, the complaint alleges Defendant misrepresented at the meeting of creditors how his insurance proceeds were spent: loss through gambling and stocks rather than purchase of Cortez Property. This testimony was allegedly false.

The complaint also alleges other misrepresentations: (1) a sworn statement of loss to his insurance carrier representing that there were no encumbrances on Mount Vernon Property, which Defendant would know as a real estate agent; (2) omitting Mount Vernon Property, his recent sale or transfer of a dozen other properties, and an insurance loss payout of $750,000 from his schedules; (3) never amending his schedules to include Cortez Property; (4) misrepresenting how he lost his insurance proceeds gambling and stock trading. Plaintiff contends these circumstances infer fraudulent intent and thus Plaintiff has sufficiently pled a claim for revocation of discharge.

The Plaintiff has alleged enough facts to support a fraud claim under the heightened pleading standard of Civil Rule 9(b). Defendant is identified as the source of the representations, the content of the alleged misrepresentations and concealment and what they are related to is included in the complaint. When and where the alleged concealments occurred (meeting of creditors; on the schedules) is included. Why the alleged concealments happened is also alleged (to hide a valuable property interest). How the concealment and misrepresentations occurred is also included.

The court is not convinced the allegations in this compliant "resurrect" the allegations in Plaintiff's earlier (now dismissed) adversary proceeding. The Plaintiff has a much heavier burden in this action. In addition to proving fraud the Plaintiff must also show failure of the Defendant to bring this information to the estate Trustee. Claims that Defendant's behavior renders debts allegedly owed Plaintiff non-dischargeable is not enough to revoke a discharge.

Conclusion

Plaintiff has pled sufficient facts to state a cause of action for revocation of Defendant's discharge. The complaint alleges that discharge was obtained through Defendant's failure to disclose his assets and Plaintiff did not discover that failure to disclose until after discharge was entered, despite reasonable and diligent efforts. Plaintiff's motion to dismiss will be DENIED. The requests for a more definitive statement under Civil Rule 12(e) and for attorney fees under Rule 9011 will be DENIED. Plaintiff shall file an answer within 14 days of entry of this order.

4. 19-13374-B-7 **IN RE: KENNETH HUDSON**
19-1128

PRE-TRIAL CONFERENCE RE: COMPLAINT
11-26-2019 [1]

BROWN V. HUDSON
GLEN GATES/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

11:30 AM

1. 20-13346-B-7 **IN RE: RAMON GUTIERREZ**

REAFFIRMATION AGREEMENT WITH HARLEY-DAVIDSON CREDIT CORP
1-21-2021 [12]

REBECCA TOMILOWITZ/ATTY. FOR DBT.

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtor's counsel will inform debtor that no appearance is necessary.

Both the reaffirmation agreement and the bankruptcy schedules show that reaffirmation of this debt creates a presumption of undue hardship which has not been rebutted in the reaffirmation agreement. Although the debtor's attorney executed the agreement, the attorney could not affirm that, (a) the agreement was not a hardship and, (b) the debtor would be able to make the payments.