UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 18, 2014 at 10:00 a.m.

---

1. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION TO CONFIRM PLAN
7-14-14 [159]

Final Ruling: This motion will be dropped from calendar because the court has not yet heard the debtors' motion for approval of their disclosure statement. That motion has been set for a hearing on August 25, 2014 at 10:00 a.m. Docket 161. Assuming the court grants the debtors' motion for approval of their disclosure statement, only then the court may entertain their plan confirmation motion.

2. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION FOR REMOVAL OF ATTORNEY AND FOR SANCTIONS
8-4-14 [170]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to sanction G. Patrick Jennings by removing him from his representation of the IRS in this case, arguing that:

- Mr. Jennings "does not want to interact with" the debtors' accountant, Mr. Stephens;

- Mr. Jennings has "made false accusations" against Mr. Stephens in the district court action;

- Mr. Jennings "has falsely slandered the [debtors'] Accountant Stephens by saying he was not competent or qualified as an expert, nor eligible to give his opinion;"

- Mr. Jennings "has been less than objective in his court filings, accusing the [debtors] of false and unlawful intentions;"

- Mr. Jennings has been partial against the debtors in representing his client the IRS;

- Mr. Jennings has undermined the "integrity and the trustworthiness of the IRS—now under heavy scrutiny of Congress for long running and deep seated partiality;"

- Mr. Jennings' "bias and impartiality has deprived the [debtors] of due process by way of an accounting, thereby preventing the [debtors] from receiving a fair shake in court;"

- Mr. Jennings "has subverted the judicial process, especially from its

principle function of ascertaining the truth [and] has demonstrated unethical conduct, bias acts, and actively misled this Court by false statements denying the [debtors] due process and an accurate accounting.

This court also has inherent authority to impose sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The authority covers a broad range of conduct that goes beyond the violation of an order. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). While it may be used to impose civil contempt sanctions, this inherent authority may be applied without resorting to contempt proceedings, but only so long as the sanctions are intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003) (noting that the inherent sanction authority, and civil penalties in general, must either be compensatory in nature or designed to coerce compliance); see also Miller v. Cardinale (In re Deville), 280 B.R. 483, 495 (B.A.P. 9th Cir. 2002) (citing and discussing Chambers at 42-51 and Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996)).

Chambers at 43 holds that the inherent sanction authority includes power to control admission to the court's bar and to discipline attorneys who appear before the court. See also Lehtinen at 1059 (reminding the suspended attorney that attorney disciplinary proceedings are neither civil nor criminal in nature and are not for the purpose of punishing but to maintain the integrity of the courts and the profession).

To exercise its inherent authority to sanction, a court must make explicit finding of bad faith or willful conduct, which is conduct more egregious than mere negligence or recklessness. Lehtinen at 1058.

On the other hand, disqualification of counsel motions are a drastic measure which courts should hesitate to employ unless absolute necessity. Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983). Such motions are often tactically motivated. Thus, the movant must satisfy a high standard of proof. Evans v. Artek Sys. Corp., 715 F.2d 788, 791-92, 794 (2nd Cir. 1983). The motions, as a result, are subject to particularly strict judicial scrutiny. Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1049 (9th Cir. 1985).

It includes sanctioning the moving party for making a disqualification motion where no evidence is presented justifying the motion. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1416 (9th Cir. 1990). To be justified, a disqualification motion must establish present concerns of impropriety, and not merely anticipatory and speculative concerns. City of Long Beach v. Standard Oil Co. of California (In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation), 658 F.2d 1355, 1361 (9th Cir. 1981).

The debtors have not demonstrated bad faith or willful conduct that is more egregious than mere negligence or recklessness on the part of Mr. Jennings.

Mr. Jennings' objection to the evidence from the debtors' accountant was an evidentiary objection that was sustained by the court. The debtors are complaining of Mr. Jennings' objection to the evidence from their accountant as if the debtors are somehow do not have to comply with the Federal Rules of Evidence that govern the admissibility of evidence in federal court proceedings.

In its ruling on the debtors' objection to IRS's proof of claim, the court stated that:

"The only declaration in support of the foregoing and the above-cited exhibits is the declaration of L.H. Stephens, CPA.

"The IRS objects to the admissibility of Mr. Stephens' declaration because Mr. Stephens has not been qualified as an expert witness, eligible to render an opinion as to the debtors' tax liabilities.

"The court agrees. Mr. Stephens' declaration does not qualify him as an expert eligible to render an opinion about the debtors' tax liabilities. His declaration does not state his skill, education, work experience, training or knowledge for expert witness qualification. Fed. R. Evid. 702. Although in the declaration Mr. Stephens' name ends with 'CPA', this is not sufficient for the court to qualify Mr. Stephens as an expert. Docket 108, Ex. C; Fed. R. Evid. 702. As Mr. Stephens has not been qualified as an expert witness, his opinions about the debtors' tax liabilities are inadmissible. Fed. R. Evid. 701(c). Without the opinions of Mr. Stephens, the debtors' other evidence - consisting of exhibits that are illegible or incomprehensible (Exhibit B) and are not helpful in supporting the debtors' own conclusions above - is also inadmissible. As a result, the debtors have not offered sufficient evidence to rebut the presumptive validity of the claim."

Docket 147 at 2.

There is nothing slanderous to challenge a purported expert witness by saying he is not competent or qualified as an expert and he is not eligible to give his opinion, when his declaration does not state his skill, education, work experience, training or knowledge that would qualify him as an expert witness. See Fed. R. Evid. 702.

The motion does not mention other specific instances where Mr. Jennings challenged Mr. Stephens or evidence procured from him. The motion speaks of challenges to Mr. Stephens or evidence from him only in general terms. And, besides the foregoing, the court does not recall of other specific instances where Mr. Stephens or evidence from him was challenged by Mr. Jennings.

The court will not address any of the litigation that transpired in federal district court or any other litigation that has not been before this court. As this court has ruled several times before, this court will not permit the debtors to relitigate any aspect of the litigation in district court.

Further, Mr. Jennings' partiality in this proceeding is warranted, given that he represents a client, the IRS, which has interests that are adverse to the interests of the debtors. Court proceedings are adversarial in nature, meaning that Mr. Jennings' loyalties lie with the IRS and the interests of the IRS - his loyalties do not lie with the debtors. Thus, the fact that he has been less than objective and impartial with the debtors should be of no surprise to the debtors.

More, the court rejects the debtors' contention that Mr. Jennings' partiality in representing the IRS here is somehow inconsistent with the integrity and trustworthiness expected from the IRS. As mentioned above, court proceedings are adversarial in nature and the IRS is entitled to protect its interests like any other party that applies for relief with a federal court. Protecting one's rights and asserting one's claims includes use of the tools prescribed by the Federal Rules of Evidence, Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and all applicable substantive law.

The IRS has liquidated its claim against the debtors in federal district court,

but the debtors are seeking to minimize that claim by prosecuting this bankruptcy case. Mr. Jennings' attempts to protect the rights and enforce the claims of the IRS, to the fullest extent possible under the law, are not inconsistent with integrity and trustworthiness.

This is especially true in this case, given that the debtors have been engaged in this dispute with the IRS for well-over two decades and the IRS has had to go back to district court to avoid the fraudulent transfers the debtors had made in an effort to avoid paying IRS's claim against them.

Finally, the instant motion avoids mentioning specific instances where Mr. Jennings disobeyed or violated a court order or violated a statute, warranting sanctions against him. The allegations of Mr. Jennings making false accusations and false statements, to mislead this court, are devoid of specific instances or facts and are devoid of admissible supporting evidence. The instant motion is not supported by any admissible evidence. There is no declaration signed under the penalty of perjury by the debtors to establish the factual assertions in the motion and to authenticate the exhibits that have been attached to the motion. See Fed. R. Evid. 802, 602, 901. The fact that the debtors do not have an attorney does not absolve them from the requirement of submitting admissible evidence in support of their motions. This motion will be denied.

3. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION TO DISMISS OR CONVERT CASE 7-18-14 [162]
GPJ-2

Tentative Ruling: The motion will be granted and the case will be dismissed.

The IRS moves for dismissal or conversion, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors cannot confirm a chapter 11 plan in this case. The California Franchise Tax Board has filed a joinder to the motion, asking for the same relief.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, without limitation, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The court overruled the debtors' objection to the proof of claim of the IRS. Docket 147. That claim totals $2,039,928.13, $1,079.17 of which is unsecured ($524.88 is priority) and $2,038,848.96 is secured by five real properties owned by the debtors. The court also overruled the debtors' objection to the proof of claim of the Franchise Tax Board. Docket 145.

Aside from the claims of the Franchise Tax Board (scheduled at $160,000) and the IRS, the debtors' five real properties listed in Schedule A are unencumbered. Docket 20, Schedules A & D. The aggregate scheduled value of those properties is $812,000. Docket 20, Schedule A. The Franchise Tax Board

has relinquished any interest in the debtors' five real properties, however. Docket 145. In addition to the claims of the IRS and the FTB, there is only one other claim scheduled by the debtors, the general unsecured claim of Sutter Roseville Medical Center for $1,132.

The court is perplexed at how the debtors will be able to confirm a plan in this case. Clearly, neither the IRS, nor the FTB will be voting to accept the debtors' plan.

As the debtors have not stripped down IRS's secured claim, that approximately $2 million secured claim will have to be paid in full. But, even if the debtors were to sell all their real properties, they cannot satisfy the claim in full because the value of the properties is only approximately $812,000, excluding sale costs and exemption claims. See Schedule A. This means that the debtors will have to find another source of income - besides the proceeds from the sale of the properties - to satisfy that claim in full.

Yet, their opposition does not explain or disclose what other source of income with which the debtors will pay the IRS's secured claim in full.

On the other hand, if the debtors were to strip down IRS's secured claim to the value of the properties, IRS's claim would be bifrucated into a secured claim and an unsecured claim, entitling the IRS to vote on both claims.

However, IRS's unsecured claim, which would exceed $1 million, along with the unsecured claim of the FTB, will dominate the general unsecured class of claims, ensuring that class' rejection of the plan.

Under either of the above scenarios, the court sees no ability of the debtors to obtain plan confirmation. The court does not see how the debtors will be able to pay off claims in full or how they will be able to secure acceptance of the plan by at least one impaired class.

The opposition filed by the debtors is unhelpful in establishing how the debtors are planning to obtain plan confirmation. The opposition is focused on merely quoting statements from the motion and complaining that those statements are untrue, fabricated or irrelevant.

For instance, the debtors complain because the IRS "has persistently refused to work with [them]," and has rejected settlement offers from the debtors. Docket 171 at 3. This is irrelevant to this motion and to the debtors' ability to confirm a chapter 11 plan.

The debtors also complain that they "have never concealed nor hidden transfer of their property into trust." Docket 171 at 4. This is also irrelevant as the debtors and the IRS have had the opportunity to litigate this issue in the district court action. Once again, the debtors are missing the point. This court will not serve as the court of appeals for the district court. The issues that have been litigated in the district court actions will not be visited by this court.

Further, the debtors continue to deny that the IRS holds a claim based on a judgment against them, even though this court already overruled their objection to IRS's proof of claim. The debtors are under the impression that they will be able to still somehow challenge IRS's proof of claim in this case. In their opposition, they state "[b]ut no judgment has been rendered because no court has declared any amount owed. In all events, without a real accounting, followed by a hearing respecting that accounting, and a court's conclusion

concerning the amount of the [debtors'] tax obligations, there is no judgment to satisfy." Docket 171 at 4.

The court also notes that the debtors' opposition is devoid of admissible evidence. The exhibits attached to the opposition are not authenticated or otherwise supported by a declaration. Also, even if the exhibits were admissible, they are not helpful for resolution of this motion. None of the exhibits pertain to the debtors' ability to confirm a plan.

Exhibit 1 to the opposition is an Internet article about bankruptcy and tax defense. Exhibit 2 is a letter from the debtors to Mr. Jennings dated August 5, 2013. Exhibit 3 is an internal IRS memorandum about the debtors' 1985 taxes, dated August 21, 1989. Exhibit 4 is the curriculum vitae of the debtors' accountant, Lawrence Stephens, along with his declaration analyzing the debtors' tax liabilities extending back to 1985. This is the same declaration the court rejected as inadmissible in connection with the debtors' objection to IRS's proof of claim. Docket 147 at 2.

In summary, the court is not convinced that the debtors have even a remote possibility of confirming a chapter 11 plan. This is cause for purposes of 11 U.S.C. § 1112(b)(4).

The debtors' personal property listed in Schedule B has been claimed as fully exempt in Schedule C. Docket 20. As the debtors' only assets with value are the five real properties that are over-encumbered by IRS's claim, there would be no assets to be administered for the benefit of the unsecured creditors. Conversion to chapter 7 then would serve no purpose. Dismissal is in the best interest of the estate and the creditors. The motion will be granted and the case will be dismissed.

4. 12-28413-A-7 F. RODGERS CORPORATION — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2119 SJL-1 — 5-29-14 [7]
MCGRANAHAN V. WESTERN STATES ASBESTOS WORKERS' TRUST FUNDS

Tentative Ruling: The motion will be granted in part and denied in part.

The Heat & Frost Insulators of Northern California Local Union 16 Health and Welfare Fund, respond to the complaint filed by the plaintiff, Michael McGranahan, seeking dismissal under Fed. R. Civ. P. 12(b)(6) of the 11 U.S.C. §§ 547(b) and 550(a) claims asserted against Western States Asbestos Workers' Trust Funds. The movant argues that:

(1) The named defendant, Western States Asbestos Workers' Trust Funds, is not an entity. The movant is the entity to which the transfers in question were made.

(2) The movant is the proper "authorized collection agent for [the] multiple employee benefit funds, for the Local Union, and for the Vacation and Holiday Accounts." Docket 8 at 5 n.1.

(3) The complaint does not sufficiently plead the facts about the transfers the plaintiff is seeking to avoid.

(4) The funds transferred to the movant were not property of the debtor.

(5) The movant was not a transferee within the meaning of 11 U.S.C. § 550(a)(1). The movant was a mere conduit.

(6) The transfers were made in the ordinary course of business.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The facts giving rise to the subject dispute, as described by the complaint, are as follows. The debtor made three transfers of funds totaling approximately $130,616.07 to the defendant within 90 days prior to the filing of the underlying chapter 7 case on April 30, 2012 by the debtor, F. Rodgers Corporation. The dates of the checks via which the transfers were made were February 1, 2012, February 7, 2012, and February 13, 2012. The complaint alleges that there may have been other transfers made to the defendant and that the plaintiff is seeking to avoid any such transfers as well. The complaint says that the transfers "were made for and on account of antecedent debt owed by the Debtor to the defendant," that at the time of the transfers the debtor was insolvent, and that the transfers "enabled the defendant to receive more than it would have received under Chapter 7 . . . if such [t]ransfers had not been made." Docket 1 at 3-4. The complaint pleads only two claims, one under § 547(b) seeking avoidance of the transfers and the other under § 550 seeking recovery of the transfers.

Initially, although the motion cites to Fed. R. Civ. P. 12(b)(6), the motion reads as if it is a motion for summary judgment, complaining that "there is no evidence," that the complaint does not "establish", that the plaintiff has "the burden to establish," that there is "no showing," etc.

The court rejects these contentions and it will not consider any of the evidence submitted with this motion. The motion is supported by a declaration and a portion of the master agreement between The International Association of Heat and Frost Insulators and Allied Workers Local 16 and the Northern California Chapter, Inc. Western Insulation Contractors Association. Dockets 9 & 10.

This is a motion to dismiss and the court will not exercise its discretion to convert the motion to one for summary judgment. See Fed. R. Civ. P. 12(d). The court will not entertain a summary judgment motion without discovery having even started and without the motion's compliance with Local Bankruptcy Rule 7056-1(a), which requires a statement of undisputed facts.

The plaintiff has not had the opportunity to do any discovery and obviously cannot adequately respond to the evidence with this motion.

Accordingly, the court will not even consider the merits of the movant's contentions that: the funds transferred to the movant were not property of the debtor, the movant was a mere conduit and not a transferee within the meaning of 11 U.S.C. § 550(a)(1), and the transfers were made in the ordinary course of business. The court will not consider these contentions because they are based on evidence submitted with the motion and they go beyond the four corners of the complaint.

As to the argument that the complaint does not sufficiently plead facts about the transfers in question, two of the allegations in the complaint pertaining to the transfers are not based on any facts. The two allegations are: the transfers "were made for and on account of antecedent debt owed by the Debtor to the defendant" and that the transfers "enabled the defendant to receive more than it would have received under Chapter 7 . . . if such [t]ransfers had not been made." Docket 1 at 3-4. The complaint simply recites the statute on these elements of the § 547 claim, without stating any facts. The complaint then is making only legal conclusions.

Hence, the motion then will be granted as to the § 547 claim. That claim will be dismissed with leave for the plaintiff to amend the complaint.

As to the remaining aspects of the allegations pertaining to the transfers, the court is satisfied that those allegations are sufficient to state a claim upon which relief can be granted. Specifically, by identifying the transfers by check number, check date and check amount, and by asserting that the debtor made those transfers to the defendant or for the benefit of the defendant, the complaint states a claim for relief that is plausible on its face, namely, that the transfers were "of an interest of the debtor in property- to or for the benefit of a creditor." 11 U.S.C. § 547(b)(1).

Finally, in addition to amending the allegations pertaining to the § 547 claim, the plaintiff is given leave to name the movant as a defendant, to the extent the plaintiff deems it necessary.

5. 12-38024-A-7 MOHAMMED/LINNA AHRARI — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2028 WSS-1 — 7-21-14 [20]
NAYIBKHIL ET AL V. AHRARI ET AL

Final Ruling: This motion will be dismissed as moot because the court dismissed this adversary proceeding on July 29, 2014. Docket 28.

6. 13-35329-A-12 KELLY/DEBORA HEISER — MOTION TO RECONSIDER
SJS-4 — 7-18-14 [52]

Tentative Ruling: The motion will be denied.

The debtors ask the court, under Fed. R. Civ. P. 54(b), 59(e) and 60(b), for reconsideration of a July 8, 2014 order (Docket 51) granting the debtors' motion to strip down the senior mortgage of The Bank of New York Mellon on their real property in Rio Linda, California (6330 Marysville Road or Boulevard). In the order, the property is identified as being located in Sacramento, California. Docket 51.

The debtors had asked the court to value the property at $135,000, but after two continuances of the hearing on the motion, giving the bank an opportunity to obtain its own appraisal of the property, the court valued the property at $195,000 and stripped down the bank's claim to the value of the property.

Fed. R. Civ. P. 59(a)&(e) provides as follows:

"(a) . . . (1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues–and to any party–as follows: (A) after a jury trial . . . ; or (B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

. . .

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment."

But, in bankruptcy proceedings, Rule 59 is subject to Fed. R. Bankr. P. 9023, which provides that:

"Except as provided in this rule and Rule 3008 [pertaining to the allowance and disallowance of claims], Rule 59 F.R.Civ.P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment."

Thus, the deadline for filing a motion for new trial or to alter or amend a judgment and for the court to order sua sponte a new trial is 14 days after entry of the judgment.

"The Court's authority to reconsider an order is governed by the doctrine that a court will generally not reexamine an issue previously decided by the same or higher court in the same case. Lucas Auto. Eng'g, Inc. v. Bridgestone / Firestone, Inc., 275 F.3d 762, 766 (9th Cir.2001); United States v. Cuddy, 147 F.3d 1111, 1114 (9th Cir.1998).

"Accordingly, a court has discretion to depart from a prior order when (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. Turner v. Burlington N. Santa Fe R. Co., 338 F.3d 1058, 1063 (9th Cir.2003) (quoting McDowell v. Calderon, 197 F.3d 1253, 1254 n.1 (9th Cir.1999) (en banc)).

"More specifically, reconsideration of an interlocutory order may be appropriate if (1) the court is presented with newly discovered evidence, (2) has committed clear error, or (3) there has been an intervening change in controlling law. Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir.2000). 'There may also be other, highly unusual, circumstances warranting reconsideration.' School Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir.1993).

"On the other hand, a motion for reconsideration is properly denied when the movant fails to establish any reason justifying relief. Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir.1985). A motion to reconsider must set forth the following: (1) some valid reason why the court should revisit its prior order; and (2) facts or law of a 'strongly convincing nature' in support of reversing the prior decision. Frasure v. United States, 256 F.Supp.2d 1180, 1183 (D.Nev.2003).

"A motion for reconsideration should not merely present arguments previously raised; that is, a motion for reconsideration is not a vehicle permitting the unsuccessful party to reiterate arguments previously presented. See Merozoite v. Thorp, 52 F.3d 252, 255 (9th Cir.1995); Khan v. Fasano, 194 F.Supp.2d 1134, 1136 (S.D.Cal.2001) ('A party cannot have relief under this rule merely because

he or she is unhappy with the judgment.').

"Moreover, a motion for reconsideration '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.' Kona Enters., Inc., 229 F.3d at 890. As the case law indicates, motions to reconsider are granted sparingly. See, e.g., School Dist. No. 1J, 5 F.3d at 1263."

Mkhitaryan v. U.S. Bank, N.A., Case No. 2:11-cv-01055-JCM-CWH, 2013 WL 3943552, at *2 (D. Nev. July 30, 2013).

As to Fed. R. Civ. P. 60(b), it is made applicable here by Fed. R. Bankr. P. 9024, allowing the court to set aside or reconsider an order or a judgment for:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances." Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828 (1992).

"[R]evisiting the issues already addressed 'is not the purpose of a motion to reconsider,' and 'advanc[ing] new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed' is likewise inappropriate." Van Skiver at 1243.

Generally, a motion for reconsideration should not be granted absent highly unusual circumstances, unless the trial court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law. Kona Enterprises, Inc. v. Estate of Bishop, 229 F3d 877, 890 (9th Cir. 2000); see also Brown v. Wright, 588 F.2d 708, 710 (9th Cir. 1978).

The valuation motion (Docket 18) was filed on March 10, 2014 and was set for hearing originally for April 14, 2014. Although the motion was set for hearing under Local Bankruptcy Rule 9014-1(f)(1), which requires written opposition at least 14 days prior to the hearing, the bank filed its opposition to the motion and request for time to obtain its own appraisal of the property on April 4, 2014, only 10 days prior to the April 14 hearing.

Nevertheless, exercising its discretion, the court continued the hearing on the motion to May 27, 2014, to allow the bank time to obtain its own appraisal of the property. The court required the debtors to file further evidence of value no later than April 28 and the bank to file its opposition no later than May 12. Reply was due no later than May 19. Docket 33. The debtors filed no further evidence of value and the bank filed nothing by May 12.

But, on May 22, the bank filed an ex parte application for continuance of the

May 27 hearing, citing the need for more time to obtain its appraisal. Docket 39. In support of the application, the bank filed a declaration signed by Joely Bui, counsel for the bank, representing that "the appraisal of the Property was conducted on Wednesday, May 28, 2014." Docket 41 at 2. The declaration was signed on May 22, 2014. Id.

At the May 27 hearing, the court questioned the bank about why it had not obtained its appraisal on time to meet the May 12 deadline. As the court recalls, the bank stated that there was a delay in the debtors' response to the attempts of the bank's appraiser to obtain access to the property. But, the bank admitted that this was not in the record of the May 22 application for continuance of the May 27 hearing.

Given the bank's representations at the May 27 hearing, the court agreed to continue the hearing one last time, requiring the bank to submit its evidence of value and explanation about why it did not obtain appraisal in time to meet the May 12 deadline, no later than June 10. The debtors' reply to that evidence was due no later than June 17. The May 27 hearing was continued to June 23, 2014. Docket 44.

On June 10, the bank filed two declarations with exhibits. One of the declarations provided evidence of value for the property and the other declaration explained why the bank was unable to meet the May 12 deadline. Dockets 45, 46, 48.

In the latter declaration, the bank corrected the date of the appraisal to May 21 and explained the delay. The bank, despite contacting its appraiser on May 1, and securing permission to contact the debtors directly, was unable to arrange inspection of the property in question prior to May 12. The bank's appraiser wrote to the bank's counsel in a May 12 e-mail, "I have left several messages with the debtor and no return calls. Is there another access number." Docket 48 ¶ 11; Docket 48, Ex. 3.

The debtors filed no reply to the bank's June 10 opposition to the motion.

At the June 23 hearing on the motion, the court valued the property at $195,000 and stripped down the bank's claim to that amount. In its ruling, the court also noted:

"The hearing on this motion was continued from May 27, 2014 to allow once again the respondent creditor, The Bank of New York Mellon, to obtain and file its own appraisal of the property. The court also required the bank to explain its failure to comply with the May 12 deadline the court had set on April 14, 2014, at the initial hearing on this motion.

"At the May 27 hearing on the motion, the bank was required to file its evidence of value no later than June 10, 2014. Docket 47. The bank filed its evidence on June 10, along with an explanation of why it had not complied with the court's deadline set on April 14. The court is satisfied that the bank's failure to file its evidence of value within the May 12 deadline was not due to its fault. The bank's appraiser had left 'several messages with the Debtors and received no return calls' prior to May 12. Docket 48 paragraph 11."

Docket 50 at 1.

Counsel for both the debtors and the bank appeared at the June 23 hearing on the motion. Docket 50. But, as the court recalls, the debtors' counsel did not dispute that it was the debtors who delayed a timely inspection of the

property, preventing the bank from preparing and filing its appraisal by the May 12 deadline given by the court at the April 14 hearing.

The debtors are complaining that the court's adoption of the bank's valuation of the property was manifestly unjust because the bank missed the court's deadlines for evidence of value twice; once, it missed the 14-day deadline for filing oppositions to the motion prior to the initial April 14 hearing on the motion, and another time it missed the court's May 12 deadline.

As a result, the debtors argue, they were prejudiced because they have been unable to have "a quick and expedient confirmation of the Chapter 12 plan." Docket 52 at 5.

The debtors point out that: "It is customary in the Eastern District of California for a first filing of a Chapter 13 Motion to Dismiss for Unreasonable Delay be conditionally denied allowing the Debtor seventy-five (75) [days] in which to confirm a plan or the Chapter 13 Trustee may request dismissal via Declaration. It should be noted that a Motion to Confirm a Chapter 13 plan need be set on at minimum forty-two (42) days' notice." Docket 52 at 5.

The debtors are also disputing the bank's account as to why the bank did not meet its May 12 deadline. "It also appears that Secured Creditor misled this court into believing that Debtors were not cooperating with either Secured Creditor or the appraiser and that was what caused the delay. As explained in the Declaration of Deborah Heiser that was not the case and the events of what actually happened are substantially different than what Secured Creditor indicated in its filing." Docket 52 at 5.

First, the sole basis for the debtors' motion is that the $195,000 valuation was manifestly unjust. The debtors do not raise any other grounds for reconsideration of the July 8, 2014 order.

The problem with the motion is that the debtors are raising new arguments and are presenting new evidence, for the first time, when they could have reasonably presented those arguments and evidence before the court entered the July 8 order.

Specifically, the debtors are disputing for the first time that the debtors did not cause a delay for the bank to miss the May 12 deadline. The debtors did not file anything with the court in reply to the bank's June 10 opposition. They had until June 17 to file their reply, but they filed nothing. Dockets 44 & 50.

More, the instant motion does not say why the debtors did not timely challenge the June 10 evidence from the bank. As noted by the Ninth Circuit, "[a] Rule 59(e) motion 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." Kona Enters., Inc., 229 F.3d at 890.

Second, as the court recalls, the debtors did not challenge the bank's June 10 evidence of value and explanation of delay in obtaining the appraisal, at the June 23 hearing on the motion. The debtors' counsel appeared at that hearing, but the court does not recall him challenging the bank's June 10 evidence.

This is the second time the debtors had an opportunity to raise the arguments and evidence they are raising now, but they failed to do so. The instant motion does not explain the debtors' lack of response to the bank's June 10

evidence.

The above alone is sufficient basis for denying the motion. The motion will be denied.

Third, even if the court were to consider the new argument and evidence from the debtors, that they did not cause the bank to miss the May 12 deadline, the court finds the evidence in support of the argument insufficient and lacking.

While the declaration from the debtors' counsel, Joe Angelo, states that "[o]n May 15, 2014 [he] received a call from Mrs. Heiser and was informed that no appraiser had ever contacted her regarding viewing the property," her declaration in support of this motion - submitted with the attorney's declaration - does not confirm this. Docket 54 ¶ 3; Docket 55.

Mrs. Heiser's declaration says nothing about her not receiving calls from the bank's appraiser prior to May 12. Docket 55. She only states that the appraiser called her on May 16, leaving a telephone message and asking to schedule a time for inspection of the property. Docket 55 at 1. But, she does not state that the May 16 telephone call was the first time the appraiser contacted her and she does not state that she had not received telephone calls from the appraiser prior to May 12. Docket 55. Mrs. Heiser's declaration is curiously silent as to communications from the appraiser prior to May 12.

As the May 15 statement in the debtors' counsel's declaration - that Mrs. Heiser told him that no appraiser had ever contacted her regarding viewing the property - is inadmissible hearsay and is unconfirmed by Mrs' Heiser's own declaration, the court is inclined not to believe that Mrs. Heiser did not receive telephone calls from the bank's appraiser prior to May 12.

Accordingly, even if the court were to consider the debtors' new argument and evidence, disputing the bank's account of attempting to obtain an appraisal prior to the May 12, the court finds the evidence unpersuasive and rejects the contention. Consequently, the court concludes that the second continuance of the hearing on the valuation motion was caused by the debtors' failure to timely respond to the appraiser's calls.

As such, the court is not convinced that the continuance of the May 27 hearing, along with the court's adoption of the bank's valuation of the property at the June 23 hearing, were manifestly unjust. The lack of manifest injustice is further bolstered by the debtors' failure to timely challenge the bank's June 10 evidence, in either the reply they were required to file no later than June 17 or at the June 23 hearing on the valuation motion.

Fourth, the debtors' reference to the deadlines to confirm a chapter 13 plan are unhelpful because this is a chapter 12 case, where the deadlines to confirm a plan are very different from the deadlines in a chapter 13 case. See 11 U.S.C. §§ 1221 & 1224. The analogy the debtors are making to the confirmation process in a chapter 13 case makes no sense.

Fifth, the court finds no basis for granting relief under Rule 60(b). Although cited by the motion, Rule 60(b) is not briefed and is not a basis for the requested relief. The motion makes no effort to brief or argue any of the grounds for relief under Rule 60(b). For instance, the motion says nothing about Rule 60(b)(2) or Rule 60(b)(6), such as that the evidence proffered by the debtors is newly discovered evidence or there are other reasons that justify relief. As noted earlier, the sole basis for the debtors' motion is that the $195,000 valuation was manifestly unjust, which is not a standard

contemplated or encompassed by Rule 60(b).

Finally, the motion does not explain why or how Fed. R. Civ. P. 54(b) applies here. That rule pertains to the entry of judgments on multiple claims or when multiple parties are involved. The entry of final judgment as to one or more, but fewer than all, claims or parties, is not implicated here.

The subject motion will be denied.

7. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO CONFIRM PLAN
SAC-10 — 7-14-14 [156]

Tentative Ruling: The motion will be denied without prejudice.

The debtors are asking the court to confirm their second amended chapter 12 plan filed on July 14, 2014. Docket 157.

Creditor Wilbur-Ellis Company opposes plan confirmation.

The motion will be denied for the following reasons:

(1) As the court is denying the debtors' valuation and lien avoidance motions and the plan incorporates those motions into the plan, the court cannot confirm the plan.

(2) The proposed plan does not include any income from the debtors' trucking business, identified as JH Farms, Inc. in Schedule B. Docket 17. This is relevant to whether the debtors are devoting all disposable income to the plan.

(3) The debtors should explain what is their connection to the trucking business, J-H Ranch, which Wilbur-Ellis contends owns three trucks. The debtors have not disclosed interest in J-H Ranch in their Schedule B. Schedule B discloses interest only in JH Farms, Inc., which is disclosed as owning one truck and one trailer. Docket 17.

(4) The plan ignores Wilbur-Ellis' contention that its $43,431.47 judgment is secured by all of the debtors' personal property. See Amended POC 19-2, Filed July 22, 2014. Schedule B lists $641,869 in personal property assets, while not all such assets are encumbered.

(5) The debtors have not explained what has happened with the 2012 crop, and consequent proceeds, from their 300 acres of land. The court also needs clarification about whether the debtors lease or own the 300 acres of land, given that Wilbur-Ellis contends that it is secured by that land, yet Schedule A lists no interest in such a real property. Docket 17. Schedule A lists interest only in the Wheatland property (606 3rd Street).

8. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO USE CASH COLLATERAL
SAC-11 — 7-23-14 [164]

Tentative Ruling: The motion will be denied without prejudice.

The debtors seek approval to use the cash collateral of Wilbur-Ellis Company, "consisting of the remaining proceeds from Debtors' 2012 wheat crop." Wilbur-Ellis holds a judgment lien against the debtors for $47,965. According to the debtors, the only "crop proceeds subject to the crop lien of Wilbur-Ellis are

funds in the amount of $11,270.93 held by Farmers Grain Elevator, Inc." The debtors are proposing to provide adequate protection to Wilbur-Ellis in the form of monthly payments in the amount of $300.

The debtors are seeking to use the cash collateral to meet their budgeted ordinary business expenses.

Wilbur-Ellis, which holds a claim for $47,965 based on a judgment, opposes the motion and contends that the judicial lien of Wilbur-Ellis extends to the 2012 crop and proceeds from that crop, and also extends to all personal property of the debtors, including proceeds of such property. Yet, the motion is not asking for permission to use Wilbur-Ellis' other cash collateral. Wilbur-Ellis also questions what happened with the crop proceeds realized from approximately 300 acres of land that is subject to Wilbur-Ellis' judgment lien.

11 U.S.C. § 1203 provides that "[s]ubject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm or commercial fishing operation." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The motion will be denied. The debtors have not met their burden of persuasion that Wilbur-Ellis' interest in the $11,270.93 cash collateral will be adequately protected. The only proposed adequate protection for Wilbur-Ellis' interest in the cash is monthly payments of $300.

However, the motion does not explain how monthly payments of $300 a month will provide adequate protection for Wilbur-Ellis' interest in the $11,270.93. Unless the debtors are planning to stay in chapter 12 for approximately 37 months prior to obtaining plan confirmation, the proposed $300 monthly payments will not provide adequate protection to Wilbur-Ellis' interest in the cash. The motion will be denied.

9. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO VALUE COLLATERAL
SAC-12
VS. WILBUR-ELLIS COMPANY — 7-23-14 [169]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to value their remaining 2012 crop proceeds of $11,270.93 in an effort to strip down Wilbur-Ellis' $47,965 claim that is secured by those proceeds.

Wilbur-Ellis opposes the motion, contending that its judicial lien extends also to all personal property of the debtors, including proceeds of such property, and extends to approximately 300 acres of land.

As Wilbur-Ellis' claim is secured by other collateral, besides the 2012 crop proceeds, the court cannot strip down Wilbur-Ellis' claim solely to the value of the 2012 crop proceed, $11,270.93. The motion does not even mention Wilbur-Ellis' other collateral. Accordingly, the motion will be denied.

10. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO AVOID JUDICIAL LIEN
SAC-13
VS. JOHN DEERE FINANCIAL FSB — 7-23-14 [174]

Tentative Ruling: The motion will be denied without prejudice.

A judgment was entered against the debtors in favor of John Deere Financial for the sum of $216,050.96 on May 1, 2013. The abstract of judgment was recorded with Yuba County on May 21, 2013. That lien attached to the debtors' residential real property in Wheatland, California. The debtors are asking the court to avoid the lien of John Deere Financial on the property under 11 U.S.C. § 522(f)(1).

The motion will be denied.

First, the motion says that the debtors have filed an Amended Schedule C to exempt the subject property. The original Schedule C does not list an exemption in the property. An Amended Schedule C is not on the docket. The court will not avoid a lien as impairing an exemption not yet claimed.

Basing a lien avoidance motion on a future claim of exemption deprives the motion from the case or controversy requirements under Article III of the United States Constitution, including that: (1) a plaintiff must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Lexmark Intern., Inc. v. Static Control Components, Inc., Case No. 12-873, WL 1168967, at *6 (Mar. 25, 2014); Allen v. Wright, 468 U.S. 737, 751 (1984), *rev'd on other grounds*, 2014 WL 1168967 (Mar. 25, 2014); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

If there is no exemption claimed as of the time the motion is filed, the debtors could not have suffered the alleged harm, *i.e.*, the impairment of that exemption, meaning that the "injury in fact" element has not been satisfied.

The formula in 11 U.S.C. § 522(f)(2)(A)(iii) expressly considers "the amount of the exemption that the debtor could claim if there were no liens on the property." The absence of an exemption claim in Schedule C reflects no right of the debtors to claim any exemption in the absence of liens. And, if the debtors are not entitled to an exemption in the absence of liens, they may not claim an impairment of such an exemption.

Second, even if the debtors had filed an Amended Schedule C, adding an exemption in the property, and the case or controversy requirements of the motion were met, the court would still have to wait for the time of objections to the added exemption to expire.

Fed. R. Bankr. P. 4003(b)(1) provides that:

"[A] party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later."

Finally, the debtors' rights to avoid a judicial lien on exemption-impairment

grounds is determined as of the petition date. In re Chiu, 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001) (citing In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992)); see also In re Kim, 257 B.R. 680, 685 (B.A.P. 9th Cir. 2000).

Although the instant motion asserts that the value of the property is $55,000, based on the appraisal of Taylor Greer, the property has a value of $90,000 in the debtors' Schedule A.

The court rejects the $55,000 valuation because: that value contradicts the value stated in Schedule A, which is supposed to be the value of the property as of the petition date; and the $55,000 valuation is as of March 19, 2014, whereas the subject petition was filed on February 13, 2014. Docket 184 ¶ 4. The motion will be denied.

11. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO AVOID JUDICIAL LIEN
SAC-14
VS. WILBUR-ELLIS COMPANY — 7-23-14 [181]

Tentative Ruling: The motion will be denied without prejudice.

A judgment was entered against the debtors in favor of Wilbur-Ellis Company for the sum of $43,431.47 on January 29, 2013. The abstract of judgment was recorded with Yuba County on February 11, 2013. That lien attached to the debtors' residential real property in Wheatland, California. The debtors are asking the court to avoid the lien of Wilbur-Ellis on the property under 11 U.S.C. § 522(f)(1).

The motion will be denied.
First, the motion says that the debtors have filed an Amended Schedule C to exempt the subject property. The original Schedule C does not list an exemption in the property. An Amended Schedule C is not on the docket. The court will not avoid a lien as impairing an exemption not yet claimed.

Basing a lien avoidance motion on a future claim of exemption deprives the motion from the case or controversy requirements under Article III of the United States Constitution, including that: (1) a plaintiff must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact" element; (2) the injury must be fairly traceable to the challenged action, known as the "causation element"; and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Lexmark Intern., Inc. v. Static Control Components, Inc., Case No. 12-873, WL 1168967, at *6 (Mar. 25, 2014); Allen v. Wright, 468 U.S. 737, 751 (1984), *rev'd on other grounds*, 2014 WL 1168967 (Mar. 25, 2014); Dunmore v. United States, 358 F.3d 1107, 1111-12 (9th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

If there is no exemption claimed as of the time the motion is filed, the debtors could not have suffered the alleged harm, *i.e.*, the impairment of that exemption, meaning that the "injury in fact" element has not been satisfied.

The formula in 11 U.S.C. § 522(f)(2)(A)(iii) expressly considers "the amount of the exemption that the debtor could claim if there were no liens on the property." The absence of an exemption claim in Schedule C reflects no right of the debtors to claim any exemption in the absence of liens. And, if the debtors are not entitled to an exemption in the absence of liens, they may not claim an impairment of such an exemption.

Second, even if the debtors had filed an Amended Schedule C, adding an exemption in the property, and the case or controversy requirements of the motion were met, the court would still have to wait for the time of objections to the added exemption to expire.

Fed. R. Bankr. P. 4003(b)(1) provides that:

"[A] party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later."

Finally, the debtors' rights to avoid a judicial lien on exemption-impairment grounds is determined as of the petition date. In re Chiu, 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001) (citing In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992)); see also In re Kim, 257 B.R. 680, 685 (B.A.P. 9th Cir. 2000).

Although the instant motion asserts that the value of the property is $55,000, based on the appraisal of Taylor Greer, the property has a value of $90,000 in the debtors' Schedule A.

The court rejects the $55,000 valuation because: that value contradicts the value stated in Schedule A, which is suppose to be the value of the property as of the petition date; and the $55,000 valuation is as of March 19, 2014, whereas the subject petition was filed on February 13, 2014. Docket 184 ¶ 4. The motion will be denied.

12. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO TURN OVER ESTATE FUNDS
SAC-15 — 7-23-14 [188]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to order creditor Farmers Grain Elevator, Inc. to turn over to them the remaining proceeds from the debtors' 2012 and 2013 wheat crop.

The motion will be denied because the court cannot order a creditor to turn over property to the debtor on a motion. Fed. R. Bankr. P. 7001(1), which requires an adversary proceeding for anyone "to recover money or property," makes only one pertinent exception, namely, "other than a proceeding to compel the debtor to deliver property to the trustee." Here, however, the debtors are seeking turnover from a creditor, which falls outside the exception contemplated by Fed. R. Bankr. P. 7001(1). Hence, this motion will be denied.

13. 14-21371-A-12 JEREMIAH/HOLLY HARPER — MOTION TO VALUE COLLATERAL
SAC-5 — 6-6-14 [68]
VS. GREEN TREE SERVICING, LLC

Tentative Ruling: The motion will be denied without prejudice.

The hearing on this motion was continued from July 7, 2014. An amended ruling from that date follows below.

The debtors request an order valuing their real property in Wheatland, California at $55,000, in an effort to strip down the only mortgage on the property, for approximately $179,878, held by Green Tree Servicing.

Although Green Tree Servicing initially opposed the motion, seeking time to obtain its own valuation of the property, Green Tree Servicing has dismissed its opposition to the motion.

The motion will be denied because it relies on the debtors' valuation of the property at $55,000 as of March 19, 2014, whereas the debtors have executed a statement under the penalty of perjury in their schedules, claiming that the value of the property was $90,000 as of the petition date, February 13, 2014. See Docket 17, Schedule A; see also Docket 70. The debtors' two valuations of the property are irreconcilable because it is inconceivable that the property could have dropped $35,000 in value in approximately one month of time. And, the trend in today's fast paced real property market is increase and not decrease of value. The valuations are inconsistent and unhelpful in the court's adjudication of value.

More, there is overwhelming authority in the Ninth Circuit requiring that claims are valued as of the plan confirmation date and not the petition date.

"Although the amount of a creditor's claim is fixed at the petition date, there is nothing to indicate that the value of the claim must also be determined at the petition date. Since modification of claims occurs only through debtors' plans, it is at confirmation that the bankruptcy court considers whether proposed modifications comply with requirements for confirmation. Thus, it may be entirely appropriate to value a claim at the time of plan confirmation. (Citations omitted).

"[E]ven though the bankruptcy court's rationale for valuing BAC's claim at confirmation was reasonable, the interpretation of § 1123(b)(5) as setting the determination of whether a claim is protected from modification at the date of confirmation is flawed. That approach improperly shifts the time for fixing a creditor's claim from the petition date to some future valuation date. It conflates the analysis of whether a creditor *holds a claim* with a determination of the *value* of that claim. The value of BAC' claim, whether it is secured or unsecured, is a distinct issue from whether BAC's claim is secured by the Debtors' principal residence."

BAC Home Loans Servicing, LP v. Abdelgadir (In re Abdelgadir), 455 B.R. 896, 902 (B.A.P. 9th Cir. 2011) (distinguishing between the time for fixing the amount of a claim and the time for valuing a claim and holding, on the other hand, that the appropriate time for determining whether the property is the debtor's principal residence is the petition date); Benafel v. One West Bank (In re Benafel), 461 B.R. 581, 587 (B.A.P. 9th Cir. 2011) (citing Abdelgadir with approval and recognizing that valuing a claim at plan confirmation is correct); In re Gutierrez, 503 B.R. 458, 462-63 (Bankr. C.D. Cal. 2013); In re Schayes, 483 B.R. 209, 214-15 (Bankr. D. Ariz. 2012); see also Mariners Inv. Fund, LLC v. Delfierro (In re Delfierro), Case No. WW-11-1249-KiJuH, WL 1933316, at *1 (B.A.P. 9th Cir. May 29, 2012); Wages v. J.P. Morgan Chase Bank, N.A. (In re Wages), Case No. ID-12-1397-JuKiKu, WL 1133924, at *3 (B.A.P. 9th Cir. Mar. 7, 2014).

As the instant motion relies on a valuation that extends back to March 19, 2014, about five months ago, that valuation is outdated in today's fast paced market. Accordingly, this motion will be denied.

14. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION TO CONFIRM PLAN
LP-10 — 3-15-14 [329]

Tentative Ruling: The motion will be granted.

The debtors ask the court to confirm their chapter 11 plan filed on March 15, 2014 (Docket 329).

Subject to reviewing the tabulation of ballots at the hearing, the court is prepared to confirm the plan.

15. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — STATUS CONFERENCE
13-2069 — 2-25-13 [1]
CARDILLO V. FABIE ET AL

Tentative Ruling: None.

16. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION TO APPROVE COMPROMISE
13-2069 LP-11 — 7-19-14 [71]
CARDILLO V. FABIE ET AL

Tentative Ruling: The motion will be dismissed without prejudice for at least two reasons. First, the court cannot confirm that the motion papers have been served on the plaintiff, Mike Cardillo. Docket 73.

Second, the amended notice of hearing is not accurate. Docket 72. It states that written opposition need not be filed by the respondent. Instead, the notice advises the respondent to oppose the motion by appearing at the hearing and raising any opposition orally at the hearing. This is appropriate only for a motion set for hearing on less than 28 days of notice. See Local Bankruptcy Rule 9014-1(f)(2). However, because 28 days or more of notice of the hearing was given in this instance, Local Bankruptcy Rule 9014-1(f)(1) is applicable. It specifies that written opposition must be filed and served at least 14 days prior to the hearing. Local Bankruptcy Rule 9014-1(f)(1)(ii). The respondent was told not to file and serve written opposition even though this was necessary. Therefore, notice was materially deficient.

In short, if the movant gives 28 days or more of notice of the hearing, it does not have the option of pretending the motion has been set for hearing on less than 28 days of notice and dispensing with the court's requirement that written opposition be filed.

17. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION FOR SUMMARY JUDGMENT
13-2069 LP-9 — 1-30-14 [17]
CARDILLO V. FABIE ET AL

Final Ruling: This motion will be dismissed as moot because the parties have settled this adversary proceeding.

18. 14-27083-A-12 RCK CONSERVATION CO-OP, L.L.C. — MOTION FOR RELIEF FROM AUTOMATIC STAY
RPG-101 — 7-23-14 [24]
TERESA JONES VS.

Tentative Ruling: The motion will be granted.

The movant, Teresa Jones and Charles Hawley, move for relief from stay as two real properties, one in Clipper Mills, California (Butte County) and the other

in Challenge, California (Yuba County). The movant asks for relief from stay under 11 U.S.C. § 362(d)(1) for cause, arguing that: (1) the debtor has not made payments on account of the claim secured by the properties since August 2012, (2) the debtor filed this case on July 8, 2014, the eve of foreclosure of the property, which was scheduled for July 11, 2014, (3) the debtor lost a motion for a temporary restraining order, heard in state court on July 7, 2014, and (4) the debtor is not qualified for chapter 12 relief.

The debtor opposes the motion.

While the movant checked the box on the information sheet for "bad faith" as one of the grounds for the motion, the motion is devoid of any discussion or mention of bad faith. Consequently, the court will not consider bad faith as basis for granting the motion.

Further, the court does not have admissible or probative evidence of value for the properties. The only evidence of value for the properties in support of the motion is in the declaration of Charles Hawley, where he says that: "I have not had an appraisal conducted for the Real Property. Accordingly, I do not have an opinion as to market value. However, I believe that the Debtor's opinion of value in the amount of $450,000 is completely unsupported and that the actual market value would be no greater than $300,000." Docket 26 at 4.

However, Mr. Hawley has not been qualified as an expert to render an opinion of value as to the properties. His declaration states nothing of his skills to appraise real property. He does not even state that he has inspected the properties. See Fed. R. Evid. 701(c) & 702. Accordingly, his statements about the value of the property are inadmissible.

But, even if the court were to consider his statements as admissible evidence, with a value of $300,000 and encumbrances totaling approximately $272,543, there is still $27,456 of equity in the property, meaning that relief under 11 U.S.C. § 362(d)(2) is unavailable.

The movant's deed is the only deed against the property and secures a claim of approximately $267,743. The properties are also encumbered by outstanding property taxes in the amount of $4,800.

The court also notes that there is no evidence in the record establishing that the properties are depreciating in value. Under United Sav. Ass'n. Of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), a secured creditor's interest in its collateral is considered to be inadequately protected only if that collateral is depreciating or diminishing in value. The creditor, however, is not entitled to be protected from an erosion of its equity cushion due to the accrual of interest on the secured obligation. In other words, a secured creditor is not entitled to demand, as a measure of adequate protection, that "the ratio of collateral to debt" be perpetuated. See Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc., 54 F.3d 722, 730 (11th Cir. 1995).

As this case was just filed on July 8, 2014 and there is at least approximately $27,543 of equity in the properties - assuming the court considers Mr. Hawley's valuation, the court is unwilling to grant relief from stay this early in the case on the sole basis that the debtor is not making contractual payments to the movant.

Nevertheless, the motion also raises the debtor's eligibility for chapter 12 relief as cause for relief from stay.

11 U.S.C. § 109(f) provides that only a family farmer or family fisherman with regular income may be a debtor under chapter 12.

11 U.S.C. § 101(18) defines a family farmer as:

"(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,031,575 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $4,031,575 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded."

Although limited liability companies are not specifically mentioned by 11 U.S.C. § 101(18), they are are quite similar to corporations in their control and ownership structures, for purposes of applying 11 U.S.C. § 101(18). Also, the court has found no cases precluding limited liability companies from being chapter 12 debtors.

"The term 'farming operation' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21). This is not an exclusive list. Rinehart v. Sharp (In re Sharp), 361 B.R. 559, 564 (B.A.P. 10th Cir. 2007).

While the movant filed this motion and the movant has the burden to establish cause, the movant cannot be expected to prove a negative, *i.e.*, disproving that the debtor is a family farmer within the meaning of 11 U.S.C. § 101(18).

As the debtors bear the burden of persuasion on all elements necessary for plan confirmation, they also bear the burden of persuasion on establishing eligibility for chapter 12 relief. First Nat'l Bank of Durango v. Woods (In re Woods), 743 F.3d 689, 705 (10th Cir. 2014) (citing Ames v. Sundance State Bank

(In re Ames), 973 F.2d 849, 851 (10th Cir. 1992)); In re Sohrakoff, 85 B.R. 848, 850 (Bankr. E.D. Cal. 1988); In re Bircher, 241 B.R. 11, 14 (Bankr. S.D. Iowa 1999); Integra Bank, N.A. v. Ross (In re Ross), 270 B.R. 710, 714 (Bankr. S.D. Ill 2001).

Unfortunately, the opposition is utterly unhelpful in establishing that the debtor is eligible for chapter 12 relief. The opposition is not supported by a declaration or affidavit establishing any of the factual assertions made by the debtor. Docket 33.

The only admissible evidence the court has in the record, pertaining to the debtor's eligibility, is from the movant. That evidence comes in the form of a declaration executed on July 2, 2014 by David Major in support of the debtor's temporary restraining order request in state court. Docket 29. Mr. Major is the managing member of the debtor, holding a majority membership interest in the debtor.

11 U.S.C. § 101(18)(B) requires the debtor to be conducting a "farming operation," which includes, without limitation, "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21).

Mr. Major's declaration does not list a single business activity of the debtor that could be classified as a farming operation. Conversely, the debtor's business activities, just six days prior to the filing of this case, are anything but a farming operation. On July 2, 2014, Mr. Major says:

"I have been working over the course of this year to obtain additional members of [the debtor] as well as attempting to make the property self-sustaining financially. In January of 2014 I was able to obtain two new members in the [debtor], and additional members have joined since then. We have turned the property from 80 tons of junk, including 57 junk cars, into a music venue with camp grounds. We have held concerts at the property and have one concert per month booked this year through October. With our new membership as well as the revenue the property is now raising, we are now able to make the monthly payments."

Docket 29 at 4.

More, Mr. Majors says that "[The debtor] had the ability to make its payments through the combination of capital contributions of its members as well as rental income and concert event income. The majority of the expenses have been paid from members' capital contributions." Docket 29 at 2.

In other words, the debtor's own managing member admits that the only sources of income for the debtor are capital contributions, income from the rental of the properties, and income from concert events conducted on the properties. This is far removed from the definition of a farming operation.

Therefore, the debtor is ineligible for chapter 12 relief and this is cause for the granting of relief from stay.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

To the extent applicable, the court determines that this bankruptcy proceeding

has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

As the court does not have admissible evidence of value for the properties from the movant, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

19. 14-22884-A-11 RAYMOND/ROSA KING — MOTION TO VALUE COLLATERAL
CAH-4
VS. NISSAN MOTOR ACCEPTANCE CORP. — 8-4-14 [57]

Tentative Ruling: The motion will be denied without prejudice.

The debtors move for an order valuing a 2013 Nissan Maxima vehicle with approximately 10,000 miles. The debtors claim that the vehicle has a replacement value of $23,000. The vehicle is subject to a claim held by Nissan Motor Acceptance Corporation, in the amount of approximately $25,011.88.

First, the motion fails to state whether the vehicle was acquired for personal, family, or household purposes. This is important because the required valuation standard for the vehicle may be different.

Second, assuming the vehicle was acquired for personal, family, or household purposes, the standard of valuation is 11 U.S.C. § 506(a)(2), *i.e.*, "the price a retail merchant would charge for property of that kind considering the age and condition of the property."

However, the court does not have evidence of the price a retail merchant would charge for the vehicle. It has evidence only of what the debtors think is the value of the vehicle.

The debtor has not been qualified as an expert on what a retail merchant would charge for the vehicle. Thus, the debtor's opinion of value is an inadmissible lay opinion. See Fed. R. Evid. 701(c) (prohibiting lay witnesses from testifying in the form of opinions based on scientific, technical or other specialized knowledge). The court does not have any other evidence of value. Accordingly, the motion will be denied.

20. 14-22884-A-11 RAYMOND/ROSA KING — MOTION TO VALUE COLLATERAL
CAH-5
VS. NATIONSTAR MORTGAGE, L.L.C. — 8-4-14 [62]

Final Ruling: The motion will be dismissed without prejudice because the motion was served on the respondent creditor, Nationstar Mortgage, to the attention of Aimee Cobb. But, Aimee Cobb does not work for Nationstar. She works for Nissan Motor Acceptance Corporation. See Docket 61 & POC 3-1. Aimee Cobb is the bankruptcy administrator for Nissan Motor Acceptance Corporation, as referenced in its proof of claim. POC 3-1. Accordingly, notice of this motion on Nationstar is deficient.