

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, April 29, 2021
Place: Department A - Courtroom #11
Fresno, California

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

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. 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.

1. [18-14905](#)-A-13 **IN RE: TRACEY PRITCHETT**
[TCS-9](#)

OBJECTION TO CLAIM OF FRANCHISE TAX BOARD, CLAIM NUMBER 6
3-31-2021 [[128](#)]

TRACEY PRITCHETT/MV
NANCY KLEPAC/ATTY. FOR DBT.
TIMOTHY SPRINGER/ATTY. FOR MV.

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

DISPOSITION: Overruled without prejudice.

ORDER: The court will issue an order.

This objection is OVERRULED WITHOUT PREJUDICE. The objection and related papers do not comply with Local Rule of Practice ("LBR") 3007-1(b)(2), which requires an objection to a proof of claim to be filed and served at least thirty (30) days prior to the hearing date. Additionally, when fewer than forty-four (44) days' notice of a hearing on an objection to a proof of claim is given, no party in interest shall be required to file written opposition to the objection. LBR 3007-1(b)(2). This objection was filed and served on March 31, 2021 and set for hearing on April 29, 2021, and the Notice of Hearing filed in connection with this objection required written opposition at least fourteen (14) days before the date of the hearing.

The court urges counsel to review the local rules in order to be compliant in future matters. The rules can be accessed on the court's website at <http://www.caeb.circ9.dcn/LocalRules.aspx>.

While this objection is overruled for procedural defects, the court notes that the Franchise Tax Board amended its proof of claim on April 15, 2021. Am. Claim 6.

2. [18-15035](#)-A-13 **IN RE: HENRY LOYA HERNANDEZ AND ALICE HERNANDEZ**
[RPZ-2](#)

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
12-28-2020 [[74](#)]

WELLS FARGO BANK, N.A./MV
SCOTT LYONS/ATTY. FOR DBT.
ROBERT ZAHRADKA/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

3. [18-15035](#)-A-13 **IN RE: HENRY LOYA HERNANDEZ AND ALICE HERNANDEZ**
[SL-4](#)

MOTION TO MODIFY PLAN
3-1-2021 [[108](#)]

ALICE HERNANDEZ/MV
SCOTT LYONS/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 at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of 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 amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is 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. [16-10445](#)-A-13 **IN RE: DONALD/NANCY NEWSOME**
[WDC-5](#)

MOTION TO CONTINUE CASE ADMINISTRATION, SUBSTITUTE PARTY, AS TO DEBTOR
3-30-2021 [[66](#)]

NANCY NEWSOME/MV
VARDUHI PETROSYAN/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 is DENIED WITHOUT PREJUDICE. The motion and related pleadings as filed do not comply with the Local Rules of Practice ("LBR"). LBR 9014-1(d)(3)(B)(i), (ii), and (iii) set forth the requirements for a valid notice of hearing, none of which are satisfied by the notice filed here. The court urges counsel to review the local rules in order to be compliant in future matters. The rules can be accessed on the court's website at <http://www.caeb.circ9.dcn/LocalRules.aspx>.

5. [20-13964](#)-A-13 **IN RE: LAURA SILVA**
[SLL-1](#)

OBJECTION TO CLAIM OF SANTANDER CONSUMER USA INC., CLAIM NUMBER 4
3-22-2021 [[20](#)]

LAURA SILVA/MV
STEPHEN LABIAK/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on April 15, 2021. Doc. #27.

1. [19-11901](#)-A-7 **IN RE: ARMANDO CRUZ**
[19-1095](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-12-2019 [1]

STRATEGIC FUNDING SOURCE, INC. V. CRUZ
JARRETT OSBORNE-REVIS/ATTY. FOR PL.

NO RULING.

2. [20-10705](#)-A-7 **IN RE: NORMA KELLY**
[20-1028](#) [ABA -1](#)

MOTION FOR SUMMARY JUDGMENT
3-12-2021 [22]

NUVISION FEDERAL CREDIT UNION V. KELLY
ALANA ANAYA/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 an order after the hearing.

This motion was set for hearing on at least 42 days' notice pursuant to Local Rule of Practice ("LBR") 7056-1(a) and the Scheduling Order (Doc. #18). The responding party timely filed written opposition and the moving party filed a timely reply. This matter will proceed as scheduled.

Preliminary Procedural Matters

As a procedural matter, LBR 7056-1(a) requires a motion for summary judgment to be accompanied by a "Statement of Undisputed Facts" which, if done correctly, would enumerate discretely each of the specific material facts relied upon in support of the motion and cite to the particular portion(s) of any pleading, affidavit, deposition, interrogatory answer, admission, or other document relied upon to establish that fact. Plaintiff Nuvision Federal Credit Union ("Plaintiff") failed to file any such Statement of Undisputed Facts in connection with this motion for summary judgment ("Motion"). Further, Plaintiff's Motion recites to facts without making any citation as to where those facts are found in the record. Although denial of this Motion is warranted on these procedural grounds alone, the court will deny the Motion on the merits because Plaintiff has not met its initial burden showing that summary judgment is warranted under Federal Rule of Civil Procedure 56.

Plaintiff also requests judicial notice of the Statement of Financial Affairs and Schedule I filed in the chapter 7 bankruptcy case of Defendant-Debtor Norma S. Kelly (hereafter, "Defendant"). Doc. #26. The court will take judicial notice of Schedule I and Statement of Financial Affairs filed in Defendant's

pending bankruptcy case at Doc. #1, Bankr. E.D. Cal. Case No. 20-10705, because the records of court proceedings cannot reasonably be questioned. See Fed. R. Evid. 201(b).

Allegations in Complaint and Answer

On February 28, 2020, Defendant filed for chapter 7 bankruptcy protection. In Defendant's Schedule I, Defendant reported that she has been employed by a fast-food restaurant as an assistant manager for the past ten years. Bankr. E.D. Cal. Case No. 20-10705, Doc. #1. Defendant's gross annual income for 2018 was \$39,517.00; for 2019 it was \$42,695.00. Id.

On May 1, 2020, Plaintiff filed a complaint against Defendant alleging that Defendant intentionally overstated her income and employment status on a credit application submitted to Plaintiff for the purpose of causing Plaintiff to agree to finance Defendant's purchase of a new vehicle. Plaintiff seeks a determination that Defendant's debt owed to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B). Compl. Doc. #1.

In the complaint, Plaintiff alleges that Defendant entered into a written agreement with Selma Hyundai to finance the purchase of a 2018 Hyundai Elantra. Compl. ¶ 6, Doc. #1. Plaintiff states that on May 27, 2018, as part of the financing process, Defendant completed and endorsed a written credit application asserting that Defendant was a regional manager for a fast-food restaurant earning a gross income of \$83,400 annually (\$6,950 per month). Compl. ¶ 7, Doc. #1. Plaintiff attached a copy of this credit application to the complaint. Ex. B, Doc. #1. Plaintiff alleges Defendant intentionally overstated her income to deceive Plaintiff. Compl. ¶ 11, Doc. #1. Plaintiff further alleges that Plaintiff relied on Defendant's representation of her income in deciding to finance Defendant's purchase of the vehicle, and had Defendant truthfully stated her monthly income Plaintiff would not have financed Defendant's purchase of the vehicle. Compl. ¶¶ 9-10, Doc. #1. Plaintiff alleges damages as a result of Defendant's statements.

Defendant timely answered the complaint. Doc. #13. According to Defendant, Defendant did purchase a 2018 Hyundai Elantra from Selma Hyundai and admits to completing a written credit application. Doc. #13. However, Defendant disputes the authenticity of the credit application relied on by Plaintiff, asserting that Defendant did not state she was a regional manager making \$6,950.00 per month. Doc. #13. Defendant claims someone from Selma Hyundai came to Defendant's place of work and told Defendant to re-sign the credit application after Selma Hyundai had made changes. Doc. #13. Defendant argues the true written credit application shows that Defendant stated she was a manager at the fast-food restaurant making \$3,850 per month. Defendant attached a copy of this credit application to her answer. Doc. #13.

Motion for Summary Judgment

By the Motion, Plaintiff moves for summary judgment on its § 523(a)(2)(B) claim against Defendant. Doc. #22. Plaintiff's Motion does not make any citations to the record but was filed with two supporting declarations. Plaintiff's Motion is supported by the Declaration of Charles Fletcher (Doc. #25), the corporate controller of Selma Hyundai, and the Declaration of Cheryl Rice, the "AVP of Loss Mitigation" for Plaintiff (Doc. #24). These declarations identify and cite to four documents submitted as exhibits: (i) the retail installment contract entered into between Defendant and Selma Hyundai; (ii) a copy of a written credit application completed and signed by Defendant on May 27, 2018 which states that Defendant earns \$6,950 per month as a regional manager for a fast-food chain; (iii) documents related to the repossession and sale of the

vehicle; and (iv) a copy of Defendant's account payment history. Plaintiff concludes, without demonstrating, that the facts are undisputed, and Plaintiff is entitled to judgment as a matter of law. Doc. #22.

Defendant opposes the Motion. Doc. #28. In Defendant's written opposition, Defendant reasserts the assertions made in her answer, mainly that the credit application relied on by Plaintiff is not the credit application completed by Defendant. Defendant's opposition also states that Defendant provided copies of her paystubs and other income to Selma Hyundai that support Defendant's version of her income and employment status. Doc. #28. Defendant again filed her copy of the credit application. However, Defendant's written opposition, signed by Defendant's counsel, is not verified or supported by a declaration of Defendant. The opposition also fails to make any citation to the record. Therefore, Defendant does not offer any evidence to support her contentions. However, because Plaintiff does not make a *prima facie* showing it is entitled to summary judgment, Defendant's failure to support her opposition with evidence and citations to the record is not fatal.

The court has considered Plaintiff's reply to Defendant's opposition but is not persuaded by the arguments set forth therein. In the Motion and by the reply, Plaintiff seeks to place its burden of proof on Defendant, which is improper, as discussed in more detail below.

Legal Standard

Federal Rule of Civil Procedure ("Rule") 56 governs summary judgment and is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056. Under Rule 56, the moving party is entitled to summary judgment only where, drawing all reasonable inferences supported by the evidence in favor of the nonmoving party, no genuine dispute of material fact exists, and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Rule 56(a).

11 U.S.C. § 523(a)(2)(B) states that a discharge under § 727 of the Bankruptcy Code does not discharge an individual debtor from any debt:

- (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . .
 - (B) use of a statement in writing
 - (i) that is materially false;
 - (ii) respecting the debtor's . . . financial condition;
 - (iii) on which the creditor to whom the debtor is liable . . . reasonably relied; and
 - (iv) that the debtor caused to be made or published with the intent to deceive[.]

11 U.S.C. § 523(a)(2)(B). In the Ninth Circuit, to prevail on a claim to except a debt from discharge under § 523(a)(2)(B), the creditor must show each of following by a preponderance of the evidence: (1) a representation of fact by the debtor; (2) that was material; (3) that the debtor knew at the time to be false; (4) that the debtor made with the intention of deceiving the creditor; (5) upon which the creditor relied; (6) that the creditor's reliance was reasonable; and (7) that damage proximately resulted from the representation. Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996) (citing In re Siriani, 967 F.2d 302, 304 (9th Cir. 1992)).

The party moving for summary judgment has the burden of establishing both that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56(a). "Where, as here, the movant is seeking summary judgment on a claim as to which it bears the burden of proof, it must lay out the elements of the claim, cite the facts which it believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim." Hotel 71 Mezz Lender LLC v. Nat'l Ret. Fund, 778 F.3d 593, 602 (7th Cir. 2015); see also Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting).

The moving party who has the evidentiary burden of proof on an issue must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Anand v. BP West Coast Prods. LLC, 484 F. Supp. 2d 1086, 1092 (C.D. Cal. 2007). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." Anderson, 477 U.S. at 254. Because Plaintiff has the evidentiary burden on its claim for relief, Plaintiff must establish each element of its § 523(a)(2)(B) claim by a preponderance of the evidence.

Plaintiff Does Not Satisfy Its Initial Burden

Plaintiff makes no effort to "demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim." Hotel 71, 778 F.3d at 602. Plaintiff must affirmatively demonstrate the absence of any genuine dispute as to material fact. See Celotex, 477 U.S. at 331 (Brennan, J., dissenting). This may have been done by citing to a deposition of Defendant, documents produced, or not produced, by Defendant during discovery, or some other affirmative demonstration of the absence of a genuine dispute.

The evidence offered by Plaintiff in support of the Motion bolsters Plaintiff's claim, but Plaintiff bears the burden of proof at trial. As such, Plaintiff must do more than bolster its own claims in order to prevail on a motion for summary judgment; Plaintiff also must cite to the record to demonstrate how no reasonable jury could find for Defendant. See Celotex, 477 U.S. 317, 331 (Brennan, J., dissenting); Anderson, 477 U.S. at 254-56. The court finds that Plaintiff has not supported its assertion in the Motion that the facts cannot be genuinely disputed and has not demonstrated that the trier of fact could not reasonably find for Defendant.

The court also finds that Plaintiff has not demonstrated it is entitled to judgment as a matter of law. Plaintiff's Motion cites the elements as stated in 11 U.S.C. § 523(a)(2)(B) but does not cite to the specific facts that satisfy each of those elements. For instance, the Declaration of Cheryl Rice in support of Plaintiff's Motion states: "Based on the representation in the credit application, Defendant intended to deceive Plaintiff into assessing her income and expenses in a manner to which she would have been able to finance the purchase of the vehicle." Rice Decl. ¶ 7, Doc. #24. This statement is made by Plaintiff's custodian of records, Cheryl Rice, but the declaration does not establish that Ms. Rice was present at the time Defendant signed the credit application or that Ms. Rice has ever spoken to Defendant. The declaration does not establish how Ms. Rice has personal knowledge of Defendant's conduct and state of mind at any point in time. The statement is therefore not based on Ms. Rice's personal knowledge and cannot be considered at summary judgment under Rule 56(c)(4). However, that statement is the only "fact" relied upon by Plaintiff to establish that Defendant knew the information on the credit application to be false and that Defendant made the statement intending to deceive Plaintiff. By failing to offer evidence supporting each element of its claim, Plaintiff has not met its initial burden under Rule 56.

Accordingly, Plaintiff's Motion will be DENIED. Plaintiff has not satisfied its initial burden of showing there is no genuine dispute as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

3. [18-14542](#)-A-7 **IN RE: LARRY SELL**
[19-1025](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-15-2019 [[1](#)]

THE LEAD CAPITAL, LLC V. SELL
DERRICK COLEMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

4. [20-13785](#)-A-7 **IN RE: BRANDON/JENIFER THACKER**
[21-1011](#)

STATUS CONFERENCE RE: COMPLAINT
3-2-2021 [[1](#)]

MERCED SCHOOL EMPLOYEES FEDERAL CREDIT UNION V. THACKER
BRANDON ORMONDE/ATTY. FOR PL.

NO RULING.