

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, May 11, 2022
Place: Department B - Courtroom #13
Fresno, California

The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click [here](#).

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, **and all parties will need to appear at the hearing unless otherwise ordered.** 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. [16-14310](#)-B-13 IN RE: AMELIA RODRIGUEZ CARRILLO
[RS-4](#)

OBJECTION TO CLAIM OF BENEFICIAL STATE BANK, CLAIM NUMBER 2-1
3-16-2022 [[78](#)]

AMELIA RODRIGUEZ CARRILLO/MV
RICHARD STURDEVANT/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

ORDER: The minutes of the hearing will be the court's findings and conclusions. Objecting party shall prepare the order to be signed by Chapter 13 Trustee.

Amelia Rodriguez Carrillo ("Debtor") objects under 11 U.S.C. § 502(b) to Proof of Claim No. 2-1 in the amount of \$15,555.46 filed by Beneficial State Bank ("Claimant") on May 31, 2017.¹ Doc. #78. Debtor objects because the deadline to file proofs of claim for nongovernmental units was April 10, 2017. Doc. #14. Since Trustee has already made disbursements to Claimant, Debtor asks to allow \$8,018.80 and to disallow the remainder of \$7,536.00 [*sic*]. Doc. #78.

Chapter 13 trustee Michael H. Meyer ("Trustee") filed limited opposition to the objection. Doc. #81. Since the proof of claim deadline was May 31, 2017 and Debtor first objected on November 5, 2021, Trustee already paid Claimant \$8,018.80 in accordance with the claim. *Id.* As result, Trustee states that the claim cannot be disallowed in its entirety because Trustee would be required to recover the \$8,018.80 already paid. *Id.* So, Trustee asks that if the claim is disallowed, it will only be disallowed in the corrected amount of \$7,536.66 but allowed in the amount of \$8,018.80.

Debtor replied, agreeing to adjust the amount disallowed to \$7,536.66 while allowing \$8,018.80. Doc. #83.

No other parties in interest timely filed written opposition. This objection will be called as scheduled due to Trustee's opposition. The court is inclined to SUSTAIN the objection with the modifications proposed by the parties.

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(1) and will proceed as scheduled. The failure of the creditors, the U.S. Trustee, or any

other party in interest except Trustee 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 objection. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except the Chapter 13 Trustee are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

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

To "defeat the claim, the objector must come forward with sufficient evidence and 'show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves.'" *Id.*, at 1039. "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." *Id.*

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof of claim filed under § 501, is deemed allowed, unless a party in interest objects. Under § 502(b)(9), if an objection is filed, the court shall determine the amount of the claim and allow such claim except to the extent that it has not been timely filed.

Here, the deadline for non-governmental entities to file a proof of claim was April 10, 2017. Doc. #14. Claimant filed Claim 2 on May 31, 2017. This was not timely. Accordingly, Claim 2 will be disallowed.

However, Trustee has already paid \$8,018.80 on account of Claim 2. Accordingly, Proof of Claim No. 2 will be allowed in the amount of \$8,018.80 and disallowed in the remaining \$7,536.66.

¹ Claimant was properly served pursuant to Federal Rules of Bankruptcy Procedure 3007(a)(2)(A) and 7004(h) by serving Richard H. Harvey, Jr., the secretary of Claimant, by certified mail; and the name and address listed in the proof of claim by first class mail on March 16, 2022. Doc. #80.

2. [21-12135](#)-B-13 **IN RE: GUSTAVO ALVAREZ TORRES**
[PLG-2](#)

MOTION TO MODIFY PLAN
4-5-2022 [[39](#)]

GUSTAVO ALVAREZ TORRES/MV
RABIN POURNAZARIAN/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.

Gustavo Alvarez Torres ("Debtor") seeks an order confirming the *First Modified Chapter 13 Plan* dated April 5, 2022 ("Proposed Plan"). Doc. #39. The Proposed Plan provides for a 100% dividend to allowed, nonpriority unsecured claims. Doc. #43. Payments shall be "as received up through and including March 2022" (month 6) and Debtor shall pay \$2,269.00 per month beginning April 2022 through the remainder of the 60-month Plan. Doc. #43, § 7. Debtor's *Amended Schedules I and J* indicates that Debtor has monthly net income of \$2,326.81 after payment of all expenses, including the \$1,200 monthly mortgage payment to Class 4 creditor United Wholesale Mortgage, which is sufficient to fund the proposed payment amount. Doc. #37, *Scheds. I, J*.

The Proposed Plan will postpone plan payments required under the operative *First Amended Chapter 13 Plan* dated October 14, 2021 and confirmed December 3, 2021 ("Current Plan") for six months while increasing the monthly payment to make up the difference Docs. #24; #33. The Current Plan provides for 60 monthly payments of \$1,889.00 with a 100% dividend to allowed, nonpriority unsecured claims. *Id.* The Proposed Plan will postpone plan payments for six months and increase the payment to make up the difference. No party in interest timely filed written opposition to this motion.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). 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 Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional

due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

3. [17-14039](#)-B-13 **IN RE: PETER/ADRIANNA BISACCA**
[MAZ-3](#)

MOTION TO MODIFY PLAN
4-4-2022 [[88](#)]

ADRIANNA BISACCA/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice.

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

Peter A. Bisacca and Adrianna Bisacca ("Debtors") seek an order confirming the *Third Modified Chapter 13 Plan* dated April 4, 2022 ("Proposed Plan"). Doc. #88. The Proposed Plan retains a monthly payment of \$930.18 for the remainder of the 60-month plan. Doc. #93. However, Additional Provision 7 modifies § 3.14 such that all funds paid to unsecured creditors through month 50 shall remain as received, but for months 51-60, the percentage paid on the remaining balance of \$57,030.94 to unsecured claims shall be reduced from 100% to 15.3%. *Id.*, § 7. In contrast to the operative *Second Modified Chapter 13 Plan* dated May 17, 2018 and confirmed July 10, 2018 ("Current Plan"), the dividend to be distributed to allowed, nonpriority unsecured claims will be significantly reduced for months 51 to 60. Docs. #72; #81

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to confirmation of the Proposed Plan under 11 U.S.C. § 1325(a)(6) because the debtors will not be able to make all payments under the plan and comply with the plan and under § 1325(a)(1) because the plan fails to comply with applicable provisions of this title. Doc. #96.

First, Trustee says that Debtors missed a single payment in January 2022 so the plan is delinquent \$760.31 through April 25, 2022 and the Proposed Plan does not include aggregate language that would cure the deficiency. *Id.*

Second, § 3.14 of the Proposed Plan says that unsecured creditors shall receive 13.5% dividend, but Additional Provision 7 provides that unsecured creditors shall retain payments through month 50 as received with a 15.3% dividend for months 51 to 60. Doc. #93, § 7. Trustee objects because unsecured creditors have received a 31.84% dividend to date. With payments remaining the same, these creditors will receive a dividend of approximately 39.967%. Doc. #96. Trustee proposes striking the language and replacing it with language that provides the amount unsecured creditors will be paid at the end of the plan term. *Id.*

Debtors replied. Doc. #98. Debtors say that they have paid the \$760.31 delinquency and agree to strike the language in Additional Provision 7 and replace it with language in the *Order Confirming Third Modified Plan* that provides that unsecured creditors will receive approximately 39.967%. *Id.*

This matter will be called and proceed as scheduled. The court is inclined to DENY WITHOUT PREJUDICE the motion for failing to serve all required parties in interest.

The *Certificate of Service* filed with this motion says that the motion documents were served on the parties listed in "debtor's address list from pacer attached as pages 2 and 3 attached [*sic*]." Doc. #92. However, only page 2 is attached. As result, Debtors have failed to prove that they served or notified Trustee, the Office of the U.S. trustee ("UST"), and 16 other creditors. *Id.*; *cf.* Doc. #73. The failure to serve the Chapter 13 Trustee is waived since the Trustee filed a response to the motion.

Failure to prove service does not affect the validity of service and the court may permit the proof of service to be amended. Fed. R. Civ. P. 4(1)(3), incorporated by Fed. R. Bankr. P. 7004(a)(1). However, LBR 9014-1(e) requires service of all pleadings and documents filed in support of a motion on or before the day they are filed with the court, with proof of service in the form of a certificate of service to be filed with the Clerk concurrently with the pleadings or documents served, or not more than three days after they are filed. LBR 9014-1(e)(1), (2).

Since no proof of service was filed to prove that Trustee (defect waived), UST, and 16 other creditors were served or notified of this motion, the court is inclined to DENY WITHOUT PREJUDICE the motion unless Debtors both (a) did in fact serve the omitted parties on April 4, 2022; and (b) file an amended proof of service evidencing the same before the scheduled hearing. This matter will be called as scheduled.

If Debtors served or notified all required parties in interest on April 4, 2022, and if Debtors file an amended certificate of service before the hearing, the motion may be granted. Any confirmation order shall include the docket control number of the motion, reference the plan by the date it was filed, and be approved as to form by Trustee.

4. [20-12359](#)-B-13 **IN RE: CARINA LOERA**
[MAZ-3](#)

MOTION TO MODIFY PLAN
3-30-2022 [[62](#)]

CARINA LOERA/MV
MARK ZIMMERMAN/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice

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

Carina Loera ("Debtor") seeks an order confirming the *Second Modified Chapter 13 Plan* dated March 30, 2022 ("Proposed Plan"). Doc. #62. The Proposed Plan provides that Debtor has paid an aggregate of \$28,898.00 between months 1 to 21, and starting month 22, Debtor shall pay \$1,518.00 per month for the remainder of the 60-month plan term. Doc. #65, § 7. Additionally, it provides that Class 2(A) creditor Safe 1 Credit Union's claim has a balance of \$8,044.40 at 4.29% interest, Debtor has paid \$20,199.13 to date, and for months 22 to 60, the dividend for this claim will be \$229.89 per month.

In contrast to the operative *First Modified Chapter 13 Plan* dated November 10, 2020 and confirmed January 6, 2021 ("Current Plan"), Debtor owed a balance of \$28,243.33 at 4.29% interest. Docs. #44; #55. The Current Plan provided that Debtor had paid \$1,372.50 in months 1 to 3, and the payment will be \$592.10 for months 4 to 60. Doc. #44. Both plans provide for a 100% dividend to be distributed to allowed, nonpriority unsecured claims.

Though no party in interest timely filed written opposition to this motion, this motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

The notice of hearing did not contain necessary language advising potential respondents of the pre-hearing dispositions that are available on the court's website. Doc. #63. LBR 9014-1(d)(3)(B)(iii) requires the movant to notify respondents that they can determine (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at <http://www.caeb.uscourts.gov> after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

For the above reason, this motion will be DENIED WITHOUT PREJUDICE.

5. [19-12361](#)-B-13 **IN RE: ANITA WASHINGTON**
[TCS-2](#)

MOTION TO MODIFY PLAN
4-6-2022 [\[41\]](#)

ANITA WASHINGTON/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

Anita E. Washington ("Debtor") seeks an order confirming the *Second Amended Chapter 13 Plan* dated April 6, 2022 ("Proposed Plan"). Doc. #41. The Proposed Plan provides that Debtor's aggregate payments for months 1-33 is \$29,724, and beginning month 34, Debtor shall make monthly payments of \$892.00. Doc. #45, § 7. All creditors will receive and retain all amounts paid prior to the filing of this plan, and allowed, nonpriority unsecured claims will receive a 100% dividend. *Id.* Debtor's amended scheduled filed on April 6, 2022 indicate that Debtor has \$1,987.22 in monthly net income after payment of all expenses, including payments of \$494 and \$1,123 per month to Class 4 creditors Capital One Auto Finance and Pennymac Loan Services, which is sufficient to fund the plan. Doc. #48, *Am. Scheds. I, J.*

In contrast to the *First Modified Chapter 13 Plan* dated September 18, 2020 and confirmed November 2, 2020 ("Current Plan"), Debtor paid an aggregate of \$14,724 for months 1-15 and monthly payments of \$1,000 per month until the end of the plan. Doc. #32. Though the plan payment is decreasing from \$1,000 to \$892, both the Proposed Plan and Current Plan provide for a 100% distributed to unsecured claims. *Id.* No party in interest timely filed written opposition to this motion.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). 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 Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that

they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

6. [22-10261](#)-B-13 **IN RE: MARY ARNOLD**
[PBB-1](#)

MOTION TO CONFIRM PLAN
4-6-2022 [\[25\]](#)

MARY ARNOLD/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.

Mary Elizabeth Arnold ("Debtor") seeks an order confirming the *First Modified Chapter 13 Plan* dated April 6, 2022 ("Proposed Plan"). Doc. #25. The Proposed Plan provides that Debtors shall pay \$285.00 for 1 month and \$590.00 for 59 months with a 0% dividend to allowed, nonpriority unsecured claims. Doc. #30, § 7. Additionally, payments to Class 2(A) creditor Matadors Community Credit Union shall begin at a rate of \$272.00 per month. *Id.* Debtor's *Amended Schedules I and J* indicate that she has \$590.11 in net monthly income, which is sufficient to fund the Proposed Plan. Docs. #16, *Am. Sched. I*; #19, *Am. Sched. J*.

The original *Chapter 13 Plan* dated February 24, 2022 (Doc. #3) was withdrawn, and no plan has been confirmed in this case. Doc. #20. No party in interest timely filed written opposition to this motion.

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

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

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

7. [22-10568](#)-B-13 **IN RE: JUAN ALARCON**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
4-19-2022 [[11](#)]

ARETE KOSTOPOULOS/ATTY. FOR DBT.
\$313.00 FILING FEE PAID 4/19/22

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

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that the filing fee of \$313.00 was paid on April 19, 2022. Therefore, the *Order to Show Cause* will be VACATED.

8. [21-10300](#)-B-13 **IN RE: DONALD/STEPHANIE SALKIN**
[TCS-4](#)

MOTION TO VACATE DISMISSAL OF CASE
5-2-2022 [[91](#)]

STEPHANIE SALKIN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
OST 5/2/22

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.

Donald Lee Salkin and Stephanie Austin Salkin ("Debtors") move for an order vacating the *Order* (Doc. #87) dismissing this case entered April 25, 2022 ("Dismissal Order") under Civ. Rule 60 (Rule 9024).² Doc. #91.

This matter will be called and proceed as scheduled. The court is inclined to DENY the motion.

As a preliminary matter, *Exhibit A* to this motion contains sensitive, personally identifiable information. LBR 9037-1(a)(1) states "[t]he responsibility for redacting personally identifiable information (as defined in [Rule] 9037) rests solely with counsel, parties in interest and non-parties." Counsel is advised to review the procedure in LBR 9037-1(b) for redacting personally identifiable information in the exhibits and promptly redact the same.

At Debtors' request, the court issued an *Order Granting Debtor's Ex-Parte Motion to Shorten Time for Hearing on Debtor's Motion to Vacate the Dismissal Order* ("OST") on May 2, 2022. Doc. #94. The OST directed Debtors to file and serve this motion no later than May 2, 2022. *Id.* Debtors filed and served the OST, notice of hearing, motion, and exhibits on all parties in interest on May 2, 2022. Doc. #95.

This motion was filed, served, and set for hearing using the procedure specified in Local Rule of Practice ("LBR") 9014-1(f)(3) and will proceed as scheduled. Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Debtors filed chapter 13 bankruptcy on February 5, 2021. Doc. #1. The original *Chapter 13 Plan* dated February 5, 2021 ("Plan") was confirmed on December 29, 2021. Docs. #3. The *Order Confirming Plan* ("OCP") included the following term:

This case shall be subject to an annual review by the Chapter 13 Trustee commencing February 1, 2022 and continuing for the duration of the case. If employed, Joint Debtor shall provide a declaration to the Trustee with supporting evidence, including copies of all paystubs for all employment since the last declaration regarding employment, copies of the most recent tax returns, and Amended Schedules I and J. If unemployed, Joint Debtor must provide a declaration indicating the reasons for continued unemployment and provide most recent tax returns.

Doc. #76, at 2.

On March 11, 2022, the chapter 13 trustee ("Trustee") filed a *Motion to Dismiss Pursuant to 11 U.S.C. § 1307* ("Dismissal Motion") for unreasonable delay by the Debtors and material default with respect to a term of a confirmed plan. MHM-5; Doc. #82. The Dismissal Motion was set for hearing on April 22, 2022. Doc. #83. Debtors did not file

opposition and their defaults were entered. Doc. #86. The Dismissal Order was entered on April 25, 2022 for failure to comply with the annual review provisions provided for by the Plan, and therefore material default with respect to a term of a confirmed plan. Doc. #87.

Debtors claim that they provided Trustee with their taxes, pay stubs, and other documents requested to show their current employment status. Doc. #91. Debtors believed that these documents resolved Trustee's request and the subsequent motion to dismiss. *Id.* Debtors' attorney inquired as to whether Trustee's demand was satisfied and believed that Debtors had complied with the order confirming the Plan. *Id.* It is not clear from the motion papers who counsel asked about Debtors' compliance with the Trustee's requirements. Based on other statements alleged, it appears Debtors' counsel mistakenly failed to confirm the Trustee's Dismissal Motion was withdrawn. This suggests the Trustee was not contacted.

Since the Dismissal Motion did not get withdrawn, the case was dismissed. Now, Debtors wish to vacate the Dismissal Order to reinstate this case. *Id.*

Rule 9024 incorporates Civ. Rule 60(b) and permits the court to grant relief from a final judgment, order, or proceeding based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in time to move for a new trial under Civ. Rule 59(b); (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason that justifies relief. Civ. Rule 60(b). Such request must be made "within a reasonable time" generally, and within one year when requested under Civ. Rule 60(b)(1), (2), or (3). Civ. Rule 60(c). Here, the case was dismissed on April 25, 2022 and this motion was filed 7 days later on May 2, 2022.

Debtors seek relief under subsections (b)(1) and (b)(6): mistake, inadvertence, surprise, or excusable neglect, and any other reason that justifies relief. Doc. #91. Debtors have been in bankruptcy for a little over one year, are current on their payments, filed this case in good faith, and intend to complete the Plan. *Id.* However, Debtors' attorney did not ensure that the Dismissal Motion was withdrawn, so the case was dismissed. Counsel apologizes for the mistake and requests that the court vacate the dismissal because Debtors are currently performing under the Plan. *Id.*

Debtors acknowledge that this motion requests an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Id.*, quoting *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

The only supporting evidence are copies of Debtors' 2021 taxes and pay statements. No foundation for the admission of the exhibits was presented. No declarations or any other admissible evidence were filed

with the motion. The motion only contains counsel's allegations, not evidence.

Courts are permitted, where appropriate, to relieve a party or its legal representative from a judgment, order, or proceeding due to a party's "inadvertence, mistake, or carelessness, as well as intervening circumstances beyond the party's control." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). This determination is "an equitable one taking account of all relevant circumstances surrounding the party's omission." *Id.*, at 395. The factors to consider include:

1. Danger of prejudice to the debtor;
2. Length of delay and potential impact on judicial proceedings;
3. Reason for the delay, including whether it was in the movant's control; and
4. Whether the party acted in good faith.

1. Danger of prejudice to the debtor: Debtors claim that they would be extremely prejudiced having to refile the case because they are above median income debtors. Doc. #91. On the other hand, they claim that their creditors would not be prejudiced because they would be receiving funds that they will not receive if the case remains dismissed. However, dismissal of the case has also resulted in the lifting of the automatic stay, thereby permitting creditors to enforce their rights and remedies under state law. Reinstating the case by vacating the dismissal would reimpose the automatic stay and halt any enforcement actions that may have recently resumed. This factor appears to be neutral or slightly favors vacatur.

2. Length of delay and impact on judicial proceedings: This motion was filed 7 days after the case was dismissed. The request appears to have been made within a reasonable time. This factor favors granting the motion.

3. Reason for delay, including whether it was in the movant's control: The motion claims that Debtors' counsel thought that Debtors had complied with the OCP's annual review provision, so she assumed that the motion would be withdrawn. Doc. #91. The motion was not withdrawn, so the case was dismissed.

Since the motion was set for hearing on April 22, 2022, Debtors had nearly a full month – from March 11 until April 8, 2022 – to file some sort of opposition or response to the motion. No response was ever filed. Whether to file any opposition was exclusively within Debtors' and their counsel's control.

The motion says that Debtors' counsel inquired as to whether the delinquency was satisfied but is silent as to the result of that inquiry, which suggests that Debtors' counsel may not have contacted the Trustee. *Id.* This factor heavily weighs against granting the motion and allowing the dismissal to stand.

4. Whether the party acted in good faith. Nothing in the record suggests that Debtors have acted in bad faith. This factor is neutral, or slightly favors granting the motion.

Though the *Pioneer* factors appear to be neutral or weigh slightly against granting this motion, no admissible evidence has been provided. The pay statements and income tax returns are not helpful for establishing that Debtors will suffer prejudice and not creditors. Further, the failures to (i) verify that Debtors had complied with the OCP annual review requirement, (ii) file a response to the Dismissal Motion, and (iii) check whether it had been withdrawn were exclusively within Debtors' control.

Debtors also seek to vacate the dismissal under Civ. Rule 60(b)(6). This provision permits the court "on just terms" to relieve a party from a final judgment for "any other reason justifies relief."

This relief is unavailable to Debtors here. The long-standing rule in this circuit is that "clause (6) [of Civ. Rule 60(b)] and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be from some other reason other than the five reasons preceding it under the Rule." *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1098 (9th Cir. 2001) (citations omitted). Debtors seek relief for alleged mistake or inadvertence and cannot have it both ways.

Additionally, Debtors have not established an extraordinary circumstance justifying relief under Civ. Rule 60(b)(6). This "catch-all" provision is available where "petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect on his part." *United States ex rel. Familian Nw. v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994), quoting *Klapprott v. U.S.*, 335 U.S. 601, 613 (1949). Debtors mistakenly failed to comply with the OCP annual review, file a response to the Dismissal Motion, or verify that the Dismissal Motion had been withdrawn. This does not evidence an extraordinary circumstance even if Civ. Rule 60(b)(6) relief was available.

This matter will be called and proceed as scheduled. The court intends to DENY the motion.

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

11:00 AM

1. [20-10809](#)-B-11 **IN RE: STEPHEN SLOAN**
[22-1007](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-1-2022 [[1](#)]

SLOAN V. SLOAN
PETER SAUER/ATTY. FOR PL.

NO RULING.

2. [17-14112](#)-B-13 **IN RE: ARMANDO NATERA**
[20-1035](#) [WEW-2](#)

MOTION TO DISMISS THIRD PARTY COMPLAINT
2-25-2022 [[258](#)]

NATERA V. BARNES ET AL
JEFFREY KAUFMAN/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part; denied in part. Third-Party Plaintiffs to file and serve amended complaint 14 days after entry of order.

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

Third-Party Defendant WFG National Title Insurance Company ("WFG") asks the court to dismiss the Third-Party Complaint filed by Defendants and Third-Party Plaintiffs Richard Barnes, individually and as Trustee of the Richard Allen Barnes Trust dated September 1, 2011 ("Barnes"), and Parker Foreclosure Services, LLC ("Parker") under Federal Rule of Civil Procedure ("Civ. Rule") 12(b)(6). Doc. #258.

Barnes and Parker timely filed written opposition. Doc. #281.

WFG claims that Barnes and Parker have failed to sufficiently plead any of their four causes of action. Doc. #258. The Negligence and Abstractor Negligence causes are not properly plead because the trustee sale guarantee is a contract of indemnity only. *Id.* Further, the alleged oral contract subject of the third cause of action lacks any supporting evidence of consideration, agreement, or damages. *Id.* Lastly, the Negligent Misrepresentation cause of action lacks

specificity in terms of alleging that WFG made knowingly or recklessly false representations with intent to induce reliance. *Id.*

In response, Barnes and Parker state their belief that the Third-Party Complaint sufficiently pleads facts to state a cause of action. Doc. #281. To the extent that the Third-Party Complaint fails to sufficiently allege a basis upon which relief could be granted, Barnes and Parker request leave to amend the Third-Party Complaint. *Id.*

Notwithstanding the procedural defects described below, the court is inclined to GRANT IN PART this motion with leave to amend as to the second and third causes of action for abstractor negligence and breach of oral contract, and intends to DENY IN PART as to the first and fourth causes of action for negligence and negligent misrepresentation. Barnes and Parker may file an amended complaint within 14 days of entry of the order. This matter will be called and proceed as scheduled.

WFG requests the court to take judicial notice of certain documents recorded in the Tulare County Recorder's Office. Doc. #261. The court may take judicial notice of all documents and other pleadings filed in this adversary proceeding, the underlying bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, but not the truth or falsity of such documents as related to findings of fact. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

PROCEDURAL DEFECTS

As a preliminary matter, the motion does not procedurally comply with the Local Rules of Practice ("LBR").

First, the "motion," notice, and points and authorities are the same document. Doc. #258. LBR 9004(c)(1) requires motions, notices, and other specified pleadings to be filed as separate documents. LBR 9014-1(d)(1) requires every motion or other request for an order to be comprised of a motion, notice, evidence, and a certificate of service.

The notice and motion are supposed to be filed as two separate documents. But here, one document was used as a motion, notice, and points and authorities. The motion and points and authorities may be combined into one document under LBR 9014-1(d)(4) provided that the document does not exceed six pages in length. The combined notice, motion, and points and authorities here is 14 pages long, so each of these three documents should have been filed separately. Even when filed separately, LBR 9014-1(d)(3)(A) and Fed. R. Bankr. P. 9014 require the motion to state with particularity the factual and legal grounds for relief.

Second, the notice of hearing was wholly insufficient. LBR 9014-1(d)(3)(B)(i) requires the notice of hearing to advise potential respondents whether and when written opposition must be filed and served. When a motion is filed on 28 days' notice or more, LBR 9014-1(f)(1)(B) states that opposition, if any, to the granting of the motion shall be in writing and shall be served and filed with the court at least 14 days preceding the date of hearing. Without good cause, no party shall be heard in opposition to the motion at oral argument if written opposition has not been timely filed. Failure to file written opposition may be deemed a waiver of any opposition to the granting of the motion.

This motion was filed on February 25, 2022 and set for hearing on May 11, 2022. Doc. #258. May 11, 2022 is 75 days after February 25, 2022, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice did not provide any information regarding whether and when opposition must be filed and served. Since the hearing was noticed under the procedure specified in LBR 9014-1(f)(1), WFG was required to inform respondents that written opposition was required, no party shall be heard in opposition if written opposition has not been timely filed, and failure to file written opposition may be deemed a waiver of any opposition to the granting of the motion.

Third, the notice of hearing did not contain necessary language informing potential respondents of the pre-hearing dispositions that are available on the court's website. Doc. #258. LBR 9014-1(d)(3)(B)(iii) requires the movant to notify respondents that they can determine (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at <http://www.caeb.uscourts.gov> after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

Fourth, LBR 9004-2(a)(6), (b)(5), (b)(6), & (e) and LBR 9014-1(c) & (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require a DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN. The DCN shall consist of not more than three letters, which may be the initials of the attorney for the moving party (e.g., first, middle, and last name) or the first three initials of the law firm for the moving party, and the number that is one number higher than the number of motions previously filed by said attorney or law firm in connection with that specific bankruptcy case.

On October 8 and 12, 2021, Barnes and Parker filed witness lists with corresponding proofs of service. Docs. ##171-72; ##177-78. Those witness lists were docketed under DCN WEW-2. This motion also has a DCN of WEW-2. This is incorrect. Because the WEW-2 DCN has already been used, WFG should have used a different DCN.

For example, WFG could have used DCN JSK-1 or WW-1 since these are the initials of WFG's attorney Jeffrey S. Kaufman of the law firm Wolfe & Wyman LLP, and neither appear to have been used yet.

The above grounds are enough to deny this motion. When a bankruptcy court operates within its local rules, there is no abuse of discretion in application of those local rules. *In re Thao Tran Nguyen*, 447 B.R. 268, 281 (B.A.P. 9th Cir. 2011) (*en banc*). Notwithstanding the procedural deficiencies, the court has considered the merits of the motion.

BACKGROUND

Plaintiff Armando Natera ("Debtor") encumbered real property located at 2430 East Orrland Avenue, Pixley, CA 93256 ("Property") with a deed of trust in favor of Barnes on or about March 23, 2016. Doc. #262, *Ex. 1*. Barnes is identified as the lender/beneficiary and Debtor as the trustor/borrower. *Id.* On or about June 6, 2017, Parker became the successor trustee under the deed of trust. *Id.*, *Ex. 2*.

Between May and October 2017, Parker conducted non-judicial foreclosure proceedings under the deed of trust. On October 25, 2017, Parker sold Property to Barnes with a credit bid of \$115,783.71. *Id.*, *Exs. 3-4*. On October 26, 2017, Parker issued a *Trustee's Deed Upon Sale* ("Trustee's Deed") in favor of Barnes, which was recorded in Tulare County on October 30, 2017. *Id.*, *Ex. 5*.

In connection with these foreclosure proceedings, Parker and Barnes purchased a limited indemnity agreement from WFG known as CLTA Form No. 22, *Trustee's Sale Guarantee* dated May 25, 2017 ("TSG"). Doc. #260, *Ex. 1*. The TSG was endorsed by two Date-Down Endorsements: one dated August 28, 2017 at 7:30 a.m., and the other dated October 25, 2017 at 7:30 a.m. ("Endorsements"). Parker and Barnes are the stated assureds on the TSG.

Debtor filed chapter 13 bankruptcy on October 25, 2017 at 1:59:28 p.m. See Bankr. Case No. 17-14112 ("Bankr.") Doc. #1. The case was dismissed on January 3, 2018. Bankr. Doc. #36. The case was reopened June 5, 2020. Bankr. Doc. #50.

Debtor filed this adversary proceeding against Barnes, Parker, and two others the same day this case was reopened. Doc. #1. Debtor amended the complaint on December 23, 2020. Doc. #92. Now, Barnes and Parker filed this Third-Party Complaint against WFG.

The Third-Party Complaint alleges that Parker's agent and owner, Donald Parker, asked WFG's agent, Dean A. Kirchen, about the effect of a bankruptcy filed on the same day as the sale without notice or a case number. Doc. #246. Barnes and Parker claim that Kirchen responded that if the Trustee's Deed was recorded within 15 days of the foreclosure, the sale is deemed perfected as of 8:00 a.m. on the day

of the sale. *Id.* If the sale is not actually effective as of 8:00 a.m. on the day of the sale, WFG's advice may have been wrong.

Based on Kirchen's advice, Barnes and Parker recorded the Trustee's Deed on October 30, 2017 and subsequently began eviction proceedings. *Id.*, Doc. #262, Ex. 5.

On November 3, 2017, Parker asked Kirchen to re-send the October 25, 2017 email, or a similar email with the information about whether the sale is deemed perfected as of 8:00 a.m. on the day of the sale. Doc. #246, Ex. A. Kirchen responded, stating:

Yes in CA, if the TDUS [Trustee's Deed] records within 15 days of the foreclosure sale it is deemed perfected as of 8am the day of the sale. Now, if you had actual knowledge of the BK filing prior to the sale that may be a different story. Please let us know if you need any further clarification.

Id., at 10. In reliance on this advice, Parker sent a confirmation to Barnes on November 28, 2017, stating that Kirchen has confirmed by email that the Trustee's Deed is "OK and valid despite [Debtor] filing BK on the sale day." *Id.*, at 13. By relying on WFG's advice, Barnes and Parker have been sued and have incurred significant legal fees.

On this basis, Barnes and Parker filed the Third-Party Complaint alleging negligence, abstractor negligence, breach of oral contract, and negligent misrepresentation. *Id.*

WFG now seeks to dismiss the Third-Party Complaint under Civ. Rule 12(b)(6). Doc. #258.

DISCUSSION

Civ. Rule 12(b)(6) is applicable to adversary proceedings under Rule 7012(b) and allows the court to dismiss for "failure to state a claim upon which relief can be granted." Courts may dismiss a complaint if it "fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016), citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010); *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). To survive a motion to dismiss under Civil Rule 12(b)(6) "a complaint must contain sufficient factual matter accepted as true to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A court should assume the veracity of the factual allegations "and then determine whether they plausibly give rise to an entitlement of relief." *Iqbal*, 556 U.S. at 679. This plausibility standard is not a probability requirement, but it does ask for more than a mere possibility; if a complaint pleads facts "merely consistent with" a theory of liability it falls short of "the

line between possibility and plausibility." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557).

When considering dismissal, all material facts alleged in the complaint are to be taken as true and viewed in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). "[T]he tenet that a court must accept as true all allegations in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662, citing *Twombly*, 550 U.S. at 555. The court may also draw on its "judicial experience and common sense." *Id.* at 679.

Negligence and Abstractor Negligence

The elements of negligence are: "(a) a *legal duty* to use care; (b) a *breach* of said legal duty; [and] (c) the breach as *the proximate or legal cause* of the resulting injury." *Ladd v. Cty. of San Mateo*, 12 Cal. 4th 913, 917 (1996) (emphasis in original), quoting *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828, 834 (1992). "[T]he existence of a duty is a question of law for the court." *Ky. Fried Chicken of Cal. V. Superior Court*, 14 Cal. 4th 814, 819 (1997).

Barnes and Parker allege that WFG had a duty to use reasonable care in providing Parker with accurate information as to whether the Trustee's Deed was valid. Doc. #246. WFG breached that duty by negligently stating that the Trustee's Deed was valid and effective as of 8:00 a.m. on the day of the sale because it was recorded within 15 days of the foreclosure, claim Barnes and Parker. *Id.* Instead, WFG should have advised Parker that the safest course of action was to seek relief from the automatic stay, which would have prevented the filing of Debtor's adversary proceeding against Barnes, Parker, and others, as well as Barnes' and Parker's subsequent Third-Party Complaint. *Id.* Since Barnes and Parker relied on WFG's advice, they allege that WFG breached its duty, thereby causing Barnes and Parker to be injured. *Id.*

As for abstractor negligence, Barnes and Parker claim that WFG undertook a duty to perform the duties of an abstractor by entering into an oral agreement with Parker, which was intended to be relied upon by Barnes and Parker. *Id.* Kirchen, WFG's agent, agreed to notify Parker in writing of any and all clouds on title that would adversely affect Barnes' ability to take clean title of Property at the foreclosure sale. *Id.* Barnes and Parker claim that WFG breached that duty by negligently providing a written representation that the Trustee's Deed was valid and deemed perfected as of 8:00 a.m. because it was recorded within 15 days of the foreclosure sale. Instead, it would have been more cost effective to advise Barnes and Parker to seek stay relief. Barnes and Parker claim to have reasonably relied upon this advice, which caused them to be damaged in an amount to be proven at trial. *Id.*

WFG argues that the Third-Party Complaint fails to sufficiently plead negligence. Doc. #258. Since WFG has not been retained as an abstractor, it argues that it owes no duty to accurately disclose the state of title in the TSG. *Id.*, citing *Siegel v. Fid. Nat. Title Ins. Co.*, 46 Cal. App. 4th, 1181, 1185, 1189-90 (1996) (“[A] title insurer who has not undertaken to perform as an abstractor owes no duty to disclose recorded liens or other clouds on title. The reason derives from the difference between an abstract of title prepared by an abstractor and a preliminary title report prepared by a title insurer prior to issuing a title insurance policy.”). On this basis, WFG claims that Barnes’ and Parker’s reliance upon the state of title in the TSG is not justified, so the claim for negligence is without merit. Doc. #258.

An “[a]bstract of title’ is a written representation . . . intended to be relied upon by the person who has contracted for the receipt of such representation, listing all recorded conveyances, instruments or documents which, under the laws of this state, impart constructive notice with respect to the chain of title to the real property described therein.” Cal. Ins. Code § 12340.10. WFG insists that the TSG is a contract of indemnity limited in scope by the terms of the guarantee rather than an abstract of title. Doc. #258. Thus, WFG says that it was inappropriate for Barnes and Parker to rely on the TSG or preliminary title report. *Id.*, citing *Fid. Nat’l Title Ins. Co. v. Miller*, 215 Cal. App. 3d 1163, 1175 (Cal. App. 4th Dist. 1989) (“Insurance Code sections 12340.10 and 12340.11 make clear that no reliance may be placed on a preliminary title report or a policy of title insurance to show the condition of title.”).

In contrast, the TSG provided to Barnes and Parker is intended to assist the foreclosing trustee in “gather[ing] certain information regarding the property and the contents of the public records.” Doc. #258, citing *Miller and Starr California Real Estate* 4th, § 7:198, *Trustee’s sale guarantee-CLTA guarantee Form No. 22*, 3 Cal. Real Est. § 7:198 (4th ed.). Thus, WFG argues that the TSG only provided limited assurance that the following information has been gathered from public records:

- i. the name of the vested owner of the property;
- ii. the names and addresses disclosed of persons who have recorded requests under Cal. Civ. Code § 2924b(a) and (d) to receive a copy of a notice of default and notice of sale;
- iii. the names and addresses disclosed of record of persons who are otherwise entitled to receive notice under Cal. Civ. Code § 2924b(c) (1)-(2);
- iv. the names and addresses of the state taxing agencies that are entitled to receive notice under Cal. Civ. Code § 2924b(c) (2) (F);
- v. the city or judicial district where the land is located in order to find a newspaper qualified to publish notice under Cal. Civ. Code § 2924f.

Doc. #258. Thus, WFG says that there can be no abstractor liability because the TSG is not an abstract of title. *Id.*

Further, WFG contends that the TSG was accurate when it was first issued and as of the two Date-Down Endorsements. The TSG was effective May 2017 at 9:46 a.m., as well as the Endorsement dates of August 28, 2017 at 7:30 a.m., and October 25, 2017 at 7:30 a.m. The TSG accurately shows that no bankruptcy had been filed.

Approximately 6.5 hours later after the second Endorsement, Debtor filed bankruptcy. The Endorsements do not substantially change the TSG, and neither the TSG nor the Endorsements provide any coverage for violation of the automatic stay. Therefore, WFG argues that there is no indemnity to the bankruptcy estate nor indemnity for Barnes' and Parker's stay violations. *Id.*

In response, Barnes and Parker allege that Kirchen, WFG's agent, in the course of conducting his duties as a title insurer undertook to give specific legal advice to Barnes and Parker with full knowledge and intent that Barnes would rely upon that advice. Doc. #281. The advice that the Trustee's Deed was effective as of 8:00 a.m. on the date of the sale is alleged by Debtor to be incorrect as a matter of law. Barnes and Parker believe that they have plead sufficient factual matter to describe what, where, why, and who necessary for WFG to formulate a defense. The response does not address abstractor negligence.

Though the court agrees that abstractor negligence is not available to Barnes and Parker because the TSG is not an abstract of title, the court disagrees as to the negligence cause of action. Cal. Ins. Code §§ 12340.10 and 12340.11 preclude reliance on a preliminary report furnished in connection with an application for title insurance to show the condition of title. However, WFG's response on November 3, 2017 to Parker's email was not sent in connection with an application for title insurance.

WFG, through Kirchen, undertook to provide specific legal advice to Parker, which it knew or should have known would be relied upon by Barnes regarding whether the Trustee's Deed was valid and perfected as of 8:00 a.m. on the date of the foreclosure sale. Such undertaking created a duty of reasonable care. *Hawkins v. Oakland Title Ins. & Guaranty Co.*, 165 Cal. App. 2d 116, 127-28 (1958) (imposing a duty of care on a defendant title company for a representation that the defendant knew would be relied upon and communicated to a specific individual plaintiff for the purpose of inducing them to act).

The court intends to DENY IN PART the motion as to the negligence cause of action and GRANT IN PART as to the abstractor negligence cause of action. Barnes and Parker shall file an amended complaint within 14 days of entry of the order.

Breach of Oral Contract

To prevail on a claim for breach of contract, a plaintiff must prove: (1) the existence of a contract; (2) plaintiff's performance or excuse for non-performance; (3) that the conditions required for defendant's performance occurred; (4) defendant's breach; and (5) plaintiff's damages were proximately caused by defendant's breach. *Acoustics, Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 913 (1971); *CDF Firefighters v. Maldonado*, 158 Cal. App. 4th 1226, 1239 (2008)

Barnes and Parker allege that WFG, through Kirchen, entered into an oral agreement with Parker, which was intended to be relied upon by Barnes, whereby WFG agreed to perform the duties of an abstractor by notifying Parker in writing of any and all clouds on title that would adversely affect Barnes' ability to take clean title of Property at the foreclosure sale. Doc. #246. Barnes and Parker contend that this duty was breached by negligently providing a written representation that the Trustee's Deed was perfected as of 8:00 a.m. the day of the foreclosure sale because it had been recorded within 15 days of the sale. *Id.* Barnes and Parker relied on WFG's advice, causing them to be damaged in an amount to be proven at trial.

WFG argues that this claim fails for several reasons: (1) Barnes and Parker have failed to establish the existence of a contract, and (2) no new consideration was provided for the purported oral contract. Doc. #258.

The exhibits attached to the Third-Party Complaint consist of an email thread between Parker and Kirchen and a fax from Parker to Barnes. Doc. #246. In the email thread, Kirchen relates the contents of Civ. Code § 2924h(c) to Parker. *Id.*, *Ex. A.* WFG insists that Kirchen does not make any specific representations regarding Property in the email exchange. Doc. #258. Meanwhile, the fax from Parker to Barnes does not mention WFG's agreement to perform the duties of an abstractor, nor does it contain any reference to a statement by an agent or officer of WFG. *Id.*

Additionally, WFG argues that this cause of action is barred because no new consideration has been alleged for the oral agreement. Further, Barnes and Parker have not alleged any specific damages, such as sanctions for violating the automatic stay, or specific monetary damages. *Id.*

Barnes' and Parker's response does not rebut WFG's contentions. Doc. #281.

It does appear that Barnes and Parker have not provided sufficient factual or legal grounds to allege the existence of an oral contract, new consideration, or damages, though the extent of any sanction or damage claim has yet to be litigated. The court is inclined to GRANT IN PART the motion to dismiss this cause of action. Barnes and Parker will be directed to file an amended complaint within 14 days of entry of the order.

Negligent Misrepresentation

A cause of action for negligent misrepresentation requires: (1) misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented; and (4) ignorance of the truth and justifiable reliance by the party to whom the misrepresentation was directed; and (5) damages. *Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc.*, 115 Cal. App. 4th 1145, 1154 (2004), quoting *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967, 983 (2003); see also *Home Budget Loans v. Jacoby & Meyers Law Offices*, 207 Cal. App. 3d, 1277, 1285 (1989); *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 174 (2003); *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986).

The Third-Party Complaint alleges that WFG represented that the Trustee's Deed would be perfected as of 8:00 a.m. the day of the foreclosure sale because it was recorded within 15 days of the sale. Doc. #246. WFG had no reasonable grounds to advise Barnes and Parker that the Trustee's Deed was perfected despite the bankruptcy, and instead should have told them to seek stay relief. Since Barnes was intended to rely on the representation, the complaint insists that Barnes' and Parker's reliance on the representation was reasonable. As an actual, legal, and proximate result of relying on the misrepresentation, Barnes sustained damages, which will be proven at trial. *Id.*

WFG's motion focuses on the elements of fraudulent misrepresentation, rather than negligent misrepresentation. Doc. #258. WFG claims that Barnes and Parker have failed to meet the heightened pleading requirement for fraud under Civ. Rule 9(b), which requires allegations of fraud to plead facts showing how, when, where, to whom, and by what means the fraudulent misrepresentations were tendered. *Id.*, citing *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997) (considering fraudulently or recklessly made misrepresentations); *Wilhelm v. Pray, Price, Williams & Rossell*, 186 Cal. App. 3d 1324, 1331 (1986) ("The complaint does not state a cause of action for negligent misrepresentation, nor can it be amended to do so."); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (discussing the heightened pleading requirement under Civ. Rule 9(b) for allegations of fraud); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (same); *Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001) (discussing fraud under the False Claims Act, 31 U.S.C. §§ 3729-3733); *Cafasso ex rel. United States v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054-55 (9th Cir. 2011) (same).

These cases are inapplicable here because Barnes and Parker are alleging negligent misrepresentation, not fraudulent misrepresentation. Civ. Rule 9(b) is expressly limited to allegations of "fraud or mistake." *Petersen v. Allstate Indem. Co.*, 281 F.R.D. 413, 418 (C.D. Cal. 2012) ("[T]he Court holds that the California tort of negligent misrepresentation need not satisfy the heightened

pleading standard of Rule 9(b)."). But there is also little doubt which representation is the subject of this dispute based on the attached documents. There is certainly enough alleged to notify WFG of the nature of the claims against them.

Even if the heightened pleading requirement of Rule 9(b) did apply, Barnes and Parker have alleged who, what, when, why, and how. A copy of the email from Kirchen to Parker satisfies all of these conditions. Barnes and Parker have set forth more than the neutral facts necessary to identify the statement, what is false or misleading about it, and why it is false. *Vess*, 317 F.3d at 1106.

The court intends to DENY IN PART the motion as to the fourth cause of action for negligent misrepresentation.

CONCLUSION

The court intends to GRANT IN PART the motion as to the second and third causes of action for abstractor negligence and breach of oral contract with leave to amend. Barnes and Parker shall file an amended third-party complaint not later than 14 days after entry of this order.

Further, the court intends to DENY IN PART the motion as to the first and fourth causes of action for negligence and negligent misrepresentation. Viewing all evidence in the light most favorable to the non-moving party, Barnes and Parker have stated claims for relief that are plausible when taken at face value.

This matter will be called and proceed as scheduled.

3. [20-10024](#)-B-7 **IN RE: SUKHJINDER SINGH**
[20-1036](#)

CONTINUED PRE-TRIAL CONFERENCE RE: AMENDED COMPLAINT
7-21-2020 [[14](#)]

SALVEN V. SINGH ET AL
RUSSELL REYNOLDS/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to June 29, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court is in receipt of chapter 7 trustee James E. Salven's ("Plaintiff") statement filed April 27, 2022. Doc. #109. Plaintiff says that the parties have reached an agreement to settle this adversary proceeding. In the main bankruptcy case, Plaintiff filed

Trustee's Motion to Compromise a Controversy on May 1, 2022 that is set for hearing on June 2, 2022. RWR-4. Accordingly, this status conference will be continued to June 29, 2022 at 11:00 a.m. to be heard after Trustee's motion. The parties are invited, but not required, to file a status report not later than seven days before the continued status conference.

4. [20-10024](#)-B-7 **IN RE: SUKHJINDER SINGH**
[20-1036](#)

ORDER TO SHOW CAUSE
4-1-2022 [[106](#)]

SALVEN V. SINGH ET AL
RESPONSIVE PLEADING

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

DISPOSITION: Continued to June 29, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

The court is in receipt of chapter 7 trustee James E. Salven's ("Plaintiff") statement filed April 27, 2022. Doc. #109. Plaintiff says that the parties have reached an agreement to settle this adversary proceeding. In the main bankruptcy case, Plaintiff filed *Trustee's Motion to Compromise a Controversy* on May 1, 2022 that is set for hearing on June 2, 2022. RWR-4. Accordingly, this *Order to Show Cause* ("OSC") will be continued to June 29, 2022 at 11:00 a.m. to be heard after Trustee's motion. The deadlines to file and serve a response to the OSC will be extended to 14 days before the continued hearing date.

5. [13-11337](#)-B-13 **IN RE: GREGORY/KARAN CARVER**
[22-1001](#) [CAE-1](#)

STATUS CONFERENCE RE: COMPLAINT
1-6-2022 [[1](#)]

CARVER ET AL V. SETERUS INC. ET AL
NANCY KLEPAC/ATTY. FOR PL.

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

DISPOSITION: Continued to June 1, 2022 at 11:00 a.m.

ORDER: The court will issue an order.

When Debtors Gregory Thomas Carver and Karan Ann Carver ("Plaintiffs") filed their adversary complaint, the Clerk of the Bankruptcy Court

issued a *Summons and Notice of Status Conference in an Adversary Proceeding* on January 6, 2022 ("Summons"). Doc. #3. The Summons set March 9, 2022 as the date of the first status conference in this case. *Id.* Since the Summons and complaint were not served on Nationstar Mortgage LLC d/b/a Mr. Cooper LLC, and Gregory Funding Inc. ("Defendants") as required under Fed. R. Bankr. P. 7004 and Fed. R. Civ. P. 4, the court continued the first status conference to April 7, 2022 and directed Plaintiffs to obtain a reissued summons and serve it, along with the complaint, on Defendants.

The Clerk issued a *Reissued Summons and Notice of Status Conference in an Adversary Proceeding* ("Reissued Summons") on March 8, 2022. Doc. #8.

Since Plaintiffs properly served the Reissued Summons and complaint on the defendants, the court continued the first status conference on April 7, 2022 to April 22, 2022 so that it could be heard after the deadline for Defendants to file an answer or other responsive pleading. Docs. ##14-15. At the time of the April 22, 2022 status conference, no answer had been filed. The court further continued that status conference to June 1, 2022 and directed Plaintiffs to seek entry of default. Docs. ##18-19.

Meanwhile, the Reissued Summons set this second status conference on May 11, 2022. *Id.* This status conference will be CONTINUED to June 1, 2022 at 11:00 a.m. to be heard with the continued first status conference. If defaults are entered and a "prove-up" hearing is set, the court may continue this second status conference to the "prove-up" hearing date and drop the continued first status conference from calendar.