**UNITED STATES BANKRUPTCY COURT**
**Eastern District of California**
**Honorable René Lastreto II**
**Hearing Date: Wednesday, July 14, 2021**
**Place: Department B – Courtroom #13**
**Fresno, California**

***The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click here.***

**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.**

**9:30 AM**

1. 19-13111-B-13 **IN RE: DALE/MICHELLE SEAMONS**
TCS-3

CONTINUED MOTION TO MODIFY PLAN
4-28-2021 [50]

MICHELLE SEAMONS/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

**The court has changed its intended ruling on this matter since posting the original pre-hearing dispositions.**

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Debtors Dale Gorden Seamons and Michelle Ann Seamons withdrew this motion on July 12, 2021. Doc. #62. Accordingly, this matter will be dropped from calendar.

2. 20-11117-B-13 **IN RE: CLAUDIA CASTRO**
TCS-4

MOTION TO MODIFY PLAN
6-2-2021 [66]

CLAUDIA CASTRO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

**The court has changed its intended ruling on this matter since posting the original pre-hearing dispositions.**

NO RULING.

Claudia Patricia Castro ("Debtor") seeks confirmation of her Third Modified Chapter 13 Plan. Docs. #66; #68.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely opposed under 11 U.S.C. §§ 1322(a) and 1325(a)(6). Doc. #74. Trustee contends: (1) Debtor will not be able to make all payments under the plan and comply with the plan; and (2) the plan fails to provide for submission of all or such portion of future earnings or other income

to the supervision and control of the trustee to execute the plan. Doc. #74.

Debtor responded on July 12, 2021. Doc. #76.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any other party in interest except Trustee 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. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties except Trustee are entered.

Trustee objects for two reasons. Doc. #74. First, Debtor will not be able to make all payments under the plan and comply with the plan. The plan proposes to pay $1,448.40 to the Class 1 ongoing mortgage payment. Doc. #68, § 3.07. On May 9, the secured creditor filed a Notice of Mortgage Payment Change increasing the mortgage payment to $1,463.73 beginning June 1, 2021. Trustee states that the proposed plan payment is sufficient to pay the actual ongoing mortgage payment of $1,463.73, but this will need to be reflected in the order confirming the plan. Doc. #74.

Second, the plan fails to provide for submission of all or such portion of Debtor's future earnings or income to the Trustee as is necessary to execute the plan. Trustee states that the proposed dividend for the Fresno County Tax Collector of $119.33 will pay over 47.54 months, but there are 46 months left in the plan. *Id.* The dividend to Fresno County Tax Collector will need to be increased to fund the plan before month 60. Additionally, the plan payment is insufficient to pay the monthly dividends and proposed attorney fee dividend of $377.50 per month. The attorney fee dividend would need to decrease to $220.00 per month to fund the plan.

In response, Debtor concedes but believes that Trustee's objections can be resolved in the order confirming plan. Doc. #76. Debtor asserts that the plan is still confirmable.

This matter will be called as scheduled to inquire about the parties' positions. If Trustee's objections are addressed in the order confirming plan, the court may grant Debtor's motion to confirm plan. Any order confirming plan must be approved by Trustee.

3. 17-10318-B-13 **IN RE: ALBERT/DEE ANNA KNAUER**
TCS-2

MOTION TO SELL
6-29-2021 [51]

DEE ANNA KNAUER/MV
NANCY KLEPAC/ATTY. FOR DBT.
TIMOTHY SPRINGER/ATTY. FOR MV.

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 an order.

Albert Lee Knauer and Dee Anna Lynn Knauer ("Debtors") move for authorization to sell all business personal property located at their restaurant, "Good Times Café," in Paso Robles, California to Jack Alger of Mutiny, LLC in exchange for $62,000. Doc. #51.

This motion will DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule").

Rule 2002(a)(2) requires at least 21 days' notice by mail to parties in interest of "a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice."

This motion seeks to sale property of the estate outside of the ordinary course of business. Doc. #51. The motion was filed on June 29, 2021 and set for hearing on July 15, 2021 in Department A before the Honorable Jennifer E. Niemann. Doc. #52. On June 30, 2021, Debtors filed and served a notice of errata and amended notice to correct the hearing to July 14, 2021 before the Honorable René Lastreto II in Department B. Docs. ##56-57.

June 29, 2021 is 15 days before July 14, 2021. The certificate of service states that the original motion documents were served on June 25, 2021, but this is still only 19 days before July 14, 2021. Doc. #54. The amended notice was filed and served on June 30, 2021, 14 days before July 14, 2021. Doc. #57. No orders shortening time for cause were requested in connection with this motion. Therefore, this motion will be DENIED WITHOUT PREJUDICE.

4. 21-11223-B-13 **IN RE: CHRISTOPHER/TRACEY PRESS**
KMM-2

OBJECTION TO CONFIRMATION OF PLAN BY TOYOTA MOTOR CREDIT CORPORATION
6-16-2021 [28]

TOYOTA MOTOR CREDIT CORPORATION/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.

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

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

Toyota Motor Credit Corporation ("Creditor") objects to Christopher David Press and Tracey Lee Press' ("Debtors") plan confirmation. Doc. #29. Debtors filed an amended chapter 13 plan on July 7, 2021, which is set for hearing on August 11, 2021. Doc. #36. Accordingly, this objection will be OVERRULED AS MOOT because Debtors have filed an amended plan.

5. 21-10724-B-13 **IN RE: JUAN SANTOYO AND JEANETTE NEVAREZ**
MHM-1

MOTION TO DISMISS CASE
6-8-2021 [31]

MICHAEL MEYER/MV
SCOTT LYONS/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) and (c)(4). Doc. #31. Debtors did not oppose. Unless the trustee's motion is withdrawn before the hearing, the motion will be GRANTED without oral argument for cause shown.

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 debtors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned

parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The record shows that there has been unreasonable delay by the debtors that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtors failed to make all payments due under the plan (11 U.S.C. § 1307(c)(4). Accordingly, the motion will be GRANTED, and the case dismissed.

6. 20-13638-B-13 **IN RE: MIGUEL RODRIGUEZ-CISNEROS AND MARIA CEJA**
AMS-3

MOTION TO VALUE COLLATERAL OF FORD MOTOR CREDIT COMPANY
6-18-2021 [102]

MARIA CEJA/MV
ADELE SCHNEIDEREIT/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Miguel Rodriguez-Cisneros and Maria De Jesus Ceja ("Debtors") seek an order valuing a 2014 Ford F150 ("Vehicle") at $22,131.00. Doc. #102.

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

First, for motions filed on less than 28 days' notice but at least 14 days' notice, LBR 9014-1(f)(2)(C) requires the movant to notify respondents that no party in interest shall be required to file written opposition to the motion. Opposition, if any, shall be presented at the hearing on the motion. If opposition is presented, or if there is other good cause, the court may continue the hearing to permit the filing of evidence and briefs.

This motion was originally filed and served on June 18, 2021 and set for hearing on July 14, 2021. Doc. #102; #110. June 18, 2021 is 26 days before July 14, 2021. Debtors filed an amended certificate of service to include additional exhibits on June 21, 2021. Doc. #111. The certificate states that those additional documents were also sent on June 18, 2021. *Id.*

All of these pleadings state that the hearing will be held on July 15, 2021, but the court does not have any hearings scheduled on that date. Debtors corrected the hearing date by filing and serving an amended notice of hearing on June 22, 2021. Doc. #113. The hearing

date defect was cured, but the amended notice still has incorrect notice language. June 22, 2021 is 22 days before July 14, 2021, so this motion was filed on LBR 9014-1(f)(2) notice.

Both the notice and the amended notice state that written opposition is required and must be filed and served at least 14 days before the hearing. This is incorrect. Since this motion was filed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) should have been included.

Second, the certificate of service for the amended notice of hearing was attached to the amended notice. Doc. #113. LBR 9004-2(c)(1) requires notices, proofs of service, and other specified pleadings to be filed as separate documents. LBR 9004-2(e)(1) requires proofs of service to be filed as separate documents. LBR 9004-2(e)(2) states that copies of the pleadings served shall not be attached to the proof of service filed with the court. Here, the amended notice included an attached certificate of service in violation of LBR 9004-2(c)(1), (e)(1), and (e)(2).

Third, 11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described in that paragraph if (1) the creditor has a purchase money security interest securing the debt that is the subject of the claim, (2) the debt was incurred within 910 days preceding the filing of the petition, and (3) the collateral is a motor vehicle acquired for the personal use of the debtor.

Here, the motion states that the Vehicle was purchased more than 910 days from the date of filing, but Debtors have not offered any evidence in support of this contention. Doc. #102. Debtors' declaration states that the Vehicle is seven years old, but it is possible they purchased an older model used. Doc. #106. Debtors' declaration should include a statement regarding how long preceding the petition date the debt was incurred.

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

The court notes that the declaration (Doc. #106) contains Debtors' opinion of replacement value, which is the relevant valuation standard under 11 U.S.C. § 506(a)(2). Additionally, all pleadings were served on the required parties. Debtors corrected the defects noted in the previous ruling. *Cf.* Doc. #91. However, there are still defects as mentioned above which prevent the court from granting the motion.

7. 21-10443-B-13 **IN RE: JORGE LOPEZ**
MHM-3

MOTION TO DISMISS CASE
6-8-2021 [82]

MICHAEL MEYER/MV
DUSHAWN JOHNSON/ATTY. FOR DBT.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

The chapter 13 trustee withdrew the motion on July 6, 2021. Doc. #107. Accordingly, this matter will be dropped from calendar.

8. 21-11259-B-13 **IN RE: LAWRENCE NIER**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
6-22-2021 [21]

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. Accordingly, the order to show cause will be vacated.

The order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

9. 21-11259-B-13 **IN RE: LAWRENCE NIER**
AP-1

OBJECTION TO CONFIRMATION OF PLAN BY METROPOLITAN LIFE INSURANCE COMPANY
6-21-2021 [17]

METROPOLITAN LIFE INSURANCE COMPANY/MV
WENDY LOCKE/ATTY. FOR MV.

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

DISPOSITION: Overruled without prejudice.

ORDER: The court will issue an order.

Metropolitan Life Insurance Company ("Creditor") objects to Lawrence F. Nier's ("Debtor") chapter 13 plan confirmation. Doc. #17.

Though not required, Debtor filed written opposition. Doc. #37. Debtor also filed supplemental opposition and requests to postpone the hearing on plan confirmation until after conclusion of the meeting of creditors. Docs. ##39-40. However, Debtor's request does not comply with the local rules of practice and will therefore be DENIED WITHOUT PREJUDICE. Debtor is advised to retain counsel.

This objection will be OVERRULED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rules").

The certificate of services states that chapter 13 trustee Michael H. Meyer ("Trustee") was served by electronic mail. Doc. #26. Rule 3015(f) requires objections to plan confirmation to be "filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, at least seven days before the date set for the hearing on confirmation, unless the court orders otherwise." Objections to confirmation are governed by Rule 9014.

Rule 9014(b) requires objections to be served in accordance with Rule 7004. Electronic service under Rule 9036 is precluded here because it "does not apply to any pleading or other paper required to be served in accordance with Rule 7004."

Rule 7004 allows service upon an individual by U.S. mail by mailing a copy of motion documents to the individual's dwelling house, usual place of abode, or to the place where the individual regularly conducts a business or profession. It is also sufficient if service is performed "by the law of the state in which service is made" or "to an agent of such defendant authorized by appointment or law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession[.]" Rule 7004(b)(8).

Since this objection will affect the estate, the Trustee, as representative of the estate, must be served in accordance with Rule 7004.[1]

Also, Debtor requests to continue this hearing until sometime after the meeting of creditors on July 27, 2021. However, this request was not properly noticed and set for hearing and violates multiple LBR provisions. Doc. #40. The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules

[1] Electronic service on the U.S. Trustee ("UST") is sufficient here. Although UST may raise, appear, and be heard on any issue in any case under § 307 and should generally be served or notified, no relief is being sought against UST. Further, Rule 3015(f) only requires that the objection "be transmitted to the [UST], at least seven days before the date set for the hearing[.]" Electronic notification under Rule 7005 and LBR 7005-1 is sufficient so long as the certificate of service lists UST's email address as required by LBR 7005-1(d), which Creditor did here.

of Bankruptcy Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most recent rules became effective April 12, 2021 and can be found at the court's website at www.caeb.uscourts.gov/documents/Forms/LocalRules/LocalRules2021.pdf.

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e), and LBR 9014-1(c) and (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require a 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. Here, no DCN was used.

Second, LBR 9014-1(d) states that every application, motion, or other request for an order shall be comprised of a motion, notice, evidence, and a certificate of service. Here, no notice of hearing was filed.

Third, this motion was filed on 14 days' notice. LBR 9014-1(f)(2)(C) states that motions filed on less than 28 days' notice require the movant to notify respondents that no written opposition shall be required, and any opposition must be presented at the hearing.

The hearing is scheduled for July 14, 2021, but the motion was filed on July 12, 2021. This is two days before the hearing. The motion should have been filed at least 14 days before the hearing.

In appropriate circumstances and for good cause shown, LBR 9014-1(f)(3) allows the court to shorten the amount of notice required below the time constraints imposed in the LBR. When a motion is filed with an order shortening time, no written opposition is required. Here, Debtor did not file a motion for an order shortening time under LBR 9014-1(f)(3). Thus, the motion must be filed with at least 14 days' notice. For the reasons Debtor's request to postpone this hearing will be denied.

Fourth, LBR 9004-2(d) requires exhibits to be filed as a separate document, include an exhibit index at the start of the document identifying by exhibit number or letter each exhibit with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets. Here, the exhibits were not filed as a separate exhibit document, did not include an index, and the exhibit pages were not consecutively numbered. Further, the certificate of service is attached the pleadings. LBR 9014-1(e)(3) requires proofs of service filed in support or opposition to a motion to be filed as a separate document and shall not be attached to the proof of service.

Despite these procedural and substantive errors, the court must treat *pro se* litigants "with great leniency when evaluation 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)). "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).

For the above reasons, Creditor's objection will be OVERRULED WITHOUT PREJUDICE. Debtor's request for continuance will be DENIED.

The court notes the meeting of creditors was continued to July 27, 2021. General Order 20-02 extends the deadline to file objections to plan confirmation to seven days after the § 341 meeting is concluded and not continued to a further date. *See* Am. Gen. Order 20-02, at 4, ¶ 5 (Am. Apr. 16, 2020). So, if the meeting of creditors concludes on July 27, 2021, the deadline to file objections to confirmation is extended to August 3, 2021. If the meeting is continued, the deadline is further extended under GO 20-02.

10. 21-11259-B-13 **IN RE: LAWRENCE NIER**
PPR-1

OBJECTION TO CONFIRMATION OF PLAN BY MIYUKI NISHIO AND SARBJIT JOHL
6-22-2021 [22]

SARBJIT JOHL/MV
DIANA TORRES-BRITO/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order on the objection after hearing. The court will issue an order on the request for continuance.

Miyuki Nishio and Sarbjit Johl (collectively "Creditors") object to Lawrence F Nier's ("Debtor") chapter 13 plan confirmation. Doc. #22.

Though not required, Debtor filed written opposition. Doc. #37. On July 12, 2021, Debtor filed additional supplemental opposition and a request for postponement, as well as a request for clarification on the plan confirmation hearing schedule. Docs. ##39-40. Debtor requests to postpone the hearing on plan confirmation until after conclusion of the meeting of creditors. However, Debtor's request does not comply with the local rules of practice and will therefore be DENIED WITHOUT PREJUDICE. Debtor is advised to retain counsel.

The court is inclined to SUSTAIN the objection.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. 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.

Ms. Nishio owns an undivided 54.55% interest and Ms. Johl owns an undivided 45.45% undivided interest in real property generally described as APN 5480-014-035 & APN 5480-014-036 ("Property") in Los Angeles, California. Doc. #22. Creditors purchased Property by trustee's sale on May 14, 2021 with a winning bid of $277,253.77. Doc. #24, Ex. A.

Debtor was the borrower under a note secured by a $220,000.00 deed of trust encumbering Property. Doc. #35. The note matured on September 1, 2020. The note was not satisfied. At the time of the sale, the amount of unpaid debt on the note was $277,253.77. *Id.*

Debtor has filed three *pro se* bankruptcies since March 17, 2021, including this case:

1. Case No. 21-10620: This chapter 7 case was filed on March 17, 2021. It was dismissed on April 5, 2021 for failure to timely file: (i) Form 122A-1, (ii) Schedules A/B through J; and (iii) Statement of Financial Affairs and Summary of Assets and Liabilities.

2. Case No. 21-11011: This chapter 13 case was filed on April 22, 2021. It was dismissed on May 10, 2021 for failure to timely file: (i) Schedule H; and (ii) a chapter 13 plan on the correct Local Form. No motions to extend the stay were filed.

3. Case No. 21-11259: The current case. This chapter 13 case was filed on May 18, 2021. The § 341 meeting of creditors was continued to July 27, 2021 at 8:00 a.m. Chapter 13 trustee Michael H. Meyer ("Trustee") has a pending motion to dismiss set for hearing on July 30, 2021 at 9:30 a.m. for unreasonable delay, failure to file a chapter 13 plan on the correct Local Form EDC 3-080, and failure to provide credit counseling certificates. No motions to impose the automatic stay were filed.

Creditors contend these repeated filings were filed solely to delay and hinder the foreclosure process.

Additionally, Creditors assert that the automatic stay was not in place on the date the trustee's deed upon sale was recorded on May 20, 2021. Under 11 U.S.C. § 362(c)(4)(A)(ii), if an individual debtor has two or more cases pending within the previous year that were dismissed, the automatic stay under subsection (a) will not go into effect upon filing the latter case. Since Debtor had two cases pending within the previous one-year period, Creditors assert that the automatic stay was not in effect pursuant to § 362(c)(4)(A)(i).

Creditors accuse Debtor of filing this bankruptcy in bad faith. Under 11 U.S.C. § 109(g), a debtor may not file a case if in the preceding 180 days "a case was dismissed by the court for willful failure of the debtor to abide by the orders of the court, or to appear in proper prosecution of the case." Since Debtor has the

burden of establishing that this plan was filed in good faith under § 1325(a)(3), he has failed to meet his burden.

Further, Creditors argue that the chapter 13 plan is not feasible as required by § 1325(a)(6). Debtor proposes a chapter 13 plan with intent to sell Property at an unspecified time in the future. Since Debtor no longer has an ownership interest in Property, his plan to sell Property to fund his plan is not feasible.

Creditors insist that the plan is uncertain and infeasible due to vagueness. Since Debtor is proposing a cure-by-sale, he must make certain commitments and meet any objections by producing evidence at a hearing. *In re Newton*, 161 B.R. 207 (Bankr. D. Minn. 1993). Debtor must produce specific terms under which he plans to market property and incorporate a default remedy to relieve the mortgage from the automatic stay if the sale does not close by the end of the proposed cure period. Debtor has not produced any specific terms under which the Property is to be marketed and sold and the plan has no default remedy.

Lastly, Creditors argue that the plan is not adequately funded. Section 1325(a)(5)(B)(ii) requires full payment of allowed secured claims. Debtor's previous loan obligation full matured on September 1, 2020, so the entire claim must be paid through the plan.

Creditors pray for the following relief:

(1) Denial of confirmation.
(2) Dismissal of this case with a 180-day bar to refiling under 11 U.S.C. § 109(g).
(3) An award of attorney fees and costs.
(4) Such other relief as deemed proper.

In response, Debtor filed written opposition. Doc. #37. Debtor states that he filed bankruptcy for the purpose of protecting his undeveloped parcels of land and seeks to pay off his creditors in full. Debtor describes how he spent more than five years designing and engineering plans for construction of a hillside home. The loan securing these parcels was spent on the fees and costs associated with approval of the plans. Debtor states that the plans have significant intellectual property value but will be effectively worthless without the parcels of land.

Debtor gives a brief summary of his interactions with his lender, his previous bankruptcies, and the foreclosure sale, and offers to voluntarily dismiss his bankruptcy case upon being allowed to pay off the secured claim in full. *Id.* Debtor prays for the court to deny Creditor's objection and return title to the parcels to Debtor.

In his supplemental briefing, Debtor states that he previously missed the meeting of creditors because his mail was stolen from his post office. Doc. #39. Debtor intends to appear at the continued meeting of creditors scheduled for July 27, 2021. In asserting that Property was improperly transferred on May 14, 2021, "Debtor relies on the wisdom of the Court to help facilitate a method of resolution between Debtor and [Creditors] and the immediate return of Debtor's [Property]." *Id.* However, the court cannot provide legal advice to

Debtor. Chapter 13 bankruptcy is complicated process that can rarely be achieved without the advice of a qualified and competent attorney specializing in that subject area. Debtor is advised to retain effective counsel if he hopes to successfully navigate the nuances of chapter 13 bankruptcy.

Debtor also requests to continue this hearing until sometime after the meeting of creditors on July 27, 2021. However, this request was not properly noticed and set for hearing and violates multiple LBR provisions. Doc. #40. The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules of Bankruptcy Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most recent rules became effective April 12, 2021 and can be found at the court's website at www.caeb.uscourts.gov/documents/Forms/LocalRules/LocalRules2021.pdf.

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Third, this motion was filed on 14 days' notice. LBR 9014-1(f)(2)(C) states that motions filed on less than 28 days' notice require the movant to notify respondents that no written opposition shall be required, and any opposition must be presented at the hearing.

The hearing is scheduled for July 14, 2021, but the motion was filed on July 12, 2021. This is two days before the hearing. The motion should have been filed at least 14 days before the hearing.

In appropriate circumstances and for good cause shown, LBR 9014-1(f)(3) allows the court to shorten the amount of notice required below the time constraints imposed in the LBR. When a motion is filed with an order shortening time, no written opposition is required. Here, Debtor did not file a motion for an order shortening time under LBR 9014-1(f)(3). Thus, the motion must be filed with at least 14 days' notice. For the reasons Debtor's request to postpone this hearing will be denied.

Fourth, LBR 9004-2(d) requires exhibits to be filed as a separate document, include an exhibit index at the start of the document identifying by exhibit number or letter each exhibit with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets. Here, the exhibits were not filed as a separate exhibit document, did not include an index, and the exhibit pages were not consecutively numbered. Further, the certificate of service is attached the pleadings. LBR 9014-1(e)(3) requires proofs of service

filed in support or opposition to a motion to be filed as a separate document and shall not be attached to the proof of service.

Despite these procedural and substantive errors, the court must treat *pro se* litigants "with great leniency when evaluation 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)). "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).

This matter will be called as scheduled. The court is inclined to SUSTAIN the objection. Debtor has failed to prove that his chapter 13 plan was filed in good faith and is feasible. Further, Debtor filed the chapter 13 plan on the wrong form. LBR 3015-1(a) requires all chapter 13 plans in this district to be filed on Local Form EDC 3-080 (Rev. 11/09/18). Debtor is advised to retain counsel if he wishes to be successful in this chapter 13 bankruptcy case. Debtor's request for continuance will be DENIED.

11. 21-10681-B-13 **IN RE: TERRY JACOBS**
PBB-2

CONTINUED HEARING RE: MOTION TO AVOID LIEN OF UNIFUND CCR PARTNERS, A NEW YORK PARTNERSHIP
4-19-2021 [27]

TERRY JACOBS/MV
PETER BUNTING/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.

Terry LaVon Jacobs ("Debtor") seeks to avoid a judicial lien in favor of Unifund CCR Partners, a New York Partnership ("Creditor") in the amount of $19,220.18 and encumbering residential real property located at 32012 Hartley Road, North Fork, California 93643 ("Property"). Doc. #27.

The court notes Debtor properly served Creditor's registered agent for service of process, CSC-Lawyers Incorporating Service, by U.S. mail on April 19, 2021 at their California office at 2710 Gateway Oaks Dr Ste 150N, Sacramento, CA 95833-3505. Doc. #31. Notably, PMGI's registered agent for service of process is also CSC-Lawyers Incorporating Service. Debtor served Unifund CCR, LLC, an affiliate of Creditor. Debtor also served PMGI, LLC the entity who filed Proof of Claim No. 1 on April 2, 2021. Claim #1. Per the proof of claim,

notices to PMGI should be sent to the Law Offices of Kenosian & Miele, LLP at 8581 Santa Monica Blvd. #17, Los Angeles, CA 90069. Debtor served this firm twice in relation to both PMGI and Creditor. This is the same attorney in the underlying state court judgment. Creditor has complied with Fed. R. Bankr. P. 7004(b)(3) and (b)(8).

No party in interest timely filed written opposition. This motion will be GRANTED.

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 chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This matter was originally scheduled for June 30, 2021. Doc. #28. The court administratively continued the hearing to July 1, 2021. Doc. #57. The matter was subsequently continued to July 14, 2021. Doc. #60.

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

Here, a judgment was entered against Debtor in favor of Creditor in the sum of $11,292.95 on January 24, 2006. Claim #1, at 6. The abstract of judgment was issued on February 15, 2006 and recorded in Madera County on February 27, 2006. *Id.* On July 8, 2014, Creditor filed an application for and renewal of judgment in Madera Superior Court seeking a total renewed amount of $19,220.18. Doc. #30, Ex. D. The application was recorded in Madera County on September 2, 2014. That lien attached to Debtor's interest in Property. Doc. #29.

As of the petition date, Property had an approximate value of $332,000.00. *Id.* Doc. #35, *Schedule A/B*. The unavoidable liens totaled $169,058.00 on that same date, consisting of a $168,520.00 deed of trust in favor of Caliber Home Loans and $538.00 statutory

lien in favor of the Madera County Tax Collector. Doc. #14, *Schedule D*. Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $300,000.00. Doc. #35, *Schedule C*. Property's encumbrances can be illustrated as follows:

| | | |
|---|---|---|
| Fair Market Value of Property on petition date | | $332,000.00 |
| Total amount of unavoidable liens | - | $169,058.00 |
| Remaining available equity | = | $162,942.00 |
| Debtor's homestead exemption | - | $300,000.00 |
| Creditor's judicial lien | - | $19,220.18 |
| Extent Debtor's exemption impaired | = | ($156,278.18) |

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

Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

12. 18-11375-B-13 **IN RE: ERIC RUBIO**
TCS-3

MOTION TO VACATE DISMISSAL OF CASE
7-1-2021 [107]

ERIC RUBIO/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
OST 7/2/21

NO RULING.

Eric Rubio ("Debtor") filed this request to vacate dismissal with an *ex parte* motion for an order shortening time under the procedure specified in Local Rule of Practice ("LBR") 9014-1(f)(3). Docs. ##106-07. Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court granted the motion to shorten time and permitted a preliminary hearing on the motion to take place on July 14, 2021 at 9:30 a.m. Doc. #110. Debtor was required to file and serve the motion to vacate no later than July 2, 2021. Debtor served the motion and supporting documents later that same day. Doc. #111.

Debtor filed bankruptcy on April 21, 2018. Doc. #1. Debtor's 36-month plan was confirmed on October 5, 2018. Doc. #63. April 2021 was the 36th month of the plan, but there was a remaining balance of

$3,705. Doc. #109. Debtor claims that he did not know that there was a remaining balance, so chapter 13 trustee Michael H. Meyer ("Trustee") filed a motion to dismiss on May 21, 2021, which was set for hearing on June 30, 2021. Doc. #99. Debtor had until June 16, 2021 to file written opposition but did not do so. Nancy D. Klepac, Debtor's attorney ("Counsel"), claims that because Debtor was able to pay the remaining balance, she did not timely file a response to Trustee's motion. Doc. #109.

Counsel instructed Debtor to bring proof of payment to the courthouse on June 30, 2021 because his payment would still be pending on the date of the hearing. However, the case was pre-disposed as a final ruling, so no hearing on the motion occurred due to counsel's failure to file written opposition.

Debtor's case was dismissed on July 1, 2021 for unreasonable delay that is prejudicial to creditors and failure to complete the terms of a confirmed plan. Docs. ##103-04. Debtor filed this motion to vacate with the request for an order shortening time that same day. Docs. ##106-07.

Debtor's counsel apologizes for the failure to respond to Trustee's motion and requests the court vacate the ruling because Debtor's chapter 13 plan is completed.

Fed. R. Bankr. P. 9024 ("Rule") incorporates Fed. R. Civ. P. ("Civil Rule") 60(b) and permits a party to move for an order vacating dismissal based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in time to move for a new trial under Civil Rule 59(b); (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason that justifies relief.

Debtor argues that the court should vacate this dismissal based on mistake, inadvertence, surprise, or excusable neglect and any other reason that justifies relief. Doc. #107. Debtor did try to make the plan payment, but the payment was not credited quickly enough to prevent dismissal. Further, failure to vacate the dismissal will result in Debtor's 36 months of plan payments to be meaningless because his case was dismissed at the end of his plan. This motion was made within a reasonable time as required under Civil Rule 60(c).

Meanwhile, Rule 9023 and Civil Rule 59(e) (as incorporated by Rule 9023) require a motion to alter or amend a judgment to be filed not later than 14 or 28 days, respectively, after entry of the judgment. This motion was filed on July 1, 2021, the same day the order dismissing the case was entered. Docs. #105-06. This motion is also timely under Rule 9023 and Civil Rule 59(b).

Under Civil Rule 59(e), motions "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharms GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). The rule "does not provide a vehicle for a party to undo its own

procedural failures [or] allow a party to introduce new evidence or advance new arguments that could and should have been presented at the [bankruptcy] court prior to the judgment." *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 34 (1st Cir. 2001). The rule authorizes reconsideration or amendment of a previous order, but it is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "Indeed, a motion for reconsideration should not be granted absent highly unusual circumstances, unless the [bankruptcy] court is presented with newly discovered evidence, committed clear error, or if there is an intervening change of controlling law." *Id.*

This motion establishes none of those requisites. No change of law or legal error is presented. Debtors can only be afforded relief if the court finds the neglect to promptly pay the plan payment or present evidence of curing plan delinquency "excusable."

Courts are permitted "*where appropriate* to accept late filings caused by inadvertence, mistake, or carelessness, as well as intervening circumstances beyond the party's control." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (emphasis added).

The real issue is whether the failure to timely pay or appear at the hearing was "excusable." At bottom, this determination is "an equitable one taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. The factors to consider include:

- Danger of prejudice.
- Length of delay and potential impact on judicial proceedings.
- Reason for the delay including whether it was in movant's control.
- Whether the party acted in good faith.

This matter will be called as scheduled to inquire whether any parties in interest oppose vacatur. Any order issued by the court will be without prejudice to those parties in interest who acted in good faith relying on the dismissal.

**11:00 AM**

1. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
21-1013

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-19-2021 [1]

LOCKE ET AL V. ZAVALA
MARICEL LOCKE/ATTY. FOR PL.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Judgment on the pleadings in favor of Defendant.

ORDER: The court will issue an order.

At the previous hearing, the court notified Debtors Maricel and Christopher Locke ("Plaintiffs") that it would enter a judgment on the pleadings in favor of Gilbert Zavala ("Defendant") if Plaintiffs did not amend the complaint or dismiss this adversary proceeding by the continued hearing date. Doc. #13. The court stated the deficiencies of the complaint on the record. Doc. #15. The status conference was continued to July 14, 2021. Doc. #16.

Plaintiffs filed a motion to dismiss the complaint on July 12, 2021. Doc. #19. However, under Fed. R. Civ. P. ("Civil Rule") 41(a)(1) (incorporated by Fed. R. Bankr. P. ("Rule") 7041), Plaintiffs can only dismiss an action without a court order by (i) filing a notice of dismissal *before* the opposing party serves an answer or a motion for summary judgment or (ii) a stipulation of dismissal signed by all parties who have appeared. Because Defendant has already filed an answer, Plaintiffs cannot dismiss this action without either Defendant's consent or a court order.

Further, the motion to dismiss violates multiple LBR provisions. First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e), and LBR 9014-1(c) and (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require a 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. Here, no DCN was used.

Second, LBR 9014-1(d) states that every application, motion, or other request for an order shall be comprised of a motion, notice, evidence, and a certificate of service. Here, only a motion was filed. There was no notice, evidence, or certificate of service.

Third, this motion was filed on less than 28 days' notice. LBR 9014-1(f)(1)(B) states that motions filed on at least 28 days' notice require that any opposition to the motion must be in writing and filed with the court at least 14 days preceding the date or continued date of the hearing. The alternative procedure to file

motions on less than 28 days' notice under LBR 9014-1(f)(2) is not available in adversary proceedings. *See* LBR 9014-1(f)(2)(A).

The hearing is scheduled for July 14, 2021, but the motion was filed on July 12, 2021. This is two days before the hearing. The motion should have been filed at least 28 days before the hearing.

In appropriate circumstances and for good cause shown, LBR 9014-1(f)(3) allows the court to shorten the amount of notice required below the time constraints imposed in the LBR. When a motion is filed with an order shortening time, no written opposition is required. Here, Plaintiffs did not file a motion for an order shortening time under LBR 9014-1(f)(3). Thus, the motion must be filed with at least 28 days' notice.

Fourth, Plaintiffs did not file a certificate of service. Rule 7004 applies to adversary proceedings. Rule 7004(a)(1). Rule 7004 allows service in the United States by first class mail "by mailing a copy of the summons and complaint to . . . the place where the individual regularly conducts a business." Rule 7004(b)(1).

LBR 9014-1(e) requires the movant to serve all pleadings and documents filed in support of a motion on or before the day they are filed, with proof of such service in the form of a certificate of service to be filed with the clerk concurrently with the pleadings or documents served, or not more than three days after they are filed. LBR 9014-1(e)(1), (2). LBR 9014-1(e)(3) requires each proof of service to be filed separately, bear the DCN of the matter to which it relates, and identify the title of the pleadings and documents served. Here, Plaintiffs should have served Defendant and filed a corresponding proof of service evidencing the same. They did not.

Despite these procedural deficiencies, the court must treat *pro se* litigants "with great leniency when evaluation 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)). "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).

Plaintiffs have therefore failed to either dismiss or amend the complaint by the July 14, 2021 hearing date. Accordingly, the court will enter judgment on the pleadings in favor of Defendant.

The court has authority to enter judgment on the pleadings under Civil Rule 12(c) (incorporated by Rule 7012) if, "after the pleadings are closed," the court determines that there is no material issue of fact presented and that one party is clearly entitled to judgment. *See Flora v. Home Fed. Sav. & Loan Asso.*, 685 F.2d 209 (7th Cir. 1982).

First, Plaintiffs filed this action is seeking recovery of a preferential payment from Defendant under 11 U.S.C. § 547(b). Generally, only the chapter 7 trustee ("Trustee") has standing to bring this type of action. A debtor may acquire standing if the trustee does not attempt to avoid the transfer and the property would have been protected or exempted under 11 U.S.C. § 522(g). 11 U.S.C. § 522(h). To establish standing, a debtor must affirmatively establish:

(1) the transfer to be avoided cannot have been a voluntary transfer of property by the debtor;
(2) the debtor cannot have concealed the property;
(3) the trustee cannot have attempted to avoid the property;
(4) the debtor must exercise an avoidance power usually used by the trustee that is listed in § 522(h);
(5) the transferred property must be of a kind that the debtor would have been able to exempt from the estate if the trustee (as opposed to the debtor) had avoided the transfer under one of the statutory provisions of § 522(g).

*DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248 (9th Cir. 1995); *see also Shifano v. Lendmark Fin. Servs. (In re Shifano)*, 2013 Bankr. LEXIS 68, at *13 (Bankr. D. Del. Jan. 8, 2013); *Myrick v. Amerus Bank (In re Myrick)*, 2000 Bankr. LEXIS 2140, *4 (Bankr. S.D. Iowa Feb. 23, 2000).

Here, Plaintiffs has not alleged any of these facts. If this claim has any merit, Trustee must pursue it. Alternatively, Plaintiff must affirmatively allege and prove that Trustee will not pursue it. On April 29, 2021, the Trustee asked the court to issue an order and a notice of assets. Trustee directed creditors with claims to file claims because Trustee discovered assets. Since Trustee recently filed a notice of assets, there is no basis for alleging this preference claim. Plaintiffs have not alleged the elements of a preference action good faith evidence that Trustee does not want to pursue the action. Therefore, Plaintiffs do not have standing to pursue this claim.

Second, the allegations raised essentially defeat the claim. The essential elements that must be alleged and specified with particularity to plead a claim under § 547(b):

(1) a transfer;
(2) of an interest in the debtor's property;
(3) to or for the benefit of a creditor;
(4) made for or on account of an antecedent debt;
(5) made while the debtor was insolvent;
(6) made on or within 90 days of the date of the filing of the petition, or in the case of an insider, between 90 days and one year before filing the petition;
(7) the transfer enabled the creditor to receive more than the creditor would have received if the case had been filed under chapter 7 and the creditor received a *pro rate* distribution as an unsecured creditor.

*In re Bullion Res. Of N. Am.*, 836 F.2d 1214 (9th Cir. 1988). Plaintiffs are suing Defendant for recovery of a preference because Defendant represented Ms. Guillermo in the Madera Superior Court matter. As a result of that matter, a judgment was entered against Plaintiffs. Thereafter, Defendant in representing Ms. Guillermo, sought to garnish certain moneys. Approximately $2,944.48 was collected. Plaintiffs allege that this amount is a preference and seek to avoid and recover that transfer.

The allegations in Paragraphs 9-10 of the complaint state that the chapter 7 trustee was appointed to liquidate and distribute certain assets and has the right to avoid and recover preferential transfers. Doc. #1. These allegations make no sense. This is a chapter 7 case, not a chapter 11 or 13 case. Paragraph 11 states that payments were made to Defendant's client, not to Defendant. *Id.* So, there is no transfer to a creditor to support a preference. Defendant is not even a creditor that can be sued for a preference.

In Paragraph 14, Plaintiffs claim that Defendant allegedly failed to advise Ms. Guillermo about the risks of a preference. First, Plaintiffs have no relationship to Defendant other than he is the attorney representing their opponent. Plaintiffs have no claim against Defendant for failing to advise his client about anything.

Also, the petition in this case was filed on May 12, 2020. These transfers alleged in the complaint occurred before that, so how would anyone know when the transfers occurred that Plaintiffs were going to file bankruptcy? It does not make logical sense. Plaintiffs cannot claim that Defendant should have advised Ms. Guillermo about something nobody knew may or may not happen in the future.

Nowhere in the complaint is it alleged that Defendant received the payments, so he is not a recipient of a preference. So, there is no basis to support a claim against Defendant for a preference.

Thus, the claim for a preference as currently pled fails even if the court believes every single thing that Plaintiffs allege. The claim fails to state a claim on its face because Plaintiffs have neither alleged that they have standing or that Defendant received money.

Next, Plaintiffs' claims against Defendant under the Fair Debt Collection Practices Act ("FDCPA") fails for the following reasons:

(1) Plaintiffs have not alleged that the debt is a consumer debt.
(2) Assuming that it is a consumer debt, Plaintiffs have not alleged that Defendant is a debt collector subject to that act. The allegations suggest that he is not a debt collector.

To be a debt collector, Defendant must engage in debt collection activity of consumer debts for people other than who those debts are owed. 15 U.S.C. § 1692a(6); *see also Romine v. Diversified Collections Servs.*, 155 F.3d 1142 (9th Cir. 1998). Lawyers can be debt collectors if they regularly, through litigation, try to enforce consumer debts. *Heintz v. Jenkins*, 514 U.S. 291 (1995). To

be liable, a defendant must be a debt collector. 15 U.S.C. § 1692e Debt collectors under the act must collect consumer debts owed to another creditor, otherwise they will not be liable under the FDCPA. There are no allegations of any of these elements in the complaint. Doc. #1.

Therefore, Plaintiffs' complaint fails on its face to state a claim upon which relief can be granted under the FDCPA. Plaintiffs have not alleged that Defendant is a debt collector, or that this is a consumer debt. So, Defendant is not subject to the FDCPA.

At the previous hearing, the court gave Plaintiffs notice of the deficiencies in the complaint and indicated that it would enter a judgment on the pleadings unless the pleading was properly amended with Defendant's consent, or a motion to amend or dismiss was filed. Since Defendant filed an answer, Plaintiffs were unable to amend or dismiss without his consent or without court order. Plaintiffs moved for dismissal on July 12, 2021, but the motion fails to comply with the Local Rules of Practice because it was not set for hearing on at least 28 days' notice. LBR 9014-1(f)(1). As stated on the record at the previous hearing, judgment will be entered on the pleadings in favor of Defendant.

2. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
21-1014

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-19-2021 [1]

LOCKE ET AL V. GUILLERMO
MARICEL LOCKE/ATTY. FOR PL.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Judgment on the pleadings in favor of Defendant.

ORDER: The court will issue an order.

At the previous hearing, the court notified Debtors Maricel and Christopher Locke ("Plaintiffs") that it would enter a judgment on the pleadings in favor of Gloria Guillermo ("Defendant") if Plaintiffs did not amend the complaint or dismiss this adversary proceeding by the continued hearing date. Doc. #13. The court stated the deficiencies of the complaint on the record. Doc. #15. The status conference was continued to July 14, 2021. Doc. #16.

Plaintiffs filed an amended complaint on July 12, 2021. Doc. #19. However, Fed. R. Civ. P. ("Civil Rule") 15(a)(1) (incorporated by Fed. R. Bankr. P. ("Rule") 7015), Plaintiffs can only amend the complaint as a matter of course within 21 days after serving it, or 21 days after service of Defendant's answer or 21 days after service of a motion under Civil Rule 12(b), (e), or (f), whichever is earlier. Defendant's answer was filed on April 22, 2021. After May

13, 2021, Plaintiffs cannot amend the complaint without the opposing party's written consent or the court's leave. Civil Rule 15(a)(2). Plaintiffs have therefore failed to either dismiss or amend the complaint by the July 14, 2021 hearing.

The court has authority to enter judgment on the pleadings under Fed. R. Civ. P. 12(c) (incorporated by Fed. R. Bankr. P 7012) if, "after the pleadings are closed," the court determines that there is no material issue of fact presented and that one party is clearly entitled to judgment. *See Flora v. Home Fed. Sav. & Loan Asso.*, 685 F.2d 209 (7th Cir. 1982).

First, Plaintiffs filed this action is seeking recovery of a preferential payment from Defendant under 11 U.S.C. § 547(b). Generally, only the chapter 7 trustee ("Trustee") has standing to bring this type of action. A debtor may acquire standing if the trustee does not attempt to avoid the transfer and the property would have been protected or exempted under 11 U.S.C. § 522(g). 11 U.S.C. § 522(h). To establish standing, a debtor must affirmatively establish:

(1) the transfer to be avoided cannot have been a voluntary transfer of property by the debtor;
(2) the debtor cannot have concealed the property;
(3) the trustee cannot have attempted to avoid the property;
(4) the debtor must exercise an avoidance power usually used by the trustee that is listed in § 522(h);
(5) the transferred property must be of a kind that the debtor would have been able to exempt from the estate if the trustee (as opposed to the debtor) had avoided the transfer under one of the statutory provisions of § 522(g).

*DeMarah v. United States (In re DeMarah)*, 62 F.3d 1248 (9th Cir. 1995); *see also Shifano v. Lendmark Fin. Servs. (In re Shifano)*, 2013 Bankr. LEXIS 68, at *13 (Bankr. D. Del. Jan. 8, 2013); *Myrick v. Amerus Bank (In re Myrick)*, 2000 Bankr. LEXIS 2140, *4 (Bankr. S.D. Iowa Feb. 23, 2000).

Here, Plaintiffs has not alleged any of these facts. If this claim has any merit, Trustee must pursue it. Alternatively, Plaintiff must affirmatively allege and prove that Trustee will not pursue it. On April 29, 2021, the Trustee asked the court to issue an order and a notice of assets. Trustee directed creditors with claims to file claims because Trustee discovered assets. Since Trustee recently filed a notice of assets, there is no basis for alleging Plaintiffs have standing to prosecute this preference claim. Plaintiffs have not alleged the elements of a preference action good faith evidence that Trustee does not want to pursue the action. Therefore, Plaintiffs do not have standing to pursue this claim.

Second, the allegations raised essentially defeat the claim. The essential elements that must be alleged and specified with particularity to plead a claim under § 547(b):

(1) a transfer;
(2) of an interest in the debtor's property;
(3) to or for the benefit of a creditor;
(4) made for or on account of an antecedent debt;
(5) made while the debtor was insolvent;
(6) made on or within 90 days of the date of the filing of the petition, or in the case of an insider, between 90 days and one year before filing the petition;
(7) the transfer enabled the creditor to receive more than the creditor would have received if the case had been filed under chapter 7 and the creditor received a *pro rate* distribution as an unsecured creditor.

*In re Bullion Res. Of N. Am.*, 836 F.2d 1214 (9th Cir. 1988). Plaintiffs are suing Defendant for recovery of a preference because Defendant obtained a judgment against Plaintiffs in the Madera Superior Court matter. Thereafter, Defendant sought to garnish certain moneys. Approximately $2,944.48 was collected. Plaintiffs allege that this amount is a preference and seek to avoid and recover that transfer.

The allegations in Paragraphs 9-10 of the complaint state that the chapter 7 trustee was appointed to liquidate and distribute certain assets and has the right to avoid and recover preferential transfers. Doc. #1. These allegations make no sense. This is a chapter 7 case, not a chapter 11 or 13 case

Thus, the claim for a preference as currently pled fails even if the court believes every single thing that Plaintiffs allege. The claim fails to state a claim on its face because Plaintiffs have not alleged that they have standing to pursue this avoidance action.

Next, Plaintiffs' claims against Defendant under the Fair Debt Collection Practices Act ("FDCPA") fails for the following reasons:

(1) Plaintiffs have not alleged that the debt is a consumer debt.
(2) Assuming that it is a consumer debt, Plaintiffs have not alleged that Defendant is a debt collector subject to that act. The allegations suggest that she is not a debt collector.

To be a debt collector, Defendant must engage in debt collection activity of consumer debts for people other than who those debts are owed. 15 U.S.C. § 1692a(6); *see also Romine v. Diversified Collections Servs.*, 155 F.3d 1142 (9th Cir. 1998). To be liable under the FDCPA, a defendant must be a debt collector. 15 U.S.C. § 1692e Debt collectors under the act must collect consumer debts owed to another creditor, otherwise they will not be liable under the FDCPA. There are no allegations of any of these elements in the complaint. Doc. #1.

Despite these procedural deficiencies, the court must treat *pro se* litigants "with great leniency when evaluation 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)). "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).

Therefore, Plaintiffs' complaint fails on its face to state a claim upon which relief can be granted under the FDCPA. Plaintiffs have not alleged that Defendant is a debt collector, or that this is a consumer debt. So, Defendant is not subject to the FDCPA.

At the previous hearing, the court gave Plaintiffs notice of the deficiencies in the complaint and indicated that it would enter a judgment on the pleadings unless the pleading was properly amended with Defendant's consent, or a motion to amend or dismiss was filed. Since Defendant filed an answer, Plaintiffs were unable to amend or dismiss without his consent or without court order. Plaintiffs filed an amended complaint on July 12, 2021, but they did not first obtain Defendant's consent nor obtain leave to file an amended complaint. Accordingly, the court will STRIKE Plaintiffs' amended complaint because they did not obtain leave to file an amended complaint or consent from the opposing party. As stated on the record at the previous hearing, judgment will be entered on the pleadings in favor of Defendant.

3. 20-12969-B-7 **IN RE: CARLOS CORTES AND BERTHA SPINDOLA**
21-1012

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-15-2021 [1]

EDMONDS V. CORTES ET AL
ANTHONY JOHNSTON/ATTY. FOR PL.

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

DISPOSITION: Continued to July 30, 2021 at 11:00 a.m.

ORDER: The court will issue an order.

Chapter 7 trustee Irma C. Edmonds ("Plaintiff") filed a status report indicating that the parties have entered into a settlement agreement that will dispose of this adversary proceeding. Doc. #27. The motion to approve the settlement agreement was originally set for hearing on July 28, 2021. ADJ-3. The court rescheduled this hearing to July 30, 2021 at 11:00 a.m. Doc. #25. Accordingly, this matter will be continued to July 30, 2021 at 11:00 a.m. to be heard in connection with the motion to approve settlement agreement.