UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, March 11, 2021
Place: Department A – Courtroom #11
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. 20-10011-A-13 **IN RE: TY SALES**
JFL-1

MOTION TO APPROVE LOAN MODIFICATION
2-2-2021 [40]

CARRINGTON MORTGAGE SERVICES, LLC/MV
STEPHEN LABIAK/ATTY. FOR DBT.
KELSEY LUU/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As a procedural matter, the Notice of Hearing filed in connection with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice include the names and addresses of persons who must be served with any opposition. The court encourages counsel review the local rules to ensure compliance in future matters, or those matters may be denied without prejudice for failure to comply with the local rules.

Creditor Carrington Mortgage Services, LLC ("Movant"), seeks authorization from this court to enter into a loan modification agreement with the debtor Ty Sales ("Debtor"). Doc. #40.

Movant holds a first position note ("Note") secured by a Deed of Trust in Debtor's real property located at 21130 Lago Bello Ln, Friant, CA 93626. Doc. #40. The Note and Deed of Trust were executed in June 2019 to secure a principal amount of $430,500.00 with an adjustable annual interest rate of 4%, with Debtor's monthly payments totaling $2,131.89, plus escrow and changes due to interest adjustments. Doc. #40; Ex. A, Doc. #42. All amounts under the Note and Deed of Trust to become due July 1, 2047. Doc. #40.

Debtor and Movant have reached an agreement to modify the terms of the Note and Deed of Trust. Decl. of Terrence Morley, Doc. #43. As modified, the principal balance would be $434,928.18 with a fixed interest rate of 2.75%. Decl.,

Doc. 43; Ex. C, Doc. #42. The maturity date is set for July 1, 2047, and the proposed monthly payment would be $1,919.61, plus escrow. Decl., Doc. #43; Ex. C, Doc. #42.

This motion is GRANTED. Debtor is authorized, but not required, to complete the loan modification with Movant. Debtor and Movant are authorized to enter into any agreement and execute any documents as may be necessary to carry out the loan modification in accordance with Movant's motion. Debtor shall continue making plan payments in accordance with their confirmed Chapter 13 plan. Debtor must modify the plan if the payments under the modified loan prevent Debtor from paying under the plan.

The 14-day stay set forth in Federal Rule of Bankruptcy Procedure 6004(h) is waived.

2. 20-10011-A-13 **IN RE: TY SALES**
SLL-2

MOTION TO MODIFY PLAN
1-21-2021 [32]

TY SALES/MV
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 at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of creditors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is 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.

3. 16-11025-A-13 **IN RE: TIM/CHERIE WILKINS**
FW-9

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C.
FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
2-4-2021 [273]

PETER FEAR/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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Fear Waddell, P.C. ("Movant"), counsel for Tim M. Wilkins and Cherie Reece Wilkins (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of final compensation in the amount of $7,544.00 and reimbursement for expenses in the amount of $350.55 for services rendered June 1, 2017 through January 25, 2021. Doc. #273. Debtors' confirmed plan provides for $60,900.00 in attorney's fees. Plan, Doc. ##184, 205. One prior fee application has been granted, allowing interim compensation to Movant pursuant to 11 U.S.C. § 331 in the amount of $53,559.50 and reimbursement for expenses totaling $1,562.52. Order, Doc. #219. Movant requests final compensation in excess of the amount called for in Debtors' plan, but believes the plan is feasible and will complete timely. Doc. #273.

Debtors' confirmed plan, section 7.04, provides that "attorney fees and costs approved pursuant to 11 U.S.C. § 330 but remaining unpaid upon the completion of the case shall not be discharged and shall be paid directly by the debtor to counsel for the debtor before and/or after entry of the discharge." Plan, Doc. #184.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) pre-petition consultation and fact gathering; (2) claim administration and objections, including objecting to erroneous mortgage payment changes; (3) original and modified plan, hearings, and

objections; and (4) preparation for discharge and case closing. Doc. #276. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on a final basis.

This motion is GRANTED. The court finds all fees and expenses of Movant previously allowed on an interim basis are reasonable and necessary. The court allows on a final basis all fees and expenses previously allowed to Movant on an interim bases, in addition to compensation requested by this motion in the amount of $7,544.00 and reimbursement for expenses in the amount of $350.55 to be paid in a manner consistent with the terms of the confirmed plan. The chapter 13 trustee is specifically authorized to pay Movant amounts requested by this motion to the extent available through the plan, not limited to the amount reserved in the plan.

4. 16-13634-A-13 **IN RE: ANDREW ESPARZA**
MHM-4

MOTION TO DETERMINE FINAL CURE AND MORTGAGE PAYMENT RULE 3002.1
2-1-2021 [92]

MICHAEL MEYER/MV
GLEN GATES/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). Freedom Mortgage Corporation timely filed written response on February 25, 2021. Doc. #101. The failure of other creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the non-responding parties in interest are entered.

Michael H. Meyer ("Trustee"), the chapter 13 trustee, moves the court for a determination of final cure pursuant to Federal Rule of Bankruptcy Procedure ("Rule") 3002.1. Doc. #92. Freedom Mortgage Corporation ("FMC") filed written response indicating that the debtor has cured the default on the loan with FMC and that the debtor is current with all post-petition payments. Doc. #101.

Rule 3002.1(g) requires that within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with 11 U.S.C. § 1322(b)(5). FMC timely filed and served its response on February 25, 2021. Doc. #101.

Rule 3002.1(h) states that on motion by the trustee filed within 21 days after service of the statement under subdivision (g) of this Rule, the court shall,

after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

The record shows that the debtors have cured the default on the loan with FMC and are current on mortgage payments to the same through February 2021. Therefore, this motion is GRANTED.

5. 16-11256-A-13 **IN RE: SAMUEL/DIANE DOMINGUEZ**
FW-11

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C.
DEBTORS ATTORNEY(S)
1-28-2021 [147]

PETER FEAR/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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Fear Waddell, P.C. ("Movant"), counsel for Samuel F. Dominguez and Diane Adeline Dominguez (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of final compensation in the amount of $7,038.00 and reimbursement for expenses in the amount of $264.89 for services rendered December 1, 2016 through January 20, 2021. Doc. #147. Debtors' confirmed plan provides for $20,000.00 in attorney's fees. Plan, Doc. ##116, 130. One prior fee application has been granted, allowing interim compensation to Movant pursuant to 11 U.S.C. § 331 in the amount of $41,712.00 and reimbursement for expenses totaling $846.66. Order, Doc. #131. Movant requests final compensation in excess of the amount called for in Debtors' plan, but believes the plan is feasible and will complete timely. Doc. #147.

Debtors' confirmed plan, section 7.04, provides that "attorney fees and costs approved pursuant to 11 U.S.C. § 330 but remaining unpaid upon the completion of the case shall not be discharged and shall be paid directly by the debtor to counsel for the debtor before and/or after entry of the discharge." Plan, Doc. #116.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) pre-petition consultation and fact gathering; (2) claim administration and objections; (3) a motion to value collateral and motion to shorten time; (4) original and modified plan, hearings, and objections; and (5) preparation for discharge and case closing. Doc. #150. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on a final basis.

This motion is GRANTED. The court finds all fees and expenses of Movant previously allowed on an interim basis are reasonable and necessary. The court allows on a final basis all fees and expenses previously allowed to Movant on an interim bases, in addition to compensation requested by this motion in the amount of $7,038.00 and reimbursement for expenses in the amount of $264.89 to be paid in a manner consistent with the terms of the confirmed plan and prior orders.

6. 19-12462-A-13 **IN RE: ROBERT HAMPTON AND DEATRIA DAVIS**
PBB-8

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH TELECARE CORPORATION
2-1-2021 [100]

ROBERT HAMPTON/MV
PETER BUNTING/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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Robert Earl Hampton and Deatria Denise Davis (together, "Debtors"), the chapter 13 debtors, move the court for an order pursuant to Federal Rule of Bankruptcy Procedure 9019, approving the compromise of all claims and disputes against Telecare Corporation ("Telecare") arising out of an employment-related

injury as set forth in Workers Compensation Appeals Board Case No. ADJ12876914 (the "WCAB Claim"). Doc. #100; Ex. A, Doc. #104.

Co-Debtor Deatria Denise Davis ("Davis"), represented by counsel, pursued the WCAB Claim. See generally Lee v. AT&T Servs., No. CV 17-4642 FMO, 2018 U.S. Dist. LEXIS 163465, at *13-15 (C.D. Cal. Sept. 24, 2018) (holding that a chapter 13 debtor has standing to pursue claims initiated after filing for bankruptcy). Davis and Telecare have crafted a settlement of the WCAB Claim for a gross payment to Davis of $25,000.00, less $3,750.00 in attorney fees and $2,112.37 deducted for prior overpayment, resulting in a net payment to Davis of $19,137.63. Doc. #33. Debtors fully exempted the gross proceeds of the WCAB Claim. See Am. Schedule C, Doc. #96.

On a motion by the chapter 13 debtor and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

It appears from the moving papers that Debtors have considered the standards of A & C Properties and Woodson. Doc. ##100, 104. Davis has already received a total of $65,372.36 as temporary disability benefits, and the proposed settlement of $25,000 will be the final payment to Davis under the WCAB Claim. Decl. of Hillary Allyn, Doc. #103. Debtors assert that the settlement amount would not increase by litigating this matter further because the evidence is clear and not subject to significant dispute. Decl., Doc. #103. The gross settlement amount is fully exempt and not adverse to interests of creditors. Decl. of Deatria Denise Davis, Doc. #102. The court concludes that the Woodson factors balance in favor of approving the compromise, and the compromise is in the best interests of the creditors and the estate.

Accordingly, the motion is GRANTED, and the settlement between Davis and Telecare is approved. Debtors are authorized, but not required, to execute any and all documents necessary to satisfy the terms of the proposed settlement agreement.

7. 16-11575-A-13 **IN RE: LOUIS/LILLIE PANCOTTI**
FW-4

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
1-14-2021 [54]

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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Fear Waddell, P.C. ("Movant"), counsel for Louis Andrew Pancotti and Lillie Jean Pancotti (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of final compensation in the amount of $4,739.50 and reimbursement for expenses in the amount of $87.91 for services rendered March 1, 2017 through January 8, 2021. Doc. #54. Debtors' confirmed plan provides for $8,000.00 in attorney's fees. Plan, Doc. ##27, 36. One prior fee application has been granted, allowing interim compensation to Movant pursuant to 11 U.S.C. § 331 in the amount of $3,144.00 and reimbursement for expenses totaling $402.70. Order, Doc. #46.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) claim administration and objections; (2) original and modified plan, hearings, and objections; and (3) preparation for discharge and case closing. Doc. #57. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on a final basis.

This motion is GRANTED. The court finds all fees and expenses of Movant previously allowed on an interim basis are reasonable and necessary. The court allows on a final basis all fees and expenses previously allowed to Movant on an interim bases, in addition to compensation requested by this motion in the amount of $4,739.50 and reimbursement for expenses in the amount of $87.91 to be paid in a manner consistent with the terms of the confirmed plan. To the extent the funds available through the plan are not sufficient to cover the fees approved, Movant has agreed to waive those fees.

8. 19-11395-A-13 **IN RE: ORA DOUANGPHOUXAY**
FW-3

MOTION TO APPROVE TRANSFER OF PROPERTY
2-9-2021 [77]

ORA DOUANGPHOUXAY/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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Ora Parsith Douangphouxay ("Debtor"), the chapter 13 debtor in this case, moves the court for an order authorizing Debtor to relinquish her legal title to the real property located at 7712 North Academy, Clovis, CA 93619 (the "Property"). Doc. #77.

LBR 3015-1(h)(1)(E) provides that "if the debtor wishes to . . . transfer property on terms and conditions not authorized by [LBR 3015-1(h)(1)(A) through (D)], the debtor shall file the appropriate motion, serve it on the trustee, those creditors who are entitled to notice, and all persons requesting notice, and set the hearing on the Court's calendar with the notice required by Fed. R. Bankr. P. 2002 and LBR 9014-1."

This motion was properly served and noticed, and no opposition has been filed. Debtor's confirmed chapter 13 plan does not revest property of the estate in Debtor upon confirmation; however, permitting Debtor to relinquish her legal title as joint tenant in the Property will not prejudice creditors or the bankruptcy estate. See Plan, Doc. #64. Though Debtor listed the Property on her Schedule A/B, Debtor valued her interest in the property at $0.00 and stated that "Debtor has no beneficial interest in the property." Schedule A/B, Doc. #1. The Property was encumbered by a lien in favor of Unified Mortgage Service, and Debtor's confirmed chapter 13 plan states that Debtor's sister is to make the payments. Plan, Doc. #64. Debtor explains that she was only named on title to the Property for financing purposes but has never made any payments on the Property. Decl. of Debtor, Doc. #79. Nilandone Parker ("Parker"), Debtor's sister and co-joint tenant, seeks to refinance the Property, and does not require Debtor's name to be on title to the Property. Decl., Doc. #79.

Accordingly, this motion is GRANTED. Debtor is authorized, but not required, to be removed from title to the Property.

11:00 AM

1. 19-11901-A-7 **IN RE: ARMANDO CRUZ**
19-1095 BN-6

MOTION TO COMPEL
2-10-2021 [140]

STRATEGIC FUNDING SOURCE, INC. V. CRUZ
JARRETT OSBORNE-REVIS/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part and denied in part.

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

This motion was set for hearing on at least 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the defendant to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the default of the defendant to this motion is entered. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987).

Strategic Funding Source, Inc. D/B/A Kapitus, a New York Corporation ("Plaintiff"), moves for an order compelling Armando Cervantes Cruz ("Defendant") to respond to Plaintiff's Requests for Production of Documents, Set One (the "Document Demands") pursuant to Federal Rule of Civil Procedure ("Rule") 37, made applicable to this proceeding through Federal Rule of Bankruptcy Procedure Rule 7037. Pl.'s Mot., Doc. #140; Ex. F, Doc. #144.

The court is inclined to GRANT IN PART Plaintiff's motion to compel the production of documents. However, to the extent Plaintiff asks the court to direct the entry of default judgment automatically should Defendant fail to comply with the court's order to compel the production of documents, that request is DENIED. Should Defendant fail to comply with the court's order, Plaintiff may file and serve a motion in compliance with LBR 9014-1(f)(1) and 9014-2.

Plaintiff commenced this adversary proceeding by filing its complaint on August 12, 2019 (the "Complaint"). Adv. Proc. No. 19-01095, Doc. #1. The allegations set forth in the Complaint arise out of a loan agreement between Plaintiff and Defendant, a Chapter 7 debtor, whereby Plaintiff agreed to loan Defendant $75,000 (the "Loan Agreement"), and Defendant agreed to repay Plaintiff $98,250.

Defendant failed to respond to the Complaint. On September 13, 2019, one month after filing the Complaint, Plaintiff filed a request for entry of default (Doc. #9) and, on September 20, 2019, the United States Bankruptcy Court Clerk filed the Entry of Default. Doc. #11. Plaintiff moved for default judgment on November 4, 2019. Doc. #17. The court determined that the elements of Plaintiff's claims had not been demonstrated and, on March 11, 2020, denied Plaintiff's motion for default judgment without prejudice, but gave Plaintiff

the opportunity to bolster its claims through limited early discovery. Orders, Doc. ##64, 72; Court Audio, Doc. #75 (attached audio file). The court authorized limited discovery. Doc. #74. Plaintiff has served the Document Demands on Defendant, to which Defendant has not responded. Decl. of Jarrett S. Osborne-Revis, Doc. #143; Ex. F, Doc. #144.

On September 24, 2020, Defendant moved to set aside the entry of default. Doc. #96. At the hearing on Defendant's motion on December 10, 2020, the court denied Defendant's motion to set aside the entry of default under Rule 55(c). Civil Minutes, Doc. #135; Order, Doc. #138.

On October 28, 2020, having yet to receive a response to the Document Demands from Defendant, Plaintiff moved under Rule 37 for default judgment as a sanction for Defendant's failure to respond to the Document Demands. Doc. #114. At the hearing on December 10, 2020, the court denied Plaintiff's motion because Plaintiff had not sought alternative remedies prior to seeking default judgment. Civil Minutes, Doc. #134; Order, Doc. #137.

After the court denied Plaintiff's first motion for sanctions based on Debtor's failure to reply to the Document Demands, Plaintiff called Defendant's counsel on December 17, 2020 to discuss the matter. Osborne-Revis Decl., Doc. #143. Despite assurances from Defendant's counsel, Defendant has not responded to Plaintiff's Document Demands. Osborne-Revis Decl. Doc. #143.

"On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery." Rule 37(a)(1). "A party seeking discovery may move for an order compelling an answer, designation, production or inspection [if] a party fails to produce documents[.]" Rule 37(a)(3)(iv).

Based on the foregoing, Plaintiff's Motion to Compel Discovery (Doc. #140) is GRANTED. By no later than the fourteenth (14th) day after the entry of the order granting this motion, Defendant shall produce documents responsive to Plaintiff's Requests for Production of Documents, Set One, and specifically state in writing as to each request that Defendant determines he has no responsive documents within his possession, custody, or control.

Defendant is cautioned that any failure to obey this order may result in sanctions, including the rendering of a default judgment against Defendant upon motion by Plaintiff pursuant to LBR 9014-1(f)(1) and 9014-2.

2. 18-14207-A-7 **IN RE: ELMER/KATHLEEN FALK**
20-1057

STATUS CONFERENCE RE: AMENDED COMPLAINT
1-11-2021 [30]

SALVEN V. MOORE ET AL
PETER SAUER/ATTY. FOR PL.
CONT'D TO 7/1/21 PER ORDER DOC #43

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

DISPOSITION: Continued to July 1, 2021 at 11:00 a.m.

NO ORDER REQUIRED.

On February 10, 2021, the court issued an order continuing the status conference to July 1, 2021 at 11:00 a.m. Doc. #43.

3. 19-14729-A-13 **IN RE: JASON/JODI ANDERSON**
19-1131

CONTINUED MOTION IN LIMINE NO. THREE TO EXCLUDE TESTIMONY OF PLAINTIFFS RETAINED EXPERT WITNESS JAMES E. SALVEN, C.P.A
12-21-2020 [74]

ANDERSON ET AL V. NATIONAL ENTERPRISE SYSTEMS, INC.
ANTHONY VALENTI/ATTY. FOR MV.
RESPONSIVE PLEADING

NO RULING.

4. 19-14729-A-13 **IN RE: JASON/JODI ANDERSON**
19-1131 FW-2

MOTION FOR DETERMINATION THAT TAX LIABILITIES OWED BY PLAINTIFFS ON AN AWARD OF ATTORNEY FEES SHOULD BE CONSIDERED ACTUAL DAMAGES
2-11-2021 [92]

ANDERSON ET AL V. NATIONAL ENTERPRISE SYSTEMS, INC.
GABRIEL WADDELL/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The defendant timely filed written opposition on

February 25, 2021. Doc. #96. The plaintiffs timely replied on March 4, 2021. Doc. #97.

By this motion, plaintiffs Jason Anderson and Jodi Anderson (collectively, "Plaintiffs") seek a determination from this court that, as a matter of law, it is appropriate, and in fact mandatory, for this court to consider the tax implications of an award of attorneys' fees and costs under 11 U.S.C. § 362(k)(1) in determining the correct compensation to award Plaintiffs in this adversary proceeding. After consideration of the pleadings filed with respect to this motion and the relevant legal authority, the court denies the motion.

As noted by both Plaintiffs and National Enterprise Systems, Inc. ("Defendant"), 11 U.S.C. § 362(k)(1) was first enacted in 1984 with the addition of 11 U.S.C. § 362(h) to the Bankruptcy Code. Doc. ##94, 96. Both sections provide in relevant part that: "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Pub. L. No. 98-353, July 10, 1984, 98 Stat. 333, § 304 (adding section 362(h) to the Bankruptcy Code); 11 U.S.C. § 362(k)(1) (previously codified as 11 U.S.C. § 362(h) but renumbered as 11 U.S.C. § 362(k)(1) pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, see Pub. L. No. 109-8, April 20, 2005, 119 Stat. 23 at § 305).

Neither Plaintiffs nor the court have found a case in which a trial or appellate court, applying 11 U.S.C. § 362(h) or 11 U.S.C. § 362(k)(1), has considered the tax implications that an award for actual damages may have on a party to increase an award of actual damages under either of those sections. Plaintiffs assert this is because this is a case of first impression since this issue arose only after the enactment of the Tax Cuts and Jobs Act of 2017 ("TCJA") suspended miscellaneous deductions for attorneys' fees from taxable income from the 2018 tax year to the 2025 year. Memo P&A, Doc. #94. However, Plaintiffs' legal authority does not support this court holding that the term "actual damages" under 11 U.S.C. § 362(k)(1), which has been part of the Bankruptcy Code in one form or another for nearly 37 years, requires this court add to an award of attorneys' fees the potential taxes Plaintiffs may owe on such an award.

Plaintiffs cite to three wrongful death cases under the Federal Tort Claim Act in which courts have considered the taxes on future income in determining an award for future income. Furumizo v. United States, 245 F. Supp. 981 (D. Haw. 1965), aff'd, 381 F.2d 965 (9th Cir. 1967); United States v. English, 521 F.2d 63 (9th Cir. 1975); Felder v. United States, 543 F.2d 657 (9th Cir. 1976). In each of these cases, the courts considered whether taxes on future income are properly considered in calculating an award of future income to compensate for a wrongful death. Furumizo, 245 F. Supp. at 1014; English, 521 F.2d at 71-72; Felder, 543 F.2d at 667-70. Plaintiffs ask this court to apply this concept to increase an award of actual damages under 11 U.S.C. § 362(k)(1) to compensate Plaintiffs for their inability to deduct such an award from their income for tax purposes. However, as the Ninth Circuit explained in English, "[the] recognition of taxes in computing a widow's probable lost benefits from her spouse's estimated earnings is an entirely different matter from taking an award and then further reducing it because personal injury awards are not taxable." English, 521 F.2d at 72, n.8; accord Felder, 543 F.2d at 667 (distinguishing as analytically distinct a case that "deals only with the fact that damage awards in personal injury and wrongful death cases are not taxable" from "this case [that] deals with the question of whether or not to deduct projected income taxes where lost future income is an element of damages" (citing to English, 521 F.2d at 72, n.8)).

This court finds no basis under Furumizo, English, and Felder to increase an award of actual damages under 11 U.S.C. § 362(k)(1) to compensate Plaintiffs for possible tax consequences Plaintiffs may suffer due to Plaintiffs' inability to deduct such an award from Plaintiffs' taxes as a result of the TCJA. As the Ninth Circuit has explained, recognizing taxes in computing an award of lost future income is analytically distinct from determining an award and then increasing that award because Plaintiffs currently are not able to deduct such an award from their federal income taxes. While the court understands there may be drastic tax consequences to an award of attorneys' fees to Plaintiffs in this adversary proceeding, the court holds that the term "actual damages" under 11 U.S.C. § 362(k)(1) does not require this court to increase such an award to compensate Plaintiffs for those consequences.

Tax laws change, including what is taxable income and what are offsetting deductions, and have done so over the nearly 37 years that "actual damages" have been the recovery for a violation of the automatic stay. No court has determined the actual damages to be awarded for a violation of the automatic stay, including the amount of attorneys' fees incurred as a result of such a violation, and then further increased that award because such an award is currently taxable without an offsetting deduction. The tax consequences of any award under 11 U.S.C. § 362(k)(1) are solely for Plaintiffs to bear; Defendant is not responsible to pay for any such tax consequences through in increase in the amount of actual damages awarded to Plaintiffs. Accord Comm'r v. Banks, 543 U.S. 426 (2005).

Accordingly, Plaintiffs' motion is denied.

5. 20-10945-A-12 **IN RE: AJITPAL SINGH AND JATINDERJEET SIHOTA**
20-1041 DRJ-1

MOTION FOR JUDGMENT ON THE PLEADINGS
1-31-2021 [17]

SIHOTA ET AL V. SINGH ET AL
DAVID JENKINS/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice as required by Local Rules of Practice 9014-1(f)(1) and 9014-1(f)(2)(A) and will proceed as scheduled.

Ajitpal Singh and Jatinderjeet Kaur Sihota (together, "Defendants") seek dismissal of the plaintiffs' complaint by motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Rule") 12(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7012(b) (the "Motion"). Doc. #17. Jaskaran Sihota, Kewal Singh, and Jaswinder Kaur (together, "Plaintiffs") timely filed written opposition arguing that the Motion is late attempt to raise a Rule 9(b) defense, and, in any event, Plaintiffs adequately pleaded the relief sought. Doc. #32. Defendants filed a

reply brief on March 4, 2021 asserting, *inter alia*, that the Motion is timely and properly made. Doc. #52.

While Defendants' motion is styled as *Defendants' Motion for Judgment on the Pleadings Pursuant to [Rule] 12(c)*, Defendants' legal argument is premised on Rule 12(b)(6) and Rule 9(b), and the relief Defendants seek is dismissal pursuant to Rule 9(b). Motion, Doc. #17; Defs.' Mem., Doc. #20. Defendants conflate a motion to dismiss under Rule 9(b) with a motion to dismiss under Rule 12(b)(6), and improperly seek dismissal grounded in Rule 9(b) by motion under Rule 12(c). Because the only arguments put forth by Defendants arise out of Rule 9(b), the court first explains why dismissal under Rule 9(b) is improper at this time. Then, because Defendants' Motion is styled as a motion brought pursuant to Rule 12(c), the court explains why Defendants failed to make the requisite showing to warrant a judgment on the pleadings pursuant to Rule 12(c).

Dismissal under Rule 9(b)

Rule 12(b)(6) permits a party to bring, by separate motion, the defense of failure to state a claim upon which relief can be granted. Unlike other Rule 12(b) defenses that are waived if not raised in a responsive pleading or Rule 12(b) motion, the defense of failure to state a claim upon which relief can be granted may be raised by a motion under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(b); Pepper v. Apple Inc., 846 F.3d 313, 317-18 (9th Cir. 2017), aff'd, 139 S. Ct. 1514 (2019).

Alternatively, Rule 9(b) requires that a party alleging fraud or mistake "must state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b). "When a party averring fraud fails to meet the heightened pleading standard of Rule 9(b), dismissal of the claim is proper." Barefield v. HSBC Holdings PLC, 18-cv-00527-LJO-LJT, 2018 U.S. Dist. LEXIS 130193, at *5 (E.D. Cal. Aug. 2, 2018), aff'd, No. 19-16324, 2021 U.S. App. LEXIS 2424 *1 (9th Cir. Cal. Jan. 28, 2021); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097 (9th Cir. 2003).

It may certainly be common practice, then, for a party to seek the dismissal of an adversary's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) when the more specific challenge to the complaint is that it fails to meet Rule 9(b)'s heightened pleading requirement. Indeed, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." Vess, 317 F.3d at 1107.

However, a closer inspection of the opinions discussing Rule 9(b) motions to dismiss and Rule 12(b)(6) motions to dismiss reveals a fundamental distinction: Rule 9(b) motions may be functionally equivalent to Rule 12(b)(6) motions (the same deference is given to the nonmoving party and the same standard of review applies), but they are not the same. As the court in Vess explains:

> When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim. We recognize that there is no explicit basis in the text of the federal rules for a dismissal of a complaint for failure to satisfy Rule 9(b), but it is established law in this and other circuits that such dismissals are appropriate.

Vess, 317 F.3d at 1107 (citations omitted); see also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) (finding dismissal of the complaint under Rule 12(b)(6) improper, but dismissal on Rule 9(b) grounds proper). The procedural history of Vess further supports the proposition that a Rule 9(b) defense is similar to, but distinct from, a Rule 12(b)(6) defense. Id. at 1102. In Vess, the Ninth Circuit reviewed the district court's rulings on motions made under both Rule 9(b) and Rule 12(b)(6), and the Ninth Circuit affirmed the district court's dismissal of certain claims pursuant to both Rule 9(b) and Rule 12(b)(6). Id. at 1108.

The distinction between Rule 9(b) motions to dismiss and Rule 12(b)(6) motions to dismiss may be entirely academic but for one important distinction. Unlike Rule 12(b)(6) motions that may be raised after the pleadings are closed pursuant to Rule 12(c), "it is well settled that a party waives any objection to [Rule] 9(b)'s special fraud pleading requirements if not raised at the outset." Avant-Garde, LLC v. Mt. Spa. Props., LLC, 2011 U.S. Dist. LEXIS 123808 at *2 (D. Ariz. Oct 25, 2011); Burdick v. Union Sec. Ins. Co., 2009 U.S. Dist. LEXIS 121768 at *51 (C.D. Cal. Dec. 9, 2009) ("Objections to the sufficiency of the pled allegations raised after the responsive pleading has been filed are waived."). "The requirement that fraud shall be stated with particularity primarily is to allow the defendant to prepare an adequate responsive pleading," thus "a [R]ule 9(b) objection is waived unless made as a separate motion prior to or concurrent with the filing of a responsive pleading." Davsko v. Golden Harvest Prods., 965 F. Supp. 1467, 1474 (D. Kan. 1997).

On the issue of waiver, Defendants argue that both the original answer and amended answer preserved the Rule 9(b) defense. The court disagrees. In Defendants' Reply, Defendants cite to Paragraph 5 of Defendants' Answer (Doc. #7) as evidence that a Rule 9(b) defense was preserved. Paragraph 5 states in its entirety: "Paragraphs 41-67 inclusive contain legal conclusions to which no response is necessary. To the extent that any response is required the allegations of paragraphs 41-67 are denied." This paragraph, like all other paragraphs in Defendants' answer and amended answer, does not raise a Rule 9(b) defense. Nowhere in Defendants' responsive pleadings do Defendants mention Rule 9(b), and Defendants' pleadings fail to even include the words "particularity," "heightened," "plead," or "fraud."

The court finds that Defendants' Motion, though styled as a Rule 12(c) motion for judgment on the pleadings, is in fact a late attempt to raise a Rule 9(b) defense because Defendants' arguments put forth in the Motion rely entirely on Rule 9(b)'s heighted pleading requirements. The court further finds that Defendants waived any Rule 9(b) defense by failing to raise that defense in the pleadings or by pre-answer motion. Accordingly, this Motion is DENIED.

Rule 12(c)

Although this Motion can be properly dismissed solely on the grounds that Defendants waived any Rule 9(b) defense, the court now briefly explains why Defendants nevertheless failed to support the Motion under Rule 12(c).

Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed — but early enough not to delay trial[.]" Fed. R. Civ. P. 12(c). The Rules allow for the defense of failure to state a claim upon which relief can be granted to be brought by a motion under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(B).

In the same way that the distinction between a motion to dismiss pursuant to Rule 9(b) can be confused with a motion to dismiss pursuant to Rule 12(b)(6),

so too a motion for judgment on the pleadings pursuant to Rule 12(c) can be confused as a motion under Rule 12(b)(6).

The court in Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012), stated that "[a]nalysis under Rule 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, 'a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.'" Chavez, 683 F.3d at 1108 (quoting Brooks v. Dunlop Mfg. Inc., No. C 10-04341 CRB, 2011 U.S. Dist. LEXIS 141942, 2011 WL 6140912, at *3 (N.D. Cal. Dec. 9, 2011)). "The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing. Because the motions are functionally identical, the same standard of review is applicable to a Rule 12(b) motion applies to its Rule 12(c) analog." Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). This means that the trial court will "discount conclusory statements" while "accepting all factual allegations in the complaint as true." Chavez, 683 F.3d at 1108. It also means that the standard of review on appeal is the same. Dworkin, 867 F.2d at 1192.

However, a Rule 12(c) "[j]udgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the [] moving party is entitled to judgment as a matter of law." Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). A Rule 12(c) judgment on the pleadings "may only be granted when the pleadings show that it is beyond doubt that the [nonmoving party] can prove no set of facts in support of his claim which would entitle him to relief." Enron Oil. Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 529 (9th Cir. 1997). The moving party must clearly establish "on the face of the pleadings that no material issue of fact remains to be resolved." Id.

Considering the pleadings in the light most favorable to Plaintiffs and accepting all factual allegations in the complaint as true, the court finds that there are issues of material fact in dispute and Defendants are not entitled to judgment as a matter of law. Defendants have not satisfied their burden of clearly establishing the absence of material issues of fact warranting relief under Rule 12(c). The pleadings show that Defendants deny a substantial portion of the allegations in Plaintiffs' complaint, and Defendants have offered no legal argument (other than an untimely Rule 9(b) defense) explaining why the disputed facts are insufficient as a matter of law to support Plaintiffs' claims.

Even if Defendants' Motion could be properly read as a true motion for judgment on the pleadings pursuant to Rule 12(c) and not as a motion to dismiss pursuant to Rule 9(b), Defendants' Motion would be DENIED because Defendants have failed to establish an absence of material fact in dispute that would justify dismissal under Rule 12(c).

6. 20-12554-A-7 **IN RE: ARAXY MARKARIAN**
20-1063

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-23-2020 [1]

PACIFIC WESTERN BANK V. MARKARIAN
DAVID BRODY/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar

NO ORDER REQUIRED.

An order dismissing the bankruptcy case was entered on March 10, 2021. Doc. #47. Therefore, the status conference will be dropped from calendar. This adversary may be administratively closed when appropriate.

7. 20-12554-A-7 **IN RE: ARAXY MARKARIAN**
20-1063 DWB-1

MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-4-2021 [19]

PACIFIC WESTERN BANK V. MARKARIAN
DAVID BRODY/ATTY. FOR MV.

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing the bankruptcy case was entered on March 10, 2021. Doc. #47. Therefore, the motion for entry of default judgment will be DENIED AS MOOT.

8. 19-12763-A-7 **IN RE: ANTONIO/JUANA VELASQUEZ**
19-1124

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-4-2019 [1]

FORD MOTOR CREDIT COMPANY V. VELASQUEZ ET AL
AUSTIN NAGEL/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar

NO ORDER REQUIRED.

A judgment in favor of the plaintiff was entered on March 8, 2021, which permitted a motion for fees to be filed and heard on or before March 11, 2021. Doc. #66. A review of the docket indicates no such motion was filed. Accordingly, this status conference is dropped from calendar. This adversary may be administratively closed when appropriate.

9. 20-10569-A-12 **IN RE: BHAJAN SINGH AND BALVINDER KAUR**
20-1042 DRJ-1

MOTION FOR JUDGMENT ON THE PLEADINGS
1-31-2021 [34]

SIHOTA ET AL V. SINGH ET AL
DAVID JENKINS/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice as required by Local Rules of Practice 9014-1(f)(1) and 9014-1(f)(2)(A) and will proceed as scheduled.

Bhajan Singh and Balvinder Kaur (together, "Defendants") seek dismissal of the plaintiffs' complaint by motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Rule") 12(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7012(b) (the "Motion"). Doc. #17. Jaskaran Sihota, Kewal Singh, and Jaswinder Kaur (together, "Plaintiffs") timely filed written opposition arguing that the Motion is a late attempt to raise a Rule 9(b) defense, and, in any event, Plaintiffs adequately pleaded the relief sought. Doc. #32. Defendants filed a reply brief on March 4, 2021 asserting, *inter alia*, that the Motion is timely and properly made. Doc. #44.

While Defendants' motion is styled as *Defendants' Motion for Judgment on the Pleadings Pursuant to [Rule] 12(c)*, Defendants' legal argument is premised on

Rule 12(b)(6) and Rule 9(b), and the primary relief Defendants seek is dismissal pursuant to Rule 9(b). Motion, Doc. #17; Defs.' Mem., Doc. #19. By this Motion, Defendants also argue, without a specific invocation of Rule 9, that dismissal is appropriate because Plaintiffs' complaint contains no specific allegations against co-Defendant Balvinder Kaur and Plaintiffs' claims against Bhajan Singh are not supported with factual allegations. Defs.' Mem ¶¶ 40, 41, Doc. #19.

The court is inclined to DENY this Motion because (1) Defendants waived any Rule 9(b) defense, and (2) Defendants' have not shown that there is an absence of issues of material fact in dispute entitling Defendants to judgment as a matter of law under Rule 12(c).

Dismissal under Rule 9(b)

Defendants conflate a motion to dismiss under Rule 9(b) with a motion to dismiss under Rule 12(b)(6).

Rule 12(b)(6) permits a party to bring, by separate motion, the defense of failure to state a claim upon which relief can be granted. Unlike other Rule 12(b) defenses that are waived if not raised in a responsive pleading or Rule 12(b) motion, the defense of failure to state a claim upon which relief can be granted may be raised after the pleadings by a motion under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(b); Pepper v. Apple Inc., 846 F.3d 313, 317-18 (9th Cir. 2017), aff'd, 139 S. Ct. 1514 (2019).

Alternatively, Rule 9(b) requires that a party alleging fraud or mistake "must state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b). "When a party averring fraud fails to meet the heightened pleading standard of Rule 9(b), dismissal of the claim is proper." Barefield v. HSBC Holdings PLC, 18-cv-00527-LJO-LJT, 2018 U.S. Dist. LEXIS 130193, at *5 (E.D. Cal. Aug. 2, 2018), aff'd, No. 19-16324, 2021 U.S. App. LEXIS 2424 *1 (9th Cir. Cal. Jan. 28, 2021); see also Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097 (9th Cir. 2003).

It may certainly be common practice, then, for a party to seek the dismissal of an adversary's complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) when the more specific challenge to the complaint is that it fails to meet Rule 9(b)'s heightened pleading requirement. Indeed, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." Vess, 317 F.3d at 1107.

However, a closer inspection of the opinions discussing Rule 9(b) motions to dismiss and Rule 12(b)(6) motions to dismiss reveals a fundamental distinction: Rule 9(b) motions may be functionally equivalent to Rule 12(b)(6) motions (the same deference is given to the nonmoving party and the same standard of review applies), but they are not the same. As the court in Vess explains:

> When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim. We recognize that there is no explicit basis in the text of the federal rules for a dismissal of a complaint for failure to satisfy Rule 9(b), but it is established law in this and other circuits that such dismissals are appropriate.

Vess, 317 F.3d at 1107 (citations omitted); see also In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997) (finding dismissal of the complaint under Rule 12(b)(6) improper, but dismissal on Rule 9(b) grounds proper). The procedural history of Vess further supports the proposition that a Rule 9(b) defense is similar to, but distinct from, a Rule 12(b)(6) defense. Id. at 1102. In Vess, Ninth Circuit reviewed the district court's rulings on motions made under both Rule 9(b) and Rule 12(b)(6), and the Ninth Circuit affirmed the district court's dismissal of certain claims pursuant to both Rule 9(b) and Rule 12(b)(6). Id. at 1108.

The distinction between Rule 9(b) motions to dismiss and Rule 12(b)(6) motions to dismiss may be entirely academic but for one important distinction. Unlike Rule 12(b)(6) motions that may be raised after the pleadings are closed pursuant to Rule 12(c), "it is well settled that a party waives any objection to [Rule] 9(b)'s special fraud pleading requirements if not raised at the outset. Avant-Garde, LLC v. Mt. Spa. Props., LLC, 2011 U.S. Dist. LEXIS 123808 at *2 (D. Ariz. Oct 25, 2011); Burdick v. Union Sec. Ins. Co., 2009 U.S. Dist. LEXIS 121768 at *51 (C.D. Cal. Dec. 9, 2009) ("Objections to the sufficiency of the pled allegations raised after the responsive pleading has been filed are waived."). "The requirement that fraud shall be stated with particularity primarily is to allow the defendant to prepare an adequate responsive pleading," thus "a [R]ule 9(b) objection is waived unless made as a separate motion prior to or concurrent with the filing of a responsive pleading." Davsko v. Golden Harvest Prods., 965 F. Supp. 1467, 1474 (D. Kan. 1997).

Defendants argue that both the original answer and amended answer preserved the Rule 9(b) defense. The court disagrees. In Defendants' Reply, Defendants cite to Paragraph 18 of Defendants' Amended Answer (Doc. #9) as evidence that a Rule 9(b) defense was preserved. Paragraph 18 states in its entirety: "Paragraphs 55-81 inclusive contain legal conclusions to which no response is necessary. To the extent that any response is required the allegations of paragraphs 55-81 are denied." This paragraph, like all other paragraphs in Defendants' answer and amended answer, does not raise a Rule 9(b) defense. Nowhere in Defendants' responsive pleadings do Defendants mention Rule 9(b), and Defendants' pleadings fail to even include the words "particularity," "heightened," "plead," or "fraud."

The court finds that Defendants' Motion, to the extent it seeks dismissal of Plaintiffs' complaint pursuant to Rule 9(b), is untimely and Defendants waived any Rule 9(b) defense by failing to raise that defense in the pleadings or by pre-answer motion.

Rule 12(c)

Having established that a Rule 9(b) motion to dismiss is distinct from a Rule 12(b)(6) motion to dismiss in at least one important respect, it is also incumbent on this court to differentiate a Rule 12(c) motion for judgment on the pleadings from a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

Rule 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed — but early enough not to delay trial[.]" Fed. R. Civ. P. 12(c). The Rules allow for the defense of failure to state a claim upon which relief can be granted to be brought by a motion under Rule 12(c). Fed. R. Civ. P. 12(h)(2)(B).

In the same way that the distinction between a motion to dismiss pursuant to Rule 9(b) can be confused with a motion to dismiss pursuant to Rule 12(b)(6),

so too a motion for judgment on the pleadings pursuant to Rule 12(c) can be confused as a motion under Rule 12(b)(6).

The court in Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012), stated that "[a]nalysis under Rule 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, 'a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.'" Chavez, 683 F.3d at 1108 (quoting Brooks v. Dunlop Mfg. Inc., No. C 10-04341 CRB, 2011 U.S. Dist. LEXIS 141942, 2011 WL 6140912, at *3 (N.D. Cal. Dec. 9, 2011)). "The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing. Because the motions are functionally identical, the same standard of review is applicable to a Rule 12(b) motion applies to its Rule 12(c) analog." Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). This means that the trial court will "discount conclusory statements" while "accepting all factual allegations in the complaint as true." Chavez, 683 F.3d at 1108. It also means that the standard of review on appeal is the same. Dworkin, 867 F.2d at 1192.

However, a Rule 12(c) "[j]udgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the [] moving party is entitled to judgment as a matter of law." Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009). A Rule 12(c) judgment on the pleadings "may only be granted when the pleadings show that it is beyond doubt that the [nonmoving party] can prove no set of facts in support of his claim which would entitle him to relief." Enron Oil. Trading & Transp. Co. v. Walbrook Ins. Co., 132 F.3d 526, 529 (9th Cir. 1997). The moving party must clearly establish "on the face of the pleadings that no material issue of fact remains to be resolved." Id.

Considering the pleadings in the light most favorable to Plaintiffs and accepting all factual allegations in the complaint as true, the court finds that there are issues of material fact in dispute and Defendants are not entitled to judgment as a matter of law. Defendants have not satisfied their burden of clearly establishing the absence of material issues of fact warranting relief under Rule 12(c). The pleadings show that Defendants either deny a substantial portion of the allegations in Plaintiffs' complaint, and Defendants have offered no legal argument (other than an untimely Rule 9(b) defense) explaining why the disputed facts are insufficient as a matter of law to support Plaintiffs' claims. As to allegations directed specifically to Balvinder Kaur, the court finds such allegations are pled in Plaintiffs' First Claim for Relief under 11 U.S.C. § 523(a)(2)(A). Complaint, Doc. #1. Balvinder Kaur is not a named defendant in the second and third claims for relief. Id.

Accordingly, this Motion is DENIED. Defendants waived any Rule 9(b) defense and the Defendants have failed to establish an absence of material fact in dispute that would justify dismissal under Rule 12(c).

10. 20-12577-A-11 **IN RE: MARIA LUNA MANZO**
20-1056

CONTINUED STATUS CONFERENCE RE: COMPLAINT
9-1-2020 [1]

AHMED V. LUNA MANZO ET AL
DAVID GILMORE/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to April 1, 2021, at 11:00 a.m.

ORDER: The court will issue an order.

The status conference will be continued to April 1, 2021, at 11:00 a.m. The court intends to drop the status conference if the bankruptcy case has been dismissed prior to April 1, 2021.

11. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [131]

KODIAK MINING & MINERALS II LLC ET AL V. DON ROSE OIL CO., INC.
VONN CHRISTENSON/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

Under Ninth Circuit authority, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts the handling and administration of the bankrupt estate." Fietz v. Great Western Savings (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)). Based on the current status of the underlying chapter 7 bankruptcy case ("Don Rose Oil Case") and the pre-trial statements, the parties should be prepared to discuss the following at the pre-trial conference:

(1) This court's continued related to jurisdiction over this adversary proceeding under Fietz based on:

(a) the sale of the bankruptcy estate's claims in this adversary proceeding to Sallyport Commercial Finance, LLC;

(b) the filing of Trustee's Final Report on January 12, 2021, in the Don Rose Oil Case (Bankr. Doc. #1192) showing that the Don Rose Oil Case is administratively insolvent at the chapter 7 administrative claim level;

(c) the imminent closing of the Don Rose Oil Case; and

(d) the request of the chapter 7 trustee in the Don Rose Oil Case to be dismissed as a party to this adversary proceeding.

(2) Assuming this court continues to have jurisdiction over this adversary proceeding, the practicality of this court conducting a trial in this adversary proceeding in light of the fact that at least one party does not consent to entry of final judgment by this court on various non-core issues to be tried.

(3) If issues raised in this adversary proceeding should be tried in a different court, what court should hear these issues and what should be done with this adversary proceeding procedurally to accomplish that.

12. 20-10945-A-12 **IN RE: AJITPAL SINGH AND JATINDERJEET SIHOTA**
20-1041 WLG-2

MOTION TO QUASH OR MODIFY DEFENDANTS DEPOSITION SUBPOENA
3-4-2021 [37]

SIHOTA ET AL V. SINGH ET AL
PETER SAUER/ATTY. FOR MV.
OST 3/5/21
RESPONSIVE PLEADING

NO RULING.

13. 20-10569-A-12 **IN RE: BHAJAN SINGH AND BALVINDER KAUR**
20-1042 WLG-2

MOTION TO QUASH
3-4-2021 [38]

SIHOTA ET AL V. SINGH ET AL
LENDEN WEBB/ATTY. FOR MV.
OST 3/5/21
RESPONSIVE PLEADING

NO RULING.