

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, March 10, 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. [19-15313](#)-B-13 **IN RE: JENNIFER PAYAN**
[NES-1](#)

MOTION FOR COMPENSATION FOR NEIL E. SCHWARTZ, DEBTORS
ATTORNEY(S)
2-10-2021 [[61](#)]

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

Jennifer Marie Payan's ("Debtor") counsel, Neil E. Schwartz of the Law Offices of Neil E. Schwartz ("Movant") requests fees of \$8,300.00 and costs of \$411.00 for a total of \$8,711.00 for services rendered from December 13, 2019 through January 13, 2021. Doc. #61. Movant states that he received a pre-petition retainer of \$2,500.00, and therefore requests \$6,211.00 be payable through the plan. Doc. #63, Ex. A. Debtor filed a declaration stating that she reviewed the fee application and has no objection to the approval of this fee application, which would authorize the chapter 13 trustee, Michael H. Meyer ("Trustee"), to pay \$6,211.00 to Movant. Doc. #61, at 5, ¶ 9(7).

This motion will be GRANTED.

This is Movant's first fee application.

Section 3.05 of the Plan indicates that Movant was paid \$2,190.00 prior to the filing of the case and subject to court approval, additional fees of \$12,000.00 shall be paid through the Plan 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. #2, ¶ 3.05. The *Rights and Responsibilities* (Form EDC 3-096) states that Movant was paid \$2,190.00 prior to filing and \$14,190.00 will be paid through this case. Doc. #3. Meanwhile, the application states that no retainer was received, but also that Movant was paid \$2,500.00 in fees prior to filing the case. Doc. #61, at 2, ¶¶ 2(b)(1), (2). The Narrative Summary clarifies that Movant's receipt of \$2,500 prior to filing was a pre-petition retainer. Doc. #63, Ex. A. It appears that the discrepancy between Form EDC 3-096, the Plan, and the application is caused by categorizing the \$310.00 filing fee as a cost separate from the total \$2,500.00 received, resulting in \$2,190.00 for pre-filing fees.

Movant indicates that his firm spent 32.7 billable hours totaling \$8,300.00, but there are some problems with these calculations. Movant's requested fee summary is as follows:

Fee Summary					
Professional	Rate	Stated Hours	Requested Fees [sic]	Corrected Hours	Corrected Fees
N.S. Attorney	\$300.00	25.5	\$7,700.00	25.5	\$7,650.00
J.G. Paralegal	\$125.00	7.2	\$600.00	5.2	\$650.00
Totals:		32.7	\$8,300.00	30.7	\$8,300.00

Doc. #61, at 4, ¶ 7. The court notes two clerical errors. At the hours and rates specified in the Fee Summary, Movant's total fees would be **\$8,550.00**, not \$8,300.00.

N.S. Attorney's 25.5 billable hours at \$300.00 per hour results in fees of \$7,650.00, not \$7,700.00. J.G. Paralegal's 7.2 billable hours at \$125.00 per hour results in fees of \$900.00, rather than \$600.00.

But both of these errors seem to resolve themselves in the time records. Doc. #63, Ex. B. The court replicated the time records to generate an accurate fee summary. Movant is advised to verify the accuracy of fee applications in the future. Movant should be mindful that it is his burden to establish entitlement to fees. It is not the court's burden to "figure out" the fee request.

The time records indicate that N.S. Attorney billed for 25.9 hours (\$7,770), but waived 0.4 hours (\$120), resulting in fees of **\$7,650.00**. Meanwhile, J.G. Paralegal billed for 6.8 hours (\$850), but waived 1.6 hours (\$200), resulting in fees of **\$650.00**. *Ibid*. Inclusion of these uncharged hours results in 32.7 total billable hours. After removing the uncharged hours, the total fees do total

\$8,300.00, but the hours are misattributed between N.S. Attorney and J.G. Paralegal. Although the total fees requested are correct and supported by the time records, the fee summary appears to allege an error that is not easily explainable on its face.

Movant also incurred the following expenses:

Expenses	
Postage	\$23.00
Filing Fees	\$310.00
Other	\$78.00
Total Costs:	\$411.00

Doc. #61, at 4, ¶ 6. The requested fees and expenses total \$8,711.00.

11 U.S.C. § 330(a)(1)(A) and (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, and value of assets; (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; and (7) confirming a chapter 13 plan. Doc. #63, Ex. A, B. The court finds the services reasonable and necessary and the expenses requested actual and necessary. No party in interest timely filed written opposition.

This motion will be GRANTED. Movant shall be awarded \$8,300.00 in fees and \$411.00 in costs, for a total of \$8,711.00 for services rendered from December 13, 2019 through January 13, 2021. Movant will be authorized to draw on the \$2,500.00 retainer and apply it to the outstanding balance of fees. Trustee will be authorized to pay Movant \$6,211.00 in accordance with the chapter 13 plan.

2. [19-10516](#)-B-13 **IN RE: FRANK CRUZ**
[TCS-4](#)

CONTINUED MOTION TO MODIFY PLAN
12-29-2020 [\[198\]](#)

FRANK CRUZ/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

This matter was previously continued so that Frank Cruz ("Debtor") could respond to objections filed by chapter 13 trustee Michael H. Meyer ("Trustee") and Salas Financial ("Salas").

By prior order of the court (Doc. #212), Debtor had until February 24, 2021 to file and serve a written response to the objections, or until March 3, 2021 to file, serve, and set for hearing a confirmable modified plan or the objections would be sustained on the grounds stated. Doc. #211. Debtor neither responded to the objections nor filed a modified plan.

Therefore, per the previous order, Trustee and Salas' objections will be SUSTAINED and this motion will be DENIED.

3. [20-13217](#)-B-13 **IN RE: LARRY/DOLORES SYRA**
[MAZ-3](#)

MOTION TO VALUE COLLATERAL OF ALLY BANK
1-27-2021 [\[54\]](#)

LARRY SYRA/MV
MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: Resolved by stipulation.

NO ORDER REQUIRED.

Larry N. Syra and Dolores G. Syra ("Debtors") ask the court for an order valuing a 2014 Audi A4 Sedan ("Vehicle") at \$13,775.00. Doc. #54. Vehicle is the collateral securing an automobile financing loan owned by Ally Bank ("Creditor"). See Claim #1-1. Mr. Syra filed a declaration with his opinion that Vehicle's replacement value under § 506(a)(1) is \$13,775.00 based on its age, condition, and mileage. Doc. #56.

On February 12, 2021, Creditor and Debtors jointly stipulated to valuing Vehicle at \$13,775.00, to be reflected in the chapter 13

plan or order confirming the plan. Doc. #63. The court approved the stipulation on February 17, 2021. Doc. #65.

Therefore, this motion was resolved by stipulation and will be dropped from calendar.

4. [20-13217](#)-B-13 **IN RE: LARRY/DOLORES SYRA**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
1-27-2021 [\[50\]](#)

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to April 21, 2021 at 9:30 a.m.

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

This motion was originally filed on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c) for unreasonable delay by the debtors that is prejudicial to creditors and failure to confirm a chapter 13 plan. Doc. #50.

Larry N. Syra and Dolores G. Syra ("Debtors") filed a response on February 12, 2021. Doc. #60.

The court previously continued the matter so that it could be heard in connection with Debtors' motion to value the collateral of Ally Bank ("Creditor") in matter #3 above (MAZ-3). Docs. #66; #67. That motion was resolved by stipulation on February 12, 2021 and an order approving the stipulation was entered February 17, 2021. Docs. #63; #65.

Creditor previously objected to Debtors' first chapter 13 plan (Doc. #3) under LBR 3015-1(c)(4) because it failed to provide for payment of the full replacement value of Creditor's Class 2(B) collateral under § 1325(a)(5)(B)(ii). Doc. #19. Debtors' reply stated that they did not oppose increasing the value of the collateral in the plan, will increase their plan payment over the duration of the plan, and will increase Creditor's monthly dividend. Doc. #24. The court sustained Creditor's objection on December 4, 2021. Docs. #33; #34.

Debtors will need to file, serve, and set for hearing a new plan for confirmation in accordance with LBR 3015-1(d)(1). This matter will be called as scheduled to inquire about the parties' current positions.

The court is inclined to continue the matter to April 21, 2021 at 9:30 a.m., which would give Debtors until March 17, 2021 to file and serve a confirmable plan with at least 35 days' notice of the hearing.

5. [20-13430](#)-B-13 **IN RE: RAUL/JESSICA SANCHEZ**
[JDR-1](#)

MOTION TO AVOID LIEN OF CAVALRY INVESTMENTS, LLC
2-5-2021 [\[23\]](#)

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

Raul Sanchez and Jessica Lee Sanchez ("Debtors") seek to avoid a judicial lien in favor of Cavalry Investments, LLC ("Creditor"), and encumbering residential real property commonly known as 2869 Hillcrest Street, Atwater, CA 95301 ("Property"). Doc. #23.

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) 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 Debtors in favor of Fireside Bank f/k/a Fireside Thrift Co. ("Fireside Bank") in the sum of \$4,466.24 on June 9, 2005 and renewal entered on June 8, 2015. Doc. #26, Ex. B. The renewed abstract of judgment was issued on January 22, 2019 and recorded in Merced County on February 26, 2019. *Id.* That lien attached to Debtor's interest in Property. Doc. #25.

Creditor filed Proof of Claim No. 18 in the amount of \$5,566.61 on December 16, 2020. Claim #18-1. Creditor purchased the debt from Fireside Bank on March 6, 2012 and therefore is the current owner of this judgment lien. *Id.*, at 5.

As of the petition date, Property had an approximate value of \$254,319.28. Docs. #1, Schedule A, ¶ 1.1; #25, ¶ 8. The unavoidable liens totaled \$253,706.00 on that same date, consisting of a deed of trust in favor of Cardinal Financial Company (Doc. #26, Ex. A). Doc. #19, Schedule D. Debtors claimed an exemption pursuant to California Civ. Proc. Code ("C.C.P.") §§ 703.140(b)(1) and (5) in the amount of \$613.28. Doc. #1, Schedule C.

Fair Market Value of Property on petition date		\$254,319.28
Total amount of unavoidable liens	-	\$253,706.00
Remaining equity available in Property	=	\$613.28
Value of Debtors' exemption	-	\$613.28
Creditor's judicial lien	-	\$4,466.24
Extent Debtors' exemption impaired	=	(\$4,466.24)

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

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

The court notes that Debtors' motion (Doc. #23, ¶ 8) incorrectly states Property was valued at \$276,434.00 on the petition date. The court relied on the evidence submitted (Docs. #1; #19; #25; #26) and not the evidently erroneous statements of counsel. If the value of Property were in fact \$276,434.00, there would be sufficient equity available for Creditor's lien such that Debtors' exemption would not be impaired, and this judgment lien would not be avoidable.

6. [20-13430](#)-B-13 **IN RE: RAUL/JESSICA SANCHEZ**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
1-27-2021 [\[15\]](#)

MICHAEL MEYER/MV
JEFFREY ROWE/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to April 21, 2021 at 9:30 a.m.
unless motion is withdrawn.

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

This motion was originally filed on 28 days' notice as required by
Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as
scheduled.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to
dismiss this case under 11 U.S.C. § 1307(c) for unreasonable delay
by the debtors that is prejudicial to creditors and failure to
confirm a chapter 13 plan. Doc. #15.

Raul Sanchez and Jessica Lee Sanchez ("Debtors") timely responded on
February 8, 2021. Doc. #29.

The court previously continued the matter so that it could be heard
in connection with Debtors' motion to avoid lien of Calvary
Investments, LLC, in matter #5 above (JDR-1). Docs. #31; #32.

Debtors' plan was filed with the petition on October 29, 2020.
Doc. #2. No party in interest timely filed written opposition to the
plan, and its confirmation awaited a motion to avoid lien. This
matter will be called as scheduled to inquire about the parties'
current positions.

The hearing will proceed unless the Trustee withdraws the motion.

If necessary, the court is inclined to continue the matter to April
21, 2021 at 9:30 a.m., which would give Debtors until March 17, 2021
to file and serve a confirmable plan with at least 35 days' notice
of the hearing.

7. [20-13358](#)-B-13 **IN RE: JENNIFER WELLS**
[MHM-2](#)

MOTION TO DISMISS CASE
2-10-2021 [\[31\]](#)

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 trustee Michael H. Meyer withdrew this motion on March 2, 2021. Doc. #45. Accordingly, this motion will be dropped from calendar.

8. [19-12163](#)-B-13 **IN RE: JACINTO/DEE'ANNA OROSCO**
[TDD-2](#)

MOTION TO MODIFY PLAN
1-21-2021 [\[77\]](#)

JACINTO OROSCO/MV
TIMOTHY DUCAR/ATTY. FOR DBT.
RESPONSIVE PLEADING

NO RULING.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2) and will proceed as scheduled.

Jacinto Simon Orosco and Dee'Anna Marie Orosco ("Debtors") seek confirmation of their Fourth Modified Plan. Doc. #77. Chapter 13 trustee Michael H. Meyer ("Trustee") timely objects on grounds that the plan fails to provide for submission of all or such portion of Debtors' future earnings or other income to the Trustee to execute the plan and Debtors will not be able to make all payments under and comply with the plan. Doc. #83.

Because February 2021 is "plan month 21," Trustee states that the plan as proposed will take 74.32 months to fund under the stated payment amount. *Id.* For Debtors' plan to be funded over its proposed 60-month duration, Trustee contends that plan payments must increase to \$2,210.94 per month effective month 21.

Debtors' February 5, 2021 response states that a Fifth Modified Plan has been filed that Debtors seek to confirm instead. Doc. #85. The Fifth Modified Plan was filed concurrently with Debtors' response on February 5, 2021 and the only substantive change is the plan

payment, which was increased from \$1,628.00 to \$2,210.94 per month for 40 months. Doc. #87; cf. #75. The higher payment amount is the sum suggested by the Trustee as necessary to "fund" the plan.

Debtors have resolved Trustee's objection and this increase in payment could potentially be reflected in the confirmation order, but there are some problems because Debtors filed an entirely *different* plan.

The Fourth Modified Plan (Doc. #75) was filed and set for hearing on more than 35 days' notice. The Fifth Modified Plan (Doc. #87) was not; it was filed on February 5, 2021, which is 33 days before the hearing on March 10, 2021 and in violation of LBR 3015-1(d)(2). The Fifth Modified Plan is a separate matter and Debtors must therefore file and serve a separate motion, notice, supporting declarations and other evidence, and certificate of service. All of these documents would need to be refiled under a new Docket Control Number ("DCN") to comply with LBR 9004-2(a)(6), (b)(5), (b)(6), (e), and LBR 9014-1(c), (e)(2). The Fifth Modified Plan cannot reuse the same DCN (TDD-2) or other supporting documents as the Fourth Modified Plan.

This matter will be called as scheduled to inquire about the parties' positions. The court may continue the matter so that Debtors can properly serve and set for hearing the Fifth Modified Plan.

The court notes LBR 9014-1(e)(2) requires a 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 are filed. Here, there are multiple certificate of service defects. The original certificate of service (Doc. #82) references an "attached service list" containing the addresses of the parties served, but no list of addresses is attached. The second (Doc. #86) and third (Doc. #88) certificates of service share the same defect. On February 9, 2021, Debtors filed an amended proof of service (Doc. #89) indicating that the Fifth Modified Plan, motion, notice, and declarations were served on all parties in the attached service list. Although Debtors fixed the service issue, this certificate was not filed within three days after the original papers were filed in violation of LBR 9014-1(e)(2). Future violations of the local rules may result in the motion being denied without prejudice in other matters.

9. [17-14671](#)-B-13 **IN RE: ESTELA GARAY**
[PBB-3](#)

MOTION TO MODIFY PLAN
1-25-2021 [\[77\]](#)

ESTELA GARAY/MV
PETER BUNTING/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Estela L. Garay ("Debtor") withdrew this motion on February 5, 2021 because Debtor already completed all of her plan payments and therefore a modification is no longer necessary. Doc. #88. Accordingly, this motion will be dropped from calendar.

10. [18-13708](#)-B-13 **IN RE: LEONARDO CHAVEZ**
[MHM-2](#)

STATUS CONFERENCE RE: NOTICE OF CHAPTER 13 TRUSTEE'S
FORBEARANCE
3-2-2021 [\[85\]](#)

NIMA VOKSHORI/ATTY. FOR DBT.

NO RULING.

The parties shall be prepared to discuss treatment of secured creditor Specialized Loan Servicing's ("SLS") letter stating that Debtor was approved for a one-month forbearance from February 1, 2021 to March 1, 2021. Doc. #85.

Chapter 13 trustee Michael H. Meyer ("Trustee") set this forbearance status conference for hearing after receipt of a copy of SLS's letter. Doc. #86.

Trustee notes that no Notice of Forbearance has been filed in this case. Doc. #85. Trustee asks that the forbearance be effective for one month only: from February 1, 2021 through March 1, 2021. *Id.*

The court notes that the debtor filed a motion to confirm a fourth modified plan which includes provisions to cure post-confirmation defaults. Docs. ##81-84. No certificate of service accompanied those documents. Though scheduled to be heard April 7, 2021 on the Bakersfield calendar, the absence of a certificate of service will result in that motion being denied.

11. [20-13208](#)-B-13 **IN RE: ELIZABETH MARTIN AND AARON HAMPTON**
[PWG-1](#)

HEARING RE: MOTION TO VACATE DISMISSAL OF CASE
3-3-2021 [\[45\]](#)

AARON HAMPTON/MV
PHILLIP GILLET/ATTY. FOR DBT.
DISMISSED 03/03/2021; OST 3/4/21

NO RULING.

Elizabeth Leigh Martin and Aaron Scott Hampton ("Debtors") filed this *ex parte* request to vacate dismissal with an order shortening time under the procedure specified in Local Rule of Practice ("LBR") 9014-1(f)(3). Doc. #45. The order shortening time permitted a preliminary hearing on the motion on March 10, 2021 at 9:30 a.m. with oral opposition allowed at the hearing if the motion was served with at least 6-days' notice by email and/or first-class mail on the U.S. Trustee and the Chapter 13 Trustee. Doc. #49.

Debtors filed a certificate of service later that day indicating that the U.S. Trustee and chapter 13 trustee Michael H. Meyer ("Trustee") were served the motion, declaration, and order by email on March 3, 2021, which is seven days before the hearing. Though Debtors complied with the order shortening time, no notice or separate motion were filed. The court also notes that *only* Trustee and U.S. Trustee were served. Requests for special notice and other parties in interest were not served.

LBR 9014-1(d)(1) requires every application, motion, contested matter, or other request for an order to be comprised of a motion (or other request for relief), notice, evidence, and a certificate of service.

LBR 9014-1(d)(3)(B)(i) provides that notices shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons who must be served with any opposition. Per LBR 9014-1(d)(3)(B)(iii), the notice shall also advise respondents that they can determine whether the matter has been resolved without oral argument or whether the court has issued a tentative ruling by checking the court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing. The notice must also advise parties appearing telephonically (everybody) that they must view the pre-hearing dispositions prior to attending the hearing.

But LBR 1001-1(f) allows the court *sua sponte* to suspend provisions of the LBR not inconsistent with the Federal Rules of Bankruptcy Procedure to accommodate the needs of a particular case or proceeding. Any order entered granting this motion would be without prejudice to parties in interest who acted in reliance on the dismissal.

Debtors request the court to vacate the dismissal (Doc. #42) entered on March 3, 2021 under Fed. R. Civ. P. ("Civil Rule") 59 and Fed. R.

Bankr. P. ("Rule") 9006, for movants' failure to pay a \$32.00 amendment filing fee. Debtors' counsel claims that the "prehearing disposition indicated that the fee had to be paid prior to the hearing." Doc. #45, at 1; #46, ¶ 3. But the pre-hearing disposition stated that the matter would be called as scheduled to inquire whether the fees had been paid and warned that the case may be dismissed if not paid prior to the hearing.

Rule 9023 and Civil Rule 59(e) (as incorporated by Rule 9023) require a motion to alter or amend a judgment to be filed not later than 14 or 28 days, respectively, after entry of the judgment. This motion was filed after the hearing on February 3, 2021 and is therefore timely.

Civil Rule 59(e) motions "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharms GmbH & Co.*, 571 F. 3d 873, 880 (9th Cir. 2009). The rule "does not provide a vehicle for a party to undo its own procedural failures [or] allow a party to introduce new evidence or advance new arguments that could and should have been presented at the [bankruptcy] court prior to the judgment." *DiMarco-Zappa v. Cabanillas*, 238 F. 3d 25, 34 (1st Cir. 2001). The rule authorizes reconsideration or amendment of a previous order, but it is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F. 3d 877, 890 (9th Cir. 2000). "Indeed, a motion for reconsideration should not be granted absent highly unusual circumstances, unless the [bankruptcy] court is presented with newly discovered evidence, committed clear error, or if there is an intervening change of controlling law." *Id.*

This motion established none of those requisites. No change of law or legal error is presented. The evidence of payment is not newly discovered. It was in the control of movants or their counsel. Instead, movants "scatter shot" the relief requested including the limited relief under Rule 9006(b)(1). Movants can only be afforded relief if the court finds the neglect to promptly pay the fee "excusable."

At the March 3, 2021 hearing, the matter was called as scheduled and no appearances were made. Doc. #42. At the time of the hearing and on the record the court said the docket indicated that the outstanding fee had not been paid. So, the case was dismissed. *Id.*; Doc. #48. After the hearing, the fees were paid and the order dismissing the case was entered. See docket generally; Doc. #43.

But Debtors' counsel acknowledges that he "has been having issues with the e-filing system" that prevented him from paying the filing fees because "the fees due were not in the e-filing account page." If so, then counsel needs to be vigilant in either correcting the problem or allow more time because of anticipated difficulties. Doc. #46, ¶ 3.

Counsel also states that the court's notices sent by U.S. mail were very slow and arrived just a few days before the March 3, 2021

hearing. *Ibid.* The order to show cause was sent by first-class U.S. mail to Debtors' and Counsel on February 18, 2021. Doc. #37. March 3, 2021 is 13 days after February 18, 2021. Counsel does not state he failed to receive electronic notification of the clerk's notice and hearing date when the notice was docketed. The motion does not address that at all.

Debtors and Counsel may wish to consider registering for electronic bankruptcy noticing. See Doc. #14, Form 309I, at 2, ¶ 14. Form 309I, which was sent to Debtors and Counsel on October 11, 2020, provides information on options to receive notices served by the Clerk by email:

Anyone can register for the Electronic Bankruptcy Noticing program at ebn.uscourts.gov or debtors can register for DeBN by filing form EDC 3-321 Debtor's Electronic Noticing Request (DeBN) with the Clerk of Court. Both options are FREE and allow the Clerk to quickly send you court-issued notices and orders by email.

Ibid.

Counsel's declaration also states that a true and correct copy of the payment receipt is attached as Exhibit A, but no such Exhibit A appears to be attached or filed. Doc. #46, ¶ 3. The certificate of service does not mention Exhibit A either, but it is possible that Exhibit A was attached to the referenced declaration. Doc. #47. Perhaps it was excluded as an attachment because LBR 9004-2(c)(1) requires declarations and exhibits to be filed as separate documents. On this record, this amounts to a failure of proof.

Counsel states that he attempted to request a Court Call appearance because the payment was not on the court's docket, but the "request was after the cut off for the day. So, it required permission from chambers for a late Court Call appearance." Doc. #46, ¶ 4.

Counsel states that he attempted to call the three chambers' numbers listed on the court website "beginning at 8:00 a.m. and continuing until about 8:55 a.m. No one answered to give approval for a late Court Call appearance." *Ibid.* Chambers staff were present at the times indicated and would have received said phone calls. The court is not in receipt of any voicemail messages resulting from these alleged calls.

Regardless, Counsel was unable to attend the 9:00 a.m. hearing. The court notes that Counsel appeared later that day at 11:00 a.m., but it is possible that this issue only arose earlier in the morning.

Counsel states that the mistake of not paying the filing fee is his alone and requests that Debtors not be penalized by having their case dismissed. *Id.*, ¶ 5. The issue is whether the mistake was "excusable neglect."

Courts are permitted "where appropriate to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Pioneer*

Investment Services Co. v. Brunswick Limited Partnership, et al, 507 U.S. 380, 388 (emphasis added). Rather than asserting delayed payment was a result of carelessness or inadvertence, counsel initially argues there were external circumstances causing failure to timely pay. I.e., asserted ambiguity in the Clerk's notice, the tentative ruling stating the payment had to be made before the hearing, Court Call issues, e-filing limitations, slow mail, etc. These are unpersuasive.

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

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

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