UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 19, 2018, at 11:00 a.m.

---

1. **18-20456-E-13** **MARIA ANDRICHUK** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
18-2044 **UST-1** **6-18-18 [16]**

U.S. TRUSTEE V. ANDRICHUK

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor (*pro se*) and the Chapter 13 Trustee on June 18, 2018. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is granted.

The United States Trustee ("Plaintiff") filed the instant Motion for Default Judgment on June 18, 2018. Dckt. 16. Plaintiff seeks an entry of default judgment for injunctive relief against Maria Andrichuk ("Defendant-Debtor") in the instant Adversary Proceeding No. 18-02044-E.

The instant Adversary Proceeding was commenced on April 9, 2018. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on April 9, 2018. Dckt. 3. The complaint and summons were properly served on Defendant-Debtor. Dckt. 6, 7.

Defendant-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on May 23, 2018. Dckt. 11.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint for injunctive relief against Defendant-Debtor. The Complaint alleges that Defendant-Debtor has filed a series of four noncompliant bankruptcy cases since 2012 that abuse the Bankruptcy Code. The Complaint asserts the following allegations, as summarized by the court:

A. Defendant-Debtor has filed at least four bankruptcy cases in the Eastern District of California since 2012;

B. Case No. 12-20590-A-13 was filed on January 12, 2012, and was dismissed on April 18, 2012, due to Defendant-Debtor's failures to (i) make plan payments; (ii) appear at the meeting of creditors, and (iii) provide tax documents to the Chapter 13 Trustee;

C. Case No. 14-23405-A-13 was filed on April 2, 2014 and was dismissed on September 26, 2014, due to Defendant-Debtor's failures to obtain confirmation of a plan;

D. Case No. 15-28843-E-13 was filed on November 13, 2015 and was dismissed on February 18, 2016, due to Defendant-Debtor's failures to provide the Chapter 13 Trustee with payment advices and tax information;

E. Case No. 18-2056-E-13 was filed on January 18, 2018 and was dismissed on June 6, 2018, due to Defendant-Debtor's failure to disclose secured claims and her inability to fund a feasible plan;

F. Defendant-Debtor's husband, Petr Andrichuk, has filed at least two bankruptcy cases since 2016;

G. Case No. 16-23373-C-13 was filed on May 24, 2016 and was dismissed on August 24, 2016 on Petr Andrichuk's motion to dismiss;

H. Case No. 16-27755-C-13 was filed on November 22, 2016 and was dismissed on January 25, 2017 due to Petr Andrichuk's failure to make plan payments.

Claim for Relief—Injunction Against Filing Another Bankruptcy Case under 11 U.S.C. §§ 105 and 349

Plaintiff requests that the court issue an injunction prohibiting Defendant-Debtor from filing or from causing to be filed, any subsequent petition for relief under the Bankruptcy Code, in the United States

Bankruptcy Court for the Eastern District of California, for a period of three years without first obtaining permission of the Chief Judge.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

(1) the possibility of prejudice to the plaintiff,
(2) the merits of plaintiff's substantive claim,
(3) the sufficiency of the complaint,
(4) the sum of money at stake in the action,
(5) the possibility of a dispute concerning material facts,
(6) whether the default was due to excusable neglect, and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that Plaintiff will be prejudiced if default judgment for injunctive relief is not entered against Defendant-Debtor to prevent the filing of further abusive bankruptcy petitions. Defendant-Debtor has filed four petitions and has not presented any reason to the court to believe that filings will stop after any future case dismissals. As Plaintiff alleges in the Complaint, monetary sanctions would be insufficient to make Defendant-Debtor stop presenting abusive filings, only injunctive relief at this point will have an impact upon Defendant-Debtor.

Defendant-Debtor has failed to perform her legal duties as a debtor and has failed to propose, confirm and execute in good faith a Chapter 13 plan of reorganization. A series of prior cases filed by Defendant-Debtor have all been dismissed for failure of some kind, whether failure to disclosure claims, to pay fees, or to propose a feasible plan. Defendant-Debtor has not confirmed a plan in any of the prior cases she filed, and each of the prior cases has been dismissed without entry of a discharge. In total, Defendant-Debtor owes at least $148.00 in filing fees for Case Nos. 12-20590-A-13 and 15-28843-E-13.

On April 9, 2018, the court issued a summons in connection with the Complaint filed by U.S. Trustee ("Summons"). The Summons required that Defendant-Debtor filed a motion or answer to the Complaint within thirty days after the date the Summons was issued. On April 11, 2018, Plaintiff served the Complaint and the Summons on Defendant-Debtor at the street address listed on the Petition in Case No. 18-2056-E-13, which was filed by Defendant-Debtor on January 18, 2018. Defendant-Debtor has not filed an answer or other response to the Complaint and a default was entered on May 23, 2018.

The court finds that the Complaint is sufficient, and the request for relief requested therein is meritorious. It has not been shown to the court that there is or may be any dispute concerning material facts. Defendant-Debtor has not contested any facts in this Adversary Proceeding. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant-Debtor has been given several opportunities to respond, and there is no indication that Defendant-Debtor has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. The court finds it necessary and proper for the entry of a default judgment against Defendant-Debtor.

The court grants default judgment in favor of Plaintiff and against Defendant-Debtor Maria Andrichuk.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by the United States Trustee ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that Maria Andrichuk ("Defendant-Debtor"), is enjoined from filing, individually, another bankruptcy case in any district for a period of three years beginning July 19, 2018, without first seeking and receiving the authorization of the chief bankruptcy judge of the district in which she wishes to file a bankruptcy petition.
>
> **IT IS FURTHER ORDERED** that the Clerk of the Bankruptcy Court, and deputy clerks operating at the discretion and control of the Clerk of the Court in any District, are authorized to reject any petition attempted to be filed by Defendant-

Debtor during the three-year period if there is not prior authorization from the chief bankruptcy judge of the corresponding district.

Counsel for Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order, which judgment includes the express authorization to reject a presented filing by Defendant-Debtor for which there is not a prior authorization from the chief bankruptcy judge in that District.

2. **09-22188-E-13 RICK SILLMAN**
18-2063
SILLMAN V. TALCOTT ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING, MOTION FOR A MORE DEFINITE STATEMENT AND MOTION TO STRIKE
5-31-18 [24]

Final Ruling: No appearance at the July 19, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—Hearing Required. FN.1.

FN.1. Movant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor on May 31, 2018. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 11:00 a.m. on August 30, 2018.

Mid Valley Title and Escrow Company, Dan Hunt, Tami Barlow, and Heidi Gomez ("Defendants") move for the court to dismiss all claims against it in Rick Sillman's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on June 20, 2018. Dckt. 39. Plaintiff-Debtor's Opposition was filed without the assistance of legal counsel, and in the Opposition, the court notes that Plaintiff-Debtor presents various legal arguments that have nothing to do with the Motion to Dismiss.

Plaintiff-Debtor does contend, however, that the Complaint satisfies the "who, when, where, why, how, dates, damages, and justifiable reliance" elements that Defendants argue is missing from the Motion. *See id.* at 8.

DEFENDANTS' REPLY

Defendants filed a Reply on July 11, 2018. Dckt. 62. Defendants argue that the entire Complaint should be dismissed because Mid Valley Title has no liability. Defendants also argues that the fourth and fifth claims fails because Plaintiff-Debtor has not alleged sufficient facts to support them.

DISCUSSION

In response to the court's comments at the July 11, 2018 status conference that the Motion failed to state grounds with particularity, Defendants filed an Amended Motion on July 13, 2018. Dckt. 67. A cursory review of the Amended Motion shows that it appears to comply with Federal Rule of Civil Procedure 7(b).

Defendants issued an Amended Notice of Hearing for the Amended Motion, stating that it will be heard at 11:00 a.m. on August 20, 2018. Dckt. 68. Two problems arise. First, once a matter has been set for hearing and the parties have received notice of the hearing, a moving party cannot unilaterally reset the hearing date. The moving party must instead seek leave of the court for the hearing to continued until the new desired date. Defendants have not done so hear, instead seeking to usurp the court's authority to set matters for continued hearings.

Second, the date chosen by Defendants is not even an available hearing date. A Memo to File re: Calendar Correction was issued on July 13, 2018, indicating that the nearest available date to the one "chosen" by Defendants is 11:00 a.m. on August 30, 2018. Dckt. 71.

As of the court's review of the matter, Defendants have not sought permission from the court for the hearing to be continued. Despite that failure, the court takes into account the discussion had with the parties on July 11, 2018—especially that Plaintiff-Debtor needs to acquire an attorney—and notes that the Amended Motion presents arguments worth Plaintiff-Debtor reviewing before the hearing. With those two points in mind, the court continues this matter to 11:00 a.m. on August 30, 2018.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss Adversary Proceeding filed by Mid Valley Title and Escrow Company, Dan Hunt, Tami Barlow, and Heidi Gomez ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Dismiss is continued to 11:00 a.m. on August 30, 2018.

3. **09-22188-E-13 RICK SILLMAN**
18-2063
SILLMAN V. TALCOTT ET AL

MOTION TO APPOINT COUNSEL, TRUSTEE OR RECEIVER TO RECOVER BANKRUPTCY ASSETS
6-1-18 [28]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required. FN.1.

FN.1. Movant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Movant has not specified clearly whether the Motion is noticed according to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). The Notice of Motion does not make a single statement that complies with this court's Local Bankruptcy Rules about what must be included in a notice of motion. No party who received the Notice has been informed of when a hearing will be heard, of whether the hearing is based upon Local Bankruptcy Rule 9014-1(f)(1) or (2) procedure, and of whether written opposition is required fourteen days before the hearing. The court treats the Motion as being noticed according to Local Bankruptcy Rule 9014-1(f)(2). Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The three identical Proofs of Service state that the Motion and supporting pleadings were served on Plaintiff-Debtor (*pro se*) and Defendants on May 29, 2018. Dckt. 31–33. By the court's calculation, 51 days' notice was provided. 14 days' notice is required.

The Motion to Appoint Representative was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Plaintiff-Debtor, Defendants, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion to Appoint Representative is denied without prejudice.

Rick Sillman ("Plaintiff-Debtor") moves for the court to appoint counsel, a trustee, or a receiver "to recover bankruptcy assets illegally removed from debtor's judgment lien, in a turnover manner, with allowable interest computed since The Judgment date of January 21, 2014." Dckt. 28 at 1–2.

Plaintiff-Debtor makes a reference to "the last major case law cites to Federal Court Appointment of Counsel" being from the late-1950s, but Plaintiff-Debtor does not provide any of the citations to the court.

DEFENDANT TALCOTT'S OPPOSITION

Lisa Talcott ("Defendant Talcott" or "Talcott") filed an Opposition on June 30, 2018. Dckt. 49. Defendant Talcott argues that there is no statutory basis or reason to appoint an attorney, a trustee, or a receiver in this Adversary Proceeding. Talcott argues that the constitutional right to counsel is afforded only during criminal proceedings, not during civil matters such as this.

Talcott argues that there is no estate interest to be protected by appointing a representative.

DEFENDANT MID VALLEY'S OPPOSITION

Mid Valley Title and Escrow Company ("Defenant Mid Valley" or "Mid Valley") filed an Opposition on July 3, 2018. Dckt. 55. Mid Valley argues that it joins in the arguments made by Defendant Talcott.

DISCUSSION

Nowhere in the Motion does Plaintiff-Debtor provide any law for the court being able to appoint a legal representative to help him enforce his judgment. In Plaintiff-Debtor's Memorandum of Points and Authorities, he cites several statutes and cases, none of which apply to his argument that the court should appoint a legal representative for him. *See* Dckt. 29.

Plaintiff-Debtor cites to 11 U.S.C. § 1104(a)(1). That provision does not apply because this is an Adversary Proceeding, and his underlying bankruptcy case was in Chapter 13 anyway, not Chapter 11. He cites to *Harris v. Viegelahn* to support that the Chapter 13 estate includes assets acquired after filing for bankruptcy; no one disputes that provision. *See* 135 S.Ct. 1829 (2015).

Plaintiff-Debtor cites *In re Shanel Ann Stasz*, in which the Bankruptcy Appellate Panel affirmed a bankruptcy court's turnover order; again, no one disputes the ability of the court to issue a turnover order. *See* No. CC-06-1380-BPaMa & CC-06-1381-BPaMa, 2007 Bankr. LEXIS 4830 (B.A.P. 9th Cir. Aug. 9, 2007). Plaintiff-Debtor cites *Shapiro v. Henson* for a Chapter 7 trustee being able to recover property for the bankruptcy estate belonging to a debtor or other person. *See* 739 F.3d 1198 (9th Cir. 2014). That point is also not in dispute.

As discussed at the July 11, 2018 status conference, Plaintiff-Debtor desperately needs to hire an attorney to help him enforce the judgment he has received, but it is not up to the court to choose that person for Plaintiff-Debtor.

The court also notes in Federal Rule of Civil Procedure 25 and Federal Rule of Bankruptcy Procedure 7025 and 9014 that,

> Rule 25. Substitution of Parties
> . . .
>
> (b) Incompetency. If a party becomes incompetent, the court may, on motion, permit the action to be continued by or against the party's representative. The motion must be served as provided in Rule 25(a)(3).

FED. R. CIV. P. 25(b).

As the court noted at the prior status conference, the court may well conclude that Plaintiff-Debtor is not competent to continue in the process of enforcing his rights arising from the judgment in the earlier proceeding and his complaint in this Adversary Proceeding. It may be with the representation of counsel that Plaintiff-Debtor may be adequately competent. It may be that Plaintiff-Debtor is unable to be responsible for his legal rights and legally competent for the court to adjudicate such rights, even with counsel.

In denying the present Motion, it is without prejudice to the court making a future determination as to Plaintiff-Debtor's legal competency before adjudicating any rights of, or against, Plaintiff-Debtor.

The Motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Appoint Representative filed by Rick Sillman ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is denied without prejudice.

4. **09-22188-E-13** **RICK SILLMAN** **MOTION TO DISMISS ADVERSARY PROCEEDING**
18-2063 **NBL-1**
SILLMAN V. TALCOTT ET AL **6-19-18 [35]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor (*pro se*) on June 19, 2018. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The hearing on the Motion to Dismiss Adversary Proceeding is continued to 11:00 a.m. on August 30, 2018.

Lisa Talcott ("Defendant") moves for the court to dismiss all claims against it in Rick Sillman's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6). The court reviews the Motion below.

Joinder by Mid Valley Title and Escrow Company, Dan Hunt, Tami Barlow, and Heidi Gomez (the "Title Company Defendants")

On June 22, 2018, the Title Company Defendants filed their "Notice of Joinder" to Ms. Talcott's Motion to Dismiss. Dckt. 42. The sum total of the "Notice of Joinder" consists of:

> "Defendants Mid Valley Title and Escrow Company and its employees, Dan Hunt, Tami Barlow and Heidi Gomez hereby join in defendant Lisa Talcott's motions to dismiss debtor and plaintiff Rick Sillman's ("Debtor") Adversary Complaint ("Complaint") set for hearing on July 19,2018."

No legal authority is given for how the Title Company Defendants force themselves into another Motion by announcing their "Joinder."

REVIEW OF COMPLAINT

Plaintiff has filed this Complaint in *pro se*, attempting to assert his legal rights himself. The court attempts to summarize the contentions and rights that Plaintiff believes he is (and can) assert in an adversary proceeding is as follows.

However, before beginning the summary, the court first notes that Plaintiff's Chapter 13 Case was dismissed on July 30, 2010. 09-22188; Order, Dckt. 33. There is no bankruptcy case pending for Plaintiff in this District.

A. Plaintiff identifies himself as "Debtor in possession of judgment plaintiff for his adversary complain. . . ." Complaint, Dckt. 1 at 2: 2–3.

B. "Defendants [in the first adversary proceeding] and their counsel did not alert the Court, the Debtor, or the standing trustee that they John Walker and Lisa Talcott] were a married couple, at any time during the bankruptcy, adversary, or appeal, when they had such duty." *Id.*, ¶ 6.

C. The defendants named by Plaintiff in the Complaint are:

1. John Walker, and Lisa Talcott (his wife), are judgment debtors under the judgment in the first adversary proceeding.

2. "Defendant Coldwell Banker Ponderosa Real Estate in Paradise, California, Seller John Walker's listing company for judgment liened '15 & 16' Powtan Trail, listed on or before June 1, 2014." *Id.*, ¶ 10.

3. "Defendant Tray Davis, John Walker's listing broker, an employee broker of Coldwell Banker Ponderosa, on or before June 1, 2014." *Id.*, ¶ 11.

4. "Defendant Mid Valley Title and Escrow (Main), Chico, California Title Company for '15 & 16' judgment liened Powtan Trail." *Id.*, ¶ 12.

5. "Defendant Mid Valley Title and Escrow (branch), Paradise, California, company that did title search for '15 & 16' Powtan Trail." *Id.*, ¶ 13.

6. "Defendant Dan Hunt, President of Mid Valley Title and Escrow in Chico, California." *Id.*, ¶ 14.

7. "Defendant Tami Barlow, Vice-President of Mid Valley Title and Escrow in Paradise, California." *Id.*, ¶ 15.

8. "Defendant Heidi Gomez, Title Officer for Mid Valley Title and Escrow, Paradise, California, who did the title search on '15 & 16' Powtan Trail." *Id.*, ¶ 16.

9. "Defendant Quincy L. Jackson, 'Buyer' of '15 & 16' Powtan Trail." *Id.*, ¶ 17.

D. Plaintiff recorded an abstract of judgment against the '15 & 16' Powtan Trail property. *Id.*, ¶ 18.

E. "Exhibit "F", which is attached hereto, and specifically incorporated by reference, is a true certified copy of "Debtor's proof of Defendant John Walker's attempt to wait until the last minute before the sale and do a voidable interspousal transfer to Lisa Talcott, his wife, to attempt to avoid the judgment lien." *Id.*, ¶ 23.

1. Exhibit F is titled "Interspousal Transfer Grant Deed" and bears a recorder stamp stating that it was recorded on December 2, 2016. Dckt. 6, pages 64–66 of Exhibits. The Abstract of Judgment filed as Exhibit A by Plaintiff has a recording date of July 3, 2014. *Id.*, pages 1–2 of Exhibits. The abstract of judgment states it was recorded in Butte County, California and recorder stamp states it was recorded in Butte County, California, approximately 29 months before the recording of the Interspousal Transfer Grant Deed.

F. For the First Cause of Action, Plaintiff seeks to "avoid" the immediate transfer by the Interspousal Grant Deed and then subsequent deeds in the chain of title pursuant to 11 U.S.C. §§ 547, 548 549. Though it appears that various theories could possibly be asserted, including the judgment lien itself, there is no bankruptcy trustee, or Chapter 13 debtor or a debtor in possession, to exercise the avoiding powers for a bankruptcy estate. As stated above, Plaintiff's bankruptcy case was dismissed long ago.

G. It appears that the title company Defendants are named as cooperating with the transfers, even though they knew of the judgment lien. If the judgment lien was of record, one only needs to review California real property law to understand the effect of that lien on the property and the responsibility of people taking to property subject to such judgment lien.

H. Much of the Complaint focuses on Plaintiff asserting that he demanded payment on his lien from various people, but that none of them would pay him. From the complaint, it appears that Plaintiff's mental health issues have continued, impairing his ability to enforce his rights. Additionally, Plaintiff is not an attorney, and various enforcement of judgment tactics and

claims to be brought against various persons involved in the alleged transfers that would be apparent to a creditor attorney, bank attorney, collection attorney, or collection agency would not be apparent to a lay person.

I. It is alleged that there was damage to the property, Defendant Jackson obtained payment of insurance proceeds, stated that the insurance more than paid him for his investment in the property, and has refused to address the judgment line.

J. The Second Cause of Action seeks recovery of property of the bankruptcy estate pursuant to 11 U.S.C. § 550 and the Third Cause of Action for disallowance of claim. As stated above there is no bankruptcy case pending in which there a bankruptcy estate and no claims at issue to be adjudicated.

K. Much of the Complaint is a long recitation of how Plaintiff believes he has been wronged. In the Fourth Cause of Action, he asserts that these allegations constitute a claim under California Business and Professions Code §§ 17200 and 1750. It appears that some of these claims relate to the title company not enforcing Plaintiff's judgment lien, while others date back to the alleged violations of the automatic stay, for which the issues have already been litigated as to John Walker and Lisa Talcott in the first adversary proceeding.

L. The Fifth Cause of Action is stated to be one for fraud and deceit. It appears that this case is premised on the title company and persons involved in the alleged transfers not honoring or enforcing Plaintiff's judgment lien.

APPLICABLE LAW

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that a complaint have a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. FED. R. CIV. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* (citing 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are

construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court "required to"accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on July 2, 2018. Dckt. 51. Plaintiff-Debtor argues that the court should deny the Motion because the parties to the Complaint have not responded timely to the summons.

Plaintiff-Debtor notes to the court other motions that have been set for hearing in this Adversary Proceeding, and he attempts to present "facts" surrounding the proceedings over the years.

That Plaintiff-Debtor would be arguing against a motion filed as a response to the Complaint as permitted by Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012 demonstrates a possible lack of basic competency to appear in *pro se* in this court.

DEFENDANT'S REPLY

Defendant filed a Reply on July 12, 2018. Dckt. 65. Defendant argues that she has responded timely, twenty-seven days after being served with the summons. *See* Dckt. 45. Defendant argues that Plaintiff-Debtor's new "facts," to the extent that they are part of his claims, should be listed in the Complaint; so, Plaintiff-Debtor should amend the Complaint.

Defendant argues that the Complaint mentions her three times to the fraudulent conveyance causes of action, and only tangentially so to other parties. She asserts that those references fall short of alleging "circumstances indicating the falseness of the statements, including the time, place, and content of the allegedly fraudulent representation or omission, as well as the identity of the person allegedly perpetrating fraud" or "actual reliance on the allegedly deceptive or misleading statements." *Id.* at 3 (quoting *California ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 634 (N.D. Cal. 1997); *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 (9th Cir. 2012)).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. The alleged fraudulent conveyance occurred more than seven years after the petition date in Plaintiff-Debtor's bankruptcy, not within ninety days before the case;

B. Plaintiff-Debtor fails to allege that the transfer was for the benefit of a creditor of Plaintiff-Debtor's or that the transfer was made for or on account of an antecedent debt owed by Plaintiff-Debtor;

C. Property of the estate was not involved;

D. The Complaint does not identify any claims made by Defendant that would be disallowable;

E. The Complaint appears to allege violations of the automatic stay under an alter ego theory, but it does not state specific violations;

F. The Complaint fails to state any unlawful, unfair, or fraudulent acts or practices committed by Defendant, nor does it allege any deceptive or misleading statements made by Defendant upon which Plaintiff-Debtor relied; and

G. The Complaint fails Federal Rule of Civil Procedure 9(b) because it presents conclusory arguments that do not meet the particularity requirements for fraud claims.

DISCUSSION

As the court discussed with Plaintiff-Debtor at the July 11, 2018 status conference, he already has a valid judgment; now, he needs to find a way to enforce it. Instead, Plaintiff-Debtor appears to want to litigate the matters again.

Unfortunately, as Plaintiff-Debtor has presented it, he is cycling back, citing Bankruptcy Code Sections for a case that does not exist, and he frames his rights as somehow being Bankruptcy Code-driven

(to the extent that he sprinkles "law" in his Complaint). In the general allegations, he makes reference to and states at least part of possible claims against some of the defendants for post-judgment transfers of property.

Seeing Plaintiff-Debtor's floundering heightens the court's concerns whether Plaintiff-Debtor is sufficiently legally competent for the court to purport to adjudicate his rights and claims.

APPLICABLE FEDERAL LAW TO DETERMINE LEGAL COMPETENCY OF PARTY

As a basic requirement for a person to have his or her rights determined in federal court, that person must meet the basic requirements for legal competency.

MOORE'S FEDERAL PRACTICE, CIVIL § 17.21, provides a good survey of the federal competency requirement.

> § 17.21 Capacity of Individual Litigant Acting on Its Own Behalf Determined by Law of Domicile
>
> [1] Domicile Tested at Time of Filing
>
> The capacity of an individual engaged in litigation to enforce its own right, not acting as a representative of another, is determined by the law of the litigant's domicile...
>
> [3] Persons Lacking Legal Capacity Must Have Adequate Representation
>
> [a] Court May Appoint Guardian
>
> Although persons lacking legal capacity may not sue or be sued, Rule 17(c) provides that their interests may be represented in litigation in federal courts (see also § 17.10[3][c] (guardian's and guardian *ad litem's* real party in interest status); § 17.22 (capacity of representatives of persons lacking legal capacity)). If a minor or other incompetent person has a representative appointed by law, such as a guardian, committee, conservator, or other similar fiduciary, this representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent who has no duly appointed representative may sue by a next friend or by a guardian ad litem. If a minor or incompetent is sued and is not represented in the action, the court must appoint a guardian ad litem or make some other proper order to protect the minor or incompetent. Similarly, if a party becomes incompetent during the course of the litigation, the court must appoint a guardian ad litem or make some other proper order. The language of the rule is mandatory and requires the court to appoint a guardian ad litem or make some other provision once the court determines that the individual is incompetent. However, the rule does not place an affirmative obligation on the district court to inquire *sua sponte* into the individual's capacity unless evidence showing that the individual has been adjudged incompetent or other clear evidence of incompetence is brought to the district court's attention. Bizarre behavior alone is insufficient to trigger a mandatory inquiry into a litigant's competency.

> The function of the representative or guardian *ad litem* is to make decisions concerning the litigation on behalf of the minor or incompetent person, and not necessarily to represent the person as an attorney. [With limited parent child exceptions.] . . .
>
> If a general guardian fails or refuses to sue or defend in a particular case, or if there is a conflict of interest between the minor or incompetent person and the guardian or next friend, federal courts may appoint a guardian or attorney ad litem to protect the interest of the represented party in the case.
>
> To determine whether an individual is considered a minor or incompetent person, Rule 17(c) must be read in conjunction with Rule 17(b). Under Rule 17(b)(1), the capacity of an individual to sue or be sued is determined by the law of the individual's domicile. Once the court applies the law of the individual's domicile and determines that the individual is underage or is otherwise incompetent, the provisions of Rule 17(c) come into play. If the minor or incompetent already has a general guardian, conservator, or like fiduciary, that representative may sue or defend on behalf of the minor or incompetent. Whether an individual or entity is the type of fiduciary that has the legal authority to represent the minor or incompetent person is also determined according to state law. If the minor or incompetent has no such representative, the court must appoint a guardian *ad litem* or make some other provision for the protection of the individual. At this stage in the process, the court is not guided by state law but rather should be guided by the protection of the individual's interests. The court is not required to follow procedures set out by state law to determine incompetency, but may follow whatever procedures are appropriate within the bounds of due process.
>
> [b] Protective Measures Implemented at Court's Discretion
>
> The directive that courts protect the interests of persons lacking legal capacity is not tantamount to a requirement that courts appoint a representative. Rather, when the court finds that a litigant lacks legal capacity, the court may either appoint a guardian *ad litem* "or issue another appropriate order ... to protect a minor or incompetent person who is unrepresented in an action." The necessity of a guardian is determined at the court's discretion. The court need only inquire whether the incompetent's interests are adequately protected.

Some of the authorities cited by MOORES in the section above include the following cases.

Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 134-135 (3rd. Cir. 2002).

> "While the New Jersey Court Rule is relevant to our inquiry and will be discussed further in the next section, we do not begin our analysis with this Court Rule. Instead, we must look to Federal Rule of Civil Procedure 17, which explains the capacity of a party to sue or be sued, and may therefore be used to determine how a person is appointed a 'legal representative' within the meaning of § 183b(c). We

apply the Federal Rules instead of the New Jersey Court Rules because state rules regarding the appointment of guardians *ad litem* are procedural and therefore do not apply, in the first instance, to cases brought in federal courts. See *M.S. v. Wermers*, 557 F.2d 170, 174 n.4 (8th Cir. 1977); 6A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1571, at 511-12 (1991); see generally *Hanna v. Plumer*, 380 U.S. 460, 471-72, 14 L. Ed. 2d 8, 85 S. Ct. 1136 (1965) (federal courts apply on-point Federal Rules of Civil Procedure instead of state procedural practices).

United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006).

"So while the commencement of a civil case does not suspend the Due Process Clause, it does alter the fairness requirements of the Clause. Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the guardians protect those interests. See Fed. R. Civ. P. 17(c) ('The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.'); see also *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003) ('[T]he district judge should be aware that due process considerations attend an incompetency finding and the subsequent appointment of a guardian ad litem.'); *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001), vacated on other grounds, 537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002)*; Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)*; Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979). Independent of the court's duty to appoint a guardian to look after his interests, Mandycz of course also is entitled to the other basic protections of due process in a civil setting. See *United States v. Kairys*, 782 F.2d 1374, 1384 (7th Cir. 1986) ('[B]ecause denaturalization is civil and equitable in nature, due process [is] satisfied by a fair trial before an impartial decisionmaker. [concluding that there is no right to jury trial for denaturalization proceeding]')."

Berrios v. N.Y. City Housing Authority, 564 F.3d 130, 134 (2nd Cir. 2009).

"A minor or incompetent person normally lacks the capacity to bring suit for himself. See, e.g., N.Y. C.P.L.R. 1201 (McKinney 1997); Fed. R. Civ. P. 17(b)(1) (capacity of an individual claim owner to sue is determined by 'the law of the individual's domicile'). Rule 17(c) provides that a minor or incompetent person may be represented by a general guardian, a committee, a conservator, or a similar fiduciary, see Fed. R. Civ. P. 17(c)(1), and that

> '[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or

issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action,'

Fed. R. Civ. P. 17(c)(2) (emphasis added). Thus, as to a claim on behalf of an unrepresented minor or incompetent person, the court is not to reach the merits without appointing a suitable representative.

. . .

On remand, the district court should first determine whether Berrios is a suitable guardian *ad litem* for Travieso. If it finds that he is not suitable and that it is not clear that a substantial claim could not be asserted on Travieso's behalf, the court should appoint another person to be Travieso's guardian *ad litem*. If the court either finds that Berrios is a suitable guardian or if it appoints a suitable guardian who is a non-attorney, it should not dismiss the action without affording such guardian the opportunity to retain counsel or to seek representation from a pro bono attorney or agency. If the guardian secures an attorney or is an attorney, the court should not dismiss the complaint for failure to state a claim without giving counsel an opportunity to file an amended complaint. If the guardian is not an attorney and does not obtain counsel, and if it is not clear to the court whether a substantial claim might be asserted on Travieso's behalf, the court should decide whether to appoint counsel, taking into "consider[ation] the fact that, without appointment of counsel, the case will not go forward at all," *Wenger*, 146 F.3d at 125. If counsel is not secured or appointed, the court may dismiss the complaint, but without prejudice."

Sam M. v. Carcieri, 608 F.3d 77, 85-86 (1st Cir. 2010).

"Rule 17(c) of the Federal Rules of Civil Procedure governs a minor or incompetent's access to federal court. It directs that a minor or incompetent may sue in federal court through a duly appointed representative which includes a general guardian, committee, conservator, or like fiduciary. Fed. R. Civ. P. 17(c)(1). If a minor lacks a general guardian or a duly appointed representative, Rule 17(c)(2) directs the court either appoint a legal guardian or Next Friend, or issue an order to protect a minor or incompetent who is unrepresented in the federal suit. Fed. R. Civ. P. 17(c)(2).

The appointment of a Next Friend or guardian *ad litem* is not mandatory. Thus, where a minor or incompetent is represented by a general guardian or a duly appointed representative, a Next Friend need not be appointed. See *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982) (declining to appoint Next Friend where plaintiffs had general guardians or duly appointed guardians who opposed the federal suit); *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989)(holding that a minor's mother lacked authority to proceed as Next Friend in federal suit where the federal court had appointed a guardian ad litem to represent the child). However, Rule 17(c) 'gives a federal court power to authorize someone other than a lawful representative to sue on behalf of an infant or incompetent person where that representative is unable, unwilling or refuses to act or has interests which conflict with those of the infant or incompetent.' *Ad Hoc Comm. of Concerned*

Teachers v. Greenburgh No. 11 Union Free Sch. Dist., 873 F.2d 25, 29 (2d Cir. 1989); *Melton*, 689 F.2d at 285 (stating that Rule 17(c) allows federal courts to appoint a Next Friend or guardian ad litem where there is a conflict of interest between the minor and her general representative).

The minor's best interests are of paramount importance in deciding whether a Next Friend should be appointed, but the ultimate 'decision as to whether or not to appoint [a Next Friend or guardian ad litem] rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority. *Melton*, 689 F.2d at 285. See also *Fernandez-Vargas v. Pfizer*, 522 F.3d 55, 66 (1st Cir. 2008)."

Garrick v. Weaver, 888 F.2d 687, (10th Cir. 1989).

"Rule 17(c) flows from the general duty of the court to protect the interests of infants and incompetents in cases before the court. See *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974). Garrick through her attorney requested the appointment of the guardian ad litem because her interests might be adverse to her children's interests as they were each claimants to the same finite fund. When the court determines that the interests of the infant and the infant's legal representative diverge, appointment of a guardian *ad litem* is appropriate. *Noe*, 507 F.2d at 11-12. Once appointed, the guardian *ad litem* is 'a representative of the court to act for the minor in the cause, with authority to engage counsel, file suit, and to prosecute, control and direct the litigation.' *Id.* at 12. We hold that a guardian ad litem sufficiently meets the "other fiduciary" requirement of Rule 17(c) so as to deprive Garrick of standing to represent her children in the same action for which the guardian ad litem was appointed. Garrick's standing to represent her minor children in other actions remains unaffected."

Dacannay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir. 1978).

"It is an ancient precept of Anglo-American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian *ad litem* is but an officer of the court. *Cole v. Superior Court*, 63 Cal. 86, 89 (1883); *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1940). While the infant sues or is defended by a guardian *ad litem* or next friend, every step in the proceeding occurs under the aegis of the court. See generally Solender, Guardian *Ad Litem*: A Valuable Representative or an Illusory Safeguard, 7 Tex.Tech.L.Rev. 619 (1976); Note, Guardians *Ad Litem*, 45 Iowa L. Rev. 376 (1960)."

Robidoux v. Rosengren, 638 F.3d 1177, (9th Cir. 2011).

"District courts have a special duty, derived from Federal Rule of Civil Procedure 17(c), to safeguard the interests of litigants who are minors. Rule 17(c) provides, in

relevant part, that a district court 'must appoint a guardian *ad litem*— or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.' Fed. R. Civ. P. 17(c). In the context of proposed settlements in suits involving minor plaintiffs, this special duty requires a district court to 'conduct its own inquiry to determine whether the settlement serves the best interests of the minor.' *Dacanay v. Mendoza*, 573 F.2d 1075, 1080 (9th Cir. 1978); see also *Salmeron v. United States*, 724 F.2d 1357, 1363 (9th Cir. 1983) (holding that 'a court must independently investigate and evaluate any compromise or settlement of a minor's claims to assure itself that the minor's interests are protected, even if the settlement has been recommended or negotiated by the minor's parent or guardian *ad litem*')."

Scannavino v. Florida Department of Corrections, 242 F.R.D. 622, 664, 666-667 (M.D. Fla. 2007).

"Although under Rule 17(b) a district court determining a party's capacity must use the law of that party's domicile, the court need not adopt any procedure required by state law but must only satisfy the requirements of due process. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1296 (11th Cir. 1999) (explaining that 'if the state law conflicts with a federal procedural rule, then the state law is procedural for *Erie/Hanna* purposes regardless of how it may be characterized for other purposes.'); *Thomas*, 916 F.2d at 1035 ('[W]e reject the notion that in determining whether a person is competent to sue in federal court a federal judge must use the state's procedures for determining competency or capacity.'). In the absence of a clear test for determining a party's incapacity or incompetence under Florida law, 'a federal procedure better preserves the integrity and the interests of the federal courts.' *Id.* at 1035.

'It is a well-understood tenant of law that all persons are presumed to be competent' and that the 'burden of proof of incompetency rests with the party asserting it.' *Weeks v. Jones*, 52 F.3d 1559, 1569 (11th Cir. 1995). Because '[a] person may be competent to make some decisions but not others,' the test of a party's competency 'varies from one context to another.' *United States v. Charters*, 829 F.2d 479, 495 n.23 (4th Cir. 1987). In general, "to be considered competent an individual must be able to comprehend the nature of the particular conduct in question and to understand its quality and consequences." *Id.* (quoting B. FREEDMAN, COMPETENCE, MARGINAL AND OTHERWISE: CONCEPTS AND ETHICS, 4 INT'L. J. OF L. & PSYCHIATRY 53, 56 (1981)). In the context of federal civil litigation, the relevant inquiry is whether the litigant is 'mentally competent to understand the nature and effect of the litigation she has instituted.' *Bodnar v. Bodnar*, 441 F.2d 1103, 1104 (5th Cir. 1971); *Donnelly v. Parker*, 158 U.S. App. D.C. 335, 486 F.2d 402, 407 (D.C. Cir. 1973) (stating that Rule 17(c) may require an inquiry into the plaintiff's 'capacity to understand the meaning and effect of the litigation being prosecuted in her name').

. . .

The rights of an incompetent litigant in a federal civil proceeding are protected by Rule 17(c), Federal Rules of Civil Procedure, which provides that a district court

'shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.' Fed. R. Civ. P. 17(c). An incompetent litigant is 'not otherwise represented' under Rule 17(c) if she has no 'general guardian, committee, conservator, or other like fiduciary.' *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 656 (2d Cir. 1999). The parties stipulated at the competency hearing that the plaintiff lacks a general guardian and is not otherwise represented within the meaning of Rule 17(c).

The decision to appoint a 'next friend' or guardian ad litem rests with the sound discretion of the district court and will be disturbed only for an abuse of discretion. *In re Kloian*, 179 Fed. Appx. 262, 265 (6th Cir. 2006) (quoting *Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989)). Unlike a determination of competency, a district court's decision whether to appoint a guardian ad litem is purely procedural and wholly uninformed by state law. *Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 135-36 (3d Cir. 2002) ('A district court need not look at the state law, however, in determining what factors or procedures to use when appointing the guardian *ad litem*.'); Burke v. Smith, 252 F.3d 1260, 1264 (11th Cir. 2001) ('It is well settled that the appointment of a guardian ad litem is a procedural question controlled by Rule 17(c).').

. . .

Under Rule 17(c), a district court must appoint a guardian ad litem if it receives 'verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.' *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003). An exhaustive review of the record, as well as the evidence adduced at the competency hearing (and other evidence properly before the court), commends the appointment of a guardian ad litem to protect the plaintiff's interests in this case. Indeed, failure to appoint a guardian ad litem undermines the plaintiff's interests and would default both the court's obligation under Rule 17(c) and the requirements of justice."

California provides the following guidance to a determination of legal competency (whether partial or full).

California Probate Code §§ 810 et seq.

§ 810. Legislative findings and declarations regarding legal capacity

(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.

§ 811. Unsound mind or incapacity

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§ 812. Capacity to make decision

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The Due Process in Competence Determinations Act, Prob. Code, §§ 810 to 813, 1801, 1881, 3201, and 3204, offers a wide range of potential mental deficits that may support a determination that a person is of unsound mind or lacks the capacity to make a decision or to do a certain act. *In re Marriage of Greenway*, 217 Cal. App. 4th 628, 640 (Cal. App. 4th Dist. 2013).

In California, a party is incompetent if he or she lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. *See* Cal. Prob. Code § 1801; *In re Jessica G.*, 93 Cal. App. 4th 1180, 1186 (2001); *Elder-Evins v. Casey*, 2012 U.S. Dist. LEXIS 92467 (N.D. Cal. July 3, 2012).

Federal Rule of Civil Procedure 17 also provides that the court "must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." FED. R. CIV. P. 17(c)(2). When a "substantial question exists regarding the mental competence of a party proceeding pro se," courts should "conduct a hearing to determine whether or not the party is competent, so that a representative may be appointed if needed." *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989); *see also Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005).

A guardian ad litem may be appointed for an incompetent adult only (1) if he or she consents to the appointment or (2) upon notice and hearing. *Jessica G.*, 93 Cal. App. 4th. at 1187–88.

California also considers the issue of "competency" in the context of the appointment of a conservator to take over the assets and affairs of a legally incompetent person. The court takes those factors into account as well as in determining this more narrow issue of legal competency in this specific federal proceeding.

Cal Prob Code § 1801

(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well--being of the individual, shall be designed to encourage the development of maximum self--reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual's proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

(e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

§ 1872. Effect of conservatorship on legal capacity of conservatee

(a) Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

(b) Except as otherwise provided in the order of the court appointing a limited conservator, the appointment does not limit the legal capacity of the limited conservatee to enter into transactions or types of transactions.

§ 1873. Court order affecting legal capacity of conservatee

(a) In the order appointing the conservator or upon a petition filed under Section 1874, the court may, by order, authorize the conservatee, subject to Section 1876, to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. The court, by order, may modify the legal capacity a conservatee would otherwise have under Section 1872 by broadening or restricting the power of the conservatee to enter into transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate.

(b) In an order made under this section, the court may include limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate including, but not limited to, the following:

(1) A requirement that for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

(2) A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not one into which a reasonably prudent person might enter.

(c) The court, in its discretion, may provide in the order that, unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order.

(d) An order under this section continues in effect until the earliest of the following times:

(1) The time specified in the order, if any.

(2) The time the order is modified or revoked.

(3) The time the conservatorship of the estate is terminated.

(e) An order under this section may be modified or revoked upon petition filed by the conservator, conservatee, the spouse or domestic partner of the conservatee, or any relative or friend of the conservatee, or any interested person. Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

At the Status Conference on July 11, 2018, Plaintiff-Debtor discussed with the court the need to obtain counsel and his intention to, which the assistance of his support (daughter and mother of daughter), obtain counsel who could assist Plaintiff-Debtor in competently stating claims that may exist.

The court notes that one of the least productive things that could occur is the court just dismissing claims and then giving Plaintiff-Debtor a short time to file an amended complaint. Plaintiff-Debtor needs to focus on obtaining counsel, or if unable to, the court address the harder issue of whether it is necessary to refer this matter to adult protective services to advise the court of their professional opinion as to Plaintiff-Debtor's legal competency.

Another Defendant's motion to dismiss has been re-set for hearing on August 30, 2018. That allows Plaintiff-Debtor more than enough time to obtain counsel, if he can, and to force the court into determining what, if anything, must be done to address this competency question if Plaintiff-Debtor is unable to engage counsel to enforce his existing judgment and advise him with respect to what claims, if any, should be asserted in a separate lawsuit (rather than as part of the remedies tied to the enforcement of the judgment.

The court continues the hearing on this Motion to Dismiss to 11:00 a.m. on August 30, 2018, to be heard in conjunction with the similar motion of other defendants.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Lisa Talcott ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the hearing on the Motion to Dismiss is continued to 11:00 a.m. on August 30, 2018.