UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, June 10, 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.

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court will begin in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

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-2

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
5-13-2021 [20]

TIMOTHY SPRINGER/ATTY. FOR DBT.
DISMISSED 5/27/21

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

An order dismissing the case was entered on May 27, 2021. Doc. #26. The objection to confirmation of the plan will be dropped as moot. No appearance is necessary.

2. 19-10803-A-13 **IN RE: CHRISTY BEELER**
TCS-5

MOTION TO MODIFY PLAN
4-30-2021 [88]

CHRISTY BEELER/MV
NANCY KLEPAC/ATTY. FOR DBT.
TIMOTHY SPRINGER/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on June 3, 2021. Doc. #98.

3. 20-12317-A-13 **IN RE: LLOYD/LINDA HENSON**
FW-1

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C.
FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
5-4-2021 [22]

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 Lloyd Martin Henson and Linda Mae Henson ("Debtors"), the debtors in this chapter 13 case, requests allowance of interim compensation in the amount of $4,729.50 and reimbursement for expenses in the amount of $333.06 for services rendered February 5, 2020 through April 15, 2021. Doc. #22.

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 consulting and fact gathering; (2) providing general case administration; (3) filing original plan and attending hearings; and (4) preparing documents for the trustee regarding debtors' online business. Doc. #24. 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 $4,729.50 and reimbursement for expenses in the amount of $333.06, totaling $5,062.56, to be paid in a manner consistent with the terms of the confirmed plan.

4. 21-11255-A-13 **IN RE: JOSHUA FULFER**
TCS-1

MOTION TO EXTEND AUTOMATIC STAY
5-25-2021 [14]

JOSHUA FULFER/MV
TIMOTHY SPRINGER/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.

Debtor Joshua Allen Fulfer ("Debtor") moves the court for an order extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3). Doc. #14. Debtor had a Chapter 13 case pending within the preceding one-year period that was dismissed, Case No. 19-13493 (Bankr. E.D. Cal.) (the "Prior Case"). The Prior Case was filed on August 15, 2019 and dismissed on December 28, 2020. Decl. of Joshua Fulfer, Doc. #16; Prior Case docket generally.

Under 11 U.S.C. § 362(c)(3)(A), if a debtor had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the current case. Debtor filed this case on May 18, 2021. Petition, Doc. #1. The automatic stay will terminate in the present case on June 17, 2021.

Section 362(c)(3)(B) allows the court to extend the stay "to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]" 11 U.S.C. § 362(c)(3)(B).

Section 362(c)(3)(C)(i) creates a presumption that the case was not filed in good faith if (1) the debtor filed more than one prior case in the preceding year; (2) a prior case was dismissed in the preceding year because the debtor failed to file or amend the petition or other documents without substantial excuse, provide adequate protection as ordered by the court, or perform the terms of a confirmed plan; or (3) the debtor has not had a substantial change in his or her financial or personal affairs since the dismissal, or there is no other reason to believe that the current case will result in a discharge or fully performed plan. 11 U.S.C. § 362(c)(3)(C)(i).

The presumption of bad faith may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). 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), 548 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted), vacated on other grounds, Taggart v. Lorenzen, 139 S. Ct. 1795 (2019).

In this case, the presumption of bad faith arises. Debtor failed to perform the terms of a confirmed plan in the Prior Case. A review of the court's docket in the Prior Case disclosed a Chapter 13 plan was confirmed on January 7, 2020, the Chapter 13 trustee ("Trustee") filed a Notice of Default and Intent to Dismiss Case (the "Notice") on November 5, 2020, and the court dismissed the Prior Case upon Trustee's declaration that Debtor failed to address the Notice in the time and manner prescribed by LBR 3015-1(g) and failed to cure the defaulted plan payments. See Case No. 19-13493, Doc. ##34, 67, 71.

In support of this motion to extend the automatic stay, Debtor declares that during the Prior Case, Debtor "was having difficulty with the IRS" because the IRS could not locate the 2018 and 2019 tax returns Debtor claims to have filed. Decl. ¶ 6, Doc. #16. Debtor lost his job during the Prior Case and is still unemployed. Decl. ¶ 6-7, Doc. #16. However, Debtor argues that his circumstances have changed because Debtor's girlfriend and Debtor's son now live with Debtor and have agreed to help Debtor with whatever payments are necessary for Debtor to have a successful chapter 13 plan and save Debtor's home. Decl. ¶ 8, Doc. #16. Debtor also is considering selling the house because Debtor's home has appreciated significantly since the Prior Case began. Decl. ¶ 9, Doc. #16. Debtor believes he will be able to make plan payments going forward and acknowledges that the present case was filed "in a sincere attempt" to save Debtor's home. Decl. ¶¶ 10, 14, Doc. #16.

The court is inclined to find that Debtor has rebutted the presumption of bad faith that arose from the failure to perform the terms of a confirmed plan in the Prior Case and that Debtor's petition commencing this case was filed in good faith. Moreover, the court recognizes that Debtor's ability to complete payments is greater with the help of Debtor's girlfriend and Debtor's son who now live with Debtor.

Accordingly, the court is inclined to GRANT the motion and extend the automatic stay for all purposes as to all creditors, unless terminated by further order of the court. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is necessary.

5. 20-13964-A-13 **IN RE: LAURA SILVA**
SLL-2

MOTION TO MODIFY PLAN
4-26-2021 [33]

LAURA SILVA/MV
STEPHEN LABIAK/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

6. 21-11172-A-13 **IN RE: EUDELEO ALVARADO**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
5-20-2021 [12]

PETER NISSON/ATTY. FOR DBT.
DISMISSED 5/24/21

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

An order dismissing the case was entered on May 24, 2021, Doc. #16. The Order to Show Cause will be dropped as moot. No appearance is necessary.

7. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
MHM-2

MOTION TO DISMISS CASE
5-4-2021 [97]

MICHAEL MEYER/MV
MICHAEL MEYER/ATTY. FOR MV.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on June 4, 2021. Doc. #129.

8. 20-11385-A-13 **IN RE: JOHN/DOLORES MARTINEZ**
TCS-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LOWES HOME CENTER LLC AND SEDGWICK
4-16-2021 [20]

DOLORES MARTINEZ/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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 Moving Party shall submit a proposed order after the hearing.

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). 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 in part.

As a procedural matter, the Notice of Hearing filed in connection with this motion does not comply with LBR 9014-1(d)(3)(B)(i), which requires the notice include the names and addresses of persons who must be served with any opposition. The court encourages counsel 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.

John Garcia Martinez and Dolores Contreras Martinez (together, "Debtors"), the chapter 13 debtors, move the court for an order pursuant to Federal Rule of Bankruptcy Procedure ("Rule") 9019, approving the compromise of all claims and disputes against Lowes Home Center LLC and Sedgwick (together, "Defendants") arising out of employment-related injuries as set forth in Workers Compensation Appeals Board Case Nos. ADJ10939060 and ADJ10939061 (the "WCAB Claims"). Doc. #20; Ex. A, Doc. #23. Richard Monge ("Litigation Counsel") represented Debtors in the WCAB Claims, and the motion states that Litigation Counsel "is to be compensated $15,420.25." Mot., Doc. #20.

The court is inclined to grant the motion authorizing the settlement agreement. The court is inclined to deny without prejudice the request to pay Litigation Counsel because the mandatory disclosure requirements of 11 U.S.C. § 329 and Rule 2016 have not been met.

Settlement Agreement

Co-Debtor John Garcia Martinez ("Martinez"), represented by counsel, pursued the WCAB Claims. Martinez and Defendants have crafted a settlement of the WCAB Claims for a gross payment to Martinez of $96,135.00, less $15,420.25 in attorney fees and an undisclosed amount of costs, resulting in a net payment to Martinez of $74,574.75. Decl. of John Martinez, Doc. #22. Debtors fully exempted the gross proceeds of the WCAB Claims. See Am. Schedule C, Doc. #25.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Rule 9019(a). Debtors move under Rule 9019 and no party has objected to the procedure. Pursuant to Rule 9019, approval of a compromise must be based upon considerations of fairness and equity. Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors with a proper deference to their reasonable views.

Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

It appears from the moving papers that Debtors have considered the standards of A & C Properties and Woodson. Doc. ##20, 22. Martinez already has received a total of $52,195.04, and Martinez is to receive the remainder in installment payments every two weeks until paid in full. Decl., Doc. #22. Martinez believes this is the best resolution to the WCAB Claims and that going to state court would not result in a better resolution. Decl., Doc. #22. The gross settlement amount is fully exempt. Decl., Doc. #22; Am. Schedule C, Doc. #25. The court concludes that the Woodson factors balance in favor of approving the compromise, and the compromise is in the best interests of the creditors and the estate.

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

Final Compensation

Debtors also request authorization to pay Litigation Counsel "the agreed attorney's fees." Mot., Doc. #20. Litigation Counsel has not filed any papers with the court, and Debtors have not provided any information describing the nature of the services rendered or the particulars of Litigation Counsel's fee agreement.

"Section 329(a) requires a debtor's attorney to disclose to the court the amount of compensation paid or promised [to be paid] for services rendered 'in contemplation of or in connection with the case.'" In re Perrine, 369 B.R. 571, 579 (Bankr. C.D. Cal. 2007) (quoting 11 U.S.C. § 329(a)). "Section 329(a) is implemented by Rule 2016(b)," and the "disclosure statements are mandatory, not permissive." Id. (citations omitted). Section 329 permits the bankruptcy court to examine the reasonableness of fees paid, or agreed to be paid, in connection with the bankruptcy case within the one-year look back period regardless of the nature of the services. Perrine, 369 B.R. at 580; 11 U.S.C. § 329(b). "Absent complete disclosure, the court is unable to make an informed judgment regarding the nature and amount of compensation paid or promised by the debtor for legal services in contemplation of [or in connection with] bankruptcy." Id.

Here, Debtors do not disclose to the court when Litigation Counsel was engaged to prosecute the WCAB Claims. There also is no information explaining the fee agreement or the nature of services rendered. Litigation Counsel has not filed any documents in this case.

Based on the lack of evidence provided and the failure of Litigation Counsel to file the mandatory disclosure statements, the court cannot allow compensation to Litigation Counsel at this time. Accordingly, Debtors' request to pay Litigation Counsel is DENIED WITHOUT PREJUDICE.

11:00 AM

1. 21-10731-A-7 **IN RE: JOSEPH TOSCANO**
21-1019

STATUS CONFERENCE RE: COMPLAINT
4-15-2021 [1]

TOSCANO V. KELSTIN GROUP, LLC.
TIMOTHY SPRINGER/ATTY. FOR PL.

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

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

This adversary proceeding was dismissed on June 9, 2021. Doc. #8. Therefore, the status conference will be dropped as moot.

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

MOTION FOR SANCTIONS
5-12-2021 [88]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The debtor filed written opposition less than 14 days before the date set for hearing. Doc. ##186, 188. 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 above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has not done here.

Judicial Notice

T2M Investments, LLC and Cory Chartrand request the court take judicial notice of: (1) the complaint filed by T2M Investments, LLC against Sylvia Nicole in the Merced County Superior Court on April 8, 2020, case no. 20cv-01478 (the

"Merced County Action"); (2) Sylvia Nicole's ex parte applications and motions to set aside default in the Merced County Action; (3) a transcript of the March 10, 2021 hearing held in the Bankruptcy Court of the Southern District of California concerning a motion to determine that Sylvia Nicole is not entitled to a discharge and a motion to transfer venue of Sylvia Nicole's bankruptcy case to the Eastern District of California, Fresno Division; (4) a vexatious litigant order entered against Sylvia Nicole on March 16, 2017 in Orange County Superior Court; (5) a list of Sylvia Nicole's bankruptcy petition filing dates from 1996 to present; (6) an order authorizing service by publication in the Merced County Action; and (7) a promissory note and deed of trust for the property located at 1521 S. 7th Street, Los Banos, California 93635 (the "Property"). Doc. #93. All of the documents were filed in the order listed above as Exhibits 1 through 7, Doc. #94.

Federal Rule of Evidence 201(b) provides the criteria for judicially noticed facts. Courts may take judicial notice of matters of public record, and the court takes judicial notice of the recorded deeds and other documents concerning the Property. See Rosal v. First. Fed. Bank of Cal., 671 F. Supp. 2d 1111, 1120 (N.D. Cal. 2009). As to the documents filed in the Merced County Action, the vexatious litigant order entered in Orange County Superior Court, and the bankruptcy case transcripts and petitions, the records of court proceedings cannot reasonably be questioned, and the court takes judicial notice of those documents. The court does not take judicial notice of the truth of the contents of any documents. Faulkner v. M&T Bank (In re Faulkner), 593 B.R. 263, 273 n.2 (Bankr. E.D. Pa. 2018).

Procedural History

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 asserted 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 Investments, LLC ("T2M"), over the Property. Plaintiff also asserted causes of action against all Defendants for acts committed during litigation that followed the execution and alleged breach of the Settlement Agreement and Plaintiff's chapter 13 bankruptcy case.

All Defendants sought to have the charges against them dismissed under Federal Rule of Civil Procedure 12(b)(6). On May 27, 2021, the court entered an order granting with prejudice Cory Chartrand's motion to dismiss. Order, Doc. #164. All allegations against Cory Chartrand were dismissed without leave to amend. Doc. #164. That same day, the court entered an order granting T2M's motion to dismiss in part, granting Plaintiff leave to amend allegations of fraud related to the Settlement Agreement, conspiracy to commit fraud, and a request for contempt. Order, Doc. #175. The causes of action against T2M arising from statements allegedly made in judicial proceedings or statements made to third parties were dismissed without leave to amend. Doc. #175. The court denied T2M's motion to dismiss the breach of contract claim against it. Doc. #175.

Prior to the court's ruling on the motions to dismiss, T2M and Cory Chartrand (together, "Movants") moved under Federal Rule of Civil Procedure 11 and Federal Rule of Bankruptcy Procedure ("Rule") 9011 for sanctions against Plaintiff (the "Motion"). Doc. #88. The Motion does not specify what form the requested sanctions should take, although the memorandum of points and authorities in support of the Motion contains argument that this court should

impose sanctions on "this serial bankruptcy filer" and declare Plaintiff a vexatious litigant, requiring Plaintiff obtain an order before Plaintiff "can ever file any further pleadings in the Eastern District." Mem. in Support of Mot. 2:24-3:3, Doc. #90. Movants also state that T2M has spent more than $5,000 participating in this adversary proceeding. Decl. of Cory Chartrand ¶ 12, Doc. #91.

Plaintiff failed to respond timely, filing her opposition to the Motion less than 14 days preceding the date of the hearing. LBR 9014-1(f)(1)(B). Plaintiff's opposition was procedurally defective, contained no legal argument, and was not considered by the court in ruling on this Motion.

Request for Sanctions

"The test to determine the appropriateness of sanctions under Fed. R. Civ. P. 11 can be applied to [Rule] 9011," but the bankruptcy court's authority to impose sanctions in this instance comes from Rule 9011. In re Webre, 88 B.R. 242, 245 (B.A.P. 9th Cir. 1988).

Rule 9011 gives bankruptcy courts "significant discretion" to sanction parties who do not adhere to the requirements of the Rule. Miller v. Cardinale (In re DeVille), 361 F.3d 539, 553 (9th Cir. 2004). Under Rule 9011(b), by presenting a petition, pleading, written motion, or other paper to the court, an attorney or unrepresented party certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[:]" (1) the petition "is not being presented for any improper purpose"; (2) "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions" have or are likely to have evidentiary support; and (4) "the denials of factual contentions are either warranted on the evidence or reasonably based on a lack of information or belief." Rule 9011(b). In sum, papers presented to the court in either a frivolous or improper manner justify the imposition of sanctions.

"In determining whether sanctions are warranted under Rule 9011(b), [this court] 'must consider both frivolousness *and* improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other.'" Dressler v. Seeley Co. (In re Silberkraus), 336 F.3d 864, 870 (9th Cir. 2003) (quoting Marsch v. Marsch (In re Marsch), 36 F.3d 825, 830 (9th Cir. 1994)) (emphasis in original). A frivolous claim is baseless and made without a reasonable and competent inquiry; it is legally unreasonable. In re Grantham Bros., 922 F.2d 1438, 1442 (9th Cir. 1991). "The frivolous and improper purpose prongs of Rule [9011] overlap, and 'evidence bearing on frivolousness . . . will often be highly probative of purpose.'" Id. at 1443 (citations omitted). Courts analyze an allegedly improper purpose under an objective standard. Id.

The objective reasonableness standard used to evaluate the propriety of pleadings under Rule 9011 takes into account the special circumstances that often arise with pro se litigants. In re Frenz, 142 B.R. 611, 613 (Bankr. D. Conn. 1992); cf. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533 (1991). Courts are generally protective of pro se litigants, but the fact that a litigant is pro se does not serve as an impenetrable shield. Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1988). A pro se litigant "has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Id. (quoting Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986)). A history of filing multiple suits alone does not warrant harassment unless the complaints are textually and

factually similar. Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1051 (9th Cir. 2007).

"[T]he sanctioning of claims in initial complaints will of course more likely be an abuse of discretion than the sanctioning of other claims." Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1366 n.5 (9th Cir. 1990). Movants cite Townsend to support their argument that the allegations in Plaintiff's Complaint are frivolous because the allegations are against Defendants' attorneys. But the facts of Townsend are distinguishable from the facts of the present case. The court in Townsend imposed sanctions after the plaintiff, represented by counsel, filed an amended complaint without conducting any further inquiry and reasserted the same baseless allegations contained in the plaintiff's original complaint. Townsend, 929 F.2d at 1366.

To illustrate further, courts have determined claims to be frivolous or filed for an improper purpose where the plaintiff filed identical complaints against separate establishments asserting identical injuries at each establishment on the same day. See Molski, 500 F.3d 1047. Also, "the routine filing of frivolous motions for reconsideration may give rise to sanctions including fines and a permanent or temporary ban on filing future documents on the docket." In re Hardee, No. 18-67130-BEM, 2021 Bankr. LEXIS 766, at *4 (Bankr. N.D. Ga. Mar. 26, 2021). Claims in the form of a collateral attack on a bankruptcy court's order brought to harass parties acting pursuant to the court's order, or to delay bankruptcy proceedings while increasing litigation costs may be improper under Rule 9011(b). See Grantham Bros., 922 F.2d at 1443.

Here, Movants seek sanctions against Plaintiff based solely on Plaintiff's filing of the Complaint. The Complaint is the only complaint this Court is aware of that contains allegations against Defendants stemming from the breach of the Settlement Agreement and the subsequent litigation. Movants argue that Plaintiff has sued T2M in state court twice "over the same mortgage on the same piece of property and has now filed four bankruptcies involving T2M and the same property," but a review of Movants' evidence does not provide any insight into the claims and merits of the other litigation. Mem. in Support of Mot. 6:17-19, Doc. #90; Chartrand Decl. ¶ 6, Doc. #91. Additionally, the Settlement Agreement, which is the basis of the Complaint, was not entered into until August 2019, during Plaintiff's previous bankruptcy and after Plaintiff commenced the prior state court lawsuits. Ex. 5, Doc. #94; Chartrand Decl. ¶ 6, Doc. #91.

With respect to the Merced County Action, Plaintiff did not respond to the allegations against her and was in default. Plaintiff unsuccessfully sought to set aside the default in the Merced County Action and was not permitted to lodge an answer. The allegations in the Complaint were not a part of the Merced County Action and no judgment was rendered in the Merced County Action.

Further, while Plaintiff has filed many bankruptcy petitions, it is unclear to this court how the previous petitions are relevant to the alleged violations of Rule 9011(b). As stated above, the allegations against Movants in the Complaint were not a part of any prior bankruptcy. Although the Complaint contained allegations that lacked legal support, those allegations have been dismissed with prejudice, which is sufficient to deter the refiling of those allegations. See Rule 9011(c)(2).

On the facts currently before this court, sanctions under Rule 9011 are not warranted.

Accordingly, this motion will be DENIED.

3. 21-10679-A-13 **IN RE: SYLVIA NICOLE**
21-1015 PJL-2

MOTION FOR SANCTIONS
4-29-2021 [56]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The debtor filed written opposition less than 14 days before the date set for hearing. Doc. #187. 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 above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has not done here.

Judicial Notice

The movant, Martin Eliopulos (hereafter, "Eliopulos"), requests the court take judicial notice of various papers filed in this adversary proceeding, particularly a motion to dismiss and the supporting papers previously filed by Eliopulos and identified on the docket as Docket Control No. PJL-1. Doc. #60.

Federal Rule of Evidence 201(b) provides the criteria for judicially noticed facts. The records of court proceedings cannot reasonably be questioned, and the court takes judicial notice of those documents. The court does not take judicial notice of the truth of the contents of any documents. Faulkner v. M&T Bank (In re Faulkner), 593 B.R. 263, 273 n.2 (Bankr. E.D. Pa. 2018).

Procedural History

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 Eliopulos, Steven Altman, Cory Chartrand, and T2M Investments, LLC (collectively, "Defendants"). Doc. #1. By the complaint ("Complaint"), Plaintiff asserted 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 Investments, LLC ("T2M"), over real property located at 1521 S. 7th Street, Los Banos, CA 93635. Plaintiff also asserted causes of action against all Defendants for acts committed during litigation that followed the execution and

alleged breach of the Settlement Agreement and Plaintiff's chapter 13 bankruptcy case.

All Defendants sought to have the charges against them dismissed under Federal Rule of Civil Procedure 12(b)(6). On May 27, 2021, the court entered an order granting with prejudice Eliopulos's motion to dismiss. Order, Doc. #171. All allegations against Eliopulos were dismissed without leave to amend. Doc. #171.

Prior to the court's ruling on the motions to dismiss, Eliopulos moved under Federal Rule of Bankruptcy Procedure ("Rule") 9011 for sanctions against Plaintiff (the "Motion"). Doc. #56. The Motion does not specify what form the requested sanctions should take, but Rule 9011(c)(2) states that sanctions "imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct." Rule 9011(c)(2).

Plaintiff failed to timely respond, filing her opposition to the Motion less than 14 days preceding the date of the hearing. LBR 9014-1(f)(1)(B). Plaintiff's opposition was procedurally defective, contained no legal argument, and was not considered by the court in ruling on this Motion.

Request for Sanctions

Rule 9011 gives bankruptcy courts "significant discretion" to sanction parties who do not adhere to the requirements of the Rule. Miller v. Cardinale (In re DeVille), 361 F.3d 539, 553 (9th Cir. 2004). Under Rule 9011(b), by presenting a petition, pleading, written motion, or other paper to the court, an attorney or unrepresented party certifies "that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[:]" (1) the petition "is not being presented for any improper purpose"; (2) "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions" have or are likely to have evidentiary support; and (4) "the denials of factual contentions are either warranted on the evidence or reasonably based on a lack of information or belief." Rule 9011(b). In sum, papers presented to the court in either a frivolous or improper manner justify the imposition of sanctions.

"In determining whether sanctions are warranted under Rule 9011(b), [this court] 'must consider both frivolousness *and* improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other.'" Dressler v. Seeley Co. (In re Silberkraus), 336 F.3d 864, 870 (9th Cir. 2003) (quoting Marsch v. Marsch (In re Marsch), 36 F.3d 825, 830 (9th Cir. 1994)) (emphasis in original). A frivolous claim is baseless and made without a reasonable and competent inquiry; it is legally unreasonable. In re Grantham Bros., 922 F.2d 1438, 1442 (9th Cir. 1991). "The frivolous and improper purpose prongs of Rule [9011] overlap, and 'evidence bearing on frivolousness . . . will often be highly probative of purpose.'" Id. at 1443 (citations omitted). Courts analyze an allegedly improper purpose under an objective standard. Id.

The objective reasonableness standard used to evaluate the propriety of pleadings under Rule 9011 takes into account the special circumstances that often arise with pro se litigants. In re Frenz, 142 B.R. 611, 613 (Bankr. D. Conn. 1992); cf. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., 498 U.S. 533 (1991). Courts are generally protective of pro se litigants, but the fact that a litigant is pro se does not serve as an impenetrable shield. Patterson v. Aiken, 841 F.2d 386, 387 (11th Cir. 1988). A pro se litigant "has no license to harass others, clog the judicial machinery with meritless litigation, and abuse

already overloaded court dockets." Id. (quoting Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986)). A history of filing multiple suits alone does not warrant harassment unless the complaints are textually and factually similar. Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1051 (9th Cir. 2007).

"[T]he sanctioning of claims in initial complaints will of course more likely be an abuse of discretion than the sanctioning of other claims." Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1366 (9th Cir. 1990). To illustrate, courts have determined claims to be frivolous or filed for an improper purpose where the plaintiff filed identical complaints against separate establishments asserting identical injuries at each establishment on the same day. See Molski, 500 F.3d 1047. Also, "the routine filing of frivolous motions for reconsideration may give rise to sanctions including fines and a permanent or temporary ban on filing future documents on the docket." In re Hardee, No. 18-67130-BEM, 2021 Bankr. LEXIS 766, at *4 (Bankr. N.D. Ga. Mar. 26, 2021). Claims in the form of a collateral attack on a bankruptcy court's order brought to harass parties acting pursuant to the court's order and to delay bankruptcy proceedings and increase litigations costs also may be improper under Rule 9011(b). See Grantham Bros., 929 F.2d at 1366.

Here, Eliopulos seeks sanctions against Plaintiff based solely on Plaintiff's filing of the Complaint. The Complaint is the only complaint this Court is aware of that contains allegations made by Plaintiff against Eliopulos. While Plaintiff has filed many bankruptcy petitions, it is unclear to this court how the previous petitions are relevant to the alleged violations of Rule 9011(b) because the allegations against Eliopulos were not a part of any prior bankruptcy. Although the Complaint contained allegations that lacked legal support, including every allegation against Eliopulos, those allegations have been dismissed with prejudice, which is sufficient to deter the refiling of those allegations without the imposition of sanctions. See Rule 9011(c)(2). The court determines that Rule 9011(b) has not been violated.

Eliopulos anchors his argument on nine suggested factors set forth in the 1997 Advisory Committee Note to Rule 9011 which incorporate the 1993 amendments and subsequent notes to Federal Rule of Civil Procedure 11. Mem. in Support of Eliopulos's Mot. 14:4-16-16, Doc. #58. Eliopulos does not cite, and the court has not found, any Ninth Circuit authority directly adopting these factors, although the case law relied on by this court tracks generally with the considerations suggested by the committee note. The court does note, however, that the 1993 Advisory Committee Notes to Federal Rule of Civil Procedure 11 state that motions for sanctions "should not be employed . . . to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes." 1993 Advisory Committee Note to Fed. R. Civ. P. 11. Plaintiff's allegations against Eliopulos have been dismissed with prejudice. Plaintiff has not reasserted any of the dismissed allegations against Eliopulos, and sanctions under Rule 9011 are not warranted at this time.

Accordingly, this motion will be DENIED.