UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

December 4, 2018 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. **Matters resolved without oral argument:**

   Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

   If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. **The court will not continue any short cause evidentiary hearings scheduled below.**

3. **If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**

4. **If no disposition is set forth below, the matter will be heard as scheduled.**

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1. 18-90406-D-13 RICHARD/SABRINA SIDA MOTION TO CONFIRM PLAN
JBA-1 10-31-18 [34]

Final ruling:

This is the debtors' motion to confirm a chapter 13 plan. The moving papers make no mention of any amendments to the debtors' original plan; thus, the court assumes the plan the debtors are seeking to confirm is their original plan, filed with the petition on May 31, 2018. The trustee's objection to confirmation of that plan was sustained by order filed August 15, 2018.

The moving parties served the present motion, notice of hearing, supporting declaration, and exhibits (not including the plan), but failed to serve the plan itself. The applicable local rule includes the procedures to confirm an original plan (LBR 3015-1(c)) and a plan modified before confirmation (LBR 3015-1(d)(1)). The rule does not specifically address the situation here, where the debtors seek confirmation of the original plan after the court has sustained an objection to that plan. However, as between the two procedures addressed in the local rule, the procedure to confirm a plan modified before confirmation is more closely geared to the situation presented here than the procedure to confirm an original plan. In the

procedure to confirm an original plan, it is the trustee who serves the plan, and objections to the plan must be filed and set for hearing within seven days after the first date set for the meeting of creditors. In the procedure to confirm a plan modified before confirmation, it is the debtors who file a motion to confirm the plan, and serve it, together with the plan.

In this case, the original plan was served by the Bankruptcy Noticing Center four months before this motion was filed, and the meeting of creditors was held and concluded three and a half months before. Thus, the procedure for interested parties to file objections to the plan within seven days after the first date set for the meeting of creditors would not work. In addition, after the time the BNC served the original plan but by the time this motion was filed and served, several creditors had filed proofs of claim with addresses different from those listed on the debtors' schedules, which meant they were never served with the plan at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g). The same is true of the creditor requesting special notice at DN 24 – it was served with the motion, notice of hearing, and so on, but was never served with the plan itself – not by the BNC and not by the debtors. Clearly, the procedure the moving parties should have followed was the one set forth in LBR 3015-1(d)(1). That is, they should have served the plan with the motion, notice of hearing, and other papers.

Because the debtors failed to serve the plan, the motion will be denied and the court need not reach the issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

2.	18-90506-D-13 BSH-2	ROBIN HAMADE-GAMMON	MOTION TO CONFIRM PLAN 10-22-18 [44]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The court is not prepared to consider the motion or the trustee's opposition because the proof of service does not sufficiently evidence the manner of service in that it does not state that the documents were placed in envelopes or that the envelopes were mailed with postage fully prepaid. The debtor's counsel was made aware of this defect in his form proof of service as early as August 28, 2018 in another case, yet the defect is repeated here.

The hearing will be continued by minute order to December 18, 2018 for the moving party to file a corrected proof of service. No appearance is necessary on December 4, 2018.

3.	18-90507-D-13 RS-1	KELVIN LOVE	MOTION TO VALUE COLLATERAL OF TRAVIS CU 11-6-18 [34]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant the motion and, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

4.   17-90012-D-13   HAZEN/GRACE BRUMMEL   MOTION TO MODIFY PLAN
      MSN-1   10-22-18 [23]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

5.   18-90714-D-13   JARED MEEK AND LAUREN LONGWELL   OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER
      RDG-1   11-8-18 [14]

6.   18-90427-D-13   STEVEN/ELVIRA CISNEROS   MOTION TO CONFIRM PLAN
      BSH-1   10-22-18 [36]

Final ruling:

This is the debtors' motion to confirm a proposed chapter 13 plan. The court is not prepared to consider the motion because the proof of service does not sufficiently evidence the manner of service in that it does not state that the documents were placed in envelopes or that the envelopes were mailed with postage fully prepaid. The debtors' counsel was made aware of this defect in his form proof of service as early as August 28, 2018 in another case, yet the defect is repeated here.

The hearing will be continued by minute order to December 18, 2018 for the moving parties to file a corrected proof of service. No appearance is necessary on December 4, 2018.

7.   18-90427-D-13   STEVEN/ELVIRA CISNEROS   MOTION TO VALUE COLLATERAL OF CENTRAL STATE CREDIT UNION
      BSH-2   10-22-18 [31]

Final ruling:

This is the debtors' motion to value collateral of Central State Credit Union (the "Credit Union"). The motion will be denied for the following reasons: (1) the proof of service is not signed; (2) the proof of service does not sufficiently evidence the manner of service in that it does not state that the documents were placed in envelopes or that the envelopes were mailed with postage fully prepaid; and (3) the moving parties failed to serve the Credit Union in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The

moving parties served the Credit Union at a street address with no attention line, whereas service on a corporation, partnership, or other unincorporated association must be to the attention of an officer, managing or general agent, or agent for service of process.

As a result of these service defects, the motion will be denied by minute order. No appearance is necessary.

8. 18-90333-D-13 DAVID LAKIN MOTION TO CONFIRM PLAN
YG-3 10-11-18 [56]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons: (1) the proof of service evidences service of the motion but not the notice of hearing, supporting declaration, or the plan; (2) the proof of service does not adequately describe the manner of service; (3) the proof of service is not signed under oath, as required by 28 U.S.C. § 1746; (4) the moving party failed to serve any of the creditors filing claims in this case at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g); and (5) the moving party failed to serve the creditors requesting special notice in this case at their designated addresses, as required by the same rule.

As a result of these service and notice defects, the motion will be denied and the court need not reach the issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

9. 18-90141-D-13 LUIS/AMPARO MONDRAGON MOTION TO MODIFY PLAN
MSN-1 10-22-18 [26]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

10. 18-90344-D-13 SERGIO HERNANDEZ MOTION TO CONFIRM PLAN
BSH-2 10-22-18 [34]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

11. 14-90967-D-13 DERYL/VIVIAN RATLIFF SDM-2

OBJECTION TO CLAIM OF PORTFOLIO RECOVERY ASSOCIATES, LLC, CLAIM NUMBER 5
9-25-18 [56]

Tentative ruling:

This is the debtors' objection to the claim of Springleaf Financial Services, Inc., Claim No. 5 on the court's claims register, now held by PRA Receivables Management, LLC, as agent of Portfolio Recovery Associates, LLC by way of a Transfer of Claim Other Than for Security, filed April 18, 2017. No opposition has been filed.

The debtors object that nothing in the proof of claim or the attachments thereto substantiates the claim's asserted priority status. The debtors request the court (1) sustain the objection; (2) order that the claim be allowed as unsecured; and (3) request the current claimholder revise the amount of the claim. The court is prepared to do the first two of these things. The proof of claim does indeed not substantiate priority status. In fact, it appears the assertion of priority status on page 1 of the claim was a mistake: none of the boxes specifying a priority code section was checked and a duplicate copy of the proof of claim, attached as page 2 and signed by a different bankruptcy specialist, does not assert priority status at all.

As for the debtors' third request, however – that the amount of the claim be changed from $1,847.67 to $1,591 – is not supported by evidence sufficient to overcome the prima facie validity of the amount of the claim afforded it by Fed. R. Bankr. P. 3001(f). The debtors listed the amount of the claim on their Schedule F as $1,591 and have filed a copy of the page of the trustee's Notice of Filed Claims showing two Springleaf Financial Services Inc. claims – (1) the one listed as a filed claim for $1,847.67, category: priority not provided in plan, and (2) the one listed in the debtors' schedules at $1,591, with the "Debt Per Filed Claim" and "Approved Claim Amt" both left blank; i.e., at zero. The Notice of Filed Claims lists the first of these as "Ignore" and the second as to be paid 9% as a general unsecured claim. That is, the trustee intends to ignore the actual filed claim because it was asserted, at least on its first page, as a priority claim, and to pay the second claim – the one listed only by the debtors and not followed up by a proof of claim filed by the creditor – as a general unsecured claim.

The reverse should be the case; that is, the trustee should pay a dividend based on the amount of the proof of claim filed by the creditor, $1,847.67, not the amount listed by the debtors, $1,591. See Chapter 13 Plan – First Modified, filed Oct. 21, 2014, sec. 2.04.[1] The debtors have made no argument, let alone submitted any evidence, to support the conclusion that the actual amount due at the petition date was $1,591, not $1,847.67. Thus, they have failed to overcome the prima facie validity of the amount of the claim, although they have overcome the validity of the asserted status of the claim as priority.

For the reasons stated, the objection will be sustained in part and overruled in part. The court will issue an order from chambers. The court will hear the matter.

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1 "The proof of claim, not this plan or the schedules, shall determine the amount and classification of a claim unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of a claim."

12. 18-90083-D-13 MERCEDES HOLLOWAY MOTION TO CONFIRM PLAN
DCJ-5 10-22-18 [98]

13. 14-91185-D-13 DAVID/ESPERANZA HARRIS MOTION TO MODIFY PLAN
DCJ-3 10-22-18 [61]

14. 17-90087-D-13 KEITH YEAMAN MOTION TO MODIFY PLAN
BSH-3 10-23-18 [53]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

15. 18-90693-D-13 MARC/JENNIFER DAVIDSON OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
11-8-18 [19]

Final ruling:

This case was dismissed on November 20, 2018. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

16. 18-90805-D-13 JAMES DUNN, AND NORMA DUNN — MOTION TO EXTEND AUTOMATIC STAY
DEF-2 — 11-13-18 [18]

Tentative ruling:

This is the debtors' motion to extend the automatic stay. The case was commenced on November 1, 2018; the 30th day after that date will be December 1, 2018. The hearing on the motion is set for December 4, 2018. Thus, the motion will be denied because the hearing will not be completed within the 30 days following the commencement of the case, as required by § 362(c)(3)(B) of the Bankruptcy Code. The court will hear the matter.

17. 16-90219-D-13 SHARON HAMILTON — CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
18-9013 GMW-1 — 9-28-18 [8]
HAMILTON V. B & B 2ND MORTGAGE, LLC ET AL

Tentative ruling:

This is the motion of defendants B&B 2nd Mortgage, LLC ("B&B 2nd"); High Pointe, LLC ("High Pointe"); and B&B Ventures, LLC (the "defendants") to dismiss this adversary proceeding. The plaintiff, Sharon Hamilton, who is also the debtor in the underlying chapter 13 case (the "debtor"), has filed opposition and the defendants have filed a reply. For the reasons discussed below, the motion will be granted.

The motion is brought pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. In ruling on a Rule 12(b)(6) motion, a court "accept[s] as true all facts alleged in the complaint, and draw[s] all reasonable inferences in favor of the plaintiff." <u>al-Kidd v. Ashcroft</u>, 580 F.3d 949, 956 (9th Cir. 2009), citing Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008). The court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" <u>al-Kidd</u>, 580 F.3d at 949, citing <u>Ashcroft v. Iqbal</u>, 129 S. Ct. 1937, 1949 (2009), in turn quoting <u>Bell Atl. Corp. v. Twombly</u>, 550 U.S. 544, 570 (2007).

In general, the court may not consider materials outside the pleadings without treating the motion as a motion for summary judgment and giving all parties a reasonable opportunity to present relevant material. Fed. R. Civ. P. 12(d); <u>Lee v. City of Los Angeles</u>, 250 F.3d 668, 688 (9th Cir. 2001); <u>Rose v. Beverly Health & Rehab. Servs.</u>, 356 B.R. 18, 23 (E.D. Cal. 2006). However, there is an exception – the court may consider matters of public record of which it may take judicial notice. <u>Lee</u>, 250 F.3d at 688-89; <u>Rose</u>, 356 B.R. at 23. Here, the court takes judicial notice of the filing of and disclosures and nondisclosures in documents in its own records and the filing of documents in several courts in Colorado.[1]

By her complaint, the debtor, Sharon Hamilton, alleges she and Terry Hamilton have been married since 1965; that the property that is the subject of the action is community property; that in 1999, Terry contracted to purchase 461.16 acres of vacant land in Colorado (the "Property") for $1,120,800; that defendant B&B 2nd agreed to loan Terry the money to purchase the Property; that Terry acquired title

in 2000 and immediately conveyed title to B&B 2nd pursuant to a loan agreement; and that, under Colorado law, the deed from Terry to B&B 2nd in fact created a lien or equitable mortgage, not an ownership interest, in the Property.[2]

Sharon claims B&B 2nd took positions that made it impossible for Terry to repay the loan when it came due in 2001 and asserted ownership of the Property in violation of Colorado law; that B&B 2nd has been repaid in full from oil and gas royalties from PDC Energy, Inc. under a 1983 lease Terry acquired when he bought the Property and that B&B 2nd had no right to payment from those royalties; and that Sharon and Terry "have been the true owners of the Property since April 14, 2000, subject to the obligation to repay their loan to defendant [B&B 2nd]" (Plaintiff's Complaint, filed Aug. 15, 2018, at 5:8-9), which has been repaid in full. Thus, Sharon seeks (1) turnover of the Property; and (2) a declaration that she and Terry are, and since 2000 have been, the true owners and that the debt to B&B 2nd has been fully repaid.

The defendants make several arguments. On two of them, the defendants are decidedly correct and the debtor is incorrect. Each of the two is independently dispositive of the motion. The court will address these two – judicial estoppel and claim preclusion – in that order. The defendants argue that judicial estoppel bars Terry's claims against them, and therefore, Sharon's claims as well.[3] Among the factors the court may consider in evaluating a judicial estoppel argument are these:

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the 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 the second court was misled." . . . A third consideration is 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.

Hamilton v, State Farm Fire & Cas. Co., 270 F.3d 778, 782-83 (2001), quoting New Hampshire v. Maine, 532 U.S. 742, 750-51 (9th Cir. 2001) (citations omitted).

The defendants cite an involuntary chapter 7 petition filed against Terry in this court in 2003, which commenced Case No. 03-93581. The case was later converted to chapter 11 on Terry's motion and later reconverted to chapter 7 on the U.S. Trustee's motion. Because Sharon's claims in this case appear to derive solely from her community property interest in the Property and in Terry's claims against the defendants, because Terry failed to disclose the Property or the claims on the asset schedules he filed in that case, and because he was granted a discharge in that case, the defendants contend judicial estoppel bars Terry's claims, and therefore, derivatively, Sharon's claims.

Sharon contends judicial estoppel does not apply because Terry listed B&B 2nd on his Schedule F as a disputed creditor and disclosed the pending litigation between B&B 2nd and himself on his statement of financial affairs. Sharon argues, alternatively, that if the Property and the claims were not "scheduled" by Terry, and thus, if judicial estoppel does apply, the Property and the claims remain property of Terry's bankruptcy case, under § 554(d), and the defendants violated the automatic stay when they proceeded with the litigation in Colorado. The court need not decide either issue because Sharon herself failed to disclose any interest in the Property or any claims against the defendants in the original schedules she

filed in the chapter 13 case in which this adversary proceeding is pending.

In those schedules, where required to state whether she owned or had any legal or equitable interest in any residence, building, land, or similar property, Sharon answered "No." Under claims against third parties, she disclosed claims against Henry Willms and others for wrongful foreclosure, but no claims against the defendants. Based on those schedules, filed March 30, 2016, Sharon obtained confirmation of a chapter 13 plan by order dated June 16, 2017. That order provided that any proceeds Sharon recovered on her claims against Henry Willms, et al., net of the trustee's compensation, would be paid to the IRS on account of its Class 2 claim. Because Sharon had not disclosed any claims against the defendants or any interest in the Property, the plan and the order confirming it made no provision for any recovery on those claims or from the Property. (Sharon did not mention any of this in her opposition.)

The three tests enumerated in Hamilton are satisfied here. First, when Sharon filed schedules in which she failed to disclose any interest in the Property or any claims against the defendants, she took a position clearly inconsistent with the position she asserts in this adversary proceeding. Second, this court accepted her position – that she had no such interests or claims – when it confirmed her chapter 13 plan, so that judicial acceptance of her inconsistent position in this adversary proceeding would create the perception that the court either was misled in confirming her plan or would be misled in awarding her relief in the adversary proceeding. And third, allowing her to assert those interests and claims now would give Sharon an unfair advantage – the potential recovery on those interests and claims, which she would very likely be able to keep for herself (see below), while imposing an unfair detriment on creditors – the discharge of Sharon's debts to them with her creditors receiving nothing on account of those interests and claims. (Sharon's confirmed plan provides for a 0% dividend on claims the debtor estimated at $274,710.)

The fact that the debtor has not yet completed her chapter 13 plan and received a discharge does not change the court's conclusion as to the second factor – judicial acceptance of the debtor's earlier inconsistent position. In Hamilton, the Ninth Circuit held that the debtor's failure to disclose certain claims in his schedules judicially estopped him from later asserting those claims where the court had granted him a bankruptcy discharge in reliance on schedules showing such claims did not exist, even though his discharge was later vacated. Hamilton, 270 F.3d at 784. Further, the court said, "Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may 'accept' the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways" (id.), including by affirming a debtor's plan of reorganization. Id., citing Donaldson v. Bernstein, 104 F.3d 547, 555-56 (3rd Cir. 1997).

Confirmation of a debtor's chapter 13 plan constitutes "acceptance" by the court of the debtor's nondisclosures on his or her schedules for purposes of judicial estoppel. Kopec v. Wells Fargo Bank NA, 2018 U.S. Dist. LEXIS 150081, *7-8, 2018 WL 4207993 (D. Ariz. Sept. 4, 2018); Melville v. Bank of N.Y. Mellon Corp., 2017 U.S. Dist. LEXIS 154950, *17, 2017 WL 4185469 (E.D. Wash. 2017); Hull v. Wells Fargo Bank, N.A., 2016 U.S. Dist. LEXIS 41929, *11 (D. Or. 2016); see also Nuno v. Wells Fargo Bank, N.A., 2017 U.S. Dist. LEXIS 149549, *9-12 (C.D. Cal. 2017) (applying judicial estoppel where, although court had not confirmed a plan or entered a discharge, court "accepted" the debtor's nondisclosures when it granted her motion to extend the automatic stay).

The debtor apparently planned for a possible judicial estoppel defense to her claims and tried to circumvent it. Six months after the court confirmed her plan, the debtor filed an amended Schedule A/B in which she disclosed a community property interest in the Property and a community property interest in the claims against the defendants. Six months after filing the amended Schedule A/B (and over a year after the court confirmed her plan), the debtor and the trustee signed a stipulation to amend the order confirming the plan to provide that the debtor would turn over to the trustee all funds received on account of her community property interest in the Property, such funds to be applied to general unsecured claims. The same day, June 28, 2018, the court signed an amended order confirming the plan to incorporate the terms of the stipulation. Six weeks after that, the debtor commenced this adversary proceeding.

There are at least two problems with this strategy. First, the stipulation was filed and the amended order was signed the same day, with no notice to creditors. Second, they were filed and signed six months after the debtor finally disclosed the claims and in the 27th month of the debtor's 36-month plan term, leaving just nine months for the debtor to liquidate her alleged interest in the Property for the benefit of creditors before she will become entitled to her chapter 13 discharge. (The stipulation and amended order do not extend the plan term and do not otherwise require the case to remain open and creditors to be paid on a recovery the debtor might receive months, perhaps even years, after the end of the plan term.) If the debtor does not recover in this adversary proceeding by the 36th month of the plan term – March 2019, and if judicial estoppel is not applied, the debtor will have succeeded in retaining for herself the proceeds of any recovery while paying her creditors nothing. In this regard, it is telling that the debtor and the defendants have filed a Joint Status Report and Discovery Plan that, while recognizing the pendency of this motion, provides for the close of non-expert discovery on February 28, 2019, the close of expert discovery on April 30, 2019, and a dispositive motions bar date of June 28, 2019.

For the reasons stated, the court concludes the debtor's claims in this adversary proceeding are barred by judicial estoppel. Amendment would be futile; thus, the complaint will be dismissed without leave to amend. To the extent the debtor intended by her amended Schedule A/B and stipulation to amend the order confirming her plan to evade the effect of judicial estoppel, the court rejects this as an improper end-run around Hamilton v. State Farm. To permit it would be to nullify the doctrine.

The defendants also contend the debtor's claims are barred by claim and issue preclusion. There are two different prior orders that may have preclusive effect in this case – (1) an order of the Colorado Court of Appeals affirming a March 3, 2011 order of the district court of Weld County, Colorado, as to which the Colorado Supreme Court denied certiorari, and (2) an order of the U.S. District Court for the District of Colorado affirming the recommendation of a U.S. Magistrate Judge. As to the former, the court will need to apply Colorado preclusion law. "If a state court would give preclusive effect to a judgment rendered by courts of that state, then the Full Faith and Credit Statute (28 U.S.C. § 1738) imports the same consequence to an action in federal court based on the same award." Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 824 (9th Cir. BAP 2006). The court concludes that, under Colorado law, Sharon's claims are barred by claim preclusion. The court is inclined to also believe, but need not decide, that issue preclusion under federal law would apply to the U.S. District Court's order.

The Colorado Supreme Court has recently summarized Colorado preclusion law.

> In the broadest sense, claim preclusion prevents the perpetual re-litigation of the same claim or cause of action. The goal of the doctrine is to promote judicial economy by barring a claim litigated in a prior proceeding from being litigated again in a second proceeding. As a matter of policy, the doctrine serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." We have previously stated that claim preclusion bars a claim in a current proceeding if four elements are met: (1) "the judgment in the prior proceeding was final"; (2) "the prior and current proceeding involved identical subject matter"; (3) "the prior and current proceeding involved identical claims for relief"; and (4) "the parties to both proceedings were identical or in privity with one another." [. . .]
>
> Issue preclusion, on the other hand, prevents the re-litigation of discrete issues, rather than causes of action. Under this doctrine, once a particular issue is finally determined in one proceeding, parties to this proceeding are barred from re-litigating that particular issue again in a second proceeding, even when the actual claims for relief in the two proceedings are different. We have explained that the doctrine of issue preclusion is broader than the doctrine of claim preclusion because it applies to claims for relief different from those litigated in the first action, but narrower in that it applies only to issues actually litigated. We have previously determined that issue preclusion prohibits litigation of the issue in the second proceeding if four elements are met: (1) the prior proceeding was decided on a final judgment on the merits; (2) the issue in the current proceeding is identical to the issue actually adjudicated in a prior proceeding; (3) the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (4) the party against whom issue preclusion is asserted is a party or in privity with a party in the prior proceeding.

Foster v. Plock, 2017 CO 39, 394 P.3d 1119, 1122-23 (Colo. 2017) (citations omitted).

Issue preclusion does not apply to Sharon's claims in this adversary proceeding because the issues involved are not identical to issues actually adjudicated in the Colorado cases. The Weld County court, in its March 3, 2011 order, did not adjudicate the underlying issues - the issues involved in the adversary proceeding - only the question whether the parties, expressly not including Sharon, had entered into a valid and binding settlement. Over Terry's opposition, the court concluded the settlement was valid and binding and entered judgments in three different cases based on that conclusion. Because the judgments were based on a settlement and the court did not actually adjudicate the underlying issues, issue preclusion does not bar Sharon's claims, which involve the underlying issues. Newman v. Donnell (In re Donnell), 2011 Bankr. LEXIS 2266, *8 (Bankr. D. Colo. 2011), citing Ferris v. Bakery, Confectionery & Tobacco Union, Local 26, 867 P.2d 38, 42 (Colo. App. 1993).

Claim preclusion, on the other hand, does apply to the March 3, 2011 order and the order of the Colorado Court of Appeals affirming it.[4] First, there is no dispute that the orders are final. Second, the three Colorado lawsuits involved subject matter identical to the subject matter of the claims now advanced by Sharon. The crucial issue in the Colorado cases and the adversary proceeding was and is whether the transaction entered into in 2000 between Terry and B&B 2nd concerning

the Property was a loan or a purchase and sale. The Colorado courts have held that where two actions involve the same property and the same transactions concerning it, identity of subject matter is established. Foster, 394 P.3d at 1127 (citations omitted).

Third, the claims for relief advanced in the Colorado cases and the adversary proceeding are identical. Sharon's argument that there has never before been a claim by a bankruptcy debtor for turnover of the Property under § 542 of the Bankruptcy Code is irrelevant.

> This element requires us to determine whether the claim at issue in the second proceeding is the same claim that was (or could have been) brought in the first proceeding. We disregard the form of the action and instead look at the actual injury underlying the first proceeding. See Meridian Serv. Metro. Dist., ¶ 38, 361 P.3d at 398 (holding that "[t]he identity of claims element 'is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies.'"). Claims are tied by the same injury where they concern "all or any part of the transaction, or series of connected transactions, out of which the [original] action arose." In determining whether claims concern the same transaction, the court must consider whether the underlying facts "are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." Claims arise out of the same transaction when they "seek redress for essentially the same basic wrong, and rest on the same or a substantially similar factual basis."

Foster, 394 P.3d at 1127 (some citations omitted). Here, Terry's claims in the Colorado cases attempted to redress the same basic wrong and rested on the same facts as Sharon's claims in the adversary proceeding. In fact, Sharon's claims are based entirely on her alleged community property interest in the Property and in Terry's claims against the defendants. The court can hardly imagine a closer identity of claims.

Finally, the element of identity or privity of the parties is satisfied. First, Sharon herself was a defendant – from the very beginning, in 2001, in one of the three lawsuits that were the subject of the global settlement and the March 3, 2011 order, and participated in the action at least to the extent of filing a motion to dismiss. As such, she had a full and fair opportunity, in the ensuing ten years, to make and prosecute her own claims, but she chose not to. Second, as the holder of a community property interest in Terry's claims, she was in privity with Terry.

> The concept of "privity" embodies broad equitable principles, and it has been said that "[a] finding of privity is simply a conclusion that something in the relationship of party and non-party justifies holding the latter to the result reached in litigation in which only the former is named." Specifically, the question of when a second party is "in privity" with a prior party requires (1) a comparison of the legal interests of each party and (2) an understanding of whether the second party's legal interests were protected by the prior party. We have articulated this privity test in a broader sense and have concluded that "[p]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'"

Foster, 394 P.3d at 1127 (citations omitted).

Here, Sharon's and Terry's legal interests were "aligned" (see id.) because both had an interest in obtaining a judgment that concluded that the transaction was a loan and not a purchase and sale - the legal theory repeatedly advanced by Terry. And Sharon's interests were adequately protected by Terry in that her claims were "premised on" Terry's actions in connection with the transaction. See id. Thus, in advancing his claims, Terry's theories "inevitably paralleled" (see id.) the theories and arguments Sharon would have asserted if she had prosecuted her own claims in the Colorado cases. Both elements of the privity test are met, and all the elements of claim preclusion are satisfied with respect to the March 3, 2011 order of the Weld County court.

In that order, the Weld County court, among other things, ordered that (1) High Pointe and/or B&B 2nd pay $250,000 to Terry and/or one or the other of his entities; (2) title to the Property and its mineral rights would be quieted in High Pointe and/or B&B 2nd; and (3) the claims of all the parties would be dismissed with prejudice, except that claims, if any, concerning Sharon would remain. Judgments were entered on this order and they became final. Thus, it was finally determined that the Property belonged to High Pointe and/or B&B 2nd, not to Terry, and Terry's claims were dismissed with prejudice. As Sharon's claims were identical to Terry's, and as she was in privity with him, the judgment bars her later separate prosecution of the claims. Sharon relies on the language in the March 3, 2011 order that the claims of all parties except Sharon would be dismissed with prejudice and that Sharon's would remain. The court was required to include this exception in order to find the settlement agreement to be binding, because Sharon had not agreed to it. (The court concluded she was not a necessary party to the settlement.) However, the court had no occasion to consider, and did not determine, whether Sharon's claims were identical to Terry's. This court has occasion to do so now and concludes that they were.

The court concludes that Terry has litigated the issues involved in Sharon's present complaint in both the state and federal district courts in Colorado for years; the factual allegations and legal issues raised in Sharon's complaint have been litigated at great length and in great depth - all to Terry's loss; Sharon has been a party to at least some of that litigation, and to the extent she was not, she freely chose not to be involved; and her claims are based entirely on her alleged community property interest in Terry's claims. It could hardly be clearer that Sharon's present complaint is a second bite by the community of Sharon and Terry at the same apple, and more likely a third or fourth.[5] In fact, it appears, although the court need not decide, that Sharon's involvement in the Colorado litigation was deliberately limited so she could hold "her" claims in reserve in the event Terry lost. In short, claim preclusion plainly bars Sharon's present claims.

For the reasons stated, the motion will be granted and the debtor's complaint will be dismissed without leave to amend.

The court will hear the matter.

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1 The defendants have submitted copies of documents filed in the Colorado District Court for Weld County, the Colorado Court of Appeals, the Colorado Supreme Court, and the federal district court for the District of Colorado in litigation involving the property and claims that are the subject of this adversary proceeding. The debtor has objected to the introduction of these

exhibits on the grounds that (1) they are not certified copies; and (2) the court may not take judicial notice of the arguments, facts alleged, or legal authorities and conclusions in the documents.

As for the first point, the debtor has not shown there is a genuine question about the authenticity of the original documents or that circumstances make it unfair to admit the copies. <u>See</u> Fed. R. Evid. 1003, incorporated herein by Fed. R. Bankr. P. 9017. As for the second, the court finds it appropriate to take judicial notice of the documents for the purposes for which the court cites them herein. The debtor's objection is overruled.

2 For ease of reference, the court will refer to Mr. Hamilton as Terry and to the debtor as Sharon. No disrespect is intended,

3 Sharon's complaint does not allege she has any separate interest in the Property or any separate claims against the defendants. Rather, all of the factual allegations pertain to the sale and/or loan transactions between Terry and B&B 2nd, and Sharon's claims appear to be based solely on her alleged community property interest in the Property and in Terry's claims against the defendants.

4 Unlike issue preclusion, claim preclusion applies to claims for relief different from those actually litigated in the first action. <u>Foster</u>, 394 P.3d at 1123.

5 In addition to the three cases in the Colorado courts, Terry was a party to separate litigation in which the U.S. District Court for the District of Colorado adopted very detailed findings of fact and conclusions of law made by its magistrate judge. As in the Colorado courts, Terry did not prevail.

18. 18-90621-D-13 KENNETH MCCOY
RDG-1

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER
10-15-18 [14]