UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, April 24, 2019
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 19-10204-B-7 **IN RE: JUAN MERCADO**
PFT-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
3-12-2019 [11]

THOMAS GILLIS

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

DISPOSITION: Conditionally denied.

ORDER: The court will issue the order.

The chapter 7 trustee's motion to dismiss is CONDITIONALLY DENIED.

The debtors shall attend the meeting of creditors rescheduled for April 29, 2019 at 10:00 a.m. If the debtor fails to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtors' discharge or file motions for abuse, other than presumed abuse, under § 707, is extended to 60 days after the conclusion of the meeting of creditors.

2. 18-12023-B-7 **IN RE: CARLOS PADILLA**
SL-2

MOTION TO RECONVERT CASE FROM CHAPTER 7 TO CHAPTER 13
3-25-2019 [65]

SCOTT LYONS

TENTATIVE RULING: The matter will proceed as scheduled

DISPOSITION: Denied.

ORDER: The court will prepare the order

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. Upon default, factual allegations will be taken as true (except those relating to amount 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 not done here.

This motion is DENIED. 11 U.S.C. § 706(a) allows a debtor in chapter 7 to convert to chapter 13 "at any time," unless the case was previously converted "under section . . . 1307." The court converted this case to Chapter 7 after the Chapter 13 Trustee filed a Motion to Dismiss for the debtor's failure to provide insurance documents to the Chapter 13 Trustee.

This case was converted to chapter 7 under 11 U.S.C. § 1307 on November 29, 2018. Doc. #46, 47. Therefore the debtor has lost his "absolute right" to convert. The good faith of the debtor should be examined on these motions. Marrama v. Citizens Bank, 127 S.Ct. 1105 (2007). Under §706(a) and (c) the court now has control of the debtor's right to convert. 6 Collier on Bankruptcy ¶ 706.02 (16th ed. 2019). The court's discretion should be exercised considering the various interests in the case. In re Walker, 77 B.R. 803, 804 (Bankr. D. Nev. 1987) quoting In re Sensibaugh, 9 B.R. 45, 46 (Bankr. E.D. Va., 1981).

First, this is the debtor's second case filing within a year of the filing of his previous case. The previous case, 18-10478 was dismissed for failure to submit necessary documents. The debtor asked the court to extend the stay in this case citing his then deteriorating health and his son's assumption of supervision over his rental properties. The court extended the stay (Doc. 22). So,

this debtor has had the protection of the bankruptcy law for some time and has not progressed very far.

Second the debtor's inattention to his duties when this case was pending under chapter 13 justifies keeping this case in Chapter 7. The Chapter 13 Trustee continued the meeting of creditors three times. The debtor missed all three. Although, the court notes in mitigation, the debtor has attended the creditors meetings since the case was pending under Chapter 7. Also, the debtor did not provide the documents needed by the Chapter 13 Trustee. That is why the Chapter 13 Trustee filed the motion to dismiss prompting the conversion to Chapter 7.

Third, the debtor's creditors appear better served in Chapter 7. The debtor's declaration (Doc. #67) supporting this motion states he wants to propose a 100% Plan (that was proposed while he was in Chapter 13) sell one of his properties and pay off a HELOC plus his small number of general unsecured creditors. He apparently can maintain his payments on the loan secured by the first lien on his house since he mentions only the HELOC being in default. He also states the Trustee is planning to sell a rental property. There is no evidence that the sale and payment of creditors will happen any faster in a Chapter 13 then it will in a Chapter 7.

Fourth, the debtor will receive a discharge promptly in this Chapter 7 case. Only one creditor, Citibank, has filed a claim in this case. This suggests the small number of creditors are not interested in aggressively participating in the case.

The motion is DENIED.

3. 19-10026-B-7 **IN RE: CHARLIE SULLIVAN**
SW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
4-4-2019 [23]

A-L FINANCIAL CORPORATION/MV
ADAM BARASCH/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted unless opposed at the hearing.

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 for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling granting the motion for relief from stay. 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 automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2017 Nissan Sentra. Doc. #27. The collateral has a value of $14,099.00 and debtor owes $13,939.21. *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is uninsured and is a depreciating asset.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

4. 18-13238-B-7 **IN RE: DENISE DAWSON**
JDR-4

MOTION TO AVOID LIEN OF FIDELITY CAPITAL HOLDINGS, INC
4-9-2019 [43]

DENISE DAWSON/MV
JEFFREY ROWE

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.

This motion is 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 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), aff'd 24 F.3d 247 (9th Cir. 1994).

A judgment was entered for Civic Plaza Apartments in the sum of $10,824.53 on June 4, 2014 (Doc. #46) against the debtor. Civic Plaza assigned the judgment to Fidelity Capital Holdings, Inc., a California corporation, dba Fidelity Creditor Service, Inc. A writ of execution was presented to the County of Los Angeles Sheriff's Office ("Sheriff's Office") with instructions to levy on Debtor's bank accounts. Doc. #45. The Sheriff's Office served the writ on Bank of America ("Bank"). Id. Bank garnished $9,500.00 from Debtor's account ending in 3882 and $392.37 from account ending in 3886. Id. The funds were forwarded to the Sheriff's Office and are still held there. Id.

The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The debtor listed this levy on Schedule A/B in the amount of $9,892.37. Doc. #12. The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) and (b)(5) in the amount of $9,892.37. Doc. #12, Schedule C.

Movant has established the four elements necessary to avoid a lien under § 522(f)(1). After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

5. 18-14538-B-7 **IN RE: OSCAR ANAYA**
AP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-18-2019 [56]

WELLS FARGO BANK, NA/MV
WENDY LOCKE/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 for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtor's and the trustee's defaults will be entered. The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a parcel of real property commonly known as 36268 Marciel Avenue, Madera,

California 93638, nka 36268 Marciel Avenue, Madera, California 93636-7714. Doc. #60. The collateral has a value of $150,000.00 and the amount owed is $24,110.15. Doc. #58. Chase Mortgage is owed $394,962.00 and the property is secured by a second deed of trust in Chase Mortgage's favor. Doc. #56, Claim #4.

If the motion involves a foreclosure of real property in California, then the order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

If an award of attorney fees has been requested, it will be denied without prejudice. A motion for attorney fees pursuant to 11 U.S.C. §506(b), or applicable nonbankruptcy law, must be separately noticed and separately briefed with appropriate legal authority and supporting documentation. In addition, any future request for an award of attorney's fees will be denied unless the movant can prove there is equity in the collateral. 11 U.S.C. §506(b).

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

6. 18-14538-B-7 **IN RE: OSCAR ANAYA**
JCW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-27-2019 [63]

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION/MV
JENNIFER WONG/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 for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtor's and the trustee's defaults will be entered. The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a parcel of real property commonly known as 36268 Marciel Avenue, Madera, California 93636-7714. Doc. #66. The collateral has a value of $150,000.00 and the amount owed is $397,478.38. Doc. #65.

If the motion involves a foreclosure of real property in California, then the order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

A waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The debtor has not made payments to the movant since July 11, 2008.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

7. 18-13240-B-7 **IN RE: DAVID MOBLEY**
TMT-1

MOTION FOR COMPENSATION FOR TRUDI G. MANFREDO, CHAPTER 7 TRUSTEE
3-25-2019 [82]

TRUDI MANFREDO/MV
PETER BUNTING
LISA HOLDER/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 amount 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 is GRANTED. 11 U.S.C. §§ 326 and 330 allow reasonable compensation to the chapter 7 trustee for the trustee's services. 11 U.S.C. § 330 requires the court to find that the fees requested are reasonable and for actual and necessary services to the estate, as well as reimbursement for actual and necessary expenses.

Chapter 7 Trustee Trudi Manfredo ("Trustee") requests fees of $18,522.85 and costs of $198.86 for a total of $19,054.71 as statutory compensation and actual and necessary expenses. During the course of this case, Trustee conducted the meeting of creditors, sold residential real property, reviewing and reconciling financial records, and prepared the final report. Doc. #85.

The court finds Trustee's services were actual and necessary to the estate, and the fees are reasonable. The motion is GRANTED and Trustee is awarded the requested gees and costs.

8. 17-11346-B-7 **IN RE: DANIEL CANCHOLA**
RWR-2

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH THE CHAPTER 7 BANKRUPTCY ESTATE OF MARIO ALBERTO GUERRA
3-28-2019 [38]

JAMES SALVEN/MV
JERRY LOWE
RUSSELL REYNOLDS/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

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

A Motion for Examination was previously filed on January 31, 2019 (doc. #33) and granted on February 4, 2019. Doc. #35. The DCN for that motion was RWR-2. This motion also has a DCN of RWR-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)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was served and filed on March 28, 2019 and set for hearing on April 24, 2019. Doc. #39, 44. April 24, 2019 is 27 days after March 28, 2019, 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. #29. That is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that no written opposition was required. Because this motion was filed, served, and noticed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) needed to have been included in the notice.

9. 17-11346-B-7 **IN RE: DANIEL CANCHOLA**
RWR-3

MOTION TO EMPLOY DAVID M. MOECK AS SPECIAL COUNSEL
3-28-2019 [45]

JAMES SALVEN/MV
JERRY LOWE
RUSSELL REYNOLDS/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

LBR 9014-1(f)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was served and filed on March 28, 2019 and set for hearing on April 24, 2019. Doc. #46, 50. April 24, 2019 is 27 days after March 28, 2019, 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. #46. That is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that no written opposition was required. Because this motion was filed, served, and noticed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) needed to have been included in the notice.

10. 19-10952-B-7 **IN RE: DAVID MUSE**
APN-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-26-2019 [16]

CAB WEST LLC/MV
DAVID JENKINS
AUSTIN NAGEL/ATTY. FOR MV.

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

DISPOSITION: Continued to May 1, 2019 at 9:00 a.m., Dept. A, before Honorable Fredrick E. Clement.

ORDER: The court will issue an order.

The case was transferred on April 16, 2019 (doc. #32) to Dept. A, to be heard before Honorable Fredrick E. Clement. The matter will be continued to May 1, 2019 at 9:00 a.m.

11. 19-10952-B-7 **IN RE: DAVID MUSE**
RJM-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-22-2019 [10]

FRANCES MURILLO/MV
DAVID JENKINS
RICK MORIN/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to May 1, 2019 at 9:00 a.m., Dept. A, before Honorable Fredrick E. Clement.

ORDER: The court will issue an order.

The case was transferred on April 16, 2019 (doc. #32) to Dept. A, to be heard before Honorable Fredrick E. Clement. The matter will be continued to May 1, 2019 at 9:00 a.m.

12. 18-14858-B-7 **IN RE: LAVON/ROSE COLES**
JES-1

MOTION TO SELL
3-14-2019 [18]

JAMES SALVEN/MV
ROSALINA NUNEZ

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 be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount 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 is 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, No. 16-00327-GS, 2018 WL 6584772, at *2 (Bankr. D. Alaska Dec. 11, 2018); citing 240 North Brand Partners, Ltd. v. Colony GFP Partners, LP (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (9th Cir. BAP 1996) citing 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, 2018 WL 6584772, at *4, 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), citing In re Bakalis, 220 B.R. 525, 531-32 (Bankr. E.D.N.Y. 1998).

The chapter 7 trustee asks this court for authorization to sell a 2005 Ford Explorer ("Estate Asset") to debtors Lavon and Rose Coles, subject to higher and better bids at the hearing, for $1,100.00. Doc. #18. The fair-market value of the vehicle is $4,048.00 and the debtors have a $2,948.00 exemption. Doc. #20. Therefore the estate will net $1,100.00.

It appears that the sale of the Estate Asset 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. The motion is GRANTED.

13. 17-11365-B-7 **IN RE: MARIO GUERRA**
RWR-2

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH THE CHAPTER 7 BANKRUPTCY ESTATE OF DANIEL M. CANCHOLA
3-28-2019 [50]

PETER FEAR/MV
JERRY LOWE
RUSSELL REYNOLDS/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

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

A Motion for Examination was previously filed on January 31, 2019 (doc. #45) and granted on February 1, 2019 (doc. #47). The DCN for that motion was RWR-2. This motion also has a DCN of RWR-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)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was served and filed on March 28, 2019 and set for hearing on April 24, 2019. Doc. #51, 56. April 24, 2019 is 27 days after March 28, 2019, 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. #51. That is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that no written opposition was required. Because this motion was filed, served, and noticed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) needed to have been included in the notice.

14. 17-11365-B-7 **IN RE: MARIO GUERRA**
RWR-3

MOTION TO EMPLOY DAVID M. MOECK AS SPECIAL COUNSEL
3-28-2019 [57]

PETER FEAR/MV
JERRY LOWE
RUSSELL REYNOLDS/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

LBR 9014-1(f)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was served and filed on March 28, 2019 and set for hearing on April 24, 2019. Doc. #58, 62. April 24, 2019 is 27 days after March 28, 2019, 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. #58. That is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that no written opposition was required. Because this motion was filed, served, and noticed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) needed to have been included in the notice.

15. 18-12266-B-7 **IN RE: TRACI SUMMERLIN**
TCS-2

MOTION FOR CONTEMPT
3-13-2019 [24]

TRACI SUMMERLIN/MV
TIMOTHY SPRINGER

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

DISPOSITION: Denied without prejudice.

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

This motion is DENIED WITHOUT PREJUDICE. Constitutional due process requires that the movant make a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

This motion is denied for lack of evidence. Movant attached no evidence to the motion. The court is therefore unable to verify the claims made in the motion.

16. 18-14776-B-7 **IN RE: ELIZABETH/PATRICK ROONEY**
JES-1

MOTION TO EMPLOY BAIRD AUCTIONS & APPRAISALS AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES
3-27-2019 [18]

JAMES SALVEN/MV
IRMA EDMONDS

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 amount 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 is GRANTED. 11 U.S.C. § 328(a) permits employment of "professional persons" on "reasonable terms and conditions" including "contingent fee basis."

Trustee is authorized to employ Baird Auctions & Appraisals ("Auctioneer") as auctioneer to sell property of the estate consisting of a 2006 Ford F-350 at a public auction, which is set for May 7, 2019 at Baird Auctions & Appraisals located at 1328 N. Sierra Vista, Suite B in Fresno, California.

The trustee proposes to compensate Auctioneer on a percentage collected basis. The percentage is 15% of the gross proceeds from the sale. Doc. #18. Trustee is also authorized to reimburse Auctioneer up to $250.00 for expenses.

The court finds the proposed arrangement reasonable in this instance. If the arrangement proves improvident, the court may allow different compensation under 11 U.S.C. § 328(a).

Trustee is authorized to employ and pay Auctioneer for his services as outlined above, and the proposed sale at auction of the 2006 Ford F-350 is approved.

17. 18-14978-B-7 **IN RE: RAUL JIMENEZ**
UST-1

MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)
3-18-2019 [18]

TRACY DAVIS/MV
MARK ZIMMERMAN
JARED DAY/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 amount 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 is GRANTED. 11 U.S.C. § 727(a)(8) states that a debtor shall be granted a discharge unless "the debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the date of the filing of the petition."

Debtor Raul Jimenez ("Debtor") previously filed for chapter 7 relief on September 3, 2014 and received a discharge on December 10, 2014. Doc. #21. September 3, 2014 is within eight years of the date this petition was filed (December 14, 2018). Therefore, Debtor cannot receive a discharge in this case and the United State's Trustee's motion is GRANTED.

18. 18-14779-B-7 **IN RE: KEVIN BOTTORFF**
CJO-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
4-5-2019 [21]

CONSUMER PORTFOLIO SERVICES, INC./MV
ERIC ESCAMILLA
CHRISTINA O/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part as to the trustee's interest and denied as moot in part as to the debtor's interest.

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 for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling. 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 motion will be DENIED AS MOOT as to the debtor pursuant to 11 U.S.C. § 362(c)(2)(C). The debtor's discharge was entered on April 6, 2019. Docket #28. The motion will be GRANTED IN PART for cause shown as to the chapter 7 trustee.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The proposed order shall specifically describe the property or action to which the order relates. The order shall provide the motion is DENIED AS MOOT as to the debtors.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2014 Ford Mustang. Doc. #26. The collateral has a value of $9,400.00 and debtor owes $21,034.01. *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

19. 19-10080-B-7 **IN RE: ROGER VAN TASSEL**
PPR-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
3-15-2019 [38]

VILLAGE CAPITAL & INVESTMENT, LLC/MV
ERIC ESCAMILLA
BONNI MANTOVANI/ATTY. FOR MV.

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

DISPOSITION: Granted in part as to the trustee's interest and denied as moot in part as to the debtor's interest.

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

This motion for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The motion will be DENIED AS MOOT as to the debtor pursuant to 11 U.S.C. § 362(c)(2)(C). The debtor's discharge was entered on April 16,

2019. Docket #48. The motion will be GRANTED IN PART for cause shown as to the chapter 7 trustee.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The order shall provide the motion is DENIED AS MOOT as to the debtor.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a parcel of real property commonly known as 1516 Avenue E, Kingsburg, California 93631-2688. Doc. #40. The collateral has a value of $275,000.00 and the amount owed is $271,469.14. Doc. #42.

If the motion involves a foreclosure of real property in California, then the order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5.

A waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will not be granted. The movant has shown no exigency.

If adequate protection is requested, it will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

20. 19-10986-B-7 **IN RE: JEANNE BAKER**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
3-29-2019 [15]

$29.00 FILING FEE BALANCE PAID ON 4/1/19

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the installment fees now due have been paid in full on April 1, 2019.

11:00 AM

1. 19-10057-B-7 **IN RE: SUSAN THEVENOT**

PRO SE REAFFIRMATION AGREEMENT WITH ALLY BANK
4-5-2019 [22]

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

DISPOSITION: Dropped.

ORDER: The court will issue an order.

The court is not approving or denying approval of the reaffirmation agreement. The creditor has not signed the reaffirmation agreement. Therefore, the agreement does not meet the requirements of 11 U.S.C. § 524(c) and is not enforceable. The debtor shall have 14 days to refile the reaffirmation agreement properly signed by the creditor.

1:30 PM

1. 19-10516-B-13 **IN RE: FRANK CRUZ**
19-1030

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
3-5-2019 [1]

CRUZ V. ABDELAZIZ

NO RULING.

2. 19-10516-B-13 **IN RE: FRANK CRUZ**
19-1030 HTK-1

AMENDED MOTION FOR REMAND, AMENDED MOTION FOR SANCTIONS
3-26-2019 [9]

CRUZ V. ABDELAZIZ
H. KHARAZI/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: The matter will proceed as scheduled.

DISPOSITION: Granted. The court will remand the action to the Fresno County Superior Court.

ORDER: The court will issue an order.

Mel Abdelaziz ("Movant") asks the court to remand this adversary proceeding to the Fresno County Superior Court ("state court"). Frank Cruz ("Debtor") removed the action to this court and opposes the motion.

This dispute stems from an alleged contract under which Debtor was to purchase Movant's real property located at 1708 N. Cedar Ave. in Fresno. Movant apparently leased the property to Debtor and it has been a rocky relationship. Based on this court's truncated record, it seems shortly after signing a modified contract for sale (it had been modified several times), Movant filed an unlawful detainer proceeding in state court against Debtor based on unpaid rent. Debtor defaulted. Debtor did not convince the state court to set the default aside though he claimed he was not properly served.

Debtor filed a lawsuit against movant in state court alleging movant breached the contract, concealed material facts and committed intentional torts. Doc. #1. Movant filed a cross complaint alleging Debtor defrauded him, breached the contract and that Debtor committed elder abuse. Doc. #16.

State court trial was to begin February 4, 2019. Doc. #10. But, no trial happened because Debtor filed his first bankruptcy case in December 2018 (18-14847-A-13). That case was dismissed because

Debtor did not file the necessary credit counseling certificate. This bankruptcy case was then filed. Less than a month later, Debtor filed the notice of removal of the state court action; this is what the motion is about.

Movant contends that under the general removal statute (28 U.S.C. § 1441(a)) only a defendant can remove the action and Debtor is the plaintiff in the state court case. The court also lacks subject matter jurisdiction, Movant claims, because the state court action raises only state law claims. So, there is no federal question jurisdiction and there is no diversity of citizenship between Movant and Debtor. The action is not a "core" claim under 28 U.S.C. § 157 says Movant without much analysis. Movant offers only the opinion of counsel that bankruptcy court jurisdiction does not apply. Finally, Movant asks this court award sanctions against Debtor.

Debtor opposes, saying Movant has not separated the notice and motion in violation of the local rules and that Debtor is entitled to 3 more days' notice under Civil Rules 5(b) and 6(d). On the substantive issue, Debtor only argues this adversary proceeding is "core" without any analysis.

Debtor is correct that Local Rule of Practice ("LBR") 9004-2(c)(1) requires that motions, notices, *inter alia*, to be filed as separate documents. Here, the motion and notice were combined into one document and not filed separately. Doc. #9. That is a basis to deny the motion. The court declines to do so here. Under LBR 1001-1(f) the court can *sua sponte* modify the rules for cause. Here, Debtor has raised a substantive response to the motion even though the notice and motion were the same document – there is no prejudice. Also, this proceeding needs to be promptly adjudicated to avoid waste of both the court's and the parties' resources. Plus, LBR 9014-1(l) permits but does not mandate denial of the motion. Finally, as can be seen below, many procedural infirmities were committed by Debtor in another motion on this calendar and the court has considered its substance even though it could have been denied outright.

Debtor is incorrect on the timing issue. Federal Rules of Civil Procedure 5(b) and 6(d) are irrelevant and inapplicable in contested motions. Fed. R. Bankr. P. 9014(c). The controlling rule is Fed. R. Bankr. P. 9006(f). That rule does add 3 days when service is by mail. But, the rule applies only to a "right or requirement to act or undertake some proceedings within a prescribed period *after being served*. . ." (emphasis added). LBR 9014-1 which governs motion practice does not require acts triggered upon service. Rather, the period of *notice* is 28 days. The time to respond (14 days before the hearing) is not triggered by the service date but by the date the motion is scheduled to be heard. Besides, Debtor's argument rings hollow since he responded to the motion and claimed no prejudice.

Movant relies upon the wrong law for the remand motion and ignores the nature of bankruptcy jurisdiction. But applying the proper law, the court will remand the adversary proceeding to the state court. First, the bankruptcy removal statute (28 U.S.C. § 1452) which is not cited by Movant supports remand. Section 1452 permits any party

to remove an action unlike the general statute which limits removal to defendants. So, Movant's main argument fails. Instead, § 1452(b) provides that a court "may" remand a removed action "on any equitable ground." Those grounds include judicial economy, comity and respect for the state court's decision-making capabilities, the effect of remand upon administration of the bankruptcy estate, the effect of bifurcating claims and parties and the possibility of an inconsistent result, the predominance of state law issues and non-debtor parties and prejudice to other parties to the action. Western Helicopters, Inc. v. Hiller Aviation, Inc., 97 B.R. 1, 6 (E.D. Cal. 1988) (superseded by statute on other grounds); See also Williams v. Shell Oil Co.,169 B.R. 684 , 692-93 (S.D. Cal 1994).

This case started in 2017 and was ready for trial just after Debtor filed his first bankruptcy case. The action involves two litigants - Debtor and Movant - so no third party would be prejudiced by remand. Judicial economy and comity would be furthered by remand. Though the extent of the bankruptcy estate may be affected by a decision on the state law claims only damages are claimed by both parties; no equitable relief is sought. Debtor's claim would need to be liquidated and Movant's claim as well. The state court is completely capable of doing that. The Chapter 13 trustee routinely requires debtors to prosecute claims and provide the trustee with updates and the trustee controls the result if it is in favor of the debtor. There is no impact on the administration of this case. Movant's contingent claim against the estate, once liquidated by the state court, can be handled by a modified Chapter 13 Plan if need be. State law issues completely dominate both the complaint and cross complaint. There is also no evidence Debtor will be prejudiced by litigating in state court.

Second, the removal notice is facially inadequate. Fed. R. Bankr. P. 9027(a) requires that a notice of removal be accompanied by "a copy of all process and pleadings." That did not occur here. In fact, the court is perplexed why only Debtor's complaint was attached to the removal notice when a cross complaint was filed by Movant in the state court action. Debtor's candor is questionable.

Third, there is a basis for mandatory abstention. Movant misreads the breadth of the bankruptcy court's jurisdiction. The court (by reference from the District Court) can hear proceedings arising under, arising in or related to cases under the bankruptcy code. 28 U.S.C. § 1334(b). As stated, all claims here are brought under state law. None of the claims "arise under" the bankruptcy code because they do not involve "a cause of action created or determined by a statutory provision of title 11." See Harris v. Wittman (In re Harris), 590 F.3d 730, 737 (9th Cir. 2009). The claims do not "arise in" a case under the bankruptcy code since the case here does not "by its nature . . . arise *only* in the context of a bankruptcy case." Gruntz v. County of Los Angeles, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting Wood v. Wood (In re Wood), 825 F.2d 90, 97 (5th Cir. 1987) (emphasis added)).

To be sure, the case here is related to a Title 11 case if "*the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy*." In re Feitz, 852 F.2d 455,

457 (9th Cir. 1988) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984) (*overruled on other grounds by* Things Remembered v. Petrarca, 516 U.S. 124, 116 S. Ct. 494 (1995)) (emphasis added).

The court does not find "related to" jurisdiction here. The notice of removal states the pending bankruptcy case is the only basis for federal jurisdiction. (Doc. #1) Under 28 U.S.C. § 1334(c)(2), that means here abstention is mandatory. For reasons stated before, the state court can timely adjudicate this matter, this matter only involves state claims and the state court has appropriate jurisdiction. Further, Debtor's notice of removal states Debtor does not consent to this court entering final orders. Debtor himself admits this court should not hear the matter. The record does not reflect any motion filed or prosecuted by Debtor or Movant for withdrawal of the reference to this court. See Fed. R. Bankr. P. 5011. What's more, the faces of the complaint and cross-complaint provide no basis for federal question or diversity jurisdiction as argued by Movant.

Though this bankruptcy case is relatively "young," the court sees no present reason to try this dispute in this court. If Movant wants to challenge the dischargeability of his claim, he can file a timely adversary proceeding. It is commonplace for this court to hold that proceeding in abeyance as the state court tries the fraud or tort issues. Movant filed a proof of claim; the liquidation of the claim can be handled in state court.

The court concludes it has no "related to" jurisdiction.

Even if the court has "related to jurisdiction," for reasons stated above, the court exercises its discretion to remand the action under 28 U.S.C. § 1452(b).

Finally, the court denies the request for sanctions. First, Fed. R. Bankr. P. 9027(a) provides that notices for removal under the bankruptcy removal statute are signed under Fed. R. Bankr. P. 9011. The record does not show Movant followed any of the procedural steps under Fed. R. Bankr. P. 9011 for a sanctions motion. Second, since Movant essentially asserted the wrong legal basis for his motion, the factual basis for the requested sanctions (Movant's attorney's fees) are not supported. Third, on this record the court has no basis to find Debtor's removal notice is an abuse of process supporting a sanctions award under 11 U.S.C. § 105(a).

The motion is GRANTED.

[If it is determined this court's ruling is not final, the above shall constitute the court's findings of fact and conclusions of law for the District Court under 28 U.S.C. § 157(c)].

3. 19-10516-B-13 **IN RE: FRANK CRUZ**
19-1031

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
3-5-2019 [1]

ABDELAZIZ V. CRUZ
UNKNOWN TIME OF FILING/ATTY. FOR PL.

NO RULING.

4. 19-10516-B-13 **IN RE: FRANK CRUZ**
19-1031 FC-1

MOTION TO VACATE
3-12-2019 [7]

ABDELAZIZ V. CRUZ
FRANK CRUZ/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied

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

This motion is DENIED. Constitutional due process requires a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The procedural errors in this motion must first be noted. Parties are expected to conform to the Local Rules of Practice ("LBR") and the Federal Rules of Evidence, Bankruptcy Procedure, and Civil Procedure, or nonconforming future motions will be denied.

Debtor is pro se, and the court must treat pro se litigants "with great leniency when evaluating compliance with the technical rules of civil procedure." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992) (citing Draper v. Coombs, 795 F.2d 915, 924 (9th Cir. 1986), inter alia). "Thus, before dismissing a pro se complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity amend effectively." Ferdik, 963 F.2d at 1261 (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

Even with that great leniency, the court is still constrained by the law. See King v. Burwell, 135 S. Ct. 2480, 2505 (2015) ("our task is to apply the text, not to improve upon it") (Scalia, J., dissenting)

(citing Pavelic & LeFlore v. Marvel Entm't Grp., Div. of Cadence Indus. Corp., 493 U.S. 120, 110 S. Ct. 456 (1989), superseded by statute on other grounds).

First, Debtor's first notice was incorrect. LBR 9014-1(f)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was served and filed on March 12, 2019 and set for hearing on April 24, 2019. Doc. #7, 8. April 24, 2019 is more than 28 days after March 12, 2019, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice failed to state that written opposition was required and must be filed at least 14 days preceding the date of the hearing, among other necessary language. Doc. #7. Because the hearing was set on 28 days' notice, the notice should have stated that written opposition was required. Because this motion was filed, served, and noticed on 28 days' notice, the language of LBR 9014-1(f)(1)(B) needed to have been included in the notice.

Second, LBR 9014-1(e)(2) requires a proof of service, in the form of a certificate of service, to be filed with the Clerk of the court concurrently with the pleadings or documents served, or not more than three days after the papers are filed.

In this case, no proof of service was filed – only a statement of service included on the memorandum of points and authorities. Doc. #8.

Third, LBR 9004-2(c)(1) requires that motions, notices, *inter alia*, to be filed as separate documents. Here, the motion and notice were combined into one document and not filed separately; the certificate of service and memorandum of points and authorities were combined into one document and not filed separately; and the declaration of Frank Cruz and exhibits were combined into one document and not filed separately.

Respondent's declaration of H. Ty Kharazi also fails on the same grounds. The declaration and exhibits must be filed separately.

Fourth, the first notice did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

The court notes than an amended notice, filed on less than 28 days' notice, included the 9014-1(d)(3)(B)(iii) language, but erroneously stated that respondent was required to file written opposition to the motion 14 days before the hearing. Doc. #17. Respondent filed opposition a week before the amended notice was sent. The court also

notes that a certificate of service was filed showing that the amended notice and motion were served on the chapter 13 trustee (who is not a party to this adversary proceeding), the United States Trustee (who is not a party to this adversary proceeding), and Plaintiff's lawyer, but not on Plaintiff. That is against Federal Rule of Bankruptcy Procedure 7004(b)(1).The certificate of service shows that Cruz served the papers. That is against Federal Rule of Civil Procedure 4(c)(2).

The omission of the noticing language in and of itself is enough to warrant denying a motion without prejudice. But because Plaintiff timely opposed, the court will consider that waived.

Debtor Frank Cruz ("Debtor" or "Cruz") asks the court to vacate a state court judgment for possession entered in favor of Mel Abdelaziz ("Respondent" or "Abdelaziz") "[B]ecause [Abdelaziz]committed extrinsic fraud on the court," inter alia. Doc. #8. Cruz, appearing pro se, does not establish the jurisdiction of this court to render such a ruling, nor does he provide any statutory authority for this court to do so – just two references to two legal opinions which are discussed below.

Federal Rule of Bankruptcy Procedure 9024 makes applicable Federal Rule of Civil Procedure 60, Relief from a Judgment or Order. Of the grounds available to grant such relief, fraud is one. Fed. R. Civ. P. 60(b)(3). The court shall construe this motion as a motion for relief under Fed. R. Civ. P. 60(b)(3). But before the court can evaluate the claim on its merits, it must first have subject matter jurisdiction.

A Federal court always has jurisdiction to determine its own jurisdiction. In re Bunyan, 354 F.3d 1149, 1152 (9th Cir. 2004) citing United States v. Ruiz, 536 U.S. 622, 628 (2002); United States v. United Mine Workers of America, 330 U.S. 258, 291 (1947). Though neither Cruz nor Abdelaziz raise the issue, this motion invokes the Rooker-Feldman doctrine. "The doctrine takes its name from Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). Rooker held that Federal statutory jurisdiction over direct appeals from state courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of Federal district courts. Rooker, 263 U.S. at 415-16. Feldman held that this jurisdictional bar extends to particular claims that are 'inextricably intertwined' with those a state court has already decided. Feldman, 460 U.S. at 486-87." Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 871 (9th Cir. 2005) cert.den. 547 U.S. 1206 (2006).

If this court has subject matter jurisdiction over this motion, it is derived by reference from the United States District Court for the Eastern District of California pursuant to 28 U.S.C. § 157(a). The district court has jurisdiction because this is a civil proceeding arising in or related to a case under Title 11 of the United States Code. 28 U.S.C. § 1334(b). If there is subject matter jurisdiction, this is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(A),(B),(O).

A bankruptcy court's application of the *Rooker-Feldman* doctrine is a question of law. Sherman v. Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007).

A motion to set aside a judgment as void raises a legal question and is reviewed *de novo*. Exp. Grp. v. Reef Indus., Inc., 54 F.3d 1466, 1469 (9th Cir. 1995); Sasson, 424 F.3d at 867 quoting Exp. Grp., 54 F.3d at 1469. But the exercise of equitable powers is discretionary. Sasson, 424 F.3d at 867 citing Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1124 (9th Cir. 2000).

If a Federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in Federal district court. If on the other hand, a Federal plaintiff asserts an allegedly illegal act or omission by an adverse party *Rooker-Feldman* does not bar jurisdiction. Noel v. Hall, 341 F.3d 1148, 1164 (9th Cir. 2003). "*Rooker-Feldman* thus applies only when the Federal plaintiff both asserts as [an] injury legal error or errors by the state court *and* seeks as [a] remedy relief from the state court judgment." Kougasian v. TMSL, Inc., 359 F.3d 1136, 1140 (9th Cir. 2003) citing Noel, 341 F.3d at 1164. "The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Industries Corp., 544 U.S. 280, 284 (2005).

In this motion, Cruz asks this court to vacate the state court judgment because it is void as a matter of law because Abdelaziz allegedly committed extrinsic fraud on the Superior Court. Doc. #8. Specifically, Cruz accuses Abdelaziz of "falsified material service of process facts and concealed this unlawful detainer action from [Cruz]." Id.

If an alleged injury asserted resulted from a state judgment itself, the *Rooker-Feldman* doctrine applies. Bianchi v. Rylaarsdam, 334 F.3d 895, 900 (9th Cir. 2003). The pivotal inquiry is "whether the Federal plaintiff seeks to set aside a state court judgment or whether [the plaintiff], is in fact, presenting an independent claim." Kamilewicz v. Bank of Boston Corp., 92 F.3d 506, 510 (7th Cir. 1996).

There is a distinction between "a federal claim alleging injury caused by a state court judgment" and "a federal claim alleging a prior injury that a state court failed to remedy." Ctrs., Inc. v. Town of Brookfield, 148 F.3d 699, 702 (7th Cir. 1998)." A Federal court is precluded from considering the former, but not the latter, under the *Rooker-Feldman* doctrine. Long v. Shorebank Dev. Corp., 182 F.3d 548, 555 (7th Cir. 1999). So, Federal courts lack subject matter jurisdiction even if the state court judgment was erroneous. See Ctrs., Inc., 148 F.3d at 702; Noel, 341 F.3d at 1163 (stating that "[I]t is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong

allegedly committed by the state court and seeks relief from the judgment of that court").

Cruz has not adequately pled his injury. His declaration seems to allude to a default and judgment entered against him at the state court level. Doc. #10. Many of the pages of evidence included are illegible or indecipherable by the court. Nor has Cruz included in evidence the alleged state court default and judgment, the certificate of service, nor any other substantive evidence. The evidence he offers is two declarations and a few exhibits. One declaration, from Leo Moreno, seems to state that on the day of alleged service, he did not see anyone approach them and ask for Defendant or serve any legal documents. Doc. #9. Cruz's declaration, inter alia, states that service was done on a Saturday at 6:00 p.m. when his business was closed, that he does not live at 4432 E. Lamona Avenue in Fresno, CA 93703, that the gates have locks on them and approaching the home is impossible, etc. Doc. #10.

The court finds that it does not have subject-matter jurisdiction over this matter. The court finds that the Rooker-Feldman doctrine applies. Cruz does not discuss or mention the Superior Court has already denied a motion to set aside the default and denied several motions about claims of possession by Cruz's alleged tenants.

Even if this court had jurisdiction over this matter, the motion will be DENIED on the merits.

Though Cruz removed this state court Unlawful Detainer proceeding to this court after judgment by the superior court and substantial post judgment litigation, the court still must consider the removed action as it is presented to this court. The judgment of the state court is not superseded by the removal and the state court's judgments are considered valid until they are set aside. Butner v. Neustadter, 324 F.2d 783 (9th Cir 1963). All judgments and orders are treated as validly entered in the federal proceeding. Carvalho v. Equifax Info. Servs., LLC, 629 F.3d 876, 887 (9th Cir. 2010). The record before this court includes state court rulings not only entering Cruz's default but denying his motion to set aside the default. Doc. #15. There is a February 2018 post judgment stipulation in state court giving Cruz one month to close escrow on the purchase of the disputed property, but there is nothing in the record indefinitely staying any procedures in the state court.

The Supreme Court has opined the removal statutes show "Congress clearly intended to preserve the effectiveness of state court orders after removal . . . ." Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423, 436 (1974). The interests of comity with state courts and the avoidance of inconsistent rulings are critical considerations in a removed action. See Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 530 (9th Cir. 2000). This court is not convinced there is any basis to essentially reverse the previous orders of the superior court. There was much post judgment litigation after Cruz suffered a default judgment. The state court has reviewed the circumstances, is closer to the dispute and made its rulings which must be presumed valid. Butner, 324 F.3d at 785-

86. Cruz presents no evidence or arguments to overcome that presumption.

But, even if Cruz's "evidence" was reviewed by this court, it makes no difference. The court does not have enough evidence to find in Cruz's favor. Cruz says he was served improperly in the Unlawful Detainer case. Yet the only evidence he provides is two declarations. Cruz's declaration refers to video recordings, a proof of service, an incorrect address, and an incorrect phone number, but no evidence supporting the allegations. Doc. #10. Nor does Cruz provide any evidence of what was before the Superior Court when he challenged the default. The court had to learn of the procedure followed in the Superior Court unlawful detainer case from Abdelaziz.

Cruz's citations to U.S. v. Throckmorton, 98 U.S. 61 (1878) and Casey v. Albertson's Inc., 362 F.3d 1254 (9th Cir. 2004) are of no assistance. Throckmorton has been either reversed or severely limited. See Chevron Corp. v. Donziger, 886 F. Supp. 2d 235, 282-85 (S.D.N.Y. 2012) [discussing two subsequent Supreme Court cases]. Casey instructs relief for fraud under Civ. Rule 60 (b)(3) requires clear and convincing evidence. Casey, 362 F.3d at 1260. Cruz's evidence is far from clear and convincing that he was precluded from participating in the unlawful detainer case by fraud.

The motion is DENIED. This court does not have subject matter jurisdiction to hear this matter.

The motion is alternatively DENIED for lack of proof, if the court has subject matter jurisdiction.

The court declines to *sua sponte* grant affirmative relief in favor of Abdelaziz. There is no record supporting sanctions. No proper request to remand this matter has been made – though it appears remand is appropriate if the court does not have subject matter jurisdiction.

5. 18-12721-B-7 **IN RE: DEBRA SMITH**
18-1071 HIR-1

MOTION FOR ENTRY OF DEFAULT JUDGMENT
3-7-2019 [26]

ABSOLUTE BONDING CORPORATION
V. SMITH
HAROLD RUBINFELD/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 amount 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 is GRANTED. 11 U.S.C. § 523(a)(2)(C)(i)(I)(ii)(II) states that a discharge under 11 U.S.C. § 727 does not discharge an individual debtor from consumer debts owed to a single creditor and aggregating more than $725.00 for luxury goods or services incurred by an individual debtor on or within 90 days before the petition is filed.

Plaintiff Absolute Bonding Corporation ("Plaintiff"), a bail bond company, entered into an agreement with Defendant Debra Smith ("Defendant") whereby Defendant agreed to pay a $650.00 down payment on June 7, 2018, and the remaining balance of $4,550.00 to be paid in 24 installments of $184.58 each in order to get her son released from custody. Doc. #28. Defendant paid the $650.00, but has not made any other payments under the agreement. Id.

Defendant filed her chapter 7 petition on June 30, 2018, which is within the 90 day limit under § 523(a)(2)(C)(i)(I). The bail bond qualifies as a "luxury good" under the statute because it is not a good or service "reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor."

§ 523(a)(2)(C)(i)(I)(ii)(II). Defendant's son is not Defendant's dependent. See doc. #28.

Defendant was properly served the summons and complaint in conformance with the Federal Rules of Bankruptcy and Civil Procedure, and has not responded to the complaint. Therefore, the Defendant's default is entered and the debt owed to Plaintiff is nondischargeable.

6. 17-10236-B-13 **IN RE: PAUL/KATHLEEN LANGSTON**
17-1044

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
7-3-2017 [17]

LANGSTON ET AL V. INTERNAL
REVENUE SERVICE
GABRIEL WADDELL/ATTY. FOR PL.
VACATED PER ECF ORDER #130

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order vacating the status conference has already been entered. Doc. #130.

7. 17-10236-B-13 **IN RE: PAUL/KATHLEEN LANGSTON**
17-1044 FW-2

CONTINUED MOTION FOR SUMMARY JUDGMENT
11-30-2018 [62]

LANGSTON ET AL V. INTERNAL
REVENUE SERVICE
GABRIEL WADDELL/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order dismissing the case has already been entered. Doc. #127.

8. 18-13238-B-7 **IN RE: DENISE DAWSON**
18-1085

STATUS CONFERENCE RE: AMENDED COMPLAINT
2-18-2019 [16]

DAWSON V. VILLANUEVA ET AL
JEFFREY ROWE/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to July 31, 2019 at 1:30 p.m.

ORDER: The court will issue an order.

At the request of Plaintiff, this matter is continued to July 31, 2019 at 1:30 p.m. to allow Plaintiff's § 522(f) motion to be heard and for Plaintiff and Defendant County of Los Angeles & Villanueva to sign a written stipulation for turn-over of the subject funds subject to an order approving the turn-over.

9. 11-10171-B-13 **IN RE: DWAYNE/RENEE KENNEDY**
19-1020

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-4-2019 [1]

KENNEDY ET AL V. HSBC BANK
NEVADA, N.A. ET AL
GABRIEL WADDELL/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to May 15, 2019 at 1:30 p.m.

ORDER: The court will issue an order.

This matter is continued to May 15, 2019 at 1:30 p.m. to be heard in conjunction with Defendant's motion to dismiss (doc. #9).

10. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1008

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
5-8-2018 [9]

TULARE LOCAL HEALTHCARE
DISTRICT V. MB FINANCIAL BANK,
RILEY WALTER/ATTY. FOR PL.
DISMISSED 1/28/19, CLOSED 2/15/19

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order dismissing the case has already been entered. Doc. #37.