UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, May 27, 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, 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. 21-10002-A-13 **IN RE: ROQUE CASTRO**
MHM-1

MOTION TO DISMISS CASE
4-20-2021 [16]

MICHAEL MEYER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a movant make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Here, the chapter 13 trustee asks the court to dismiss this case for unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtor failed provide the trustee with all of the documentation required by 11 U.S.C. § 521(a)(3) and (4). Doc. #16. The debtor did not oppose.

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

Accordingly, this motion will be GRANTED. The case will be dismissed.

2. 20-11415-A-13 **IN RE: ALBERTO GALICIA FLORES AND JOANNA CANO**
MAZ-3

MOTION TO INCUR DEBT
4-16-2021 [67]

JOANNA CANO/MV
MARK ZIMMERMAN/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.

As a procedural matter, the motion does not comply with LBR 9014-1(d)(3)(A), which requires a motion to particularly state the legal grounds for the relief sought. The court encourages counsel to 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.

Alberto Galicia Flores and Joanna Cano (together, "Debtors"), the chapter 13 debtors in this case, move the court for an order authorizing Debtors to incur new debt. Doc. #67. Debtors plan to incur new debt to purchase a motor vehicle. Doc. #67.

LBR 3015-1(h)(1)(E) provides that "if the debtor wishes to incur new debt . . . 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 as required by LBR 3015-1(h). Debtors are current on their chapter 13 plan payments and the chapter 13 plan is not in default. Decl. of Joanna Cano, Doc. #69. Debtors filed amended Schedules I and J that demonstrate an ability to pay future plan payments, projected living and business expenses, and the new debt. Doc. #72. The new debt is a single loan incurred to purchase a motor vehicle that is reasonably necessary for the maintenance or support of Debtors. Decl., Doc. #69. The only security for the new debt will be the motor vehicle to be purchased by Debtors. Id.

Accordingly, this motion is GRANTED. Debtors are authorized, but not required, to purchase a vehicle in a manner consistent with the motion.

3. 21-10125-A-13 **IN RE: JOEL/ARACELI ALVARADO**
MAZ-1

MOTION TO CONFIRM PLAN
4-9-2021 [35]

ARACELI ALVARADO/MV
MARK ZIMMERMAN/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)(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.

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.

4. 21-10632-A-13 **IN RE: MARCO LOPEZ AGUIRRE AND MAYRA LOPEZ**
EAT-1

OBJECTION TO CONFIRMATION OF PLAN BY LAKEVIEW LOAN SERVICING, LLC
4-14-2021 [17]

LAKEVIEW LOAN SERVICING, LLC/MV
LEROY AUSTIN/ATTY. FOR DBT.
CASSANDRA RICHEY/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The debtors filed their chapter 13 plan ("Plan") on March 25, 2021. Doc. #12. Lakeview Loan Servicing, LLC ("Creditor") objects to confirmation of the Plan on the grounds that: (1) the Plan does not provide for the curing of the $11,656.52 default asserted by Creditor's proof of claim; (2) the monthly Plan payments of $1,156.33 are less than the ongoing mortgage payments owed to Creditor; and (3) the Plan and the debtors' schedules are unclear as to whether the debtors or the trustee will be making the ongoing mortgage payments to Creditor. Doc. #17.

Federal Rule of Bankruptcy Procedure 3001(f) provides 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." 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. Creditor filed its proof of claim on April 13, 2021. Claim 8.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #12. The Plan fails to account for the arrears asserted by Creditor's claim. Claim 8; Doc. #12. The Plan also states that post-petition monthly payments to Creditor are to be paid by the trustee, but the monthly plan payment proposed by the Plan is insufficient to meet the payments owed to Creditor. See Claim 8.

Accordingly, pending any opposition at hearing, the objection will be SUSTAINED.

5. 20-12732-A-13 **IN RE: JOSE CUIRIZ**
MHM-3

CONTINUED MOTION TO DISMISS CASE
3-4-2021 [67]

MICHAEL MEYER/MV
CHINONYE UGORJI/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue the order.

This motion to dismiss was originally filed by the chapter 13 trustee ("Trustee") on March 4, 2021 and set for hearing on April 22, 2021 at 9:30 a.m. Doc. ##67-70. Trustee moved to dismiss under 11 U.S.C. § 1307(c) for: (1) unreasonable delay by the debtor that is prejudicial to creditors and (2) failure to confirm a chapter 13 plan. Doc. #67.

The hearing on this matter was continued to May 27, 2021 to track with the hearing on the motion to confirm the first modified plan filed by Jose J. Cuiriz ("Debtor"), the debtor in this chapter 13 case. Doc. #73. Debtor's motion to confirm the first modified plan will be denied (see matter no. 6, below), and Debtor has not responded to Trustee's motion to dismiss.

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

Accordingly, this motion will be GRANTED. The case will be dismissed.

6. 20-12732-A-13 **IN RE: JOSE CUIRIZ**
NUU-1

CONTINUED MOTION TO CONFIRM PLAN
2-24-2021 [62]

JOSE CUIRIZ/MV
CHINONYE UGORJI/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtor Jose J. Cuiriz ("Debtor") filed and served this motion to confirm the first modified Chapter 13 plan pursuant to Local Rule of Practice ("LBR") 3015-1(d)(1) and set for hearing on April 22, 2021. Doc. ##62-65. The Chapter 13 trustee ("Trustee") filed an opposition to Debtor's motion. Doc. #71. The court continued this matter to May 27, 2021 and ordered Debtor to file and serve a written response to Trustee's objection by May 6, 2021; or if Debtor elected to withdraw this plan, then Debtor had to file, serve, and set for hearing a confirmable modified plan by May 13, 2021. Doc. #74.

Having reviewed the docket in this case, the court finds Debtor has not voluntarily converted this case to Chapter 7 or dismissed this case, and Trustee's objection has not been withdrawn. Further, Debtor has not filed and served any written response to Trustee's objection. Debtor has not filed, served, and set for hearing a confirmable modified plan by the time set by the court.

Accordingly, Debtor's motion to confirm their first modified Chapter 13 plan is DENIED on the grounds set forth in Trustee's opposition.

7. 20-12257-A-13 **IN RE: JESUS/ESTEFANIA FLORES**
FW-1

MOTION FOR COMPENSATION FOR GABRIEL WADDELL, DEBTORS ATTORNEY(S)
4-23-2021 [23]

ESTEFANIA FLORES/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 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 Jesus Villegas Flores and Estefania Avellaneda Flores (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of interim compensation in the amount of $3,860.00 and reimbursement for expenses in the amount of $399.91 for services rendered January 13, 2020 through April 15, 2021. Doc. #23.

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). The court may allow reasonable compensation to the chapter 13 debtor's attorney for representing interests of the debtor in connection with the bankruptcy case. 11 U.S.C. § 330(a)(4). 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) case administration, including administration after the death of a co-debtor; (3) original plan and confirmation hearings; and (4) preparation for meetings and hearings. Doc. #25. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on an interim basis.

This motion is GRANTED. The court allows interim compensation in the amount of $3,860.00 and reimbursement for expenses in the amount of $399.91 to be paid in a manner consistent with the terms of the confirmed plan.

8. 16-11060-A-13 **IN RE: MANUEL/DEBRA GOMES**
MHM-1

MOTION TO DISMISS CASE
4-21-2021 [24]

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

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

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

Here, the chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(6) and 1307(c)(8) for material default by the debtors with respect to a term of a confirmed plan and termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan. Doc #24. The debtors did not oppose.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for "cause". "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(6) and 1307(c)(8).

Accordingly, the motion will be GRANTED. The case will be dismissed.

9. 20-12867-A-13 **IN RE: ULF JENSEN AND BARBARA KIRKEGAARD-JENSEN**
EAT-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
4-27-2021 [61]

CIT BANK, N.A./MV
PATRICK KAVANAGH/ATTY. FOR DBT.
CASSANDRA RICHEY/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 chapter 13 trustee ("Trustee") timely filed written opposition on May 13, 2021. Doc. #73. The debtors filed written opposition on May 14, 2021. Doc. #80. 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). Therefore, the defaults of the non-responding parties in interest are entered.

The movant, CIT Bank, N.A. ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) with respect to real property located at 6119 Cloud Peak Ct, Bakersfield, CA 93313 ("Property"). Doc. #61.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

After review of the included evidence, the court finds no "cause" to lift the stay. Movant contends that, as a junior lien holder secured by the Property, it is entitled to adequate protection payments and that the delay by the debtors in confirming a chapter 13 plan is cause for terminating the automatic stay. Doc. #61. However, the debtors' chapter 13 plan was confirmed on May 13, 2021. Order Confirming Plan, Doc. #71. As Trustee points out, under the terms of the confirmed plan, Movant is to be paid in full over the life of the plan and will begin receiving payments in month 7. Plan, Doc. #50. Additionally, Movant is not entitled to adequate protection payments and was not scheduled to receive payments until after plan confirmation. See Obj., Doc. #73; Plan § 3.08, Doc. #50. No cause exists to lift the stay.

Accordingly, the motion will be DENIED.

10. 21-10171-A-13 **IN RE: MICHELLE/MANUEL VALENCIA**
EPE-1

MOTION TO CONFIRM PLAN
4-21-2021 [29]

MANUEL VALENCIA/MV
ERIC ESCAMILLA/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Set for evidentiary hearing.

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 to confirm the debtors' first modified chapter 13 plan was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). On May 4, 2021, the chapter 13 trustee ("Trustee") filed written opposition on the grounds that the debtors were delinquent in plan payments, the debtors were not providing all projected disposable income to unsecured creditors as required by 11 U.S.C. § 1325(b), and the debtors exceeded the maximum deductions allowed in calculating disposable income. Doc. #37. On May 11, 2021, Deutsche Bank National Trust Company ("Creditor") filed written opposition to the motion to confirm the chapter 13 plan on the ground that the 2% interest rate proposed by the plan is too low. Doc. #41.

Michelle Diana Valencia and Manuel Fernando Valencia (together, "Debtors") filed their first modified chapter 13 plan ("Plan") on April 12, 2021. Doc. #24. On April 21, 2021, Debtors moved to confirm the Plan and set the confirmation hearing for May 27, 2021 at 9:30 a.m. Doc. #29. The Plan called for monthly payments of $2,952.00 for 60 months. Doc. #24. The Plan proposes to pay a 0% dividend to nonpriority unsecured claims. Id. The Plan also classifies Creditor in Class 2(A) and proposes to pay the amount claimed by Creditor over 60 months at an interest rate of 2%. Id.

Trustee's Objection

Trustee first objects to confirmation under 11 U.S.C. § 1325(a)(6), arguing that Debtors will not be able to make all payments under the plan and comply with the plan because plan payments are delinquent. Doc. #37.

On May 20, 2021, Debtors responded indicating that the delinquency was paid on May 17, 2021. Doc. #45.

Trustee next objects to confirmation under 11 U.S.C. § 1325(b) because Debtors are not allocating all of their projected disposable income to pay general unsecured creditors and because Debtors' disposable income calculations were erroneous. Doc. #37.

Prior to filing any written response, Debtors filed amended Forms 122C-1 and 122C-2, which purport to cure the defects indicated in Trustee's opposition. Doc. #38; Doc. #45.

Trustee has not withdrawn his opposition to Plan confirmation. At the hearing, Trustee will be asked to verify whether Debtors have addressed the issues giving rise to Trustee's opposition.

Creditor's Objection

Creditor opposes Plan confirmation because the 2% interest rate proposed by the Plan is insufficient to compensate Creditor for the delay in receiving payments. Doc. #41. Creditor argues that the United States Supreme Court's decision in Till v. SCS Credit Corp., 541 U.S. 465 (2004) (plurality), requires the application of the "formula approach," which calculates the appropriate interest rate by first determining the national prime rate and then adjusting the prime rate to account for the greater nonpayment risk that bankrupt debtors typically pose. Till, 541 U.S. at 478-79. Creditor argues that the 2% proposed by the Plan is below the current prime rate of 3.25% and the Plan therefore is unconfirmable under 11 U.S.C. § 1325(a)(5)(B). Doc. #41.

Debtors filed written response to Creditor's opposition on May 19, 2021. Doc. #43. Debtors essentially argue that the 2% interest rate is adequate and appropriate, acknowledging that the 2% rate is a reduction of the prime rate. Doc. #43.

This issue may only be resolved after the presentation of evidence at a hearing. The Supreme Court in Till explained, after describing the "formula approach," that the appropriate adjustment of the prime rate depends "on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment." Till, 541 U.S. at 479. The bankruptcy court is then obligated "to select a rate high enough to compensate the creditor for its risk but not so high as to doom the plan." Id. at 480.

Although Debtors argue that Creditor has not met its burden of establishing a higher interest rate for the Plan, Creditor need not make such a showing at this stage. While "the evidentiary burden is squarely on the creditors," such burden is only imposed at the hearing stage. Id. at 479; see In re Tapang, 540 B.R. 701 (Bankr. N.D. Cal. 2015) (finding that creditor failed to meet its burden after considering the evidence presented at rate adjustment hearing).

Accordingly, an evidentiary hearing is needed to resolve this objection to confirmation of the Plan unless the parties reach a consensual resolution. At the hearing, the parties shall be prepared to propose a schedule for an evidentiary hearing.

11. 20-12179-A-13 **IN RE: BURRON/ANNA CUMMINGS**
FW-3

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, PC FOR GABRIEL J WADELL, DEBTORS ATTORNEY(S)
4-29-2021 [35]

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 Burron Marcel Cummings and Anna Mae Cummings (together, "Debtors"), the debtors in this chapter 13 case, requests allowance of interim compensation in the amount of $4,475.00 and reimbursement for expenses in the amount of $378.30 for services rendered March 12, 2020 through April 15, 2021. Doc. #35.

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). The court may allow reasonable compensation to the chapter 13 debtor's attorney for representing interests of the debtor in connection with the bankruptcy case. 11 U.S.C. § 330(a)(4). 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) case administration, including motions to value and a motion to dismiss; (3) original plan and confirmation hearings; and (4) preparation for meetings and hearings. Doc. #37. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on an interim basis.

This motion is GRANTED. The court allows interim compensation in the amount of $4,475.00 and reimbursement for expenses in the amount of $378.30 to be paid in a manner consistent with the terms of the confirmed plan.

12. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
SSA-2

OBJECTION TO CONFIRMATION OF PLAN BY T2M INVESTMENTS LLC
4-23-2021 [81]

T2M INVESTMENTS LLC/MV
STEVEN ALTMAN/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion is DENIED AS MOOT. The debtor filed a modified plan on May 18, 2021. Doc. #113. However, the modified plan was not accompanied with a motion to confirm the modified plan as required by Local Rule of Practice 3015-1(d)(1). Additionally, the form of the plan does not conform with Local Rule of Practice 3015-1(c)(1), which requires a chapter 13 plan to be filed on Form EDC 3-080. The debtor shall promptly move to confirm the modified plan in accordance with the local rules. The rules can be accessed at http://www.caeb.uscourts.gov/LocalRules.aspx. The EDC Form 3-080 can be accessed at http://www.caeb.uscourts.gov/Forms/FormsAndPublications.aspx.

13. 21-10384-A-13 **IN RE: ELLIOTT/TIFFANY SHIPES**
RSW-2

MOTION FOR AUTHORIZATION FOR DEBTORS TO SIGN SUBORDINATE NOTE AND DEED OF TRUST
5-13-2021 [31]

TIFFANY SHIPES/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

As a procedural matter, the motion does not comply with LBR 9014-1(d)(3)(A), which requires a motion to particularly state the legal grounds for the relief sought. The court encourages counsel to 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.

Elliott Royce Shipes and Tiffany Leanne Shipes (together, "Debtors"), the chapter 13 debtors in this case, move the court for an order authorizing Debtors to incur new debt. Doc. #31. Debtors seek authorization to sign a HUD partial claim subordinate note secured by a deed of trust on Debtors' residence. Doc. #31. Debtors wish to borrow $26,740.21. Decl. of Tiffany Shipes, Doc. #33.

LBR 3015-1(h)(1)(E) provides that "if the debtor wishes to incur new debt . . . 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."

The court is inclined to GRANT this motion. This motion was served and noticed properly, and opposition may be presented at the hearing. Debtors state that the amount to be borrowed is the amount that Debtors are "behind," presumably on mortgage payments. Decl., Doc. #33. The HUD partial claim, which Debtors are requesting authorization to execute, defers the repayment of mortgage principal through an interest-free subordinate mortgage that is not due until the first mortgage is paid off. There is no indication that Debtors are not current on their chapter 13 plan payments or that the chapter 13 plan is in default. Debtors state that no payments will be due until 2050 and the new debt will not affect Debtors' ability to make plan payments. Decl., Doc. #33.

Accordingly, subject to opposition raised at the hearing, this motion is GRANTED. Debtors are authorized, but not required, to execute the documents necessary to execute the HUD partial claim.

14. 18-15097-A-13 **IN RE: ERIC/ELIZABETH AYALA**
TCS-3

CONTINUED MOTION TO MODIFY PLAN
3-3-2021 [54]

ELIZABETH AYALA/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

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 chapter 13 trustee ("Trustee") timely opposed this motion but withdrew the opposition on April 1, 2021. See Opp'n, Doc. #61; Opp'n Withdrawal, Doc. #63. Creditor Wilmington Savings Fund Society, FSB ("Creditor") filed a limited opposition requesting certain language be included in the confirmation order. Doc. #65. The failure of other 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). Therefore, the defaults of the non-responding parties in interest are entered. 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.

Eric Ayala and Elizabeth Michelle Ayala (together, "Debtors"), the chapter 13 debtors, move the court to confirm Debtors' second modified chapter 13 plan. Doc. #54. Creditor's limited opposition explains that the proposed second modified plan states that Creditor shall be paid 60 monthly ongoing payments by month 84 of the proposed plan. Doc. #65. Creditor asserts that the order confirming Debtors' second modified plan clarify that Creditor shall be paid 84 monthly ongoing payments by month 84 of the proposed plan. Doc. #65.

Debtors have not responded to Creditor's limited opposition.

Unless opposition is presented at the hearing, the motion to confirm Debtors' second modified plan will be GRANTED. The proposed order shall reflect clarifying language proposed by Creditor's opposition. Doc. #65.

11:00 AM

1. 20-11321-A-7 **IN RE: SENAIDA GONZALES**
20-1043

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT
7-2-2020 [1]

JOHN C. HART, CONSERVATOR OF THE ESTATE OF JAMES G V. GONZALES
RYAN SULLIVAN/ATTY. FOR PL.
DISMISSED 3/31/21, CLOSED 4/19/21

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This adversary proceeding was dismissed on March 31, 2021. Doc. #24. Therefore, the pre-trial conference will be dropped as moot.

2. 02-10437-A-13 **IN RE: MARK STEINHAUER**
20-1064

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-24-2020 [1]

STEINHAUER ET AL V. HSBC FINANCE CORPORATION
GABRIEL WADDELL/ATTY. FOR PL.

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

A judgment resolving this adversary proceeding was entered on April 29, 2021. Doc. #37. Therefore, the status conference will be dropped as moot.

3. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015

STATUS CONFERENCE RE: COMPLAINT
3-8-2021 [1]

NICOLE V. ELIOPULOS ET AL
SYLVIA NICOLE/ATTY. FOR PL.

NO RULING.

4. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 CBC-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR ABSTENTION
4-6-2021 [29]

NICOLE V. ELIOPULOS ET AL
CORY CHARTRAND/ATTY. FOR MV.
RESPONSIVE PLEADING

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 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 hearing on this motion was continued to May 27, 2021 at 11:00 a.m. prior to the initial hearing on the motion. Civil Minutes, Doc. #97. The plaintiff filed timely opposition, and this matter will proceed as scheduled.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopulos, Steven Altman, Cory Chartrand, and T2M Investments, LLC (collectively, "Defendants"). Doc. #1. By the complaint ("Complaint"), Plaintiff asserts ten causes of action against all Defendants, primarily for fraud and breach of contract. The allegations stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with defendant T2M, over real property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The allegations also assert causes of action against all Defendants for acts committed during the litigation that followed the execution and alleged breach of the Settlement Agreement.

On April 6, 2021, defendant Cory Chartrand ("Chartrand") moved to dismiss all claims against him pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6) and moved for the bankruptcy court's abstention citing Rule 12(b)(1). Doc. #29. Rule 12(b) is made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

Plaintiff filed two written oppositions. On May 13, 2021, Plaintiff filed written opposition addressing Chartrand's request for dismissal under Rule 12(b)(6). Doc. #105. On May 14, 2021, Plaintiff filed written opposition addressing Chartrand's abstention argument. Doc. #110. Chartrand replied to Plaintiff's opposition on May 18, 2021. Doc. #113. Per the reply, Chartrand objected to Plaintiff's oppositions primarily because Plaintiff's oppositions were filed as sworn declarations. While these objections are well taken, because the court did not consider the evidence, if any, presented by Plaintiff's written opposition, those objections are overruled.

Pursuant to Plaintiff's opposition, Plaintiff agrees to dismiss count 2 for Theft, count 4 for Breach of Contract, count 5 for Contract Fraud, count 6 for Mortgage Fraud, count 7 for Title Fraud, count 8 for Contract Conversion, and count 10 for Contempt against Chartrand. Doc. #105. Plaintiff continues to

assert against Chartrand count 1 for Bankruptcy Fraud, count 3 for Lawsuit Fraud, and count 9 for Conspiracy to Commit Fraud. Id. Plaintiff filed additional opposition on May 25, 2021, two days before the date set for hearing, which the court will not consider because it was not filed timely. See LBR 9014-1(f)(1).

Having considered the complaint in its entirety, the court is inclined to GRANT the motion to dismiss WITH PREJUDICE. Chartrand's motion to abstain is DENIED.

MOTION TO DISMISS

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, 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)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Chartrand's Rule 12(b)(6) motion is at times premised on the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[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. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

"As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." Vess, 317 F.3d at 1108 (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990)) (internal quotation marks omitted). The Ninth Circuit has consistently held that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee, 236 F.3d at 1019 (internal quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

"[A] pro se litigant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). "[I]n applying the foregoing standards [for ruling on 12(b)(6) motions] enunciated by the Supreme Court, a federal court must construe a pro se complaint liberally, and hold it to less stringent standards than pleadings drafted by lawyers." Greenstein, 576 B.R. at 171 (citing Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th

Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Rule 12(d). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into a motion for summary judgment. Branch, 14 F.3d at 454. Here, the complaint specifically refers to the Settlement Agreement, the authenticity of the Settlement Agreement is not in dispute, and the Settlement Agreement was filed as an exhibit in support of the motion to dismiss. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss under Rule 12(b)(6).

FRAUD CLAIMS

The first two causes of action remaining against Chartrand sound in or allege fraud. "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted). The allegations of the Complaint as a whole have been considered in ruling on this Motion. To the extent that any claims alleged by Plaintiff may be construed as allegations of fraud on the court, perjury, false evidence, or abuse of process, those allegations are separately addressed elsewhere.

Count 1: Bankruptcy Fraud

Count 1 of Plaintiff's Complaint alleges that:

> Defendants intentionally provided false information about plaintiff's residency, the settlement agreement status, plaintiff's bankruptcy filings, and civil lawsuit status to the trustee and to this bankruptcy court. This material misrepresentation was made with the purpose to obtain a change of venue order, so [D]efendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts.] Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in an amount to be proven at trial.

Complaint, Count 1, 4:20-5:1 (original formatting omitted). Count 1 must be dismissed with prejudice because it does not contain facts that, if true, would entitle Plaintiff to recover against Chartrand.

Count 1 alleges that Defendants, including Chartrand, made misrepresentations to the bankruptcy court or to the bankruptcy trustee; Count 1 does not allege that misrepresentations were made to Plaintiff. Count 1 alleges that the misrepresentation was made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 1 may be liberally construed to allege that

Defendants had a future intent to defraud Plaintiff, but it does not allege that Defendants made the misrepresentations intending to defraud Plaintiff or induce Plaintiff's reliance. Count 1 does not allege that Plaintiff relied on the misrepresentations. See Okun v. Morton, 203 Cal. App. 3d 805, 828 (1988) ("It must be shown that the plaintiff actually relied upon the misrepresentation[.]").

Count 1 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts would not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 1 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 3: Lawsuit Fraud

Count 3 of Plaintiff's complaint alleges:

> Defendant T2M failed to return the Property to plaintiff, refused to cancel the mortgage, sued plaintiff without serving plaintiff with the lawsuit legally, obtained request for default fraudulently, did not serve the paperwork as required by law, and provided false information about the settlement agreement to superior court to injure plaintiff. Defendants were aware of their process abuse and misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 3, 5:10-16 (original formatting omitted). Count 3 must be dismissed with prejudice because Plaintiff does not contain facts that, if true, would entitle Plaintiff to recover against Chartrand.

"In its broad, general sense the concept of fraud embraces anything which is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon." Okun, 203 Cal. App. 3d at 827-28 (quotations and citations omitted). As an initial matter, the majority of allegations asserted in Count 3 do not describe fraudulent conduct. Further, the allegations asserted in Count 3 do not specifically identify Chartrand, and those that might apply to Chartrand do not state a claim for relief.

In the Complaint, Plaintiff alleges that Defendants together, or Chartrand individually, failed to return the Property to Plaintiff and refused to cancel the mortgage, and then sued Plaintiff but failed to make proper service, and then sought an entry of default by making misrepresentations to the state court or an officer thereof, and then again failed to serve Plaintiff with the notice of entry of default or any other required documents and proceeded to argue against setting aside the entry of default, all while providing false information to the Superior Court of Merced County. Even if all of the allegations are true, Plaintiff does not state a claim that is plausible on its face. See Iqbal, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As in Count 1, Count 3 does not allege that any misrepresentations were (i) made to Plaintiff, (ii) made to induce Plaintiff's reliance, or (iii) relied on by Plaintiff.

Count 3 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 3 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 9: Conspiracy to Commit Fraud

Count 9 of Plaintiff's Complaint alleges:

> Defendants knew it is wrong to conspire together to commit illegal acts. Yet, together and continually they provided false information about plaintiff's title and ownership of properties, the settlement agreement, plaintiff's residency, mortgage owed, plaintiff's bankruptcy filings, and civil lawsuit status to third parties and to this bankruptcy court. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 9, 7:5-13 (original formatting omitted). Count 9 must be dismissed with prejudice as to allegations against Chartrand because Plaintiff does not allege facts that, if true, would entitle Plaintiff to recover against Chartrand and permitting additional pleading to amend the claim would be futile.

Under California law, "a civil conspiracy does not give rise to a cause of action unless an independent civil wrong has been committed." Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006). "There is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." Kerr v. Rose, 216 Cal. App. 3d 1551, 1564 (1990). If the plaintiff fails to demonstrate fraud, the cause of action for conspiracy to commit fraud likewise fails. Id.

Plaintiff asserted two counts of fraud against Chartrand, Count 1 for Bankruptcy Fraud and Count 3 for Lawsuit Fraud. Count 9 for Conspiracy to Commit Fraud fails because Counts 1 and 3 against Chartrand will be dismissed with prejudice.

As to the misrepresentations made to third parties and the bankruptcy court, Plaintiff cannot establish the underlying tort of fraud, and therefore cannot establish conspiracy. Count 9 alleges that Defendants made misrepresentations to third parties and to the bankruptcy court. Plaintiff alleges that Defendants intended third parties and the bankruptcy court to rely on the misrepresentations. Count 9 does not allege that Defendants conspired intending to defraud Plaintiff or induce Plaintiff's reliance. Count 9 does not allege that Plaintiff relied on the misrepresentations.

Count 9 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 9 is DISMISSED WITHOUT LEAVE TO AMEND.

Although Plaintiff does not specifically allege fraud on the court, perjury, false evidence, or abuse of process, the court is to construe Plaintiff's pro se complaint liberally. Greenstein, 576 B.R. at 171. Plaintiff's Complaint may be read as attempting to allege any of these causes of action, but ultimately fails to state any claim upon which relief can be granted because no such causes of action exist under state or federal law. Id. at 177-180.

The Supreme Court of California has explained that unjustified litigation and litigation-related misconduct should be addressed "through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 9 (1998) (citations omitted). For example, "[p]erjury . . . undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact[, but] there is no civil remedy in damages against a witness who commits perjury." Id.; see also Greenstein, 576 B.R. at 177-78. "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." Silberg v. Anderson, 50 Cal. 3d 205, 214 (1990) (discussing California's litigation privilege).

Similarly, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases). "Under federal law, fraud on the court is an equitable doctrine justifying the setting aside of a federal judgment." Id. (citing Fed. R. Civ. P. 60(b)(3)). Yet even if Plaintiff were seeking to vacate a prior federal court judgment (the Complaint makes no indication that such relief is requested), "[f]raud on the court involves far more than an injury to a single litigant." Greenstein, 576 B.R. at 179 (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)) (quotations omitted). Fraud on the court considers whether the integrity of the judicial process was harmed. Id. Liberally construing Plaintiff's allegations and accepting them as true, they do not amount to a fraud on the court.

Accordingly, to the extent Plaintiff seeks damages for an alleged fraud on the court, perjurious testimony, or the presentation of false evidence, Plaintiff cannot state a claim upon which relief can be granted and amendment would be futile. These claims are DISMISSED WITHOUT LEAVE TO AMEND.

CALIFORNIA'S LITIGATION PRIVILEGE

Many of the allegations against Chartrand may also be properly dismissed without leave to amend because they stem from statements made in judicial proceedings and are subject to California's litigation privilege, codified at California Civil Code § 47(b)(2). Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 824-25 (B.A.P. 9th Cir. 2009); Greenstein, 576 B.R. at 178 n.18. The litigation privilege is absolute. Silberg, 50 Cal. 3d at 215.

A four-part test must be met for application of California's litigation privilege: "the communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigations; and (4) that has some connection or logical relation to the action." Cedar Funding, 419 B.R. at 824.

Made in a Judicial or Quasi-Judicial Proceeding

"[C]ourts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." Silberg, 50 Cal. 3d at 213. "A bankruptcy proceeding is a judicial proceeding within the scope of California's litigation privilege." Cedar Funding, 419 B.R. at 825.

By Litigants or Other Participants Authorized by Law

The second element is met if the statement was made by a party to the action or the attorney for a party to the action. Silberg, 50 Cal. 3d at 219. The second element will also be met if the statement was made by a witness, even if the statement is not made in court. Jacob B. v. County of Shasta, 40 Cal. 4th 948, 959 (2007).

To Achieve the Objects of the Litigation & Has Some Connection or Logical Relation to the Action

"The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to the action, i.e., that it not be extraneous to the action." Silberg, 50 Cal. 3d at 219-20. "The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." Id. at 220.

In the Complaint, Plaintiff states that Chartrand is a licensed attorney who represented defendant T2M in the civil lawsuit in Merced County Superior Court. Doc. #1. Any allegations against Chartrand that arise from Chartrand's involvement in a state court or bankruptcy proceeding are part of a judicial proceeding in which Chartrand was an authorized participant. Further, the statements made in support of a change of venue order or other relief as alleged by Plaintiff are logically connected with the action. Accordingly, all allegations against Chartrand are absolutely protected and must be DISMISSED WITHOUT LEAVE TO AMEND.

ABSTENTION

Younger Doctrine

Chartrand argues that under Younger v. Harris, 401 U.S. 37 (1971), this court may not enjoin or otherwise interfere with pending state court proceedings.

Chartrand's moving papers do not address the recent limitations imposed by the United States Supreme Court to the application of the Younger doctrine. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013). Pursuant to Sprint, "Younger applies to only three exceptional categories of proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial function." French v. Fed. Home Loan Mortg. Corp. (In re French), 619 B.R. 285, 293 (Bankr. D.N.J. 2020) (citations and quotations omitted). The adversary proceeding before this court does not meet any of these descriptions.

Accordingly, the court finds that abstention under Younger is not warranted.

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Colorado River Doctrine

Chartrand also argues that this court should abstain from exercising its jurisdiction over this adversary proceeding under the principles announced in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Doc. #43.

"Colorado River is not an abstention doctrine, though it shares the qualities of one." United States v. State Water Res. Control Bd., 988 F.3d 1194, 1202 (9th Cir. 2021). In applying Colorado River, a federal court's task "is not to find some substantial reason for the *exercise* of federal jurisdiction [but rather] to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (emphasis in original). "If there is any substantial doubt as to whether the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties[,] it would be a serious abuse of discretion to grant the stay or dismissal at all." State Water Res. Control Bd., 988 F.3d at 1203 (citing Moses H. Cone, 460 U.S. at 28) (quotations and punctuation omitted).

The general rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[.]" Colorado River, 424 U.S. at 817. "[T]he Supreme Court [has] clarified that to fit into this narrow doctrine, 'exceptional circumstances' must be present." Moses H. Cone, 460 U.S. at 15-16. Recently reiterated by the Ninth Circuit, eight guiding factors should be considered in determining whether a Colorado River stay is appropriate:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

State Water Res. Control Bd., 988 F.3d at 1203 (citing R.R. St. & Co., Inc. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011)). "The factors are not a mechanical checklist," and "a single factor may decide whether a stay is permissible." Id. (quotations and citations omitted). Of the eight enumerated factors, the Ninth Circuit has repeatedly found the eighth factor to be dispositive. See Id.; Holder v. Holder, 305 F.3d 854, 870 (9th Cir. 2002); Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 (9th Cir. 1993). "Under the rules governing the Colorado River doctrine, the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of a stay." Intel Corp., 12 F.3d at 913.

Here, there is a substantial doubt that the pending action in Merced County Superior Court ("State Court Action") will resolve the issues before this court. Plaintiff had defaulted in the State Court Action and had unsuccessfully sought to set aside the default. As a result, Plaintiff was unable to answer the state court complaint against her and a default judgment may have been entered against her had the State Court Action not been stayed. Because Plaintiff was unable to answer in the State Court Action, the allegations in Plaintiff's Complaint in federal court would not be determined on the merits in the State Court Action. Further, the parties to the State Court Action would

eventually have to return to this court to determine the extent to which a default judgment entered in the State Court Action resolves issues related to this adversary proceeding and Plaintiff's bankruptcy case as a whole.

There is substantial doubt that the State Court Action will resolve all the issues before this court, but the same facts also weigh against abstention because retaining jurisdiction will avoid piecemeal litigation, will protect Plaintiff's ability to obtain a decision on the merits, and the Property is located in this district.

Accordingly, Chartrand's request for abstention is DENIED.

JUDICIAL NOTICE AND "OUTSIDE" EVIDENCE

Chartrand requests the court take judicial notice of various documents. Federal Rule of Evidence 201(c) requires a court to take judicial notice "if a party requests it and the court is supplied with the necessary information." Chartrand provided insufficient information to support the request for judicial notice.

The request to take judicial notice is DENIED.

CONCLUSION

Chartrand's motion to dismiss is GRANTED WITH PREJUDICE. All allegations against Chartrand will be dismissed without leave to amend.

Chartrand's request for abstention is DENIED.

5. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 CBC-2

CONTINUED MOTION TO STRIKE
4-6-2021 [35]

NICOLE V. ELIOPULOS ET AL
CORY CHARTRAND/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITIONS: Denied as moot.

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 will be DENIED AS MOOT because the entirety of claims alleged against the moving party are being dismissed pursuant to the tentative ruling in the related motion to dismiss filed by the moving party (CBC-1), there are no claims to strike. See Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 185 (Bankr. C.D. Cal. 2017).

6. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 CBC-3

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL, AND/OR MOTION FOR ABSTENTION
4-6-2021 [41]

NICOLE V. ELIOPULOS ET AL
CORY CHARTRAND/ATTY. FOR MV.
RESPONSIVE PLEADING

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 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 hearing on this motion was continued to May 27, 2021 at 11:00 a.m. prior to the initial hearing on the motion. Civil Minutes, Doc. #98. The plaintiff filed timely opposition, and this matter will proceed as scheduled.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopulos, Steven Altman ("Altman"), Cory Chartrand, and T2M Investments, LLC (collectively, "Defendants"). Doc. #1. By the complaint ("Complaint"), Plaintiff asserts ten causes of action against all Defendants, primarily for fraud and breach of contract. The allegations stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with defendant T2M, over real property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The allegations also assert causes of action against all Defendants for acts committed during the litigation that followed the execution and alleged breach of the Settlement Agreement.

On April 6, 2021, defendant T2M Investments, LLC ("T2M") moved to dismiss each allegation against it under Federal Rule of Civil Procedure ("Rule") 12(b)(6) and moved for the bankruptcy court's abstention citing Rule 12(b)(1). Doc. #41. Rule 12(b) is made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

Plaintiff filed two written oppositions. On May 13, 2021, Plaintiff filed written opposition addressing T2M's request for dismissal under Rule 12(b)(6). Doc. #106. On May 14, 2021, Plaintiff filed written opposition addressing T2M's abstention argument. Doc. #111. T2M replied to Plaintiff's opposition on May 18, 2021. Doc. #117. Per the reply, T2M objected to Plaintiff's oppositions primarily because Plaintiff's oppositions were filed as sworn declarations. While these objections are well taken, because the court did not consider the evidence, if any, presented by Plaintiff's written opposition, those objections are overruled. Plaintiff filed additional opposition on May 25, 2021, two days before the date set for hearing, which the court will not consider because it was not filed timely. See LBR 9014-1(f)(1).

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Having considered the complaint in its entirety, the court is inclined to:

1. GRANT T2M's motion to dismiss counts 1, 2, 3, 7, and 8 without leave to amend;

2. GRANT T2M's motion to dismiss counts 5, 6, 9, and 10 with leave to amend, with any amended complaint to be filed and served on or before June 30, 2021;

3. DENY T2M's motion to dismiss count 4 for breach of contract; and

4. DENY T2M's motion to abstain.

MOTION TO DISMISS

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, 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)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

T2M's Rule 12(b)(6) motion is at times premised on the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[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. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

"As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." Vess, 317 F.3d at 1108 (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990)) (internal quotation marks omitted). The Ninth Circuit has consistently held that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee, 236 F.3d at 1019 (quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

"[A] pro se litigant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). "[I]n applying the foregoing standards [for ruling on 12(b)(6) motions] enunciated by the Supreme Court, a federal court must construe a pro se complaint liberally, and hold it to less stringent standards

than pleadings drafted by lawyers." Greenstein, 576 B.R. at 171 (citing Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Rule 12(d). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into a motion for summary judgment. Branch, 14 F.3d at 454. Here, the complaint specifically refers to the Settlement Agreement, the authenticity of the Settlement Agreement is not in dispute, and the Settlement Agreement was filed as an exhibit in support of the motion to dismiss. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss under Rule 12(b)(6).

FRAUD CLAIMS

Of the ten causes of action set forth in Plaintiff's Complaint, the majority sound in or allege fraud. "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted).

The fraud claims are collected below and discussed in turn. Although they are separated to match the organization of the Complaint, the allegations of the Complaint as a whole have been considered in ruling on this Motion. To the extent that any claims alleged by Plaintiff may be construed as allegations of fraud on the court, perjury, false evidence, or abuse of process, those allegations are separately addressed elsewhere.

Count 1: Bankruptcy Fraud

Count 1 of Plaintiff's Complaint alleges that:

> Defendants intentionally provided false information about plaintiff's residency, the settlement agreement status, plaintiff's bankruptcy filings, and civil lawsuit status to the trustee and to this bankruptcy court. This material misrepresentation was made with the purpose to obtain a change of venue order, so [D]efendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts.] Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in an amount to be proven at trial.

Complaint, Count 1, 4:20-5:1 (original formatting omitted). Count 1 must be dismissed with prejudice because it does not allege facts that, if true, would entitle Plaintiff to recover against T2M.

Count 1 alleges that Defendants, including T2M, made misrepresentations to the bankruptcy court or to the bankruptcy trustee; Count 1 does not allege that misrepresentations were made to Plaintiff. Count 1 alleges that the misrepresentation was made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 1 may be liberally construed to allege that Defendants had a future intent to defraud Plaintiff, but it does not allege that Defendants made the misrepresentations intending to defraud Plaintiff or induce Plaintiff's reliance. Count 1 does not allege that Plaintiff relied on the misrepresentations. See Okun v. Morton, 203 Cal. App. 3d 805, 828 (1988) ("It must be shown that the plaintiff actually relied upon the misrepresentation[.]").

Count 1 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts would not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 1 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 3: Lawsuit Fraud

Count 3 of Plaintiff's complaint alleges:

> Defendant T2M failed to return the Property to plaintiff, refused to cancel the mortgage, sued plaintiff without serving plaintiff with the lawsuit legally, obtained request for default fraudulently, did not serve the paperwork as required by law, and provided false information about the settlement agreement to superior court to injure plaintiff. Defendants were aware of their process abuse and misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 3, 5:10-16 (original formatting omitted). Count 3 must be dismissed with prejudice because Plaintiff does not allege facts that, if true, would entitle Plaintiff to recover against T2M.

"In its broad, general sense the concept of fraud embraces anything which is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon." Okun, 203 Cal. App. 3d at 827-28 (quotations and citations omitted). As an initial matter, the majority of allegations asserted in Count 3 do not describe fraudulent conduct.

In the Complaint, Plaintiff alleges that Defendants together, or T2M individually, failed to return the Property to Plaintiff and refused to cancel the mortgage, and then sued Plaintiff but failed to make proper service, and then sought an entry of default by making misrepresentations to the state court or an officer thereof, and then again failed to serve Plaintiff with the notice of entry of default or any other required documents and proceeded to argue against setting aside the entry of default, all while providing false information to the Superior Court of Merced County. Even if all of the allegations are true, Plaintiff does not state a claim that is plausible on its

face. See Iqbal, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As in Count 1, Count 3 does not allege that any misrepresentations were (i) made to Plaintiff, (ii) made to induce Plaintiff's reliance, or (iii) relied on by Plaintiff.

It is important to note here that some of the allegations in Count 3 may give rise to a cause of action in contract against T2M. Because Plaintiff specifically asserts breach of contract elsewhere in the Complaint, the court need not determine whether allegations in Count 3 would satisfy a breach of contract claim.

Count 3 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 3 is DISMISSED WITHOUT LEAVE TO AMEND.

Counts 5 & 6: Contract Fraud and Mortgage Fraud

Count 5 of Plaintiff's complaint alleges:

> Defendants T2M and Altman never intended to remove the mortgage after they received the title [and] possession of the Property from plaintiff, but they expected [a] third party to pay it off instead. This material misrepresentation was made with the purpose to take plaintiff's Property without any consideration for plaintiff in return. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 5, 5:24-6:6 (original formatting omitted).

Count 6 of Plaintiff's Complaint alleges:

> After defendants T2M and Altman received title and possession of the Property, defendants did not remove the mortgage right away as agreed but continued to charge plaintiff monthly mortgage on the Property. Defendants were aware of their fraud and profited from them. As a direct and proximate result of defendants' misconduct, Plaintiff was damaged in the amount to be proved at trial.

Complaint, Count 6, 6:7-13 (original formatting omitted).

Liberally construing Plaintiff's Complaint, Counts 5 and 6 require dismissal without prejudice as to the allegations against T2M because T2M is a party to the Settlement Agreement. See Branch, 14 F.3d at 454 (explaining that on a motion to dismiss the court may consider a document if its authenticity is not disputed, it is identified in but not attached to the complaint, and it is included as part of a motion to dismiss).

California recognizes a claim of promissory fraud as a "subspecies of fraud and deceit." Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). "A promise to do something necessarily implies the intention to perform; hence, where a promise

is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Id. (citations omitted).

Granting leave to amend is required because the allegations are not particular enough to satisfy Rule 9(b). Plaintiff states the "who": T2M and Altman. Plaintiff does not state the time, place, or content of any alleged misrepresentation or promise made by T2M and fails to explain why the statements are false or misleading. Plaintiff also fails to sufficiently allege reliance and the resulting damage. Plaintiff does not "state with particularity the circumstances constituting fraud." Rule 9(b).

Accordingly, Counts 5 and 6 against T2M are DISMISSED WITH LEAVE TO AMEND. Plaintiff may amend the complaint and in so doing consolidate the allegations against T2M as appropriate.

Count 7: Title Fraud

Count 7 of Plaintiff's Complaint alleges:

> Defendant T2M obtained title and ownership of plaintiff's property through fraudulent recording of the grant deed of $209,000 in transfer value without paying plaintiff any consideration. Defendants lied to the bankruptcy court that plaintiff is the owner of the property locates [sic] at 2546 Canvasback Dr., Los Banos, CA 93635 to injure plaintiff with the trustee and the court. This material misrepresentation was made with the purpose to obtain a change of venue order, so defendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts]. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 7, 6:14-24 (original formatting omitted). To the extent that Count 7 alleges that T2M made misrepresentations to the bankruptcy court or to the bankruptcy trustee, Count 7 must be dismissed with prejudice because Plaintiff does not describe facts that, if true, would entitle Plaintiff to recover against T2M, and permitting additional pleading of this claim would be futile.

Count 7 does not allege that misrepresentations were made to Plaintiff or to induce Plaintiff's reliance. Count 7 alleges that a misrepresentation was made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 7 does not allege that Plaintiff relied on the misrepresentations.

However, Plaintiff is not precluded from re-asserting any facts alleged as part of Count 7 that do not involve statements made in a judicial proceeding and that may properly be incorporated to a claim of promissory fraud or breach of contract against T2M.

Count 7 fails to state a claim upon which relief can be granted. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 7 against T2M is DISMISSED WITHOUT LEAVE TO AMEND.

Count 8: Contract Conversion

Count 8 of Plaintiff's Complaint alleges:

> Defendants did not perform as required by agreement[. Instead,] Defendants forced plaintiff to change the contract content fraudulently to injure plaintiff and [a] third party by signing a new deed that had nothing to do with the original settlement agreement. Defendants were aware of their illegal act but refused to stop. As a direct and proximate result of their misconduct, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 8, 6:24-7:5 (original formatting omitted).

To the extent that Count 8 asserts a cause of action for conversion, Count 8 must be dismissed with prejudice for failing to state a claim upon which relief can be granted. Real property cannot be converted. See Munger v. Moore, 11 Cal. App. 3d 1, 6-7 (1970); Nabil Mosarah v. Suntrust Mortg., No. 11-cv-01739, 2012 U.S. Dist. LEXIS 32848, at *11-12 (E.D. Cal. Mar. 9, 2012); Monster Energy Co. v. Vital Pharms., Inc., No. 18-1882 JGB, 2019 U.S. Dist. LEXIS 111806, at *39-41 (C.D. Cal. May 20, 2019). Therefore, permitting additional pleading of this claim will be futile.

However, Plaintiff is not precluded from re-asserting any facts alleged as part of Count 8 that may properly be incorporated to a claim of promissory fraud or breach of contract against T2M.

Accordingly, Count 8 against T2M is DISMISSED WITHOUT LEAVE TO AMEND.

Count 9: Conspiracy to Commit Fraud

Count 9 of Plaintiff's Complaint alleges:

> Defendants knew it is wrong to conspire together to commit illegal acts. Yet, together and continually they provided false information about plaintiff's title and ownership of properties, the settlement agreement, plaintiff's residency, mortgage owed, plaintiff's bankruptcy filings, and civil lawsuit status to third parties and to this bankruptcy court. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 9, 7:5-13 (original formatting omitted). Count 9 must be dismissed without prejudice as to allegations against T2M.

Under California law, "a civil conspiracy does not give rise to a cause of action unless an independent civil wrong has been committed." Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006). "There is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." Kerr v. Rose, 216 Cal. App. 3d 1551, 1564 (1990). If the plaintiff fails to demonstrate fraud, the cause of action for conspiracy to commit fraud likewise fails. Id.

As to the misrepresentations made to third parties and the bankruptcy court, Plaintiff cannot establish the underlying tort of fraud, and therefore cannot establish conspiracy. Count 9 alleges that Defendants made misrepresentations to third parties and to the bankruptcy court. Plaintiff alleges that Defendants intended third parties and the bankruptcy court to rely on the misrepresentations. Count 9 does not allege that Defendants conspired intending to defraud Plaintiff or induce Plaintiff's reliance. Count 9 does not allege that Plaintiff relied on the misrepresentations.

However, because Plaintiff's claims against T2M sounding in promissory fraud will be dismissed with leave to amend, to the extent that Plaintiff's claim of conspiracy to commit fraud arises out of statements made to Plaintiff by T2M, Count 9 will be dismissed with leave to amend. Any further allegations of conspiracy related to fraud must meet the heightened pleading standard of Rule 9(b), which requires describing the who, what, where, when, and how of the misconduct charged. See Vess, 317 F.3d at 1106.

Fraud on the Court, Perjury, False Evidence, or Abuse of Process

Although Plaintiff does not specifically allege fraud on the court, perjury, false evidence, or abuse of process, the court is to construe Plaintiff's pro se complaint liberally. Greenstein, 576 B.R. at 171. Plaintiff's Complaint may be read as attempting to allege any of these causes of action, but ultimately fails to state any claim upon which relief can be granted because no such causes of action exist under state or federal law. Id. at 177-180.

The Supreme Court of California has explained that unjustified litigation and litigation-related misconduct should be addressed "through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 9 (1998) (citations omitted). For example, "[p]erjury . . . undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact[, but] there is no civil remedy in damages against a witness who commits perjury." Id.; see also Greenstein, 576 B.R. at 177-78. "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." Silberg v. Anderson, 50 Cal. 3d 205, 214 (1990) (discussing California's litigation privilege).

Similarly, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases). "Under federal law, fraud on the court is an equitable doctrine justifying the setting aside of a federal judgment." Id. (citing Fed. R. Civ. P. 60(b)(3)). Yet even if Plaintiff were seeking to vacate a prior federal court judgment (the Complaint makes no indication that such relief is requested), "[f]raud on the court involves far more than an injury to a single litigant." Greenstein, 576 B.R. at 179 (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)) (quotations omitted). Fraud on the court considers whether the integrity of the judicial process was harmed. Id. Liberally construing Plaintiff's allegations and accepting them as true, they do not amount to a fraud on the court.

Accordingly, to the extent Plaintiff seeks damages for an alleged fraud on the court, perjurious testimony, or the presentation of false evidence, she cannot state a claim upon which relief can be granted and amendment would be futile. These claims are DISMISSED WITHOUT LEAVE TO AMEND.

CALIFORNIA'S LITIGATION PRIVILEGE

Many of the allegations against T2M may also be properly dismissed without leave to amend because they stem from statements made in judicial proceedings and are subject to California's litigation privilege, codified at California

Civil Code § 47(b)(2). Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 824-25 (B.A.P. 9th Cir. 2009); Greenstein, 576 B.R. at 178 n.18. The litigation privilege is absolute. Silberg, 50 Cal. 3d at 215.
A four-part test must be met for application of California's litigation privilege: "the communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigations; and (4) that has some connection or logical relation to the action." Cedar Funding, 419 B.R. at 824.

Made in a Judicial or Quasi-Judicial Proceeding

"[C]ourts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." Silberg, 50 Cal. 3d at 213. "A bankruptcy proceeding is a judicial proceeding within the scope of California's litigation privilege." Cedar Funding, 419 B.R. at 825.

By Litigants or Other Participants Authorized by Law

The second element is met if the statement was made by a party to the action or the attorney for a party to the action. Silberg, 50 Cal. 3d at 219. The second element will also be met if the statement was made by a witness, even if the statement is not made in court. Jacob B. v. County of Shasta, 40 Cal. 4th 948, 959 (2007).

To Achieve the Objects of the Litigation & Has Some Connection or Logical Relation to the Action

"The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to the action, i.e., that it not be extraneous to the action." Silberg, 50 Cal. 3d at 219-20. "The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." Id. at 220.

Any allegations against T2M that arise from T2M's involvement in a state court or bankruptcy proceeding are part of a judicial proceeding in which T2M was an authorized participant. Further, the statements made in support of a change of venue order or other relief as alleged by Plaintiff are logically connected with the action. Accordingly, all allegations against T2M related to statements made in judicial proceedings whether as a witness or party are absolutely protected and must be DISMISSED WITHOUT LEAVE TO AMEND.

COUNT 2: THEFT

Count 2 of Plaintiff's Complaint alleges:

> Defendant T2M took possession of plaintiff's residence for a year and a half already but refused to record a deed of reconveyance to cancel the mortgage. Defendants intentionally provided false information about the settlement agreement to this court and to the superior court to steal plaintiff's property. As a result, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 2, 5:2-9 (original formatting omitted). Plaintiff's Count 2 must be dismissed for failure to state a claim upon which relief can be granted. Leave to amend would be futile.

The court is unaware of any civil claim for theft of real property, and, as discussed above, a civil claim of conversion does not apply to real property. See Monster Energy, 2019 U.S. Dist. LEXIS 111806, at *39-42.

As also stated above, Plaintiff cannot assert a claim of fraud when the alleged misrepresentations were not made to Plaintiff, were not made to induce Plaintiff's reliance, and on which Plaintiff did not rely.

Count 2 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b) that apply to the averments of fraud, the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 2 is DISMISSED WITHOUT LEAVE TO AMEND.

COUNT 4: BREACH OF CONTRACT

The elements of a cause of action for breach of contract are: (1) the existence of the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. First Com. Mortg. Co. v. Reece, 89 Cal. App. 4th 731, 745 (2001). "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." Monster Energy Co. v. Schechter, 7 Cal. 5th 781, 789 (2019).

Plaintiff's Complaint alleges sufficient facts to support each of the elements of breach of contract against T2M. Therefore, T2M's motion to dismiss the claim of breach of contract will be denied.

The Complaint specifically identifies the Settlement Agreement signed in August 2019, but the Settlement Agreement was not attached to the Complaint. However, co-defendant Altman filed a copy of the Settlement Agreement as an exhibit in support of his separate motion to dismiss. Ex. 4, Doc. #18. Because the authenticity of the Settlement Agreement is not disputed and the Complaint identifies the Settlement Agreement, the court can consider the Settlement Agreement in deciding this motion to dismiss. See Branch, 14 F.3d at 454.

Plaintiff alleges that T2M is a party to the Settlement Agreement, and T2M is a defined party and a signatory to the contract. Plaintiff alleges that she performed under the Settlement Agreement by transferring the Property to T2M via grant deed, as required by paragraph J(1) of the Settlement Agreement. Plaintiff alleges that T2M failed to fulfill its promises under the Settlement Agreement. Plaintiff generally alleges damages.

Because Plaintiff's Complaint alleges sufficient facts to support each of the elements of breach of contract against T2M, T2M's motion to dismiss Count 4 is DENIED.

COUNT 10: CONTEMPT

Although Plaintiff's Complaint does not directly ask the court to impose sanctions for contempt, Plaintiff's Complaint is to be construed liberally.

The bankruptcy court has civil contempt powers pursuant to 11 U.S.C. § 105(a). Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003) ("Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)."). Under § 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out

the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(2). Together, §§ 524(a)(2) and 105(a) authorize the court to impose civil contempt sanctions for violation of the discharge order. When a party acts in violation of a debtor's discharge, the court may award the debtor "compensatory damages, attorneys fees, and [coerce] the offending creditor's compliance with the discharge injunction." See Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). Relatively mild, non-compensatory fines against the offending creditor may be necessary in some circumstances. Dyer, 322 F.3d at 1193-94.

To establish a violation of 11 U.S.C. § 524, the debtor must prove that the creditor willfully violated the discharge injunction. In the Ninth Circuit, courts have applied a two-part test to determine whether a party's violation was willful: (1) did the alleged offending party know that the discharge injunction applied; and (2) did such party intend the actions that violated the discharge injunction? See, e.g., Nash v. Clark Cty. Dist. Attorney's Office (In re Nash), 464 B.R. 874, 880 (B.A.P. 9th Cir. 2012) (citing Espinosa v. United States Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) aff'd, 559 U.S. 260 (2010)); Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006).

The party seeking sanctions for contempt has the burden of proving, by clear and convincing evidence, that the offending party violated the order and sanctions are justified. Zilog, 450 F.3d at 1007. Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." Emmert v. Taggart (In re Taggart), 584 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted), vacated and remanded on other grounds by Taggart v. Lorenzen, 139 S. Ct. 1795 (2019). Debtor has not met this burden.

Count 10 is DISMISSED WITH LEAVE TO AMEND because the Complaint does not specify what court order T2M is alleged to have disobeyed.

To the extent that Plaintiff asserts that a claim that is secured by real property is discharged in a bankruptcy case, that is incorrect. "The discharge injunction does not. . . prevent a creditor from collecting against the collateral that secures its debt." In re Fontaine, 603 B.R. 94, 113 (Bankr. D.N.M. 2019). The discharge injunction only prevents a creditor from enforcing a debt personally against the debtor. Johnson v. Home State Bank, 501 U.S. 78 (1991). To the extent that T2M has sought to collect on T2M's lien that is secured by the Property, T2M has not violated any discharge that has been granted to Plaintiff.

ABSTENTION

Younger Doctrine

T2M argues that under Younger v. Harris, 401 U.S. 37 (1971), this court may not enjoin or otherwise interfere with pending state court proceedings.

T2M's moving papers do not address the recent limitations imposed by the United States Supreme Court to the application of the Younger doctrine. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013). Pursuant to Sprint, "Younger

applies to only three exceptional categories of proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial function." French v. Fed. Home Loan Mortg. Corp. (In re French), 619 B.R. 285, 293 (Bankr. D.N.J. 2020) (citations and quotations omitted). The adversary proceeding before this court does not meet any of these descriptions.

Accordingly, the court finds that abstention under Younger is not warranted.

Colorado River Doctrine

T2M also argues that this court should abstain from exercising its jurisdiction over this adversary proceeding under the principles announced in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Doc. #43.

"Colorado River is not an abstention doctrine, though it shares the qualities of one." United States v. State Water Res. Control Bd., 988 F.3d 1194, 1202 (9th Cir. 2021). In applying Colorado River, a federal court's task "is not to find some substantial reason for the *exercise* of federal jurisdiction [but rather] to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the *surrender* of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (emphasis in original). "If there is any substantial doubt as to whether the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties[,] it would be a serious abuse of discretion to grant the stay or dismissal at all." State Water Res. Control Bd., 988 F.3d at 1203 (citing Moses H. Cone, 460 U.S. at 28) (quotations and punctuation omitted).

The general rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction[.]" Colorado River, 424 U.S. at 817. "[T]he Supreme Court [has] clarified that to fit into this narrow doctrine, 'exceptional circumstances' must be present." Moses H. Cone, 460 U.S. at 15-16. Recently reiterated by the Ninth Circuit, eight guiding factors should be considered in determining whether a Colorado River stay is appropriate:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

State Water Res. Control Bd., 988 F.3d at 1203 (citing R.R. St. & Co., Inc. v. Transp. Ins. Co., 656 F.3d 966, 978-79 (9th Cir. 2011)). "The factors are not a mechanical checklist," and "a single factor may decide whether a stay is permissible." Id. (quotations and citations omitted). Of the eight enumerated factors, the Ninth Circuit has repeatedly found the eighth factor to be dispositive. See Id.; Holder v. Holder, 305 F.3d 854, 870 (9th Cir. 2002); Intel Corp. v. Advanced Micro Devices, Inc., 12 F.3d 908, 913 (9th Cir. 1993). "Under the rules governing the Colorado River doctrine, the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of a stay." Intel Corp., 12 F.3d at 913.

Here, there is a substantial doubt that the pending action in Merced County Superior Court ("State Court Action") will resolve the issues before this court. Plaintiff had defaulted in the State Court Action and had unsuccessfully sought to set aside the default. As a result, Plaintiff was unable to answer the state court complaint against her and a default judgment may have been entered against her had the State Court Action not been stayed. Because Plaintiff was unable to answer in the State Court Action, the allegations in Plaintiff's Complaint in federal court would not be determined on the merits in the State Court Action. Further, the parties to the State Court Action would eventually have to return to this court to determine the extent to which a default judgment entered in the State Court Action resolves issues related to this adversary proceeding and Plaintiff's bankruptcy case as a whole.

There is substantial doubt that the State Court Action will resolve all the issues before this court, but the same facts also weigh against abstention because retaining jurisdiction will avoid piecemeal litigation, will protect Plaintiff's ability to obtain a decision on the merits, and the Property is located in this district.

Accordingly, T2M's request for abstention is DENIED.

JUDICIAL NOTICE AND "OUTSIDE" EVIDENCE

T2M requests the court take judicial notice of various documents. Federal Rule of Evidence 201(c) requires a court to take judicial notice "if a party requests it and the court is supplied with the necessary information." T2M provided insufficient information to support its request for judicial notice.

The request to take judicial notice is DENIED.

CONCLUSION

Having considered the complaint in its entirety, the court is inclined to:

1. GRANT T2M's motion to dismiss counts 1, 2, 3, 7, and 8 without leave to amend;

2. GRANT T2M's motion to dismiss counts 5, 6, 9, and 10 with leave to amend, with any amended complaint to be filed and served on or before June 30, 2021;

3. DENY T2M's motion to dismiss count 4 for breach of contract; and

4. DENY T2M's motion to abstain.

7. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 CBC-4

CONTINUED MOTION TO STRIKE
4-6-2021 [47]

NICOLE V. ELIOPULOS ET AL
CORY CHARTRAND/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITIONS: Denied as moot.

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 will be DENIED AS MOOT because the entirety of claims alleged against the moving party that relate to protected activity under California's litigation privilege are being dismissed pursuant to the tentative ruling in the related motion to dismiss filed by the moving party (CBC-3), there are no applicable claims to strike. See Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 177-79 (Bankr. C.D. Cal. 2017).

8. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 PJL-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
4-6-2021 [23]

NICOLE V. ELIOPULOS ET AL
PAUL LEEDS/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted without leave to amend.

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 hearing on this motion was continued to May 27, 2021 at 11:00 a.m. prior to the initial hearing on the motion. Civil Minutes, Doc. #101. The plaintiff filed timely opposition, and this matter will proceed as scheduled.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopulos, Steven Altman, Cory Chartrand, and T2M Investments, LLC (collectively, "Defendants"). Doc. #1. By the complaint ("Complaint"), Plaintiff asserts ten causes of action against all Defendants, primarily for fraud and breach of contract. The allegations stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with defendant

T2M, over real property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The allegations also assert causes of action against all Defendants for acts committed during the litigation that followed the execution and alleged breach of the Settlement Agreement.

On April 6, 2021, defendant Martin Eliopulos ("Eliopulos") moved to dismiss all claims against him under Federal Rule of Civil Procedure ("Rule") 12(b)(6). Doc #23. Rule 12(b) is made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

On May 13, 2021, Plaintiff filed written opposition addressing Eliopulos' request for dismissal under Rule 12(b)(6). Doc. #104. Eliopulos replied to Plaintiff's opposition on May 20, 2021. Doc. #123.

Pursuant to Plaintiff's opposition, Plaintiff dismissed count 2 for Theft, count 4 for Breach of Contract, count 5 for Contract Fraud, count 6 for Mortgage Fraud, count 7 for Title Fraud, count 8 for Contract Conversion, and count 10 for Contempt against Eliopulos. Doc. #104. Plaintiff continues to assert against Eliopulos count 1 for Bankruptcy Fraud, count 3 for Lawsuit Fraud, and count 9 for Conspiracy to Commit Fraud. Id. Plaintiff filed additional opposition on May 25, 2021, two days before the date set for hearing, which the court will not consider because it was not timely filed. See LBR 9014-1(f)(1).

Having considered the complaint in its entirety, the court is inclined to GRANT the motion to dismiss WITH PREJUDICE.

MOTION TO DISMISS

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, 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)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Eliopulos' Rule 12(b)(6) motion is at times premised on the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[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. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

"As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." Vess, 317 F.3d at 1108 (citing Balistreri v. Pacifica Police Dep't,

901 F.2d 696 (9th Cir. 1990)) (internal quotation marks omitted). The Ninth Circuit has consistently held that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee, 236 F.3d at 1019 (quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

"[A] pro se litigant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). "[I]n applying the foregoing standards [for ruling on 12(b)(6) motions] enunciated by the Supreme Court, a federal court must construe a pro se complaint liberally, and hold it to less stringent standards than pleadings drafted by lawyers." Greenstein, 576 B.R. at 171 (citing Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Rule 12(d). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into a motion for summary judgment. Branch, 14 F.3d at 454. Here, the complaint specifically refers to the Settlement Agreement, the authenticity of the Settlement Agreement is not in dispute, and the Settlement Agreement was filed as an exhibit in support of the motion to dismiss. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss under Rule 12(b)(6).

FRAUD CLAIMS

The first two causes of action remaining against Eliopulos sound in or allege fraud. "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted). The allegations of the Complaint as a whole have been considered in ruling on this Motion. To the extent that any claims alleged by Plaintiff may be construed as allegations of fraud on the court, perjury, false evidence, or abuse of process, those allegations are separately addressed elsewhere.

Count 1: Bankruptcy Fraud

Count 1 of Plaintiff's Complaint alleges that:

> Defendants intentionally provided false information about plaintiff's residency, the settlement agreement status, plaintiff's bankruptcy filings, and civil lawsuit status to the trustee and to

> this bankruptcy court. This material misrepresentation was made with the purpose to obtain a change of venue order, so [D]efendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts.] Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in an amount to be proven at trial.

Complaint, Count 1, 4:20-5:1 (original formatting omitted). Count 1 must be dismissed with prejudice because it does not allege facts that, if true, would entitle Plaintiff to recover against Eliopulos.

Count 1 alleges that Defendants, including Eliopulos, made misrepresentations to the bankruptcy court or to the bankruptcy trustee; Count 1 does not allege that misrepresentations were made to Plaintiff. Count 1 alleges that the misrepresentations were made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 1 may be liberally construed to allege that Defendants had a future intent to defraud Plaintiff, but it does not allege that Defendants made the misrepresentations intending to defraud Plaintiff or induce Plaintiff's reliance. Count 1 does not allege that Plaintiff relied on the misrepresentations. See Okun v. Morton, 203 Cal. App. 3d 805, 828 (1988) ("It must be shown that the plaintiff actually relied upon the misrepresentation[.]").

Count 1 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts would not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 1 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 3: Lawsuit Fraud

Count 3 of Plaintiff's complaint alleges:

> Defendant T2M failed to return the Property to plaintiff, refused to cancel the mortgage, sued plaintiff without serving plaintiff with the lawsuit legally, obtained request for default fraudulently, did not serve the paperwork as required by law, and provided false information about the settlement agreement to superior court to injure plaintiff. Defendants were aware of their process abuse and misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 3, 5:10-16 (original formatting omitted). Count 3 must be dismissed with prejudice because Plaintiff does not allege facts that, if true, would entitle Plaintiff to recover against Eliopulos.

"In its broad, general sense the concept of fraud embraces anything which is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon." Okun, 203 Cal. App. 3d at 827-28 (quotations and citations omitted). As an initial matter, the majority of allegations asserted in Count 3 do not describe fraudulent conduct. Further, the allegations asserted in Count 3 do not specifically

identify Eliopulos, and those that might apply to Eliopulos do not state a claim for relief.

In the Complaint, Plaintiff alleges that Defendants together, or Eliopulos individually, failed to return the Property to Plaintiff and refused to cancel the mortgage, and then sued Plaintiff but failed to make proper service, and then sought an entry of default by making misrepresentations to the state court or an officer thereof, and then again failed to serve Plaintiff with the notice of entry of default or any other required documents and proceeded to argue against setting aside the entry of default, all while providing false information to the Superior Court of Merced County. Even if all of the allegations are true, Plaintiff does not state a claim that is plausible on its face. See Iqbal, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As in Count 1, Count 3 does not allege that any misrepresentations were (i) made to Plaintiff, (ii) made to induce Plaintiff's reliance, or (iii) relied on by Plaintiff.

Count 3 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 3 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 9: Conspiracy to Commit Fraud

Count 9 of Plaintiff's Complaint alleges:

> Defendants knew it is wrong to conspire together to commit illegal acts. Yet, together and continually they provided false information about plaintiff's title and ownership of properties, the settlement agreement, plaintiff's residency, mortgage owed, plaintiff's bankruptcy filings, and civil lawsuit status to third parties and to this bankruptcy court. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 9, 7:5-13 (original formatting omitted). Count 9 must be dismissed with prejudice as to allegations against Eliopulos because Plaintiff does not allege facts that, if true, would entitle Plaintiff to recover against Eliopulos and permitting additional pleading to amend the claim would be futile.

Under California law, "a civil conspiracy does not give rise to a cause of action unless an independent civil wrong has been committed." Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006). "There is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." Kerr v. Rose, 216 Cal. App. 3d 1551, 1564 (1990). If the plaintiff fails to demonstrate fraud, the cause of action for conspiracy to commit fraud likewise fails. Id.

Plaintiff asserted two counts of fraud against Eliopulos, Count 1 for Bankruptcy Fraud and Count 3 for Lawsuit Fraud. Count 9 for Conspiracy to Commit Fraud fails because Counts 1 and 3 against Eliopulos will be dismissed.

As to the misrepresentations made to third parties and the bankruptcy court, Plaintiff cannot establish the underlying tort of fraud, and therefore cannot establish conspiracy. Count 9 alleges that Defendants made misrepresentations to third parties and to the bankruptcy court. Plaintiff alleges that Defendants intended third parties and the bankruptcy court to rely on the misrepresentations. Count 9 does not allege that Defendants conspired intending to defraud Plaintiff or induce Plaintiff's reliance. Count 9 does not allege that Plaintiff relied on the misrepresentations.

Count 9 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 9 is DISMISSED WITHOUT LEAVE TO AMEND.

Fraud on the Court, Perjury, False Evidence, or Abuse of Process

Although Plaintiff does not specifically allege fraud on the court, perjury, false evidence, or abuse of process, the court is to construe Plaintiff's pro se complaint liberally. Greenstein, 576 B.R. at 171. Plaintiff's Complaint may be read as attempting to allege any of these causes of action, but ultimately fails to state any claim upon which relief can be granted because no such causes of action exist under state or federal law. Id. at 177-180.

The Supreme Court of California has explained that unjustified litigation and litigation-related misconduct should be addressed "through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 9 (1998) (citations omitted). For example, "[p]erjury . . . undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact[, but] there is no civil remedy in damages against a witness who commits perjury." Id.; see also Greenstein, 576 B.R. at 177-78. "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." Silberg v. Anderson, 50 Cal. 3d 205, 214 (1990) (discussing California's litigation privilege).

Similarly, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases). "Under federal law, fraud on the court is an equitable doctrine justifying the setting aside of a federal judgment." Id. (citing Fed. R. Civ. P. 60(b)(3)). Yet even if Plaintiff were seeking to vacate a prior federal court judgment (the Complaint makes no indication that such relief is requested), "[f]raud on the court involves far more than an injury to a single litigant." Greenstein, 576 B.R. at 179 (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)) (quotations omitted). Fraud on the court considers whether the integrity of the judicial process was harmed. Id. Liberally construing Plaintiff's allegations and accepting them as true, they do not amount to a fraud on the court.

Accordingly, to the extent Plaintiff seeks damages for an alleged fraud on the court, perjurious testimony, or the presentation of false evidence, Plaintiff

cannot state a claim upon which relief can be granted and amendment would be futile. These claims are DISMISSED WITHOUT LEAVE TO AMEND.

CALIFORNIA'S LITIGATION PRIVILEGE

The allegations against Eliopulos may also be properly dismissed without leave to amend because they stem from statements made in judicial proceedings and are subject to California's litigation privilege, codified at California Civil Code § 47(b)(2). Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 824-25 (B.A.P. 9th Cir. 2009); Greenstein, 576 B.R. at 178 n.18. The litigation privilege is absolute. Silberg, 50 Cal. 3d at 215.

A four-part test must be met for application of California's litigation privilege: "the communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigations; and (4) that has some connection or logical relation to the action." Cedar Funding, 419 B.R. at 824.

Made in a Judicial or Quasi-Judicial Proceeding

"[C]ourts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." Silberg, 50 Cal. 3d at 213. "A bankruptcy proceeding is a judicial proceeding within the scope of California's litigation privilege." Cedar Funding, 419 B.R. at 825.

By Litigants or Other Participants Authorized by Law

The second element is met if the statement was made by a party to the action or the attorney for a party to the action. Silberg, 50 Cal. 3d at 219. The second element will also be met if the statement was made by a witness, even if the statement is not made in court. Jacob B. v. County of Shasta, 40 Cal. 4th 948, 959 (2007).

To Achieve the Objects of the Litigation & Has Some Connection or Logical Relation to the Action

"The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to the action, i.e., that it not be extraneous to the action." Silberg, 50 Cal. 3d at 219-20. "The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." Id. at 220.

In the Complaint, Plaintiff states that Eliopulos is a licensed attorney who represented defendant T2M in bankruptcy court. Doc. #1. Any allegations against Eliopulos that arise from Eliopulos' involvement in a state court or bankruptcy proceeding are part of a judicial proceeding in which Eliopulos was an authorized participant. Further, the statements made in support of a change of venue order or other relief as alleged by Plaintiff are logically connected with the action. Accordingly, all allegations against Eliopulos are absolutely protected and must be DISMISSED WITHOUT LEAVE TO AMEND.

JUDICIAL NOTICE AND "OUTSIDE" EVIDENCE

Eliopulos requests the court take judicial notice of various documents. Federal Rule of Evidence 201(c) requires a court to take judicial notice "if a party requests it and the court is supplied with the necessary information."

Eliopulos provided insufficient information to support the request for judicial notice.

The request to take judicial notice is DENIED.

CONCLUSION

Eliopulos' motion to dismiss is GRANTED WITH PREJUDICE. All allegations against Eliopulos will be dismissed without leave to amend.

9. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 SSA-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR ABSTENTION
4-2-2021 [15]

NICOLE V. ELIOPULOS ET AL
STEVEN ALTMAN/ATTY. FOR MV.
RESPONSIVE PLEADING

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 court's findings and conclusions. The court will issue an order.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The hearing on this motion was continued to May 27, 2021 at 11:00 a.m. prior to the initial hearing on the motion. Civil Minutes, Doc. #102. The plaintiff filed timely opposition, and this matter will proceed as scheduled.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopulos, Steven Altman, Cory Chartrand, and T2M Investments, LLC (collectively, "Defendants"). Doc. #1. By the complaint ("Complaint"), Plaintiff asserts ten causes of action against all Defendants, primarily for fraud and breach of contract. The allegations stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with defendant T2M, over real property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The allegations also assert causes of action against all Defendants for acts committed during the litigation that followed the execution and alleged breach of the Settlement Agreement.

On April 2, 2021, defendant Steven Altman ("Altman") moved to dismiss each allegation against him under Federal Rule of Civil Procedure ("Rule") 12(b)(6) and moved for the bankruptcy court's abstention citing Rule 12(b)(1). Doc. #15. Rule 12(b) is made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012.

Plaintiff filed two written oppositions. On May 13, 2021, Plaintiff filed written opposition addressing Altman's request for dismissal under Rule 12(b)(6). Doc. #103. On May 14, 2021, Plaintiff filed written opposition addressing Altman's abstention argument. Doc. #109. Altman replied to

Plaintiff's opposition on May 19, 2021. Doc. #121. Plaintiff filed additional opposition on May 25, 2021, two days before the date set for hearing, which the court will not consider because it was not filed timely. See LBR 9014-1(f)(1).

Having considered the complaint in its entirety, the court is inclined to:

1. GRANT Altman's motion to dismiss counts 1, 2, 3, 7, and 8 without leave to amend;

2. GRANT Altman's motion to dismiss counts 4, 5, 6, 9, and 10 with leave to amend, with any amended complaint to be filed and served on or before June 30, 2021; and

3. DENY Altman's motion to abstain.

MOTION TO DISMISS

"A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, 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)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

Altman's Rule 12(b)(6) motion is at times premised on the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[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. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

"As with Rule 12(b)(6) dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without prejudice. Leave to amend should be granted if it appears at all possible that the plaintiff can correct the defect." Vess, 317 F.3d at 1108 (citing Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990)) (internal quotation marks omitted). The Ninth Circuit has consistently held that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee, 236 F.3d at 1019 (quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

"[A] pro se litigant is not excused from knowing the most basic pleading requirements." Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir. 2000). "[I]n applying the foregoing standards [for ruling on 12(b)(6) motions] enunciated by the Supreme Court, a federal court must

construe a pro se complaint liberally, and hold it to less stringent standards than pleadings drafted by lawyers." Greenstein, 576 B.R. at 171 (citing Hebbe v. Pliler, 611 F.3d 1202, 1205 (9th Cir. 2010)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). When matters outside the complaint are presented to and not excluded by the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment. Id.; Rule 12(d). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). "[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion into a motion for summary judgment. Branch, 14 F.3d at 454. Here, the complaint specifically refers to the Settlement Agreement, the authenticity of the Settlement Agreement is not in dispute, and the Settlement Agreement was filed as an exhibit in support of the motion to dismiss. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss under Rule 12(b)(6).

FRAUD CLAIMS

Of the ten causes of action set forth in Plaintiff's Complaint, the majority sound in or allege fraud. "Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted).

The fraud claims are collected below and discussed in turn. Although they are separated to match the organization of the Complaint, the allegations of the Complaint as a whole have been considered in ruling on this Motion. To the extent that any claims alleged by Plaintiff may be construed as allegations of fraud on the court, perjury, false evidence, or abuse of process, those allegations are separately addressed elsewhere.

Count 1: Bankruptcy Fraud

Count 1 of Plaintiff's Complaint alleges that:

> Defendants intentionally provided false information about plaintiff's residency, the settlement agreement status, plaintiff's bankruptcy filings, and civil lawsuit status to the trustee and to this bankruptcy court. This material misrepresentation was made with the purpose to obtain a change of venue order, so [D]efendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts.] Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in an amount to be proven at trial.

Complaint, Count 1, 4:20-5:1 (original formatting omitted). Count 1 must be dismissed with prejudice because it does not allege facts that, if true, would entitle Plaintiff to recover against Altman.

Count 1 alleges that Defendants, including Altman, made misrepresentations to the bankruptcy court or to the bankruptcy trustee; Count 1 does not allege that misrepresentations were made to Plaintiff. Count 1 alleges that the misrepresentations were made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 1 may be liberally construed to allege that Defendants had a future intent to defraud Plaintiff, but it does not allege that Defendants made the misrepresentations intending to defraud Plaintiff or induce Plaintiff's reliance. Count 1 does not allege that Plaintiff relied on the misrepresentations. See Okun v. Morton, 203 Cal. App. 3d 805, 828 (1988) ("It must be shown that the plaintiff actually relied upon the misrepresentation[.]").

Count 1 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts would not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 1 is DISMISSED WITHOUT LEAVE TO AMEND.

Count 3: Lawsuit Fraud

Count 3 of Plaintiff's complaint alleges:

> Defendant T2M failed to return the Property to plaintiff, refused to cancel the mortgage, sued plaintiff without serving plaintiff with the lawsuit legally, obtained request for default fraudulently, did not serve the paperwork as required by law, and provided false information about the settlement agreement to superior court to injure plaintiff. Defendants were aware of their process abuse and misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 3, 5:10-16 (original formatting omitted). Count 3 must be dismissed with prejudice because Plaintiff does not allege facts that, if true, would entitle Plaintiff to recover against Altman.

"In its broad, general sense the concept of fraud embraces anything which is intended to deceive, including all statements, acts, concealments and omissions involving a breach of legal or equitable duty, trust or confidence which results in injury to one who justifiably relies thereon." Okun, 203 Cal. App. 3d at 827-28 (quotations and citations omitted). As an initial matter, the majority of allegations asserted in Count 3 do not describe fraudulent conduct.

In the Complaint, Plaintiff alleges that Defendants together, or Altman individually, failed to return the Property to Plaintiff and refused to cancel the mortgage, and then sued Plaintiff but failed to make proper service, and then sought an entry of default by making misrepresentations to the state court or an officer thereof, and then again failed to serve Plaintiff with the notice of entry of default or any other required documents and proceeded to argue against setting aside the entry of default, all while providing false information to the Superior Court of Merced County. Even if all of the allegations are true, Plaintiff does not state a claim that is plausible on its

face. See Iqbal, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). As in Count 1, Count 3 does not allege that any misrepresentations were (i) made to Plaintiff, (ii) made to induce Plaintiff's reliance, or (iii) relied on by Plaintiff.

It is important to note here that some of the allegations in Count 3 may give rise to a cause of action in contract against Altman. Because Plaintiff specifically asserts breach of contract elsewhere in the Complaint, the court need not determine whether Count 3 would satisfy a breach of contract claim.

Count 3 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b), the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 3 is DISMISSED WITHOUT LEAVE TO AMEND.

Counts 5 & 6: Contract Fraud and Mortgage Fraud

Count 5 of Plaintiff's complaint alleges:

> Defendants T2M and Altman never intended to remove the mortgage after they received the title [and] possession of the Property from plaintiff, but they expected [a] third party to pay it off instead. This material misrepresentation was made with the purpose to take plaintiff's Property without any consideration for plaintiff in return. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 5, 5:24-6:6 (original formatting omitted).

Count 6 of Plaintiff's Complaint alleges:

> After defendants T2M and Altman received title and possession of the Property, defendants did not remove the mortgage right away as agreed but continued to charge plaintiff monthly mortgage on the Property. Defendants were aware of their fraud and profited from them. As a direct and proximate result of defendants' misconduct, Plaintiff was damaged in the amount to be proved at trial.

Complaint, Count 6, 6:7-13 (original formatting omitted).

Liberally construing Plaintiff's Complaint, Counts 5 and 6 require dismissal without prejudice as to the allegations against Altman because Altman is a signatory to the Settlement Agreement. See Branch, 14 F.3d at 454 (explaining that on a motion to dismiss the court may consider a document if its authenticity is not disputed, it is identified in the complaint, and included as part of a motion to dismiss).

California recognizes a claim of promissory fraud as a "subspecies of fraud and deceit." Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Id. (citations omitted).

Granting leave to amend is required because the allegations are not particular enough to satisfy Rule 9(b). Plaintiff states the "who": T2M and Altman. Plaintiff does not state the time, place, or content of any alleged misrepresentation or promise made by Altman and fails to explain why the statements are false or misleading. Plaintiff also fails to sufficiently allege reliance and the resulting damage. Plaintiff does not "state with particularity the circumstances constituting fraud." Rule 9(b).

Accordingly, Counts 5 and 6 against Altman are DISMISSED WITH LEAVE TO AMEND. Plaintiff may amend the complaint and in so doing consolidate the allegations against Altman as appropriate.

Count 7: Title Fraud

Count 7 of Plaintiff's Complaint alleges:

> Defendant T2M obtained title and ownership of plaintiff's property through fraudulent recording of the grant deed of $209,000 in transfer value without paying plaintiff any consideration. Defendants lied to the bankruptcy court that plaintiff is the owner of the property locates [sic] at 2546 Canvasback Dr., Los Banos, CA 93635 to injure plaintiff with the trustee and the court. This material misrepresentation was made with the purpose to obtain a change of venue order, so defendants can continue to commit frauds against plaintiff in superior court and other bankruptcy cour[ts]. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 7, 6:14-24 (original formatting omitted). To the extent that Count 7 alleges that Altman made misrepresentations to the bankruptcy court or to the bankruptcy trustee, Count 7 must be dismissed with prejudice because Plaintiff does not describe facts that, if true, would entitle Plaintiff to recover against Altman, and permitting additional pleading of this claim would be futile.

Count 7 does not allege that misrepresentations were made to Plaintiff or to induce Plaintiff's reliance. Count 7 alleges that misrepresentations were made so Defendants could obtain a change of venue order, i.e., that Defendants intended the bankruptcy court to rely on the misrepresentations. Count 7 does not allege that Plaintiff relied on the misrepresentations.

However, Plaintiff is not precluded from re-asserting any facts alleged as part of Count 7 that do not involve statements made in a judicial proceeding and that may properly be incorporated to a claim of promissory fraud or breach of contract against Altman.

Count 7 fails to state a claim upon which relief can be granted. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 7 against Altman is DISMISSED WITHOUT LEAVE TO AMEND.

Count 8: Contract Conversion

Count 8 of Plaintiff's Complaint alleges:

> Defendants did not perform as required by agreement[. Instead,] Defendants forced plaintiff to change the contract content fraudulently to injure plaintiff and [a] third party by signing a new deed that had nothing to do with the original settlement agreement. Defendants were aware of their illegal act but refused to stop. As a direct and proximate result of their misconduct, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 8, 6:24-7:5 (original formatting omitted).

To the extent that Count 8 asserts a cause of action for conversion, Count 8 must be dismissed with prejudice for failing to state a claim upon which relief can be granted. Real property cannot be converted. See Munger v. Moore, 11 Cal. App. 3d 1, 6-7 (1970); Nabil Mosarah v. Suntrust Mortg., No. 11-cv-01739, 2012 U.S. Dist. LEXIS 32848, at *11-12 (E.D. Cal. Mar. 9, 2012); Monster Energy Co. v. Vital Pharms., Inc., No. 18-1882 JGB, 2019 U.S. Dist. LEXIS 111806, at *39-41 (C.D. Cal. May 20, 2019). Therefore, permitting additional pleading of this claim will be futile.

However, Plaintiff is not precluded from re-asserting any facts alleged as part of Count 8 that may properly be incorporated to a claim of promissory fraud or breach of contract against Altman.

Accordingly, Count 8 against Altman is DISMISSED WITHOUT LEAVE TO AMEND.

Count 9: Conspiracy to Commit Fraud

Count 9 of Plaintiff's Complaint alleges:

> Defendants knew it is wrong to conspire together to commit illegal acts. Yet, together and continually they provided false information about plaintiff's title and ownership of properties, the settlement agreement, plaintiff's residency, mortgage owed, plaintiff's bankruptcy filings, and civil lawsuit status to third parties and to this bankruptcy court. Defendants were aware of the misrepresentations and profited from them. As a direct and proximate result of the misrepresentations and concealment, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 9, 7:5-13 (original formatting omitted). Count 9 must be dismissed without prejudice as to allegations against Altman.

Under California law, "a civil conspiracy does not give rise to a cause of action unless an independent civil wrong has been committed." Rusheen v. Cohen, 37 Cal. 4th 1048, 1062 (2006). "There is no separate tort of civil conspiracy, and there is no civil action for conspiracy to commit a recognized tort unless the wrongful act itself is committed and damage results therefrom." Kerr v. Rose, 216 Cal. App. 3d 1551, 1564 (1990). If the plaintiff fails to demonstrate fraud, the cause of action for conspiracy to commit fraud likewise fails. Id.

As to the misrepresentations made to third parties and the bankruptcy court, Plaintiff cannot establish the underlying tort of fraud, and therefore cannot establish conspiracy. Count 9 alleges that Defendants made misrepresentations to third parties and to the bankruptcy court. Plaintiff alleges that Defendants intended third parties and the bankruptcy court to rely on the misrepresentations. Count 9 does not allege that Defendants conspired intending to defraud Plaintiff or induce Plaintiff's reliance. Count 9 does not allege that Plaintiff relied on the misrepresentations.

However, because Plaintiff's claims against Altman sounding in promissory fraud will be dismissed with leave to amend, to the extent that Plaintiff's claim of conspiracy to commit fraud arise out of statements made to Plaintiff by Altman, Count 9 will be dismissed with leave to amend. Any further allegations of conspiracy related to fraud must meet the heightened pleading standard of Rule 9(b), which requires describing the who, what, where, when, and how of the misconduct charged. See Vess, 317 F.3d at 1106.

Fraud on the Court, Perjury, False Evidence, or Abuse of Process

Although Plaintiff does not specifically allege fraud on the court, perjury, false evidence, or abuse of process, the court is to construe Plaintiff's pro se complaint liberally. Greenstein, 576 B.R. at 171. Plaintiff's Complaint may be read as attempting to allege any of these causes of action, but ultimately fails to state any claim upon which relief can be granted because no such causes of action exist under state or federal law. Id. at 177-180.

The Supreme Court of California has explained that unjustified litigation and litigation-related misconduct should be addressed "through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded." Cedars-Sinai Med. Ctr. v. Superior Court, 18 Cal. 4th 1, 9 (1998) (citations omitted). For example, "[p]erjury . . . undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact[, but] there is no civil remedy in damages against a witness who commits perjury." Id.; see also Greenstein, 576 B.R. at 177-78. "[T]he law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result." Silberg v. Anderson, 50 Cal. 3d 205, 214 (1990) (discussing California's litigation privilege).

Similarly, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases). "Under federal law, fraud on the court is an equitable doctrine justifying the setting aside of a federal judgment." Id. (citing Fed. R. Civ. P. 60(b)(3)). Yet even if Plaintiff were seeking to vacate a prior federal court judgment (the Complaint makes no indication that such relief is requested), "[f]raud on the court involves far more than an injury to a single litigant." Greenstein, 576 B.R. at 179 (quoting Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989)) (quotations omitted). Fraud on the court considers whether the integrity of the judicial process was harmed. Id. Liberally construing Plaintiff's allegations and accepting them as true, they do not amount to a fraud on the court.

Accordingly, to the extent Plaintiff seeks damages for an alleged fraud on the court, perjurious testimony, or the presentation of false evidence, Plaintiff cannot state a claim upon which relief can be granted and amendment would be futile. These claims are DISMISSED WITHOUT LEAVE TO AMEND.

CALIFORNIA'S LITIGATION PRIVILEGE

Many of the allegations against Altman may also be properly dismissed without leave to amend because they stem from statements made in judicial proceedings and are subject to California's litigation privilege, codified at California Civil Code § 47(b)(2). Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R.

807, 824-25 (B.A.P. 9th Cir. 2009); Greenstein, 576 B.R. at 178 n.18. The litigation privilege is absolute. Silberg, 50 Cal. 3d at 215.

A four-part test must be met for application of California's litigation privilege: "the communication must be (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigations; and (4) that has some connection or logical relation to the action." Cedar Funding, 419 B.R. at 824.

Made in a Judicial or Quasi-Judicial Proceeding

"[C]ourts have applied the privilege to eliminate the threat of liability for communications made during all kinds of truth-seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings." Silberg, 50 Cal. 3d at 213. "A bankruptcy proceeding is a judicial proceeding within the scope of California's litigation privilege." Cedar Funding, 419 B.R. at 825.

By Litigants or Other Participants Authorized by Law

The second element is met if the statement was made by a party to the action or the attorney for a party to the action. Silberg, 50 Cal. 3d at 219. The second element will also be met if the statement was made by a witness, even if the statement is not made in court. Jacob B. v. County of Shasta, 40 Cal. 4th 948, 959 (2007).

To Achieve the Objects of the Litigation & Has Some Connection or Logical Relation to the Action

"The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to the action, i.e., that it not be extraneous to the action." Silberg, 50 Cal. 3d at 219-20. "The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." Id. at 220.

Any allegations against Altman that arise from Altman's involvement in a state court or bankruptcy proceeding are part of a judicial proceeding in which Altman was an authorized participant. Further, the statements made in support of a change of venue order or other relief as alleged by Plaintiff are logically connected with the action. Accordingly, all allegations against Altman related to statements made in judicial proceedings whether as a witness, counsel, or party, are absolutely protected and must be DISMISSED WITHOUT LEAVE TO AMEND.

COUNT 2: THEFT

Count 2 of Plaintiff's Complaint alleges:

> Defendant T2M took possession of plaintiff's residence for a year and a half already but refused to record a deed of reconveyance to cancel the mortgage. Defendants intentionally provided false information about the settlement agreement to this court and to the superior court to steal plaintiff's property. As a result, Plaintiff was damaged in the amount to be proven at trial.

Complaint, Count 2, 5:2-9 (original formatting omitted). Plaintiff's Count 2 must be dismissed with prejudice for failure to state a claim upon which relief can be granted. Leave to amend would be futile.

The court is unaware of any civil claim for theft of real property, and, as discussed above, a civil claim of conversion does not apply to real property. See Monster Energy, 2019 U.S. Dist. LEXIS 111806, at *39-42.

As also stated above, Plaintiff cannot assert a claim of fraud when the alleged misrepresentations were not made to Plaintiff, were not made to induce Plaintiff's reliance, and on which Plaintiff did not rely.

Count 2 fails to state a claim upon which relief can be granted. Even if leave to amend were granted so that Plaintiff could satisfy the heightened pleading requirements of Rule 9(b) that apply to the averments of fraud, the facts alleged do not support a claim for relief under California law. The court finds that permitting additional pleading of this claim would be futile.

Accordingly, Count 2 is DISMISSED WITHOUT LEAVE TO AMEND.

COUNT 4: BREACH OF CONTRACT

The elements of a cause of action for breach of contract are: (1) the existence of the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach by the defendant; and (4) damages. First Com. Mortg. Co. v. Reece, 89 Cal. App. 4th 731, 745 (2001). "A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." Monster Energy Co. v. Schechter, 7 Cal. 5th 781, 789 (2019).

Plaintiff's Complaint fails to allege sufficient facts to support each of the elements of breach of contract against Altman. Therefore, Altman's motion to dismiss the claim of breach of contract will be granted with leave to amend.

The Complaint specifically identifies the Settlement Agreement signed in August 2019, but the Settlement Agreement was not attached to the Complaint. However, Altman filed a copy of the Settlement Agreement as an exhibit in support of his motion to dismiss. Ex. 4, Doc. #18. Because the authenticity of the Settlement Agreement is not disputed and the Complaint identifies the Settlement Agreement, the court can consider the Settlement Agreement in deciding this motion to dismiss. See Branch, 14 F.3d at 454.

Plaintiff alleges that Altman and co-defendant T2M are parties to the Settlement Agreement. The Settlement Agreement itself does not include Altman when defining the parties to the contract, but Altman is a signatory to the contract. Plaintiff alleges that she performed under the Settlement Agreement by transferring the Property to T2M via grant deed, as required by paragraph J(1) of the Settlement Agreement. Plaintiff alleges that T2M failed to fulfill its promises under the Settlement Agreement, but Plaintiff never alleges that Altman failed to perform under the Settlement Agreement. Plaintiff generally alleges damages.

Plaintiff fails to allege facts against Altman that support each of the elements of breach of contract. Besides alleging that Altman is a party to the Settlement Agreement, Plaintiff does not allege that Altman breached the Settlement Agreement or caused Plaintiff damages. Plaintiff's Complaint is to be liberally construed and leave to amend must be granted.

Accordingly, Count 4 is DISMISSED WITH LEAVE TO AMEND.

COUNT 10: CONTEMPT

Although Plaintiff's Complaint does not directly ask the court to impose sanctions for contempt, Plaintiff's Complaint is to be construed liberally.

The bankruptcy court has civil contempt powers pursuant to 11 U.S.C. § 105(a). Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003) ("Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)."). Under § 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(2). Together, §§ 524(a)(2) and 105(a) authorize the court to impose civil contempt sanctions for violation of the discharge order. When a party acts in violation of a debtor's discharge, the court may award the debtor "compensatory damages, attorneys fees, and [coerce] the offending creditor's compliance with the discharge injunction." See Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). Relatively mild, non-compensatory fines against the offending creditor may be necessary in some circumstances. Dyer, 322 F.3d at 1193-94.

To establish a violation of 11 U.S.C. § 524, the debtor must prove that the creditor willfully violated the discharge injunction. In the Ninth Circuit, courts have applied a two-part test to determine whether a party's violation was willful: (1) did the alleged offending party know that the discharge injunction applied; and (2) did such party intend the actions that violated the discharge injunction? See, e.g., Nash v. Clark Cty. Dist. Attorney's Office (In re Nash), 464 B.R. 874, 880 (B.A.P. 9th Cir. 2012) (citing Espinosa v. United States Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) aff'd, 559 U.S. 260 (2010)); Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006).

The party seeking sanctions for contempt has the burden of proving, by clear and convincing evidence, that the offending party violated the order and sanctions are justified. Zilog, 450 F.3d at 1007. Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." Emmert v. Taggart (In re Taggart), 584 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted), vacated and remanded on other grounds by Taggart v. Lorenzen, 139 S. Ct. 1795 (2019). Debtor has not met this burden.

Count 10 is DISMISSED WITH LEAVE TO AMEND because the Complaint does not specify what court order Altman is alleged to have disobeyed.

To the extent that Plaintiff asserts that a claim that is secured by real property is discharged in a bankruptcy case, that is incorrect. "The discharge injunction does not. . . prevent a creditor from collecting against the collateral that secures its debt." In re Fontaine, 603 B.R. 94, 113 (Bankr. D.N.M. 2019). The discharge injunction only prevents a creditor from enforcing a debt personally against the debtor. Johnson v. Home State Bank, 501 U.S. 78 (1991). To the extent that T2M or Altman have sought to collect on T2M's lien that is secured by the Property, they have not violated any discharge that has been granted to Plaintiff.

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ABSTENTION

Altman's only argument to support the request for abstention is contained in a footnote on the last page of Altman's Memorandum of Points and Authorities. Doc. #18. Altman incorporates by reference the argument raised under the Younger doctrine presented by co-defendant Chartrand to support Chartrand's separate motion to dismiss.

In effect, Altman argues that under Younger v. Harris, 401 U.S. 37 (1971), this court may not enjoin or otherwise interfere with pending state court proceedings.

Chartrand's argument, and Altman's by reference, does not address the recent limitation by the United States Supreme Court to the application of the Younger doctrine. Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 78 (2013). Pursuant to Sprint, "Younger applies to only three exceptional categories of proceedings: (1) ongoing state criminal prosecutions; (2) certain civil enforcement proceedings; and (3) pending civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial function." French v. Fed. Home Loan Mortg. Corp. (In re French), 619 B.R. 285, 293 (Bankr. D.N.J. 2020) (citations and quotations omitted). The adversary proceeding before this court does not meet any of these descriptions.

Accordingly, the court finds that abstention under Younger is not warranted. Altman's request for abstention is DENIED.

JUDICIAL NOTICE AND "OUTSIDE" EVIDENCE

Altman requests the court take judicial notice of various documents. Federal Rule of Evidence 201(c) requires a court to take judicial notice "if a party requests it and the court is supplied with the necessary information." Altman provided insufficient information to support his request for judicial notice.

The request to take judicial notice is DENIED.

CONCLUSION

Having considered the complaint in its entirety, the court is inclined to:

1. GRANT Altman's motion to dismiss counts 1, 2, 3, 7, and 8 without leave to amend;

2. GRANT Altman's motion to dismiss counts 4, 5, 6, 9, and 10 with leave to amend, with any amended complaint to be filed and served on or before June 30, 2021; and

3. DENY Altman's motion to abstain.

10. 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

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

DISPOSITION: Continued to June 17, 2021, at 11:00 a.m.

NO ORDER REQUIRED.

The parties have stipulated to continue the hearing on the motion for entry of discharge to June 17, 2021, at 11:00 a.m. The court has already issued an order on May 19, 2021. Doc. #549.