

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: APRIL 13, 2016
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. See *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); accord LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [15-10215](#)-A-7 ERIC MCKINLEY CONTINUED STATUS CONFERENCE RE:
[15-1115](#) COMPLAINT
MANFREDO V. ROAM ET AL 9-22-15 [[1](#)]
GABRIEL WADDELL/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

2. [16-10224](#)-A-7 JUANITO ALFORQUE STATUS CONFERENCE RE: COMPLAINT
[16-1020](#) 2-12-16 [[1](#)]
U.S. TRUSTEE V. ALFORQUE, JR.
TERRI DIDION/Atty. for pl.

Final Ruling

The status conference is continued to May 17, 2016, at 10:00 a.m., to allow the plaintiff to prove up the default.

3. [15-13735](#)-A-7 ISELA IBARRA-MCCANN CONTINUED STATUS CONFERENCE RE:
[15-1153](#) COMPLAINT
DE SANTIAGO V. IBARRA-MCCANN 12-22-15 [[1](#)]
KENT SHARP/Atty. for pl.

[The status conference will be called subsequent to plaintiff's motion for entry of default judgment, KLS-2.]

No tentative ruling.

4. [15-13735](#)-A-7 ISELA IBARRA-MCCANN MOTION FOR ENTRY OF DEFAULT
[15-1153](#) KLS-2 JUDGMENT
DE SANTIAGO V. IBARRA-MCCANN 3-9-16 [[33](#)]
KENT SHARP/Atty. for mv.

Final Ruling

Motion: Entry of Default Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted in part, denied in part without prejudice

Judgment: Prepared by moving party consistent with this ruling and pursuant to instructions below

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount

of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). The court accepts the well-pleaded facts in the complaint as true. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

CLAIM UNDER § 523(a)(4)

The court will deny the motion for judgment under § 523(a)(4). A nondischargeability claim under § 523(a)(4) requires the existence of (1) an express, technical or statutory trust, (2) a debt caused by the debtor's fraud or defalcation, and (3) the debtor's status as a fiduciary when the debt arose. *Otto v. Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997), *abrogated on other grounds, Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *Cal-Micro, Inc. v. Cantrell (In re Cantrell)*, 329 F.3d 1119, 1125 (9th Cir. 2003). An express or technical trust has not been alleged in the complaint. The complaint does allege that Ibarra-McCann was a real estate agent who assisted de Santiago in a real estate purchase unrelated to the transaction forming the basis for the complaint in state court. But the existence of a real estate license, without more, does not confer "fiduciary capacity." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 22:616 (rev. 2015) (citing *In re Honkanen*, 446 B.R. 373, 378 (B.A.P. 9th Cir. 2011)).

This denial is, however, without prejudice. If the plaintiff desires to file an amended complaint that states a claim under § 523(a)(4), the court will consider a subsequent motion for default judgment relying in whole or in part on this basis for nondischargeability.

CLAIM UNDER § 523(a)(19)

Accepting the allegations of the complaint as true, and considering the state court judgment attached to the complaint and motion for default judgment, the plaintiff de Santiago is entitled to judgment that the entire amount of the state court judgment is nondischargeable, including post-judgment interest.

The state court judgment, attached as Exhibit A to the declaration of Kent L. Sharp, is in favor of plaintiff de Santiago and against defendant Ibarra-McCann on claims for Securities Fraud, violation of California Corporations Code section 25401 et seq., and other claims. Claims for Securities Fraud and a violation of Cal. Corp. Code § 25401 et seq. are claims for violations of securities laws. Section 25401 et seq. of the Cal. Corp. Code is a reference to California securities statutes, and a violation of § 25401 entitles an injured plaintiff to damages, Cal. Corp. Code § 25501, against the violator and certain related parties and aiders and abettors.

The judgment awards plaintiff a total amount of damages as of May 8, 2014, of \$325,650 against all defendants, including Ibarra-McCann, jointly and severally. Under § 523(a)(19)(A)(i), this judgment evidences a debt for a violation by Ibarra-McCann of State securities laws under Cal. Corp. Code § 25401 et seq. Under § 523(a)(19)(A)(ii), the finding against Ibarra-McCann on a claim for Securities Fraud or "Intentional Misrepresentation / Deceit" is a debt that is for common law fraud or deceit in connection with the purchase or sale of any security.

Lastly, § 523(a)(19)(B) is satisfied because the debt that is for violations of securities laws and common law fraud or deceit has resulted from a judgment entered in a state judicial proceeding.

POST-JUDGMENT INTEREST

The court recognizes the principle that post-judgment interest on a nondischargeable debt continues to accrue even after a bankruptcy petition is filed for purposes of determining the amount of the nondischargeable debt, as opposed to payment of the claim in bankruptcy representing such debt. See *In re Foster*, 319 F.3d 495, 497-98 (9th Cir. 2003) (post-petition interest on nondischargeable debts is also nondischargeable).

The total state court judgment debt as of the date of the judgment's issuance was \$325,650. All post-judgment interest on this judgment is likewise nondischargeable, but the court will not calculate this interest or enter a money judgment in this proceeding. The judgment shall not include any reference to dollar amounts other than the amount of the original judgment. The judgment may state that all post-judgment interest is nondischargeable.

5. [14-14453](#)-A-7 SAMUEL LOPEZ CONTINUED STATUS CONFERENCE RE:
[14-1141](#) COMPLAINT
CALLISON V. LOPEZ 11-21-14 [[1](#)]
DANIEL BARADAT/Atty. for pl.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to May 17, 2016, at 10:00 a.m. Not later than 7 days prior to the continued hearing the parties shall file a joint status report.

6. [16-10165](#)-A-7 ANGELA RENFROE CONTINUED STATUS CONFERENCE RE:
[16-1012](#) COMPLAINT
U.S. TRUSTEE V. RENFROE 1-27-16 [[1](#)]
ROBIN TUBESING/Atty. for pl.

Final Ruling

Default judgment granted, the status conference is concluded.

7. [16-10165](#)-A-7 ANGELA RENFROE MOTION FOR ENTRY OF DEFAULT
[16-1012](#) UST-1 JUDGMENT
U.S. TRUSTEE V. RENFROE 3-4-16 [[9](#)]
ROBIN TUBESING/Atty. for mv.

Final Ruling

Motion: Entry of Default Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted in part, denied in part as moot

Order: Prepared by moving party

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055. The plaintiff has moved for default judgment.

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court finds that default judgment should be entered against the defendant. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and are cumulative. *See In re Casse*, 198 F.3d. 327, 337-41 (2d Cir. 1999).

In cases where cause is found under § 349(a), a filing bar may exceed the 180-day limit described in § 109(g). *See, e.g., id.* at 341; *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). *But see In re Frieouf*, 938 F.2d 1099, 1103-04 (10th Cir. 1991). In *Leavitt*, the Ninth Circuit B.A.P. noted that § 349 was intended to authorize courts to control abusive filings, notwithstanding the limits of § 109(g). *See In re Leavitt*, 209 B.R. 935, 942 (B.A.P. 9th Cir. 1997).

Section 349(a) invokes a "cause" standard. In *Leavitt*, the panel held that "egregious" conduct must be present to find "cause" under § 349, but "a finding of bad faith constitutes such egregiousness." *Id.* at 939 (upholding the bankruptcy court's decision that debtors' inequitable proposal of Chapter 13 plan merely to avoid an adverse state court judgment was an unfair manipulation of the Code). In this circuit, a finding of bad faith is sufficient "cause" for barring future filings pursuant to § 349(a). *Id.* at 939. The overall test used to determine bad faith is to consider the totality of the circumstances. See, e.g., *In re Leavitt*, 209 B.R. at 939; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In determining whether bad faith exists, "[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

The court concludes that a filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found. The court may find cause to bar a debtor from re-filing if the debtor: (1) acted inequitably in filing a case or proposing a plan, (2) misrepresented the facts, (3) unfairly manipulated the Code, or (4) proposed a plan in an inequitable manner. These factors are disjunctive.

Based on the undisputed facts, the court finds cause to impose a filing bar exceeding the 180-day limit in § 109(g). The facts show debtor has unfairly manipulated the Code without genuine intent to prosecute the debtor's cases to discharge or reorganization.

The claim seeking dismissal with prejudice is denied as moot given that the dismissal of the current case has already occurred. However, the court will enter default judgment on the claim seeking an injunction.

The debtor will be enjoined from filing another bankruptcy petition in the Eastern District of California without leave of court for a two-year period commencing on the entry of the order dismissing the debtor's bankruptcy case. During such time, leave of court will not be granted to file a petition unless the following conditions have been met: (1) the request for leave of court to file a petition is accompanied by a cashier's check made payable to the Clerk of Court for the full amount of the filing fee and documents that include the completed schedules and statements prepared and ready to be filed, (2) reasonable assurances are provided that debtor will appear at the § 341 meeting, and (3) the debtor shows a material change in circumstances that warrant the filing of a subsequent petition.

8. [15-12889](#)-A-7 ERIC MIRELES AND MAXINE CONTINUED STATUS CONFERENCE RE:
[15-1135](#) HERNANDEZ COMPLAINT
AMBROSE ET AL V. MIRELES 10-30-15 [[1](#)]
DORINDA MYERS/Atty. for pl.

No tentative ruling.

9. [15-11593](#)-A-7 BRIAN LUONG
[15-1095](#)
AMERICAN EXPRESS BANK, FSB V.
LUONG
KEN WHITTALL-SCHERFEE/Atty. for pl.

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
7-23-15 [[1](#)]

No tentative ruling.