**UNITED STATES BANKRUPTCY COURT**
**Eastern District of California**
**Honorable René Lastreto II**
**Hearing Date: Wednesday, January 27, 2021**
**Place: Department B – Courtroom #13**
**Fresno, California**

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

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

### INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

**Tentative Ruling:** If a matter has been designated as a tentative ruling it will be called. 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. 20-10810-B-13 **IN RE: TIMOTHY/DIANE SOUZA**
BDB-1

OBJECTION TO CLAIM OF STELLA P. HAMETIS, CLAIM NUMBER 43-1
12-17-2020 [33]

TIMOTHY SOUZA/MV
BENNY BARCO/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3007-1(b)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Timothy Souza and Diane Souza ("Debtors") object to proof of claim #43 in the amount of $44,400.00 for Provident Trust and filed by Stella Hametis as its IRA Owner ("Claimant") on July 16, 2020 and amended July 17, 2020. Doc. #33. Claimant was not required to file opposition.

In the absence of opposition, this objection will be SUSTAINED.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under § 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states that a proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim. If a party objects to a proof of claim, the burden of proof is on the objecting party. *Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1039 (B.A.P. 9th Cir. 2000).

Here, Debtors object to Claim #43 on the basis that the deadline to file a proof of claim for nongovernmental creditors was May 11,

2020. Doc. #18. Claimant filed Claim #43 on July 16, 2020 and amended it on July 17, 2020. *See* Claims #43-1; #43-2; #43-3. Claimant's proof of claim was not timely filed. On the face of the claim, there is no evidence that any of the exceptions to timely filing apply. *See*, Fed. R. Bankr. P. 3002.

The proof of claim lists Claimant's noticing address:

> Stella P. Hametis
> 7931 'A' Street
> Lincoln, NE 68510

Claim #43-3, ¶ 3. The payment address:

> Provident Trust FBO Stella P. Hametis
> 8880 West Sunset Road Suite # 250
> Las Vegas, NV 89148

*Ibid.* The master address list included Claimant's payment address and did not include her noticing address. Doc. #5. The certificate of service did include the correct noticing address, however. Doc. #35. Written opposition was not required. Claimant may present opposition at the time of the hearing.

In the absence of opposition, the court is inclined to SUSTAIN the objection. Accordingly, Claim #43 filed by Stella Hametis will be disallowed in its entirety.

2. 20-13310-B-13 **IN RE: EARL/YOLONDA ALLEN**
SL-2

MOTION TO CONFIRM PLAN
12-10-2020 [36]

EARL ALLEN/MV
SCOTT LYONS/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be

resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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 will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

The court notes that the motion (Doc. #36) contained the chapter 13 plan, proof of claim instructions, a blank proof of claim form, and notice of the meeting of creditors and applicable deadlines. LBR 9004-2(c)(1) requires that motions, exhibits, *inter alia*, to be filed as separate documents. These additional documents should have been filed separately from the motion. Failure to file exhibits or plans as separate documents will be grounds for denial without prejudice in other matters.

3. 20-11117-B-13 **IN RE: CLAUDIA CASTRO**
TCS-2

CONTINUED MOTION TO MODIFY PLAN
11-10-2020 [39]

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

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion will be DENIED AS MOOT. Per the court's prior order (Doc. #55, #56), Claudia Castro ("Debtor") was to either (1) file and serve a written response to the chapter 13 trustee Michael H. Meyer's ("Trustee") opposition to this motion not later than January 13, 2021, or (2) file, serve, and set for hearing a motion to confirm a modified plan not later than January 20, 2021, or the motion would be denied on the grounds stated in the opposition. Debtor filed a modified plan on December 22, 2020, which is set for hearing in matter #4 below. *See* TCS-3. Accordingly, this motion will be DENIED AS MOOT.

4. 20-11117-B-13 **IN RE: CLAUDIA CASTRO**
TCS-3

MOTION TO MODIFY PLAN
12-22-2020 [48]

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

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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 will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

5. 19-12622-B-13 **IN RE: JULIE MARTINEZ**
FW-5

MOTION TO MODIFY PLAN
12-15-2020 [79]

JULIE MARTINEZ/MV
GABRIEL WADDELL/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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 will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

6. 18-10624-B-13 **IN RE: PATSY TAYLOR**
SLL-1

MOTION FOR COMPENSATION FOR STEPHEN LABIAK, DEBTORS ATTORNEY(S)
12-28-2020 [26]

STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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.

Patsy Taylor's ("Debtor") counsel, Stephen L. Labiak of the Law Office of Stephen Labiak ("Movant") requests fees of $3,110.00 for services rendered and expenses incurred throughout the duration of this case. Doc. #26. Debtor filed a declaration stating that she agreed to pay Movant a total of $4,000.00 to complete this chapter 13 case. Doc. #28. Debtor paid Movant $890.00 toward attorney fees prior to filing and consented to him being paid an additional $3,110.00 through the chapter 13 plan. *Id.*, ¶ 2.

This motion will be GRANTED.

Section 3.05 of the plan and Form EDC 3-096 indicate that Movant was paid $890.00 prior to filing the case with additional fees of $3,110.00 to be paid through the plan. Doc. #5, ¶ 3.05; #7. The plan provides two options for payment of Debtor's attorney's fees: (1) the "no look" fee of LBR 2016-1(c) or (2) by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #5, ¶ 3.05. Here, neither box was checked. The plan states "if neither alternative is selected, the attorney shall comply with the latter." *Ibid.* And thus, the order confirming the chapter 13 plan states "that the debtor's attorney will seek approval of his fees by filing and serving an application in compliance with U.S.C. sections 329 and 330, and Fed. R. Bankr. P. 2002, 2016, and 2017." Doc. #23.

Movant's motion does not specifically state that Movant intended to opt-in to LBR 2016-1(c), but it does state "box 3.05 of the Plan was not checked on the Plan which was filed as Pacer Document No. 5 on 2/26/18, Debtor's attorney fees of $3110.00 were not included in the Order Confirming Plan which was filed 6/7/18." Doc. #26, ¶ 1. Thus, Movant asks the court to approve attorney fees in the amount of $3,110.00. *Id.* No contemporaneous time records were submitted. As noted above, Debtor filed a declaration stating that she agreed to pay Movant $4,000.00 for her chapter 13 case prior to filing her petition. Doc. #28. This seems to imply that Debtor and Movant intended to opt-in to LBR 2016-1(c), which states in relevant part:

> The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements in this Subpart.
>
> > 1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.
> >
> > 2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.*
> >
> > 3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this

> Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all pre-confirmation services and most post-confirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form 3-095, *Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases*, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6). . . .

LBR 2016-1(c)(1)-(3). Movant charged Debtor a total fee of $4,000.00 and filed a copy of Form EDC 3-096. Doc. #7. Debtor appears to have intended to compensate Movant for all pre-confirmation services and most post-confirmation services for the $4,000.00 fee described in LBR 2016-1(c). Doc. #28. Although Movant did not check the box opting-in to LBR 2016-1(c), he fulfilled all other pre-confirmation obligations and will perform the remaining post-confirmation services until this case is completed.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Since Debtor's chapter 13 plan has been confirmed, Movant's services have included, without limitation: (1) advising Debtor about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition; (3) preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting documents to Trustee; (5) attending and completing the § 341 meeting of creditors; (6) confirming a chapter 13 plan. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

The court also notes no timely opposition to the motion has been filed by an interested party. This motion was on full notice.

Movant shall be awarded $3,110.00 for attorney fees. This fee shall cover remaining post-confirmation services in this case as specified in LBR 2016-1(c)(3). Movant may seek additional compensation only if there is substantial and unanticipated post-confirmation work that is necessary warranting additional fees.

7. 20-13727-B-13 **IN RE: ADOLFO/AURELIA HERNANDEZ**
ETW-1

OBJECTION TO CONFIRMATION OF PLAN BY PELICAN HOLDINGS, LLC
12-15-2020 [14]

PELICAN HOLDINGS, LLC/MV
SCOTT LYONS/ATTY. FOR DBT.
EDWARD WEBER/ATTY. FOR MV.

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

DISPOSITION: Continued to February 24, 2021 at 9:30 a.m.

ORDER: The court will issue an order.

This objection was filed within seven days after the first date set for the § 341(a) meeting of creditors pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and 9014-1(f)(2).

This objection will be CONTINUED to February 24, 2021 at 9:30 a.m. for failure to comply with the local rules.

First, LBR 3015-1(c)(4) objections to plan confirmation require the movant to comply with LBR 9014-1(a)-(e), (f)(2), and (g)-(l). Specifically, "[t]he notice of hearing shall inform the debtor, the debtor's attorney, and the trustee that no written response to the objection is necessary." LBR 3015-1(c)(4).

LBR 9014-1(f)(2)(C) requires the movant to notify the respondent or respondents that no party in interest shall be required to file written opposition to the objection. Opposition, if any, shall be presented at the hearing. If opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

Here, the notice cited LBR 9014-1(f)(1) and stated, "IF YOU OPPOSE the Motion, you must file and serve a written response with the court no later than fourteen (14) days before the hearing." Doc. #15. This is incorrect. Because LBR 3015-1(c)(4) requires notice pursuant to LBR 9014-1(f)(2), the notice should have stated that no written opposition was required and may be presented at the hearing.

Second, the certificate of service indicates that only the notice and the objection were served on the debtors, their attorney, the chapter 13 trustee, and the U.S. trustee. Doc. #18. This objection relies on a declaration and exhibits, but neither appear to have been served. LBR 9014-1(e)(1) requires service of all pleadings and documents filed in support of or opposition to a motion to be made on or before the date they are filed with the Court. Here, it appears two documents filed in support of the objection were not served on the necessary parties.

Typically, failure to comply with the local rules is grounds for overruling the objection without prejudice. However, because this a

LBR 3015-1(c)(4) objection, it would be untimely if overruled and refiled because the deadline—which is seven days after the first date set for the § 341(a) meeting of creditors—has already lapsed.

Accordingly, this objection will be CONTINUED to February 24, 2021 at 9:30 a.m. The movant shall file an amended notice of hearing and an amended proof of service that comply with the local rules within 14 days of the entry of this order.

The court notes that Declarant, Dr. Hefflin, includes no description of any expertise on the issues of feasibility or appropriate interest rate in the declaration supporting the objection. Doc. #16. If these issues remain unresolved at the time of the next hearing, and no modified Plan has been filed, the parties should be prepared to discuss scheduling of further hearings on this matter at that time.

8. 20-13542-B-13 MHM-1 **IN RE: PEDRO SILVA RAMIREZ AND ROSA PRECIADO DE SILVA**

MOTION TO DISMISS CASE
12-22-2020 [24]

JAMES CANALEZ/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

On January 15, 2021, chapter 13 trustee Michael Meyer withdrew this motion. Doc. #40. Accordingly, the matter will be dropped from calendar and the motion will be dismissed.

9. 18-13153-B-13 MHM-2 **IN RE: LUIS BRAVO**

MOTION TO RECONVERT CASE FROM CHAPTER 13 TO CHAPTER 7
12-22-2020 [91]

ERIC ESCAMILLA/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 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.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to convert this case to chapter 7 because Luis Bravo ("Debtor") is delinquent in the amount of $4,160.61. Doc. #91. Debtor did not timely file written opposition.

This motion will be GRANTED.

Debtor filed chapter 7 bankruptcy on July 31, 2018. Doc. #1. The case was converted to chapter 13 on August 23, 2018. Doc. #38. Pursuant to 11 U.S.C. §§ 1307(c)(4) and (6), Trustee asks to convert this case to chapter 7 because Debtor is delinquent $4,160.61 as of November 2020. Doc. #91. Additional payments of $2,090.40 per month will continue to be due under the 60-month plan. *Id.*

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal or conversion under 11 U.S.C. § 1307(c)(6) for being delinquent in making plan payments.

Trustee has requested conversion because this case originated as a chapter 7 and there are substantial non-exempt assets that can be liquidated and disbursed to unsecured creditors. Doc. #91. Thus, Trustee contends that it is in the best interest of the creditors and the estate to convert this case back to chapter 7. *Id.* citing *Brown v. Sobczak (In re Sobczak)*, 369 B.R. 512 (B.A.P. 9th Cir. 2007).

The court agrees. After looking at the amended schedules, it appears there are non-exempt assets in the estate to be administered for the benefit of unsecured claims. According to Amended Schedule A/B and C, Debtor has $153,059.00 in assets and claimed $43,783.00 in exemptions. Doc. #47, Schedules A/B, C. The remaining non-exempt assets total $109,276.00 and include the following:

(1) a 2015 Ford F-150 valued at $23,086.00;

(2) a 2017 Dodge Ram valued at $33,368.00; and

(3) a claim against third parties valued at $75,997.00, which totals $52,822.00 after subtracting Debtor's $23,175.00 exemption.[1]

For these reasons, the court finds conversion of this case to chapter 7 to be in the best interests of creditors and the estate. Therefore, this motion will be GRANTED.

10. 19-15160-B-13 **IN RE: ALFREDO SANCHEZ**
SL-1

MOTION TO AVOID LIEN OF WELLS FARGO BANK, N.A.
12-9-2020 [26]

ALFREDO SANCHEZ/MV
SCOTT LYONS/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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.

Alfredo Sanchez ("Debtor") filed this motion seeking to avoid a judicial lien in favor of Wells Fargo Bank, N.A. ("Creditor"), and encumbering residential real property located at 30761 Cottontail Street, Visalia, CA 93291 ("Property"). Doc. #26.

This motion will be GRANTED. In order to avoid a lien under 11 U.S.C. § 522(f)(1) the movant must establish four elements:

[1] This third-party claim is listed as a "Breach of contract and foreclosure mechanic's lien claim against Ghasan Ali Ahmed and Mohmed Nor Ahmed." Doc. #47, Schedule A/B, ¶ 33.

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

Here, a judgment was entered against Debtor in favor of Creditor in the sum of $8,784.00 on March 13, 2018. Doc. #28, Ex. D. An abstract of judgment was issued on July 12, 2018 and recorded in Tulare County on September 10, 2018. *Id.* That lien attached to Debtor's interest in Property. Doc. #29. As of the petition date, Property had an approximate value of $220,372.00. *Id.*; #1, Schedule A. The unavoidable liens totaled $130,632.00 on that same date, consisting of a deed of trust in favor of Wells Fargo Home Mortgage. Doc. #24. Debtor claimed an exemption pursuant to California Civ. Proc. Code ("C.C.P.") § 704.730 in the amount of $100,000.00. Doc. #1, Schedule C.

| | | |
|---|---|---|
| Fair Market Value of Property on petition date | | $220,372.00 |
| Amount of first priority deed of trust | - | $130,632.00 |
| Remaining equity available in Property | = | $89,740.00 |
| Value of Debtor's exemption | - | $100,000.00 |
| Creditor's judicial lien | - | $8,784.00 |
| Extent Debtors' exemption impaired | = | ($19,044.00) |

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

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

11. 20-13261-B-13 **IN RE: HUMBERTO COVIAN**
SLL-2

MOTION FOR COMPENSATION FOR STEPHEN LABIAK, DEBTORS ATTORNEY(S)
12-28-2020 [23]

STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to 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.

Humberto Covian's ("Debtor") counsel, Stephen L. Labiak of the Law Office of Stephen Labiak ("Movant") requests fees of $8,210.00 and costs of $43.65 for a total of $8,253.65 for services rendered from August 31, 2020 through December 22, 2020. Doc. #23. Debtor filed a declaration stating that he reviewed the fee application and has no objection to authorizing the chapter 13 trustee Michael H. Meyer ("Trustee") to pay $8,253.65 to Movant. Doc. #28, ¶¶ 5-6. No party in interest timely filed written opposition.

This motion will be GRANTED.

Section 3.05 of the plan and Form EDC 3-096 indicate that Movant was paid $0.00 prior to the filing of the case and additional fees of $9,000.00 shall be paid through this plan, subject to court approval, by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #6, ¶ 3.05; #7. The court notes that the plan has not yet been confirmed, but Movant states that it has been signed, submitted, and should soon be confirmed pending court approval. Doc. #27.

Movant indicates that his firm spent the 24.6 billable hours totaling $8,210.00 in fees:

| Professional | Hours | Rate | Fees |
|---|---|---|---|
| Stephen L. Labiak | 23.0 | $350.00 | $8,050.00 |
| Linda Fellner | 1.6 | $100.00 | $160.00 |
| **Totals:** | **24.6** | | **$8,210.00** |

Doc. #23, at 4, ¶ 7; *see also* #25, Ex. B. Ms. Fellner appears to be the paralegal referenced in Movant's declaration. Doc. #27, at 2, ¶ 14. Movant also incurred $43.65 in expenses for "Reproduction." *Id.*, ¶ 6. The combined fees and expenses requested in this fee application total $8,253.65.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a]

professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) advising Debtor about bankruptcy and non-bankruptcy alternatives; (2) reviewing Debtor's financial information, the effects of exemptions, repossession, value of assets, and value of business; (3) gathering information and documents to prepare the petition; (4) preparing the petition, schedules, statements, and chapter 13 plan; (5) preparing and sending § 341 meeting documents to Trustee; (6) attending and completing the § 341 meeting of creditors; (7) preparing and filing a motion to value collateral, which was approved (SLL-1); (8) signing plan confirmation and submitting it for court approval. Doc. #27. The court finds the services reasonable and necessary and the expenses requested actual and necessary. As noted above, no party in interest timely filed written opposition at least 14 days before the hearing.

Accordingly, this motion will be GRANTED. Movant shall be awarded $8,210.00 in fees and $43.65 in costs.

12. 17-11570-B-13 **IN RE: GREGGORY KIRKPATRICK**
MHG-10

OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
12-14-2020 [255]

GREGGORY KIRKPATRICK/MV
MARTIN GAMULIN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: The matter will proceed as a scheduled.

DISPOSITION: Procedural objections will be SUSTAINED.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This objection was filed on 44 days' notice under Local Rule of Practice 3007-1(b)(1), 9014-1(f)(1), Federal Rules of Bankruptcy Procedure 3002.1, and 3007 and will proceed as scheduled.[2]

Greggory Kirkpatrick ("Debtor") objects to Christopher Scott Callison and Perla Perez's ("Creditors") Rule 3002.1 Notice of Postpetition Mortgage Fees, Expenses, and Charges filed July 3, 2020 in the amount of $20,716.82 for attorney fees and expenses incurred between October 21, 2019 through December 5, 2019. Doc. #255. Creditors timely filed opposition. Doc. #260. Debtor also objected

[2] Unless otherwise indicated, references to "LBR" are to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" are to the Federal Rules of Bankruptcy Procedure; and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

to two other notices filed by Creditors in related matters #13 and #14 below. *See* MHG-8; MHG-9.

Background

Creditors filed a proof of claim on July 14, 2017, which was amended on September 6, 2017. *See* Claim #8-2. The amended claim was subject to contentious litigation wherein Creditors' Claim #8-2 was allowed in the amount of $160,875.11. Doc. #202. The arrearage claim was allowed in the sum of $18,584.19. Doc. #201. The arrearage included attorney's fees. The court found them recoverable under the controlling documents. Due to Creditors' discovery derelictions, the court denied allowance of pre-petition fees as part of Creditors' claimed arrearage.

The notice subject to this objection was filed in this case on July 3, 2020, but the docket indicates that it was modified on July 6, 2020. Doc. #217. This entry appears to have been entered on the docket in error and no image is available. *See* docket generally. In the parties' related adversary proceeding (from which this court has largely abstained), Creditors filed the same notice under Rule 3002.1 on the same date, July 3, 2020. *See Kirkpatrick v. Callison et al.*, AP No. 19-01100, Doc. #73. This notice claimed $20,681.00 in attorney fees and $35.82 in expenses incurred between October 21, 2019 and December 5, 2019, for a total of $20,716.82. *Ibid.* An identical notice was also filed in this adversary proceeding on December 6, 2019, which is the subject of the objection in matter #13 below. *Id.*, Doc. #35.

In total, Creditors filed eight notices under Rule 3002.1:

(1) The first notice ("AP Notice #1") was filed in the adversary proceeding on December 6, 2019 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. *Id.*, Doc. #35. This notice is the subject of matter #13 below. MHG-8.

(2) The second and third notices ("AP Notice #2" and "BK Notice #1") were filed in the adversary proceeding and bankruptcy case, respectively, on May 14, 2020 and totaled $11,862.77, consisting of $11,857.75 in attorney fees and $5.02 in expenses incurred from December 6, 2019 through March 31, 2020. Doc. #206; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #63. These notices are the subject of the objection in matter #14 below. MHG-9.

(3) The fourth and fifth notices ("AP Notice #3" and "BK Notice #2") were filed in the adversary proceeding and bankruptcy case, respectively, on July 3, 2020 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. Doc. #217; *Kirkpatrick v.* Callison, AP No. 19-01100, Doc. #73. These notices appear to be duplicative of AP Notice #1. From the exhibits, AP Notice #3 in particular appears to be the subject of this objection. *See* Doc. #258, Ex. 2.

(4) The sixth and seventh notices ("AP Notice #4" and "BK Notice #3") were filed in the adversary proceeding and bankruptcy case, respectively, on September 5, 2020 and totaled $5,276.89, consisting of $5,264.75 in attorney fees and $12.14 in expenses incurred from April 1, 2020 through June 30, 2020. Doc. #234; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #88.

(5) The eighth and final notice ("AP Notice #5") was filed in the adversary proceeding on September 25, 2020 and totaled $4,274.25, consisting of $4,231.25 in attorney fees and $43.00 in expenses incurred from July 1, 2020 through August 31, 2020. *Id.*, Doc. #99.

Debtor's Objections

On December 14, 2020, Debtor filed this objection for procedural and substantive reasons. Doc. #255. The procedural reasons are:

(1) Creditor violated Rule 3002.1(c) by failing to serve an amended proof of claim and file the notice as a supplement to their amended proof of claim within 180 days after the fees, charges, and expenses were incurred. Since the notice is for fees incurred between October 21, 2019 through December 5, 2019 and the notice was filed on July 3, 2020, the notice was untimely. *Id.*

(2) Creditors violated Rule 3002.1(c) because they did not amend their proof of claim filed September 6, 2017 and attach the notice as a supplement to the proof of claim. *Id.*

Debtor also objects substantively as to the reasonableness of Creditors' fees of $20,716.82 as: (1) required by the underlying agreement and applicable to nonbankruptcy law to cure a default or maintain payments under § 1322(b)(5); and (2) not reasonable attorney's fees and expenses under § 506. *Id.*

Creditors' Reply

Creditors timely responded disagreeing with the defects cited by Debtor. Doc. #260.

First, Creditors claim that their attorney filed the official notice form and properly noticed Debtors attorneys via mail and email. *Id.* Creditors insist that the loan agreement provided for "[a]ll costs, expenses and expenditures including, without limitation, the complete legal costs incurred by enforcing this Agreement as a result of any default by the Borrower, will be added to the principle then outstanding and win [sic] immediately be paid by the Borrower." *Id.* On this basis, Creditors contend that these legal and mailing fees are the direct result of the Debtor's default. Creditors contend that they properly served the notice under Rule 3002.1(d). *Id.*

Creditors argue that the postpetition attorney fees are reasonable given the totality of the circumstances and by contractual obligation of the Debtor under the loan agreement. Creditors claim the mortgage fees, charges, and expenses asserted are reasonable and necessary attorney fees. *Id.*

Procedural Defects

Debtor is correct about the procedural deficiencies. Although some of these defects are not fatal as discussed below in the related objections, AP Notice #3 and BK Notice #2 filed on July 3, 2020 were untimely because they were filed more than 180 days after the fees and expenses were incurred. These notices seek fees incurred for the period between October 21, 2019 through December 5, 2019 and were filed on July 3, 2020. Doc. #258, Ex. 2. July 3, 2020 is 211 days after December 5, 2019, and therefore AP Notice #3 (AP #19-011000, Doc. #73) and BK Notice #2 (Doc. #217) were not timely. Meanwhile, Debtor's objection was timely filed December 14, 2020. Doc. #255.

Accordingly, the procedural objections will be SUSTAINED because Creditors' notice was filed more than 180 days after the expenses were incurred. The substantive objections will therefore be moot.

Creditors are not without recourse. These notices were duplicates and therefore would be deemed moot regardless. AP Notice #1 covers the same fees for this time period and was timely filed on December 6, 2019. It is the subject of matter #13 below.

13. 17-11570-B-13 **IN RE: GREGGORY KIRKPATRICK**
MHG-8

OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
12-4-2020 [244]

GREGGORY KIRKPATRICK/MV
MARTIN GAMULIN/ATTY. FOR DBT.

TENTATIVE RULING: The matter will proceed as a scheduling conference.

DISPOSITION: Procedural objections will be OVERRULED.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This objection was filed on 44 days' notice under Local Rule of Practice 3007-1(b)(1), 9014-1(f)(1), Federal Rules of Bankruptcy Procedure 3002.1, and 3007, and will proceed as scheduled.[3]

Greggory Kirkpatrick ("Debtor") objects to Christopher Scott Callison and Perla Perez's ("Creditors") Rule 3002.1 Notice of Postpetition Mortgage Fees, Expenses, and Charges filed December 6, 2019 in the amount of $20,716.82 for attorney fees and expenses

[3] Unless otherwise indicated, references to "LBR" are to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" are to the Federal Rules of Bankruptcy Procedure; and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

incurred between October 21, 2019 through December 5, 2019. Doc. #244. Creditors did not timely file opposition, though they did oppose related objections in matters #12 and #14, above and below. *See also* MHG-9, MHG-10.

Background

Creditors filed a proof of claim on July 14, 2017, which was amended on September 6, 2017. *See* Claim #8-2. The amended claim was subject to contentious litigation wherein Creditors' Claim #8-2 was allowed in the amount of $160,875.11. Doc. #202. The arrearage claim was allowed in the sum of $18,584.19. Doc. #201. The arrearage included attorney's fees. The court found them recoverable under the controlling documents. Due to Creditors' discovery derelictions, the court denied allowance of pre-petition fees as part of Creditors' claimed arrearage.

In the parties' related adversary proceeding (from which the court has largely abstained), Creditors filed this Notice of Postpetition Mortgage Fees, Expenses, and Charges under Rule 3002.1 on December 6, 2019. *See Kirkpatrick v. Callison et al.*, AP No. 19-01100, Doc. #35. This notice claimed $20,681.00 in attorney fees and $35.82 in expenses incurred between October 21, 2019 and December 5, 2019, for a total of $20,716.82. *Ibid.*

In total, Creditors filed eight notices under Rule 3002.1:

(1) The first notice ("AP Notice #1") was filed in the adversary proceeding on December 6, 2019 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. *Id.*, Doc. #35. This notice is the subject of this objection. Doc. #247, Ex. 2.

(2) The second and third notices ("AP Notice #2" and "BK Notice #1") were filed the adversary proceeding and bankruptcy case, respectively, on May 14, 2020 and totaled $11,862.77, consisting of $11,857.75 in attorney fees and $5.02 in expenses incurred from December 6, 2019 through March 31, 2020. Doc. #206; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #63. These notices are the subject of the objection in matter #14 below. MHG-9.

(3) The fourth and fifth notices ("AP Notice #3" and "BK Notice #2") were filed in the adversary proceeding and bankruptcy case, respectively, on July 3, 2020 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. *Kirkpatrick v.* Callison, AP No. 19-01100, Doc. #73. These notices appear to be duplicative of AP Notice #1 and are the subject of the objection in matter #12 above. MHG-10.

(4) The sixth and seventh notices ("AP Notice #4" and "BK Notice #3") were filed in the adversary proceeding and bankruptcy case, respectively, on September 5, 2020 and totaled $5,276.89, consisting of $5,264.75 in attorney fees and $12.14 in expenses incurred from April 1, 2020 through June 30, 2020. Doc. #234; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #88.

(5) The eighth and final notice ("AP Notice #5") was filed in the adversary proceeding on September 25, 2020 and totaled $4,274.25, consisting of $4,231.25 in attorney fees and $43.00 in expenses incurred from July 1, 2020 through August 31, 2020. *Id.*, Doc. #99.

Debtor's Objections

On December 4, 2020, Debtor filed this objection for procedural and substantive reasons. Doc. #244. The procedural reasons are:

(1) Creditors did not comply with Rule 3002.1(c) because they did not serve the notice upon Debtor at his residence;

(2) Creditors did not comply with Rule 3002.1(c) because they did not serve an amended proof of claim and file the notice as a supplement to their amended proof of claim within 180 days after the date on which the fees, expenses, or charges were incurred; and

(3) Creditors violated Rule 3002.1(d) by failing to amend their proof of claim and attach the notice as a supplement to the proof of claim. *Id.*

A fourth procedural defect was cited that appears to be a duplicate of the first: the proof of service indicates that Debtor was not served at his residence in violation of Rule 3002.1(c). *Id.*

Debtor also objects substantively as to the reasonableness of Creditors' fees of $20,716.82 as: (1) required by the underlying agreement and applicable to nonbankruptcy law to cure a default or maintain payments under § 1322(b)(5); and (2) not reasonable attorney's fees and expenses under § 506. *Id.*

As noted above, Creditors did not timely file written opposition, but did file a response in the two related matters.

Alleged Procedural Defects

Debtor is largely correct about the procedural deficiencies, but for these reasons, the defects are not fatal to consideration of the claim here.

First, failure to serve the debtor *and his counsel* is required by Rule 3002.1(c). But Debtor has substantively responded to the notice by objecting and raising numerous arguments. The Debtor here has suffered no prejudice. The Rules are to be administered by the court to secure, just, speedy, and inexpensive determination of every proceeding. Rule 1001. Debtor's response supports administration of this claim in such a manner.

Second, the failure of Creditors to properly file the notice as a "Supplement" to the proof of claim is also true, but not fatal. Rule 3002.1(d) requires preparation of the supplement on the official bankruptcy form—the Creditors did here—and filed as "a supplement to [Creditors'] proof of claim." The Creditors did not do the latter.

There is no dispute the filing of the notice was timely. The notice seeks fees incurred for the period between October 21, 2019 through December 5, 2019. Doc. #35. The notice was filed (albeit improperly) on December 6, 2019; well within the 180 days from when the charges were incurred (October 2019). *Id.* Debtor's objection was also timely filed December 4, 2020, within one year of the notice as specified in Rule 3002.1(e). Doc. #244.

Rule 3002.1 is a "procedural mechanism" implementing § 1322(b)(5) so debtors can emerge at the end of a Chapter 13 Plan with a fresh start. *In re Rivera*, 599 B.R. 335, 342 (Bankr. D. Ariz. 2019). To inform the debtor, the "Supplement" required under the rule should be filed in the claims register, not the court docket. *In re Sheppard*, 10-133959-KRH, 2012 WL 1344112 *4 (Bankr. E.D. Va. April 18, 2012).

That said, if there is an objection to the notice—as here—where are pleadings related to the objection filed? In the court docket. The objection implements the rules dealing with contested matters. Rules 3007, 9013, 9014. Thus, the filing of the "Supplement" in the wrong place in this circumstance results in no prejudice to the parties.

It does, though, impact the administration of the case and the Chapter 13 Trustee who must disburse according to filed and allowed claims. Creditors here shall file the notices as "Supplements" to their existing amended proof of claim as directed by the official bankruptcy form. They should attach copies of the original timely filed notices (with the time and date of original filing stamp) to a cover page referencing both this case and the claim number. They should be filed in the claims register. These objections can simultaneously proceed.

Third, even if the Creditors' failures here are enough to disregard the notices, the court finds the notices are sufficient in this case under the informal proof of claim doctrine. The Ninth Circuit has long recognized and applied that doctrine. *In Re Sambo's Restaurants*, 754 F. 2d 811, 815-817 (9th Cir. 1985); *Pacific Resource Credit Union v. Fish, et al (In re Fish)*, 456 B.R. 413, 417 (B.A.P. 9th Cir. 2011). The notices here are written, filed within the time deadlines of Rule 3002.1, filed on behalf of Creditors, and bring to the court's attention the amount of the claim asserted. Debtor here provides no authority holding that filing the notice in the improper place if the other requirements of an informal proof of claim are present, is by itself grounds to sustain objections to the notice. The court finds in this case improper filing location is not fatal.

Finally, though further amendment of the Creditor' amended claim may eventually be required for the Trustee to disburse based on the claim, the purpose of the notice is procedural and informational. Debtor has objected to the notice. The notices are not yet part of the amended claim because there is a pending objection. Surely, Debtor would not want to be saddled with the idle act of objecting to a notice of additional charges and an amended proof of claim simultaneously? That makes no sense.

The procedural objections will be OVERRULED. We turn now to the substantive objections.

Alleged Substantive Defects

Creditors contend that the loan agreement provided for "[a]ll costs, expenses and expenditures including, without limitation, the complete legal costs incurred by enforcing this Agreement as a result of any default by the Borrower, will be added to the principle then outstanding and win [sic] immediately be paid by the Borrower." Debtor asserts, with little analysis that the fees are not "required by the underlying agreement and applicable non-bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code."

The quoted provision of the loan agreement lists two conditions for legal costs to be added to the principal: default by the borrower and enforcing the agreement. Debtor does not dispute the satisfaction of both conditions. The agreement was in default pre-petition. Debtor filed an adversary proceeding in Superior Court and later in this court challenging the foreclosure and the obligations of Creditors under related business sale agreements. What is unclear is how much, if any, fees should be charged "to the loan." Further evidence is necessary.

Paragraph 34 of the deed of trust purportedly securing Debtor's obligation to Creditors, provides legal fees if expended by Creditors to protect the security are "payable" by Debtor. When they would be "payable" is unspecified.

Separate from the issue of recoverability of attorney's fees is whether the fees sought must be paid to either cure the default or maintain payments under § 1322(b)(5). Rule 3002.1(e); *In re Fomosa*, 582 B.R. 423, 435-36 (Bankr. E.D. Mich. 2018) [finding the loan agreement there required the lender's demand before fees were payable; the absence of the demand meant the fees need not be paid under the Plan to cure the default or maintain payments]. The loan agreement here does state that appropriate fees are to be paid immediately by the Borrower. But it also says it will be added to the principal. That likely means added to the principal if the charges are not "immediately" paid by the borrower. But Creditors do not assert that they are payable now or later. Creditors' position is now vague.

Debtor claims the information provided by Creditors supporting the charge is inadequate. It is now. Though Creditors complied with Rule 3002.1(c) itemizing the components of the charges on the official form, the basis for the charges is non-existent. Since this objection begins a contested matter, the discovery rules now apply. Rule 9014.

It is premature to discuss any "actions" the court must take now under Rule 3002.1(i). Creditors have not failed to notify Debtor and have provided *some* information. It is ultimately going to be Creditors' burden to convince the court the fees claimed are allowable and necessary to either cure the default or maintain

payments under the loan. *See*, *In re Brumley*, 570 B.R. 287, 289-90 (Bankr. W.D. Mich. 2017).

The procedural objections will be OVERRULED. Creditors Christopher Scott Callison and Perla Perez must file the notices in the claims register as directed. The substantive objections to the notice of fees, expenses, and charges will be determined in a later evidentiary hearing.

14. 17-11570-B-13 **IN RE: GREGGORY KIRKPATRICK**
MHG-9

OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
12-14-2020 [250]

GREGGORY KIRKPATRICK/MV
MARTIN GAMULIN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: The matter will proceed as a scheduling conference.

DISPOSITION: Procedural objections will be OVERRULED.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This objection was filed on 44 days' notice under Local Rule of Practice 3007-1(b)(1), 9014-1(f)(1), Federal Rules of Bankruptcy Procedure 3002.1, and 3007, and will proceed as scheduled.[4]

Greggory Kirkpatrick ("Debtor") objects to Christopher Scott Callison and Perla Perez's ("Creditors") Rule 3002.1 Notice of Postpetition Mortgage Fees, Expenses, and Charges filed May 14, 2020 in the amount of $11,862.77. Doc. #250. Creditors timely filed opposition on January 13, 2021. Doc. #261. The court notes that the first reply did not contain a certificate of service as required by LBR 9004-2(e) and 9014-1(e). *Id.* Creditors refiled a duplicate reply on January 21, 2021 and included a separately filed certificate of service. Doc. #262; #263. Debtor also objected to two other Rule 3002.1 notices filed by Creditors in related matters #12 and #13 above. *See* MHG-8; MHG-10.

## Background

Creditors filed a proof of claim on July 14, 2017, which was amended on September 6, 2017. *See* Claim #8-2. The amended claim was subject

[4] Unless otherwise indicated, references to "LBR" are to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" are to the Federal Rules of Bankruptcy Procedure; and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

to contentious litigation wherein Creditors' Claim #8-2 was allowed in the amount of $160,875.11. Doc. #202. The arrearage claim was allowed in the sum of $18,584.19. Doc. #201. The court found them recoverable under the controlling documents. Due to Creditors' discovery derelictions, the court denied allowance of pre-petition fees as part of Creditors' claimed arrearage.

The notice subject to this objection was filed in this case on May 4, 2020. Doc. #206. In the parties' related adversary proceeding (from which the court has largely abstained), Creditors filed the same notice under Rule 3002.1 on the same date, May 4, 2020. *See Kirkpatrick v. Callison et al.*, AP No. 19-01100, Doc. #63. These notices claimed $11,857.75 in attorney fees and $5.02 in expenses incurred between December 6, 2019 and March 31, 2020, for a total of $11,862.77. *Ibid.*

In total, Creditors filed eight notices under Rule 3002.1:

(1) The first notice ("AP Notice #1") was filed in the adversary proceeding on December 6, 2019 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. *Id.*, Doc. #35. This notice is the subject of matter #13 above. MHG-8.

(2) The second and third notices ("AP Notice #2" and "BK Notice #1") were filed the adversary proceeding and bankruptcy case, respectively, on May 14, 2020 and totaled $11,862.77, consisting of $11,857.75 in attorney fees and $5.02 in expenses incurred from December 6, 2019 through March 31, 2020. Doc. #206; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #63. These notices are the subject of this objection. Doc. #253, Ex. 2 and 3.

(3) The fourth and fifth notices ("AP Notice #3" and "BK Notice #2") were filed in the adversary proceeding and bankruptcy case, respectively, on July 3, 2020 and totaled $20,716.82, consisting of $20,681.00 in attorney fees and $35.42 in expenses incurred from October 21, 2019 through December 5, 2019. *Kirkpatrick v.* Callison, AP No. 19-01100, Doc. #73. These notices appear to be duplicative of AP Notice #1 above and the subject of matter #12 above. MHG-10.

(4) The sixth and seventh notices ("AP Notice #4" and "BK Notice #3") were filed in the adversary proceeding and bankruptcy case, respectively, on September 5, 2020 and totaled $5,276.89, consisting of $5,264.75 in attorney fees and $12.14 in expenses incurred from April 1, 2020 through June 30, 2020. Doc. #234; *Kirkpatrick v. Callison*, AP No. 19-01100, Doc. #88.

(5) The eighth and final notice ("AP Notice #5") was filed in the adversary proceeding on September 25, 2020 and totaled $4,274.25, consisting of $4,231.25 in attorney fees and $43.00 in expenses incurred from July 1, 2020 through August 31, 2020. *Id.*, Doc. #99.

Debtor's Objections

On December 14, 2020, Debtor filed this objection for procedural and substantive reasons. Doc. #250. The procedural reasons are:

(1) Creditors did not comply with Rule 3002.1(c) because they did not serve the notice upon Debtor at his residence;

(2) Creditors did not comply with Rule 3002.1(c) because they did not serve an amended proof of claim and file the notice as a supplement to their amended proof of claim within 180 days after the date on which the fees, expenses, or charges were incurred; and

(3) Creditors violated Rule 3002.1(d) by failing to amend their proof of claim and attach the notice as a supplement to the proof of claim. *Id.*

A fourth procedural defect was cited that appears to be a duplicate of the first: the proof of service indicates that Debtor was not served at his residence in violation of Rule 3002.1(c). *Id.*

Debtor also objects substantively as to the reasonableness of Creditors' fees of $11,862.77 as: (1) required by the underlying agreement and applicable to nonbankruptcy law to cure a default or maintain payments under § 1322(b)(5); and (2) not reasonable attorney's fees and expenses under § 506. *Id.*

Creditors' Reply

Creditors timely responded disagreeing with the defects cited by Debtor. Doc. #261. As noted above, a duplicate was later filed with a separate certificate of service. Doc. #262.

First, Creditors claim that their attorney filed the official notice form and properly noticed Debtors attorneys via mail and email. Doc. #261. Creditors insist that the loan agreement provided for "[a]ll costs, expenses and expenditures including, without limitation, the complete legal costs incurred by enforcing this Agreement as a result of any default by the Borrower, will be added to the principle then outstanding and win [sic] immediately be paid by the Borrower." *Id.* On this basis, Creditors contend that these legal and mailing fees are the direct result of the Debtor's default. Creditors contend that they properly served the notice under Rule 3002.1(d). *Id.*

Creditors believe that the postpetition attorney fees are reasonable given the totality of the circumstances and by contractual obligation of the Debtor under the loan agreement. Creditors claim the mortgage fees, charges, and expenses asserted are reasonable and necessary attorney fees. *Id.*

Alleged Procedural Defects

Debtor is largely correct about the procedural deficiencies, but for these reasons, the defects are not fatal to consideration of the claim here.

First, failure to serve the debtor *and his counsel* is required by Rule 3002.1 (c). But Debtor has substantively responded to the notice by objecting and raising numerous arguments. The Debtor here

has suffered no prejudice. The Rules are to be administered by the court to secure, just, speedy, and inexpensive determination of every proceeding. Rule 1001. Debtor's response supports administration of this claim in such a manner.

Second, the failure of Creditors to properly file the notice as a "Supplement" to the proof of claim is also true, but not fatal. Rule 3002.1(d) requires preparation of the supplement on the official bankruptcy form—the Creditors did here—and filed as "a supplement to [Creditors'] proof of claim." The Creditors did not do the latter.

There is no dispute the filing of the notice was timely. The notice seeks fees incurred for the period between December 6, 2019 through March 31, 2020. Doc. #206. The notice was filed (albeit improperly) on May 4, 2020; well within the 180 days from when the charges were incurred (December 2019). Debtor's objection was also timely filed December 14, 2020, within one year of the notice as specified in Rule 3002.1(e). Doc. #250.

Rule 3002.1 is a "procedural mechanism" implementing § 1322(b)(5) so debtors can emerge at the end of a Chapter 13 Plan with a fresh start. *In re Rivera*, 599 B.R. 335, 342 (Bankr. D. Ariz. 2019). To inform the debtor, the "Supplement" required under the Rule should be filed in the claims register, not the court docket. *In re Sheppard*, 10-133959-KRH, 2012 WL 1344112 *4 (Bankr. E.D. Va. April 18, 2012).

That said, if there is an objection to the notice—as here—where are pleadings related to the objection filed? In the court docket. The objection implements the Rules dealing with contested matters. Rules 3007, 9013, 9014. Thus, the filing of the "Supplement" in the wrong place in this circumstance results in no prejudice to the parties.

It does, though, impact the administration of the case and the Chapter 13 Trustee who must disburse according to filed and allowed claims. Creditors here shall file the notices as "Supplements" to their existing amended proof of claim as directed by the official bankruptcy form. They should attach copies of the original timely filed notices (with the time and date of original filing stamp) to a cover page referencing both this case and the claim number. They should be filed in the claims register. These objections can simultaneously proceed.

Third, even if the Creditors' failures here are enough to disregard the notices, the court finds the notices are sufficient in this case under the informal proof of claim doctrine. The Ninth Circuit has long recognized and applied that doctrine. *In Re Sambo's Restaurants*, 754 F. 2d 811, 815-817 (9th Cir. 1985); *Pacific Resource Credit Union v. Fish, et al (In re Fish)*, 456 B.R. 413, 417 (B.A.P. 9th Cir. 2011). The notices here are written, filed within the time deadlines of Rule 3002.1, filed on behalf of Creditors, and bring to the court's attention the amount of the claim asserted. Debtor here provides no authority holding that filing the notice in the improper place if the other requirements of an informal proof of claim are present, is by itself grounds to sustain objections to the

notice. The court finds in this case improper filing location is not fatal.

Finally, though further amendment of the Creditor' amended claim may eventually be required for the Trustee to disburse based on the claim, the purpose of the notice is procedural and informational. Debtor has objected to the notice. The notices are not yet part of the amended claim because there is a pending objection. Surely, Debtor would not want to be saddled with the idle act of objecting to a notice of additional charges and an amended proof of claim simultaneously? That makes no sense.

The procedural objections will be OVERRULED. We turn now to the substantive objections.

Alleged Substantive Defects

Creditors contend that the loan agreement provided for "[a]ll costs, expenses and expenditures including, without limitation, the complete legal costs incurred by enforcing this Agreement as a result of any default by the Borrower, will be added to the principle then outstanding and win [sic] immediately be paid by the Borrower." Debtor asserts, with little analysis, that the fees are not "required by the underlying agreement and applicable non-bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code."

The quoted provision of the loan agreement lists two conditions for legal costs to be added to the principal: default by the borrower and enforcing the agreement. Debtor does not dispute the satisfaction of both conditions. The agreement was in default pre-petition. Debtor filed an adversary proceeding in Superior Court and later in this court challenging the foreclosure and the obligations of Creditors under related business sale agreements. What is unclear is how much, if any, fees should be charged "to the loan." Further evidence is necessary.

Paragraph 34 of the deed of trust purportedly securing Debtor's obligation to Creditors, provides legal fees if expended by Creditors to protect the security are "payable" by Debtor. When they would be "payable" is unspecified.

Separate from the issue of recoverability of attorney's fees is whether the fees sought must be paid to either cure the default or maintain payments under § 1322(b)(5). Rule 3002.1(e); *In re Fomosa*, 582 B.R. 423, 435-36 (Bankr. E.D. Mich. 2018) [finding the loan agreement there required the lender's demand before fees were payable; the absence of the demand meant the fees need not be paid under the Plan to cure the default or maintain payments]. The loan agreement here does state that appropriate fees are to be paid immediately by the Borrower. But it also says it will be added to the principal. That likely means added to the principal if the charges are not "immediately" paid by the borrower. But Creditors do not assert that they are payable now or later. Creditors' position is now vague.

Debtor claims the information provided by Creditors supporting the charge is inadequate. It is now. Though Creditors complied with Rule 3002.1(c) itemizing the components of the charges on the official form, the basis for the charges is non-existent. Since this objection begins a contested matter, the discovery rules now apply. Rule 9014.

It is premature to discuss any "actions" the court must take now under Rule 3002.1(i). Creditors have not failed to notify Debtor and have provided *some* information. It is ultimately going to be Creditors' burden to convince the court the fees claimed are allowable and necessary to either cure the default or maintain payments under the loan. *See*, *In re Brumley*, 570 B.R. 287, 289-90 (Bankr. W.D. Mich. 2017).

The procedural objections will be OVERRULED. Creditors Christopher Scott Callison and Perla Perez must file the notices in the claims register as directed. The substantive objections to the notice of fees, expenses, and charges will be determined in a later evidentiary hearing.

15. 20-13579-B-13 **IN RE: ISMAEL SPINDOLA**
MHM-1

MOTION TO DISMISS CASE
12-22-2020 [24]

MICHAEL MEYER/MV
JAMES CANALEZ/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

On January 15, 2021, chapter 13 trustee Michael Meyer withdrew this motion. Doc. #35. Accordingly, the matter will be dropped from calendar and the motion will be dismissed.

16. 15-12993-B-13 **IN RE: ROBERT/KARLA RODRIGUEZ**
GEG-7

MOTION FOR COMPENSATION BY THE LAW OFFICE OF GATES LAW GROUP, APC FOR GLEN E. GATES, DEBTORS ATTORNEY(S)
12-22-2020 [155]

GLEN GATES/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part.

ORDER: The minutes of the hearing will be the court's findings and conclusions. 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) and will proceed as scheduled.

Robert and Karla Rodriguez's ("Debtors") counsel, Glen E. Gates of the Gates Law Group, APC ("Movant"), requests fees of $1,645.00 and costs of $0.00 for services rendered from January 11, 2019 through December 7, 2020. Doc. #155. The motion included a declaration signed by Debtors stating that they have reviewed and have no objection to the fee application. *Id.*, ¶ 9(7). Chapter 13 trustee Michael H. Meyer ("Trustee") timely responded stating that the estate does not have sufficient funds to pay attorney's fees of $1,645.00 and Debtors would need to pay $900.09 into the plan to fund this fee application. Doc. #161. Movant replied stating that he will voluntarily reduce any fee by $900.09 to allow Debtors to complete the case and close the matter. Doc. #163.

This motion will be GRANTED IN PART.

This case was originally filed under chapter 7 on July 29, 2015. Doc. #1. The *Disclosure of Compensation* form indicates that Movant was paid $1,500.00 prior to filing the petition. *Id.*, at 41. The case was converted to chapter 13 on November 13, 2015. Doc. #37; GEG-1. A chapter 13 plan was filed on November 25, 2015 and was confirmed on March 30, 2016. Doc. #94; GEG-2. The plan provided for $1,500.00 in fees prior to filing and an additional $5,000.00 in fees to be paid through the plan, subject to court approval, by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #64, ¶ 2.06.

This is Movant's second fee application. This court previously granted Movant's application for $15,960.00 in fees. Doc. #131; GEG-5. Because Movant was formerly a member of the firm Pascuzzi, Pascuzzi & Stoker, $14,490.00 was awarded to Pascuzzi, Pascuzzi & Stoker and $1,470.00 was awarded to Movant. *Id.*

In this application, Movant spent 4.70 billable hours at $350.00 per hour and totaling $1,645 in fees. Doc. #155, at 4, ¶ 7; *see also* #157, Ex. B and C. As noted above, Trustee filed a response stating that the estate does not have sufficient funds to pay this fee application and Debtors would need to pay $900.09 to fund this application. Doc. #161. By this court's calculation, the estate has approximately $744.91 on hand to pay towards attorney fees. Movant responded that he will voluntarily waive $900.09 in fees to complete the case. Doc. #163.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) amending the petition and schedules; (2) responding to Trustee's motion to dismiss (MHM-3); (3) preparing and filing this fee application; and (4) meeting and communicating with Debtors and Trustee regarding case status. Doc. #157, Ex. A. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Accordingly, this motion will be GRANTED IN PART. Due to Movant's voluntary reduction of $900.09 in fees, Movant shall be awarded $744.91 of the remaining amount of fees requested.

17. 21-10047-B-13 TCS-2 **IN RE: JASON ATHERTON AND GENZZIA DOVIGI-ATHERTON**

MOTION TO EXTEND AUTOMATIC STAY
1-20-2021 [11]

JASON ATHERTON/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
OST 1/21/21

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied as moot.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This motion was properly set for hearing on the notice required by Local Rule of Practice ("LBR") 9014-1(f)(3) with an order shortening time. Doc. #14. Consequently, the creditors, the chapter 13 trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The order shortening time specified that the debtors shall serve the motion and a copy of the order no later than January 20, 2021. Doc. #14. The certificate of service indicates that the notice of hearing, motion, and declaration were served on all parties in interest, but makes no mention of whether the order was served. Doc. #15. The court will inquire at the hearing as to whether the order shortening time was properly served.

Jason Aaron Atherton and Genzzia Sabrina Dovigi-Atherton (collectively "Debtors") filed this motion to extend the automatic stay. Doc. #10.

If Debtors have had a bankruptcy case pending within the preceding one-year period, but was dismissed, then under 11 U.S.C. § 362(c)(3)(A), the automatic stay under subsection (a) of this section with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease, shall terminate with respect to the Debtors on the 30th day after the filing of the later case.

Debtors had one relevant previous case pending, case no. 16-12713. That case was filed on July 27, 2016 and was dismissed on November 15, 2019 for failure to make plan payments. However, this case was filed on January 9, 2021, which is more than one year since the previous case was dismissed.

So, the requisite for application of § 362(c)(3) is not present. This motion is therefore moot.

Accordingly, the motion will be DENIED.

**11:00 AM**

1. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A**
20-1060 GL-1 **CALIFORNIA LOCAL HEALTH CARE DISTRICT**

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
12-17-2020 [15]

COALINGA REGIONAL MEDICAL
CENTER, A CALIFORNIA LOC V.
XAVIER BECERRA/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied. Defendant to answer the complaint 14 days after entry of the order on this motion.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This motion was filed on 28 days' notice as required by Local Rule of Practice 9014-1 and will proceed as scheduled.[5]

Service Defects

First, the court notes that the defendant's certificates of service were not filed separately as required by the local rules. LBR 9014-1(e)(2) requires proof of service, in the form of a certificate of service, to be filed with the Clerk of the court concurrently with the pleadings or documents served, or not more than three days after the papers were filed. LBR 9004-2(e)(1) provides that proofs of service shall be filed as separate documents. LBR 9004-2(e)(2) states that copies of the pleadings served "SHALL NOT be attached to the proof of service filed with the court." Here, each motion document included an attached certificate of service in violation of LBR 9004-2(e)(2). *See* Doc. #15; #16; #21. Moreover, those certificates were not filed separately as required by LBR 9004-2(e)(1). The court notes that only one certificate is needed for multiple documents and pleadings related to papers with the same docket control number. *See* LBR 9004-2(e)(3).

Second, LBR 7005-1(a) allows service by electronic means pursuant to Civil Rule 5(b)(2)(E), as made applicable by Rule 7005, which generally applies to pleadings filed after the original complaint and other papers specified in Civil Rule 5(a)(1). LBR 7005-1(d) states, in relevant part:

[5] Unless otherwise indicated, references to "LBR" are to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rules" are to the Federal Rules of Bankruptcy Procedure; "Civil Rule" are to the Federal Rules of Civil Procedure; and all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

> 1) *Upon Those Parties Consenting to Service by Electronic Means*. Service by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(E) shall be accomplished by transmitting an email which includes as a PDF attachment the document(s) served. The subject line of the email shall include the words "Service Pursuant to Fed. R. Civ. P. 5," and the first line of the email shall include the case or proceeding name and number and the title(s) of the document(s) served.
> . . .
> 3) *Certificate of Service*. The certificate of service shall include all parties served, whether by electronic or conventional means. Where service was accomplished by electronic means, the certificate of service shall include the email addresses to which the document(s) were transmitted, and the party, if any, whom the recipient represents.

LBR 7005-1(d)(1), (d)(3). Here, each certificate of service identifies individually the document or pleading served as required by LBR 9014-1(e)(3). However, the certificates do not identify the parties served or list their respective mailing or email addresses. Instead, the certificates provide the defendant "electronically filed the following documents with the Clerk of the Court by using the CM/ECF system . . . **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system." Doc. #15; #16; #21 (emphasis in original). Neither the parties, counsel, nor email addresses are listed as required by LBR 7005-1(d)(1) and (d)(3). All of these details should be listed in a separately filed certificate of service. *See*, *e.g.*, Doc. #20.

Typically, this motion would be denied without prejudice for the foregoing procedural defects, but on January 11, 2021 the plaintiff timely filed substantive opposition waiving any service defects. Doc. #18.

## Background

Coalinga Regional Medical Center ("Plaintiff") filed this adversary proceeding to: (1) avoid 90-day pre-petition preferential transfers totaling $44,797.00 to the Department of Health Care Services ("Defendant") under § 547; (2) recover the avoided transfer under § 550; and (3) disallow Defendant's $184,306.72 unsecured claim until the $44,797.00 preference is paid in full under § 502(d). Doc. #1.

Defendant asks this court to dismiss the action under Civil Rule 12(b)(6) (made applicable in adversary proceedings under Rule 7012) because: (1) the two-year statute of limitations under § 546(a)(1)(A) ran before the proceeding was filed; and (2) the remaining causes of action are dependent on the non-cognizable avoidance claim. Doc. #15.

Plaintiff timely responded contending that Defendant's motion is without merit because: (1) Defendant failed to cite to binding case law in this district directly contrary to its position; (2) the

cases cited by Defendant do not apply; (3) Defendant misunderstands the nature of chapter 9 and the court's role in determining whether a municipal debtor has established the statutory prerequisites to be eligible for an order for relief; and (4) Defendant misconstrues the Bankruptcy Code. Doc. #18.

Defendant replied reiterating: (1) the avoidance claim is barred by the two-year statute of limitations; (2) Defendant's case law does not control because it ignores § 301 and "fails to harmonize" §§ 301 and 921(c); (3) the Ninth Circuit refused to affirm the reasoning used in Plaintiff's caselaw by footnote in Defendant's antecedent case; (4) Defendant's chapter 13 caselaw applies in chapter 9 cases; (5) Defendant's case demonstrates how §§ 301 and 921(c) should be harmonized. Doc. #21.

## Motion to Dismiss Standard

Civil Rule 12(b)(6) states dismissal is warranted "for failure to state a claim upon which relief can be granted." "A complaint need not state 'detailed factual allegations,' but must contain sufficient factual matter to 'state a claim to relief that is plausible on its face.'" *Doan v. Singh*, 617 F.App'x. 684, 685 (9th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544-55 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

In reviewing Civil Rule 12(b)(6) motions, the court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 555). The court may also draw on its "judicial experience and common sense." *Id.* at 679.

If the allegations show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

## Defendant's Contentions

Defendant contends that Plaintiff's claim for relief under § 547 is barred by the running of the two-year statute of limitations in § 546(a). Section 546 provides:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
>
> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or

> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

§ 546(a). Defendant insists the "entry of the order for relief" in § 546(a)(1)(A) refers to the initial filing date of the petition. Doc. #16 citing *Murphy v. Wray (In re Wray)*, 258 B.R. 777, 780 (9th Cir. 2001). Defendant cites § 301 (applicable to chapter 9 cases through § 901(a)), which provides: "The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." In the Ninth Circuit, Defendant urges, the date of the order for relief is generally the same date as the petition date. Doc. #16 citing *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 807 (9th Cir. 1994).

Here, Plaintiff filed its chapter 9 case on September 7, 2018. Under § 546(a), Defendant contends, Plaintiff had until September 7, 2020 to file its avoidance action. Because Plaintiff filed its adversary proceeding on October 19, 2020, Defendant argues the avoidance claim is barred by the running of the statute of limitations and must be dismissed. Doc. #16.

Defendant also preempts Plaintiff's potential argument that *In re City of Stockton*, 493 B.R. 772, 776 (Bankr. E.D. Cal. 2013), should apply. *Id.* Defendant believes that § 921(c) pertains to a separate order for relief after deciding whether there are objections to the chapter 9 petition. *Id.*, citing *In re Wellston*, 42 B.R. 282, 285 (Bankr. E.D. Mo. 1984). Otherwise, § 301—"The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such a chapter"—would be negated.

Finally, Defendant claims that the remaining causes of action for recovery of avoided transfers under § 550 and disallowance of Defendant's unsecured claims until the preference payment is returned are dependent on the non-cognizable avoidance claim.

Plaintiff's Opposition

Plaintiff, meanwhile, claims that the complaint was timely filed on October 19, 2020 because that is less than two years after the order for relief was entered on December 21, 2018. Doc. #18. Plaintiff describes the motion as being predicated on the notion that there are two separate orders for relief in a chapter 9 bankruptcy case: an order for relief entered after the court decides objections to the chapter 9 petition and an order that occurs on the petition date. Plaintiff argues that this notion is erroneous and ignores applicable law in this district. Further, Plaintiff insists that Defendant's cited cases are inapplicable because they involve chapter 7, 11, or 13 cases, but not chapter 9, which differ because an order for relief does not arise automatically upon the filing of a chapter 9 petition. *Id.*

Plaintiff quotes the Honorable Christopher M. Klein's explanation in *In re City of Stockton*:

> Chapter 9 is peculiar in that the filing of a voluntary petition does not constitute an order for relief. 11 U.S.C. § 921(d). Rather, the municipality must be prepared to litigate its way to an order for relief in its voluntary case by demonstrating its eligibility to be a chapter 9 debtor and establishing that it filed the petition in good faith. 11 U.S.C. §§ 109(c) & 921(c).

*In re City of Stockton*, 475 B.R. 720, 724-25 (Bankr. E.D. Cal. 2012), *accord*, *In re City of Stockton*, 493 B.R. 772 (Bankr. E.D. Cal. 2013). After filing its petition, Plaintiff claims it had to file a statement of qualifications, a declaration, and a chapter 9 relief motion set for notice and a hearing. After consideration of the pleadings, the court determined Plaintiff met its *prima facie* case that it was eligible for chapter 9 relief and that good cause existed for the entry of the order for relief, which was signed and entered on December 21, 2018. Doc. #78.

Plaintiff further contends that the cases cited by Defendant are inappropriate or misconstrued. *Wray* was about whether the statute of limitations ran from the date of filing of a chapter 13 case or the date it was converted to chapter 7. *Acequia, Inc.* involved a chapter 11 case and whether the bankruptcy court correctly determined that debtor's founder was liable for making certain fraudulent transfers. *Wellston* was whether to grant a municipal debtor's application to release a garnishment and for authority to use funds for the operation of essential city services. Plaintiff claims that *Wellston* did not hold or state that § 921(c) "pertains to a separate order for relief that is entered after the court decides any objections to the Chapter 9 bankruptcy petition. Doc. #18; *cf.* Doc. #16, at 4, ¶¶ 6-8.

Lastly, Plaintiff claims that there is no conflict between §§ 301(b), 921(c), and 546(a)(1)(A) because § 921(d) provides "[i]f the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter notwithstanding section 301(b)." Doc. #18. Municipal bankruptcies are rare, and the court must ensure municipal debtors meet the requirements of § 109(c) before they are eligible for an order for relief. The order for relief was entered on December 21, 2018 (Doc. #78) and therefore the complaint was timely filed on October 19, 2020.

Defendant's Reply

Defendant filed a reply reiterating the following arguments: (1) the avoidance claim is barred § 546(a)'s two-year statute of limitations; (2) *City of Stockton* does not control because it ignores § 301 and "fails to harmonize" §§ 301 and 921(c); (3) the Ninth Circuit refused to affirm the reasoning of *City of Stockton* In a footnote in *City of Desert Hot Springs*, which was decided ten years before *City of Stockton*; (4) *Wray* applies in chapter 9 cases; and (5) *Wellston* demonstrates how §§ 301 and 921(c) should be harmonized. Doc. #21.

Defendant maintains that *In re City of Stockton* does not apply because it "fails to harmonize" §§ 301 and 921(c). Defendant insists that the Ninth Circuit refused to affirm its reasoning in a footnote in *Silver Sage Partners, Ltd. v. City of Desert Hot Springs.* In *Desert Hot Springs*, the issues were: whether an order overruling an objection to a chapter 9 and denying a motion to dismiss was interlocutory, and whether the Court of Appeals had jurisdiction to hear the case. By footnote in its ruling affirming the dismissal of the appeal by the Bankruptcy Appellate Panel, the appeals court added:

> We do not decide whether a Chapter 9 order for relief issues automatically once the municipality files a voluntary petition, 11 U.S.C. § 301, or whether the court must first consider objections to the bankruptcy under 11 U.S.C. § 921(c) before entering the order for relief. *Compare* Collier on Bankruptcy, 15th ed. Revised, § 921.04[5] *with In re Colorado CentreC Metropolitan Dist.*, 113 B.R. 25, 27 (Bankr. N.D. Col. 1990). Regardless of when the order for relief is entered, we hold that chapter 9 supplies a creditor with adequate protections against irreparable harm to distinguish *In re Mason*, 709 F.2d 1313.

*Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 791 at n.4 (9th Cir. 2003).

This dicta, Defendant argues, is evidence that *Stockton*'s reasoning was rejected. But *Desert Hot Springs* was decided nearly a decade before *In re Stockton.* Rejection of *Stockton's* reasoning is unlikely.

Defendant also cites another footnote as authority, claiming that it demonstrates how §§ 301 and 921 can be harmonized:

> By its order of April 25, 1983, the United States Supreme Court prescribed that the (new) Bankruptcy Rules supersede all previous Bankruptcy Rules as of August 1, 1983. This order is not inconsistent with other provisions of the Bankruptcy Code, such as Section 301, which states that the filing of the petition commences a bankruptcy case, which in turn constitutes an order for relief without further Court consideration, unless a motion to dismiss is filed.

*In re Wellston*, 42 B.R. 282, 284 at n.1. (Bankr. E.D. Mo. 1984). Both of these cases involve different issues and were decided before a 2005 amendment modifying §§ 301 and 921.

Defendant also argues that *Wray*'s holding—that the "entry of the order for relief" in § 546(a)(1)(A) refers to the filing date of the petition—should apply to chapter 9 cases because § 301(b) states that "[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief[.]" Doc. #21 citing *Murphy v. Wray (In re Wray)*, 258 B.R. 777, 780 (9th Cir. 2001). But *In re Wray*

was a chapter 13 case that was converted to chapter 7, so it is not applicable to this case.

Conclusion

Section 921 provides:

> (c) After any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of this title.
>
> (d) If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter **notwithstanding section 301(b)**.

§ 921(c), (d) (emphasis added).

Defendant's argument that § 301(b) constitutes an order for relief is flawed. Section 921(d) is clear. Section 301(b) constituting as an order for relief is halted in chapter 9 cases until the court issues an order for relief after time for objections, notice, and a hearing to determine whether the case should be dismissed if the petition was not filed in good faith or the requirements of the Code were not met.

Suppose an objection to eligibility to file Chapter 9 is filed five months after the petition date. If Defendant's position is correct, there would be two "Orders for Relief:" the petition date, and when eligibility is finally determined. This seems hardly workable or correct. That would leave all avoidance action defendants, potential or actual, never able to determine when the limitations period starts.

Defendant's claim that this adversary proceeding is time barred under § 546 is without merit. This adversary proceeding was filed on October 19, 2020, which is within two years of the order for relief entered on December 21, 2018. *See* case no. 18-13677, Doc. #78.

Accordingly, this motion will be DENIED. Defendant shall file an answer to the complaint not later than 14 days after entry of the order on this motion.

2. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
20-1002

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-14-2020 [1]

TULARE LOCAL HEALTHCARE
DISTRICT V. BAKER & HOSTETLER
RILEY WALTER/ATTY. FOR PL.

NO RULING.

The parties previously agreed to continue this status conference to January 27, 2021. Doc. #35. An answer was due twenty days after the conclusion of the previous status conference. Doc. #33.

On January 11, 2021, the parties filed a stipulation agreeing that all discovery and other proceedings related to this case should be stayed pending a further status conference in August 2021. Doc. #38. The parties determined that a related criminal proceeding pending in Tulare County Superior Court, *People v. Benzeevi, Green, Germany*, and a civil proceeding pending in Kern County Superior Court, *Tulare Local Healthcare District v. Baker Hostetler, Greene, et al.*, must be resolved before this case may proceed. *Id.* The parties also agreed to file a joint status report by August 8, 2021 and appear at the hearing to answer inquiries and select a date and time for further status conference.

3. 08-17066-B-13 **IN RE: JOE PARKS**
20-1039 FW-1

MOTION TO COMPEL AND/OR MOTION FOR SANCTIONS
1-18-2021 [21]

PARKS V. HSBC MORTGAGE
SERVICES, INC. ET AL
GABRIEL WADDELL/ATTY. FOR MV.

NO RULING.

This motion was filed on seven days' notice pursuant to the Scheduling Order entered October 1, 2020 (Doc. #22) and will proceed as scheduled. Written opposition was not required and respondents may appear at the time of the hearing.

Joe Parks ("Plaintiff") seeks an order compelling HSBC Mortgage Services, Inc., and HSBC Finance Corporation ("Defendants") to make disclosures, answer interrogatories, and produce documents in response to requests for production. Doc. #21.

Plaintiff filed this adversary proceeding on June 24, 2020. Doc. #1. Defendants answered on August 26, 2020. Doc. #13. The parties filed a joint discovery conference report on September 16, 2020, which specified that the parties agreed to file and serve initial disclosures before September 16, 2020. Doc. #15. As noted above, this court entered a scheduling order on October 1, 2020. Doc. #22.

Plaintiff claims that Defendants have not provided their initial disclosures nor responded to their settlement offers. Doc. #21. Plaintiff has not received any responses despite having served discovery requests to both Defendants on November 30, 2020. Repeated letters, emails, and voicemails were sent to Defendants before Plaintiff was informed that Defendants' counsel was "cleaning out his office for new employment." *Id.*

Lacking receipt of responses to discovery requests or further settlement communication, Plaintiff filed this motion seeking the following relief:

(1) Monetary sanctions to Plaintiff not to exceed $4,026.00;

(2) Non-monetary sanctions for failure to make required disclosures and respond to discovery requests as follows:
(i) Directing matters deemed admitted be designed as facts as permitted by Civil Rule 37(b)(2)(A)(i);
(ii) Prohibiting Defendants from supporting or opposing Plaintiff's claims or introducing matters into evidence;
(iii) Striking Defendants' pleadings;
(iv) Rendering default judgment against Defendants;
(v) Finding Contempt; and

(3) In the alternative, Plaintiff requests:
(i) An order compelling disclosures, responses to interrogatories, and production of documents within five days;
(ii) Extending the discovery cutoff deadline;
(iii) Staying proceedings until the foregoing orders are obeyed.

Written opposition was not required and may be presented at the hearing. This matter will be called as scheduled to inquire about the current status of discovery.