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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 19-12900-B-7 **IN RE: REBECCA FREITAS**
VVF-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-29-2019 [77]

MECHANICS BANK/MV
STEPHEN LABIAK
VINCENT FROUNJIAN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted unless opposed at the hearing.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Debtor filed non-opposition on November 4, 2019. Doc. #83. Unless the trustee presents opposition at the hearing, the court intends to enter the trustee's default and enter the following ruling granting the motion for relief from stay. If the trustee presents opposition at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2012 Ford F-150. Doc. #81. The collateral has a value of $24,000.00 and debtor owes $16,374.02 *Id.*

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

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes

extraneous or procedurally incorrect relief that is only available in an adversary proceeding, then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

2. 19-10402-B-7 **IN RE: BOONMEE EADS**
JES-1

MOTION TO COMPEL
10-1-2019 [18]

JAMES SALVEN/MV
GEORGE ALONSO

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor had a right to 2018 Federal and State tax refunds. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds

from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor possessed, or had custody or control over the tax refunds after the petition for relief was filed. See doc. #20. Debtor is ordered to turn over the 2018 federal and state tax refunds, estimated to be at least $4,000.00, or the information so that trustee can prepare the returns, within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

3. 18-13721-B-7 **IN RE: LUZERO BANUELOS FARIAS**
JES-1

MOTION TO COMPEL
9-30-2019 [23]

JAMES SALVEN/MV
SCOTT LYONS

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The court notes that the amended notice of hearing (doc. #27) was not served. However, the only difference the court could see between the amended notice and the original notice (doc. #24) was the name of the hearing judge, the court does not believe that failure to serve the amended notice will prejudice any party who received original notice.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor had a right to 2018 Federal and State tax refunds. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor possessed, or had custody or control over the tax refunds after the petition for relief was filed. See doc. #25. Debtor is ordered to turn over the 2018 federal and state tax refunds, estimated to be at least $4,000.00, or the information so that trustee can prepare the returns, within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

4. 18-13224-B-7 **IN RE: ANTHONY CORRAL**
FW-3

MOTION TO SELL FREE AND CLEAR OF LIENS AND/OR MOTION FOR COMPENSATION FOR CMT PROPERTIES, INC., BROKER(S)
10-11-2019 [97]

JAMES SALVEN/MV
DAVID JENKINS
PETER FEAR/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed for higher and better bids only.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. Under 11 U.S.C. § 363(f), the trustee may sell estate property of the estate outside the ordinary course of business, after notice and a hearing, free and clear of "any interest in such property of an entity other than the estate, only if . . . such entity consents, such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property, such interest is in bona fide dispute . . . ."

The trustee wishes to sell real property located at 941 E. Michigan Avenue in Fresno, CA ("Property") for $135,000.00 to Yessenia Cucena Vargas ("Buyer"). Doc. #97. The United States of America claims a federal tax lien in the amount of $130,735.93. Doc. #99, claim #1. The State of California claims a state tax lien in the amount of $20,649.96. Doc. #99, claim #2. After subtracting the amounts to pay off the first two deeds of trust, costs of sale, and broker fee, trustee estimates to have $31,000.00 available to pay creditors. Doc. #99.

The Property is subject to a first deed of trust held by Deutsche Bank National Trust ("DBNT") (the approximate payoff of which is

$80,200.00) and a second deed of trust held by Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Countrywide Home Loans, Inc. (the approximate payoff of which is $8,700.00). Doc. #99. MERS did not oppose, and DBNT filed conditional non-opposition, conditioning non-opposition if certain provisions are included in the order. Doc. #105. Trustee shall respond to these proposed provisions at the hearing.

Trustee has filed an adversary proceeding to avoid certain penalty and interest portions of the disputed liens. See adversary proceeding no. 19-01046. Trustee and the IRS—the only taxing authority responding to the complaint—stipulated to a resolution.

Because "[DBNT conditionally] consents, the price at which such property is to be sold is greater than the aggregate value of all liens on such property, and such interest is in bona fide dispute" the trustee may sell the property located at 941 E. Michigan Avenue in Fresno, CA for $135,000.00 to Yessenia Cucena Vargas and free and clear of the state and federal tax liens under 11 U.S.C. § 363 (f)(4) and (5)as prayed in the motion. The liens are transferred to the proceeds.

Trustee's motion is GRANTED.

5. 07-12326-B-7 **IN RE: YOLANDA RODRIGUEZ**
FW-2

MOTION TO REDUCE TIME ALLOWED TO AMEND EXEMPTIONS
10-16-2019 [26]

JAMES SALVEN/MV
GEOFFREY ADALIAN

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a

prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The chapter 7 trustee ("Trustee") asks the court for an order reducing the time period that debtor is allowed to amend exemptions to December 13, 2019. Doc. #26.

Debtor filed chapter 7 over 12 years ago. Trustee filed a report of no distribution and the case was closed. The United States Trustee reopened the case in September 2019 and Trustee was again appointed trustee. The case was reopened "upon hearing of an unscheduled interest in a personal injury/product liability lawsuit ("Lawsuit")." Doc. #26.

After a case is closed, a debtor may not have an absolute right to amend her exemptions. See In re Goswami, 304B.R. 386 (B.A.P. 9th Cir. 2003); but see In re Oster, 293 B.R. 242, 249 (Bankr. E.D. Cal 2003).

The court may however reduce the time a debtor has to amend exemptions, for good cause, under Federal Rule of Bankruptcy Procedure 9006(c)(1). The court finds that good cause exists to allow the reduction. Debtor may at some point attempt to amend her exemptions, and if the amendment is allowed, Trustee's efforts in securing the proceeds from the Lawsuit may be nullified. See doc. #26. Defining the definite time period to allow debtor to amend claimed exemptions will give Trustee a clear direction in which to take this case.

6. 19-13041-B-7 **IN RE: AURORA MADRIGAL**
ASW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR RELIEF FROM CO-DEBTOR STAY
10-10-2019 [48]

NEWREZ LLC/MV
CAREN CASTLE/ATTY. FOR MV.
DISMISSED 10/10/19

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

DISPOSITION: Granted in part and denied in part.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995).Further, because the court

will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The movant, NewRez LLC dba Shellpoint Mortgage Servicing as servicer for THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWABS, INC., ASSET-BACKED CERTIFICATES, SERIES 2007-8 ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(4) concerning real property located at 1341 East Live Oak Drive in Nogales, AZ 85621.

Under § 362(d)(4), if the court finds that the debtor's filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval OR multiple bankruptcy filings affecting such real property, then an order entered under paragraph (4) is binding in any other bankruptcy case purporting to affect such real property filed not later than two years after the date of entry of the order.

After review of the included evidence, the court finds that the debtor's filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved the transfer of all or part ownership of the subject real property without the consent of the secured creditor or court approval.

Prior to this bankruptcy case, the original borrower defaulted on their obligation to the lender at least two times (in 2011 and 2018) which triggered the lender to record a Notice of Trustee's sale. The original borrower subsequently filed bankruptcy at least three times after the foreclosure sales were noticed and recorded. The first case was filed in October 2012 and dismissed in January 2015. The second was filed in May 2019 and dismissed that same month for failure to file information. The third case was filed in mid-June 2019 and dismissed at the end of June for failure to file information.

Approximately one week after this case was filed, a quitclaim deed was recorded in Santa Cruz County in which the original borrower purportedly granted an interest in the subject property to debtor. Doc. #52. However, debtor does not list the property in her schedules and is apparently not her principal residence.

The borrower has missed approximately 16 payments to lender, and the total amount due under the loan is approximately $129,016.52. The court finds that relief is warranted under § 362(d)(2) because the subject property is not necessary for an effective reorganization because debtor is in chapter 7.

The Court having rendered findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as incorporated by Federal Rule of Bankruptcy Procedure 7052:

IT IS ORDERED that the automatic stay of 11 U.S.C. § 362(a) is vacated concerning real property located at 1341 East Live Oak Drive in Nogales, AZ 85621; and

IT IS FURTHER ORDERED, pursuant to 11 U.S.C. § 362(d)(4), that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either transfer of all or part ownership of, or other interest in, the aforesaid real property without the consent of the secured creditor or court approval; or multiple bankruptcy filing affecting such real property. The order shall be binding in any other case under Title 11 of the United States Code purporting to affect the real property described in the motion not later than two years after the date of entry of the order.

The request for attorney's fees and costs is denied because movant has not shown that they are over-secured under 11 U.S.C. § 506(b). Even if movant were to show that they are over-secured, a request for fees and costs must be separately filed, served, and noticed for a hearing.

The request for relief from the co-debtor stay is denied because § 1301 is not applicable in chapter 7 and unnecessary.

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

7. 19-13048-B-7 **IN RE: CRAIG BREWER**
JES-2

MOTION TO EMPLOY BAIRD AUCTIONS & APPRAISALS AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES
10-1-2019 [31]

JAMES SALVEN/MV
PETER BUNTING
RUSSELL REYNOLDS/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the

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

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

Trustee is authorized to employ Baird Auctions & Appraisals ("Auctioneer") as auctioneer to sell property of the estate consisting of two firearms – a Remington pump 30 caliber, serial no. 37575 and a Western field 22 semi auto, serial no. SB836R. ("Firearms") - at a public auction set for December 3, 2019 at Baird Auctions & Appraisals located at 1328 N. Sierra Vista, Suite B in Fresno, California. Doc. #31.

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

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

Trustee is authorized to employ and pay Auctioneer for his services as outlined above, and the proposed sale at auction of the Firearms is approved.

8. 19-13954-B-7 **IN RE: MICHAEL VASQUEZ AND ALLEXUS GARCIA**
APN-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-11-2019 [14]

NISSAN MOTOR ACCEPTANCE CORPORATION/MV
ROSALINA NUNEZ
AUSTIN NAGEL/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

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

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2018 Nissan Sentra. Doc. #18. The collateral has a value of $14,350.00 and debtor owes $25,165.52. *Id.*

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

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

9. 18-13768-B-7 **IN RE: LISA RIGGINS**
JES-1

MOTION TO COMPEL
9-30-2019 [19]

JAMES SALVEN/MV
MARK ZIMMERMAN

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor may have had a right to 2018 Federal and State tax refunds of at least $2,400.00. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates

> that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor possessed, or had the right to possess or right to custody or control over the tax refunds of at lest $2,400.00 after the petition for relief was filed. See doc. #21. Debtor has not responded to trustee's demands for turnover of the returns and any refunds. Id. Debtor is ordered to turn over the 2018 federal and state tax refunds, if any, or the information so that trustee can prepare the returns if the returns have not been filed, within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

10. 19-13668-B-7 **IN RE: REYNALDO PEREZ**
JES-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
10-9-2019 [16]

JAMES SALVEN/MV

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

DISPOSITION: Sustained.

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

This objection was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This objection is SUSTAINED.

Federal Rule of Bankruptcy Procedure 4003(b) allows a party in interest to file an objection to a claim of exemption within 30 days

after the § 341 meeting of creditors is held or within 30 days after any amendment to Schedule C is filed, whichever is later.

In this case, the § 341 meeting was concluded on October 3, 2019 and this objection was filed and served on October 9, 2019, which is within the 30 day timeframe.

The Eastern District of California Bankruptcy Court in In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015) held that "the debtor, as the exemption claimant, bears the burden of proof which requires her to establish by a preponderance of the evidence that [the property] claimed as exempt in Schedule C is exempt under [relevant California law] and the extent to which that exemption applies."

Trustee objects to debtor's claimed exemptions of $3,600.00 and $4,000.00 under California Code of Civil Procedure § 704.070 because that section deals with paid earnings, while debtor is attempting to exempt tax refunds. Doc. #16. Tax refunds are not subject to exemption under any section of California Code of Civil Procedure § 704.

The court finds that the trustee is correct, and in the absence of any objection or opposing evidence, SUSTAINS the trustee's objection.

11. 18-14676-B-7 **IN RE: EDWARDO NAVARRO**
JES-2

MOTION TO COMPEL
10-9-2019 [38]

JAMES SALVEN/MV
MARIO LANGONE

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages).

Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor had a right to 2018 Federal and State tax refunds of at least $6,617.00. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor had the right of possession, or the right to custody or control over the tax refunds, if any after the petition for relief was filed. See doc. #40. Debtor is ordered to turn over the 2018 federal and state tax refunds of at least $6,617.00 or the information so that trustee can prepare the returns, within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

12. 18-13377-B-7 **IN RE: YOLANDA RAMIREZ**
JES-1

MOTION TO COMPEL
10-2-2019 [26]

JAMES SALVEN/MV
DAVID JENKINS

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor had a right to 2018 Federal and State tax refunds of at least $1,250.00. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates that [he] is not in possession of the property of

> the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor possessed, or had custody or control over the tax refunds of at least $1,250.00 which trustee believes to have equity over and above any available exemption of the debtor after the petition for relief was filed. See doc. #28. Debtor is ordered to turn over the 2018 federal and state tax refunds, estimated to be at least $1,250.00 within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

13. 18-13691-B-7 **IN RE: NELS BLOOM**
JES-2

MOTION TO COMPEL
10-2-2019 [44]

JAMES SALVEN/MV
TIMOTHY SPRINGER

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 11 U.S.C. § 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." In the Ninth Circuit, "[T]he right to receive a tax refund constitutes and interest in property." Nichols v. Birdsell, 491 F.3d 987, 990 (9th Cir. 2007).

On the bankruptcy petition date, debtor had a right to 2018 Federal and State tax refunds. 11 U.S.C. § 542(a) requires debtor to turn over property of the estate that was in their possession, custody or control during the case or its value.

In the case of Newman v. Schwartzer (In re Newman), 487 B.R. 193 (9th Cir. BAP 2013), the trustee filed a motion for an order compelling debtors to turn over tax refunds. The Newman Court considered whether the trustee could compel turnover of tax refunds from the debtor when the debtor had already spent these refunds. The court held,

> §542(a) does not require the debtor to have current possession of the property which is subject to turnover. "If a debtor demonstrates that [he] is not in possession of the property of the estate or its value at the time of the turnover action, the trustee is entitled to recovery of a money judgment for the value of the property of the estate." *Id.* at 202 citing Rynda v. Thompson (In re Rynda), 2012 Bankr. LEXIS 688 (9th Cir. BAP 2012)[an unpublished opinion].

In this case, Debtor possessed, or had custody or control over the tax refunds after the petition for relief was filed. See doc. #48. Trustee estimates the value to the estate of the refunds at $1,250.00. Id. Debtor is ordered to turn over the 2018 federal and state tax refunds, or the information so that trustee can prepare the returns, within five days of service of the order granting this motion. Failure to do so may result in sanctions pursuant to 11 U.S.C. § 105(a).

11:00 AM

1. 19-13453-B-7 **IN RE: KIMBERLY HALE**

PRO SE REAFFIRMATION AGREEMENT WITH ALLY BANK
10-24-2019 [16]

NO RULING.

2. 19-13464-B-7 **IN RE: JACQUELIN/JOSE GONZALEZ**

PRO SE REAFFIRMATION AGREEMENT WITH TRAVIS CREDIT UNION
10-24-2019 [26]

DREW HENWOOD

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

DISPOSITION: Dropped.

ORDER: The court will issue an order.

Debtors' counsel will inform debtors that no appearance is necessary.

The court is not approving or denying approval of the reaffirmation agreement. Debtors were represented by counsel when they entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), if the debtor is represented by counsel, the agreement must be accompanied by an affidavit of the debtor's attorney attesting to the referenced items before the agreement will have legal effect. *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). The reaffirmation agreement, in the absence of a declaration by debtor(s)' counsel, does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable.

The debtors shall have 14 days to refile the reaffirmation agreement properly signed and endorsed by the attorney.

3. 19-13668-B-7 **IN RE: REYNALDO PEREZ**

PRO SE REAFFIRMATION AGREEMENT WITH LAKEVIEW LOAN SERVICING, LLC
10-23-2019 [22]

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

DISPOSITION: Dropped.

NO ORDER REQUIRED.

This matter was automatically set for a hearing because the reaffirmation agreement is not signed by an attorney. However, this reaffirmation agreement appears to relate to a consumer debt secured by real property. Pursuant to 11 U.S.C. §524(c)(6)(B), the court is not required to hold a hearing and approve this agreement.

1:30 PM

1. 18-14315-B-7 **IN RE: BRANDON/SANDRA CAUDEL**
19-1011

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT
10-29-2019 [45]

HARDCASTLE SPECIALTIES, INC. V. CAUDEL
VIVIANO AGUILAR/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

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

LBR 9014-1(f)(2)(A) states that motions filed and serve on 14 day's notice "shall not be used for a motion filed in connection with an adversary proceeding."

This motion was filed and served on October 29, 2019. Doc. #49. The motion was set for hearing on November 13, 2019. Doc. #46. November 13, 2019 is less than 28 days after October 29, 2019, and therefore set on less than 28 day's notice under LBR 9014-1(f)(2).

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

This motion does not have a DCN.

2. 18-13218-B-7 **IN RE: VAN LAI**
19-1098

STATUS CONFERENCE RE: COMPLAINT
8-29-2019 [1]

SALVEN V. FIRST AMERICAN TRUSTEE SERVICING SOLUTIONS,
ROBERT HAWKINS/ATTY. FOR PL.
DISMISSED 9/16/19, CLOSED 10/4/19

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order dismissing the case has already been entered. Doc. #7.

3. 18-13224-B-7 **IN RE: ANTHONY CORRAL**
19-1046

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
7-23-2019 [19]

SALVEN V. THE UNITED STATES OF AMERICA DEPARTMENT OF THE TRE
PETER FEAR/ATTY. FOR PL.

NO RULING.

4. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
18-1088

RESCHEDULED STATUS CONFERENCE RE: COMPLAINT
12-31-2018 [1]

SUGARMAN V. SOLESECO, LLC
JOHN MACCONAGHY/ATTY. FOR PL.

NO RULING.

5. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
MB-12

RESCHEDULED PRE-TRIAL CONFERENCE RE: MOTION TO REJECT LEASE OR EXECUTORY CONTRACT
11-11-2018 [1103]

RANDY SUGARMAN/MV
MICHAEL COLLINS
JOHN MACCONAGHY/ATTY. FOR MV.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on November 12, 2019.

6. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1033 MNG-2

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
4-26-2019 [21]

SUGARMAN V. IRZ CONSULTING, LLC
SANFORD LANDRESS/ATTY. FOR MV.

TENTATIVE RULING: This hearing will proceed as scheduled

DISPOSITION: Denied. IRZ to file an answer 14 calendar days after entry of this order.

ORDER: Court will issue the order unless otherwise determined at the hearing.

Randy Sugarman, Chapter 11 Trustee ("Trustee"), filed a complaint against IRZ Consulting, LLC aka IRZ Construction Division, LLC ("IRZ") objecting to IRZ's proof of claim and alleging breach of contract and negligence. These stem from IRZ's alleged failure to competently perform construction management services for the planning and construction of a dairy waste collection, treatment, conversion and disposal system for one of the debtor's large dairies in Oregon. The complaint includes four claims for relief: objection to claim, breach of contract, negligence—claims 1-3—to avoid an allegedly fraudulent transfer—claim 4. The fourth claim is not challenged here.

IRZ's proof of claim for about $350,000.00 is for unpaid amounts due under two "contracts" with the debtor. Trustee alleges no sums are due because of IRZ's material breaches of the contract. Those alleged breaches are the factual basis for the breach of contract and negligence claims which are at issue on this motion. Trustee claims damages of $850,000.00 which is what the debtor allegedly paid IRZ. Consequential damages exceeding $18,550,000.00 are alleged against IRZ. Trustee claims the development of the waste disposal system was severely flawed resulting in the closure of the dairy, sale of the herd and the affected dairy property at below market, remediation costs, profit loss, administrative fines and attorney's fees.

IRZ asks the court to dismiss the first three claims under Federal Rule of Civil Procedure[1] 12(b)(6) (applied in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b)). Other actions are pending raising the same issues as the claim objection, contends IRZ. There are two other adversary proceedings — one removed from the Oregon Circuit Court — about the same dairy as this adversary proceeding. Second, Trustee is precluded from bringing this action, says IRZ, because no certificate of merit under Or. Rev. Stat. § 31.300 was filed with the complaint. Finally, IRZ argues Trustee

[1] Future references to the Federal Rules of Civil Procedure shall be denoted by "Civil Rule"; references to the Federal Rules of Bankruptcy Procedure shall be noted by "Rule."

did not sue the right defendant since IRZ was performing construction management duties only and other firms were involved in the design and implementation of the dairy waste treatment plan.

Civil Rule 12 (b)(6)

A motion to dismiss for failure to state a claim under Civil Rule 12 (b)(6) tests the legal sufficiency of a claim. Navarro v. Black, 250 F.3d 729, 732 (9th Cir. 2001). "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.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citation omitted). The motion may be based on either absence of a cognizable legal theory or the lack of sufficient facts "alleged under a cognizable legal theory." Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). Two of IRZ's arguments – wrong defendant and other actions pending – are not strictly dismissal motion contentions. The third – certificate of merit – may be. The court will briefly examine each.

Notably, IRZ's motion also includes a declaration of Wayne Downey, IRZ's Director of Construction. Doc. #24. Mr. Downey states many of the design and construction services which impacted the efficacy of the waste system were not performed by IRZ but others. Id. Specifically pipe plant, manure system, flush/irrigation system, separation screen, and building structure services were the responsibility of unnamed parties. Id. "In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007).

Other pending actions

IRZ's argument goes too far. The relief involved in the other actions relate to priority of the many liens asserted against the dairy. This adversary proceeding relates not only to claim allowance but affirmative claims the estate has against IRZ.

Also, Judge Clement has previously ordered this proceeding and the others dealing with this dairy consolidated for trial purposes. Doc. #94. So, the risk of inconsistent rulings is nonexistent. Consolidation is well within the court's discretion. Adams v. Cal. Dept. of Health Servs., 487 F.3d 684, 688 (9th Cir. 2007) (overruled in part on other grounds in Taylor v. Sturgell, 553 U.S. 880, 904 (2008)).

What is more, in the Ninth Circuit, "claim splitting" is determined by application of claim preclusion rules. Assuming the parties in all the actions are the same—they are not—the "same cause of action" requirement of claim preclusion analyzes four criteria:

- Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;

- Whether substantially the same evidence is presented in the two actions;
- Whether the two suits involve infringement of the same right;
- Whether the two suits arise out of the same transactional nucleus of facts.

Constantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982). There is no "prior judgment" here. Some of the same evidence may be presented in all actions but that evidence would not include the gravamen of Trustee's claims here. The same right is not involved since affirmative claims asserted in this case differ from priority and sales proceeds issues in the other actions. Part of the claims in the removed action do involve the same transaction at issue here but the breach of contract, negligence and fraudulent transfer claims do not.

Wrong Defendant

Civil Rule 21 (applicable in adversary proceedings by Rule 7021) states in part: "Misjoinder of parties is not a ground for dismissing an action." IRZ's argument on this issue suggests IRZ should bring a third-party complaint against these parties. It does not support an order dismissing the complaint against IRZ. There is no argument on this motion that the allegations are insufficient to state a claim against IRZ. Discovery may establish other parties should be added. But for now, there is no basis to grant the motion to dismiss on this ground.

Permissive joinder of defendants under Civil Rule 20 (applicable to adversary proceedings by Rule 7020) is a right belonging to plaintiffs and a defendant cannot use Rule 20 to force the plaintiff to join a person as an additional defendant. Hefley v. Textron, Inc., 713 F.2d 1487, 1499 (10th Cir. 1983). The motion (and declaration) suggests the identities of other parties. But the motion contains no argument or analysis that the joinder of these parties is mandatory. So, the question is whether Trustee should join them. That is up to the Trustee.

Certificate of Merit

Or. Rev. Stat. § 31.300 (2019) requires an attorney before filing a complaint alleging a claim against a "design professional" arising out of that professional's activities for which the professional is licensed, to certify the attorney has consulted a design professional with similar credentials who is willing to testify as to the liability of the design professional. If this requirement is not complied with, a court must dismiss the complaint upon motion of the "design professional." Or. Rev. Stat. § 31.300(4). IRZ argues Trustee did not comply so dismissal is mandatory. The court disagrees.

First, the Downey declaration, if properly considered on this motion, states IRZ was involved in only "project management services." Those services are not included in the definition of

"design professional" under Or. Rev. Stat. § 31.300(1). "Design professional" under that statute is limited to architect, landscape architect, professional engineer or professional land surveyor. There is no analysis by IRZ that "project management services" is contemplated under the statute.

Second, though less than unanimous in this circuit, when confronting application of a similar California statute, Cal. Civ. Proc. § 411.35, federal courts in diversity cases find the certificate of merit a procedural and not a substantive requirement of law. Apex Directional Drilling, LLC v. SHN Consulting Eng'rs & Geologists, Inc., 119 F. Supp. 3d 1117 (N.D. Cal. 2015); Bard Water Dist. v. James Davey & Assocs., 671 F.App'x 506 (9th Cir. 2016). *But cf.* Lewis v. Ctr. for Counseling & Health Res., C08-1086 MJP, 2009 U.S. Dist. LEXIS 67415 (W.D. Wash. July 28, 2009) [discussing Washington's certificate requirement in malpractice actions]. Notably, even the title of Oregon's certificate of merit statute is "Pleading Requirements for Actions Against Design Professionals." True enough, jurisdiction in this case is based on 28 U.S.C. § 1334 not diversity, 28 U.S.C. § 1332, but that suggests an even narrower application of a state pleading requirement. In the absence of contrary authority, the court is not persuaded that a certificate of merit is a pre-requisite to the filing of this adversary proceeding.

Trustee's argument that IRZ is judicially estopped from raising the issue is without merit. The judicial estoppel doctrine is informed by several factors:

1. Whether a party's later position is clearly inconsistent with its earlier position;
2. Whether a party has succeeded in persuading a court to accept that party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled;
3. Whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Ah Quin v. City of Kauai DOT, 733 F.3d 267, 270 (9th Cir. 2013). Federal courts apply federal principles of judicial estoppel, even when based on statements made in other tribunals. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 603 (9th Cir. 1996).

Trustee has presented nothing suggesting the second or third factors are present here. The motion is DENIED.

7. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1037

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
7-23-2018 [1]

IRZ CONSULTING LLC V. TEVELDE ET AL
SANFORD LANDRESS/ATTY. FOR PL.

NO RULING.

8. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1091

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-28-2019 [1]

SUGARMAN V. MARTIN LEASING RESOURCE, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR PL.

NO RULING.

9. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1091 MCG-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-4-2019 [13]

SUGARMAN V. MARTIN LEASING RESOURCE, LLC ET AL
JEFFREY FLASHMAN/ATTY. FOR MV.

NO RULING.

10. 18-11651-B-11 **IN RE: GREGORY TE VELDE**
19-1091 MCG-1

CONTINUED COUNTER MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT MARTIN LEASING RESOURCES, LLC
10-2-2019 [34]

SUGARMAN V. MARTIN LEASING RESOURCE, LLC ET AL
JOHN MACCONAGHY/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue the order.

Local Rule of Practice 7056-1(a) requires that a motion for summary judgment "shall be accompanied by a 'Statement of Undisputed Facts'

which shall enumerate discretely each of the specific material facts relied upon in support of the motion and cite the particular portions of any pleading, affidavit, deposition, interrogatory answer, admission or other document relied upon to establish that fact." Subdivision (b) has similar requirements for the opposition.

Plaintiff's counter-motion did not comply. Though "Undisputed Facts" were listed in the counter-motion with citations to documents it was not separate and the facts were not discretely numbered. This is an important requirement because parties supporting and opposing a summary judgment motion must specifically respond to those facts. That did not occur here even though defendant's "reply" and plaintiff's "reply" were opportunities to comply.

The "Capital Equipment Lease" which is crucial to the motion to dismiss and the purported summary judgment motion was attached to the complaint as an exhibit. So, the lease, documents incorporated by reference and matters properly judicially noticed can be treated as part of the complaint for purposes of ruling on the motion to dismiss. Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.), 768 F.3d 1046, 1051 (9th Cir. 2014); Deerpoint Grp., Inc. v Agrigenix, LLC, 393 F.Supp.3d 968, 974 (E.D. Cal. 2019). It does not convert the motion to one for summary judgment.

Defendant did file a declaration with the dismissal motion which was clearly "outside of the pleadings." The court need not consider that as the court has discretion to exclude it on the 12(b)(6) motion. Fed. R. Civ. Proc 12(d).

Counter-motion is DENIED without prejudice.

11. 18-14160-B-7 **IN RE: BRYAN ROCHE**
19-1013

PRE-TRIAL CONFERENCE RE: COMPLAINT
1-17-2019 [1]

VANDENBERGHE V. ROCHE
DAREN SCHLECTER/ATTY. FOR PL.

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

DISPOSITION: Continued to December 18, 2019 at 1:30 p.m.

ORDER: The court will issue an order.

On October 3, 2019, the court approved a stipulation to modify dates in scheduling order. Doc. #43. This pre-trial conference will be continued to December 18, 2019 pursuant to that stipulation.

12. 19-11293-B-7 **IN RE: JEFFREY/JAIME HULL**
19-1094

CONTINUED STATUS CONFERENCE RE: COMPLAINT
8-7-2019 [1]

HULL V. U.S. DEPARTMENT OF EDUCATION ET AL
NANCY KLEPAC/ATTY. FOR PL.

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

DISPOSITION: Continued to January 29, 2020 at 11:00 a.m.

ORDER: The court will issue an order.

At the previous status conference, plaintiff was ordered to serve the summons and complaint on defendant. On November 4, 2019, a reissued summons was requested by plaintiff's counsel. An amended complaint was filed on November 5, 2019. Doc. #13. The amended complaint and reissued summons appear to have been properly served on November 7, 2019. Therefore this status conference is continued to January 29, 2020 at 11:00 a.m. to give defendant an opportunity to answer the complaint.