

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

August 24, 2023 at 11:00 a.m.

1. [17-27077-E-13](#)
[23-2022](#)
PLC-2

MICHAEL SCALLIN
Peter Cianchetta

**MOTION FOR ENTRY OF DEFAULT
JUDGMENT**
7-5-23 [17]

**SCALLIN V. U.S. DEPARTMENT OF
EDUCATION**

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on July 5, 2023. By the court's calculation, 50 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). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is continued to XXXXXXXXXX.

Debtor Michael Everett Scallin (“Plaintiff-Debtor”) filed the instant Motion for Default Judgment on July 6, 2023. Dckt. 17. Plaintiff-Debtor seeks an entry of default judgment against the United States Department of Education (“Defendant”/“United States”) in the instant Adversary Proceeding No. 23-02022.

The instant Adversary Proceeding was commenced on February 16, 2023. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on February 16, 2023. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 7.

SUMMARY OF COMPLAINT

The Complaint, Dckt. 1, asserts claims to determine the dischargeability of a student loan debt. Claims have been filed by the United States Department of Education in Plaintiff-Debtor’s Bankruptcy Case which total \$85,803.08. It is further alleged that the total student loan debt is in excess of \$95,193.14. The Complaint states detailed factual allegations (not mere conclusions), as well as reference to some legal authority, relating to the asserted undue hardship caused to Plaintiff-Debtor by these student loan obligations. The factual allegations and legal grounds include:

1. Plaintiff-Debtor lives paycheck to paycheck and has no disposable income to repay their student loans. Complaint, Dckt. 1 ¶ 7.
2. Plaintiff-Debtor lives on less than the Internal Revenue Service standard for a single parent with one child. *Id.*
3. Between 2017 and 2021, Plaintiff-Debtor held numerous jobs, and struggled to make Plan payments without the help of family contributions. *Id.* ¶ 8.
4. Plaintiff-Debtor is now employed with a current monthly salary of \$6,543.30, which is under the median family income for California and the size of the household. *Id.* ¶ 8.
5. Plaintiff-Debtor cannot decrease their monthly expenses any further to help make payments toward their student loans. *Id.* ¶ 9.
6. Plaintiff-Debtor is 47 years old and has 50% custody of their minor child. Plaintiff-Debtor does not anticipate any future income that would allow Plaintiff-Debtor to repay their loans. *Id.* ¶ 10.
7. Plaintiff-Debtor has attempted to maximize their income and minimize expenses. *Id.* ¶ 11.
8. Excepting Plaintiff-Debtor’s debts from discharge would impose an undue hardship on Plaintiff-Debtor. And thus the court should determine the debt dischargeable pursuant to 11 U.S.C. § 523(a)(8). *Id.* ¶¶ 12, 13.

SERVICE OF SUMMONS AND COMPLAINT

A reissued summons was obtained by Plaintiff-Debtor on March 7, 2023 (Dckt. 6). No Certificate of Service has been filed by Plaintiff-Debtor. No answer or other responsive pleading has been filed by the United States Department of Education.

On April 5, 2023, A Certificate of Service for the Reissued Summons and Complaint was filed. Dckt. 7. Service was made on March 7, 2023 on:

US Department of Education
50 United Nations Plz Ste 1200
San Francisco, CA 94102
(Certified Mail)

This is the address provided on the Roster of Governmental Agencies maintained by the Clerk of the Court and posted on the Court's website.

DEFENDANT'S DEFAULT

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on May 24, 2023. Dckt. 12.

PLAINTIFF-DEBTOR'S MOTION FOR DEFAULT JUDGMENT

Plaintiff-Debtor's Motion requests entry of default judgment on the following grounds:

1. **Procedural Grounds:**
 - a. All defendants have been served and the proof of service was filed. Motion, Dckt. 17 at 2:8-10.
 - b. Defendant did not respond to the filed complaint. *Id.*
 - c. On May 24, 2023, Default was entered. *Id.* at 2:10-11.
 - d. Plaintiff-Debtor has not heard from Defendant regarding this proceeding. *Id.* at 2:22-24.
2. **Factual and Legal Grounds:**
 - a. "Excepting Plaintiff's debts to defendants from discharge would impose an undue hardship on Plaintiff under the three-prong Brunner test." Motion, Dckt. 17 at 3:5-8.

The court notes, Plaintiff-Debtor does not provide a legal citation or summary of what this "test" is nor any analysis relating to the case at hand.

- b. Plaintiff-Debtor cannot maintain a minimum standard of living. “No specific guidance has been given to determine the minimum standard of living, there has been some guidance in the 9th Circuit including ‘common sense’ and absence of discretionary funds.” Motion, Dckt. 17 at 3:9-12.

The court notes, Plaintiff-Debtor has failed to provide a legal citation as to the 9th Circuit guidance Plaintiff-Debtor is referencing.

- c. Plaintiff-Debtor will likely never be able to pay off the debt as their expenses continue to rise and skills decline. Plaintiff-Debtor has little marketable skills other than to sell insurance, and competes with the increases of technology which has caused Plaintiff-Debtor to be out of work. Motion, Dckt. 17 at 3:17-20. Debtor’s role as a single parent has hampered their ability to develop job skills and without support causes sever hardship. *Id.* at 3:20-23.

Plaintiff-Debtor’s Declaration, Dckt. 19, provides some factual testimony as to the facts stated above.

3. **Attorney’s Fees Provisions:**

- a. The promissory notes for the loans contain an attorney’s fees clause. Pursuant to California Civil Code § 1717, Plaintiff-Debtor, as prevailing party, is entitled to the attorney’s fees. Motion, Dckt. 17 at 4.

In reviewing Plaintiff-Debtor’s Declaration he also testifies (identified by paragraph number in the Declaration):

1. Plaintiff-Debtor believes her student loan obligation should be discharge.
1. Plaintiff-Debtor provides her legal conclusion that it causes an undue hardship.
1. Plaintiff-Debtor’s current monthly earnings are \$6,543.30.
1. Plaintiff-Debtor has a teenage daughter and he concludes that they can barely pay the bills.
2. Plaintiff-Debtor relied upon contributions from his mother to make the Chapter 13 Plan payments due to Debtor’s under and unemployment.
2. Plaintiff-Debtor states his conclusion that he will never be able to pay off any of his student loan debt.
2. Plaintiff-Debtor has little marketable skills, other than selling insurance.
3. Plaintiff-Debtor states his conclusion that she tried to repay her student loans.

4. Being a single parent limits Plaintiff-Debtor's ability to develop more job skills.
5. Plaintiff-Debtor cannot afford to go to college to increase her marketable skills.
8. Plaintiff-Debtor concludes that he cannot afford the student loans and "no one told me how hard it would be to repay them at the time they gave them to me."

Declaration; Dckt. 19.

Other than stating a dollar amount of monthly earnings, Plaintiff-Debtor does not provide any evidence of his current employment, his current gross income, his current expenses, and projected expenses going forward. Plaintiff-Debtor provides no evidence of the college education and degree(s) obtained by him. The financial listed on Supplemental Schedule I (Dckt. 148) is outdated as the vast majority of Debtor's income is stated as the family contribution.

On Schedule J filed in this case on October 26, 2017, Debtor states that the age of his daughter was 12 years. Dckt. 1 at 32. It being six years later, Debtor's daughter is now 18 years of age (or will soon be) and no longer a minor.

FAILURE TO STATE WITH PARTICULARITY AND PROVIDE FACTUAL AND LEGAL GROUNDS

Federal Rule of Civil Procedure 7(b) states,

"(b) Motions and Other Papers

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) **state with particularity the grounds for seeking the order;** and

(C) state the relief sought."

FED. R. CIV. P. 7(b) (emphasis added). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself. In addition, our Local Bankruptcy Rules require motions to state with particularity the factual and legal grounds therefore. Local Bankruptcy Rule 9014-1(d). Legal grounds for the relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability *Id.*

Plaintiff-Debtor has failed to provide legal grounds in support of their Motion.

First, Plaintiff-Debtor has failed to provide the court with reference to the federal rules governing default judgments. The court has not been presented any legal standard that entitles a party to entry of default judgment, the federal rules allowing entry for default judgment, and whether there are factors the court considers in exercising discretion to enter default judgment, and how they should apply here.

Second, Plaintiff-Debtor postulates that there are several tests and guidance under prevailing authority that courts should follow to determine whether student loans should be excepted from discharge. Plaintiff-Debtor fails to provide a citation or discussion of this authority. The court declines the opportunity to attempt to find what Plaintiff-Debtor is referring to, when Plaintiff-Debtor could have easily provided the court with these citations and analogize them to Plaintiff-Debtor's case.

Third, even if Plaintiff-Debtor were to provide the court with proper legal grounds entitling a debtor to relief, the court is missing key factual information to make their determination as to whether the student loan debt would be an undue hardship.

Plaintiff-Debtor has provided little information as to the nature of the loans. It is unclear to the court where Debtor obtained their education from, whether they completed any educational programs, such as an associate's degree or bachelor's degree, and whether the schooling has enhanced their earning ability.

Plaintiff-Debtor argues a large part of their failure to maintain loan payments is their minor child. Plaintiff-Debtor does not state how old their minor child is and how long the expenses for their minor child will persist throughout the repayment period.

Also, Plaintiff-Debtor has failed to address how they have made good faith efforts to repay the loans. Plaintiff-Debtor states they have attempted to maximize their income and minimize their expenses, and have negotiated repayment plans, but they have failed to provide details of these negotiations, and the extent, if any, Defendant was willing to adjust the payment plans.

Additionally, Plaintiff-Debtor claims they have limited disposable income, but has failed to address whether they sought alternatives to the standard repayment plan. The court notes, the United States has numerous options to debtors whose loan payments are high compared to their income.^{FN. 1.} Plaintiff-Debtor has failed to detail whether Plaintiff-Debtor has sought relief of income-driven repayment plans that would make their loan payments more feasible, allowing them to make payments while maintaining a minimal standard of living.

FN. 1. See <https://studentaid.gov/manage-loans/repayment/plans/income-driven>.

August 24, 2023 Hearing

At the hearing, **XXXXXXXXXX**

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 Debtor Michael Everett Scallin (“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 for Entry of Default Judgment is continued to **xxxxxxxxxx**

FINAL RULINGS

2. [18-25851](#)-E-13
[DPC-7](#)

ROBERT HUNTER
Peter Macaluso

CONTINUED MOTION TO DISMISS
CASE
5-8-23 [[163](#)]

2 thru 6

Final Ruling: No appearance at the August 24, 2023 Hearing is required.

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, and Office of the United States Trustee on May 8, 2023. By the court’s calculation, 44 days’ notice was provided. 28 days’ notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

<p>The hearing on the Motion to Dismiss is continued to 11:00 a.m. on September 21, 2023.</p>
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The Chapter 13 Trustee, David Cusick (“Trustee”), seeks dismissal of the case on the basis that:

1. The debtor, Robert Paul Hunter (“Debtor”), is delinquent in Plan payments.

DEBTOR’S OPPOSITION

Debtor filed an Opposition on June 7, 2023. Dckt. 167. Debtor states there are two adversary proceedings, Case No.’s 22-02087 and 22-02088, and they have motions for entry of default judgment for both. the adversaries. Debtor expects the default judgment will allow them to avoid two deeds of trust and obtain a reverse mortgage to pay off the Plan. Declaration, Dckt. 168.

Debtor requests that the Trustee’s motion be denied or, in the alternative, continued for sixty (60) days to allow for resolution of the adversary proceedings.

DISCUSSION

Delinquent

Debtor is \$4,172.00 delinquent in plan payments, which represents multiple months of the \$1,900.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Based on the foregoing, cause exists to dismiss this case.

However, Debtor asserts that if they avoid the two deeds of trust subject to the adversary proceeding, they can obtain a reverse mortgage to complete the Plan. Debtor asserts the hearings on their Motions for Entry of Default Judgment are set for August 24, 2023. Upon review of the adversaries' dockets, no motions for entry of default judgment have been filed or set for hearing.

REQUEST FOR CONTINUANCE

On August 20, 2023, Debtor filed a request for continuance, as Debtor's Counsel is out of town and unavailable to attend the August 24, 2023 hearing. The court construes the document to be an *Ex Parte Motion* (as required by Fed. R. Bankr. P. 9013) to continue the hearing.

Upon consideration of the *Ex Parte Motion*, the court continues the hearing on the Motion to Dismiss to September 21, 2023 at 11:00 a.m.

The court shall issue an 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 the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), 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 September 21, 2023.**

3. [18-25851-E-13](#) **ROBERT HUNTER**
[22-2087](#)
CAE-1

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
9-1-22 [[1](#)]

HUNTER V. FILLMORE GROUP TRUST

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Unknown

Adv. Filed: 9/1/22
Summons Reissued: 9/15/22 [Dckt 6]
Answer: none

Nature of Action:
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 8/8/23 to be conducted in conjunction with the hearing on the Motion for Entry of Default Judgment.

<p>The Adversary Proceeding Status Conference is continued to 11:00 a.m. on September 21, 2023.</p>
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Final Ruling: No appearance at the August 24, 2023 Hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided.

The Proof of Service does not state that the Motion and supporting pleadings were served on Defendant. Rather, it states that the Summons was served by publication, pursuant to court order, Dckt. 15, on February 23, 2023, March 2, 2023, March 9, 2023, and March 16, 2023.

The Certificate of Service states that service was effectuated on July 3, 2023. The attestation states service by U.S. Mail, First Class, has been made to the address stated on the Deed of Trust and service has been made via email to lienservices@hotmail.com. However, the Attestation does not state the Motion was served by publication, like the Summons was.

Federal Rules of Civil Procedure Rule 5, as incorporated into Federal Rules of Bankruptcy Procedure 7005, governs service of pleadings and other papers, including a written motion or notice, appearance, demand, or offer of judgment, or similar paper. Federal Rule of Civil Procedure 5(a)(2) provides that no service is required on a party who is in default for failure to appear, stating:

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4

Moore's Federal Practice - Civil provides the following analysis of Federal Rule of Civil Procedure 5(a)(2)

[2] Party Failing to Appear Not Entitled to Receive Service

Parties who have never made an appearance in the proceeding (and thus are in default for failure to appear) are not entitled to notice or service under Rule 5.⁶ No affirmative duty is placed on the plaintiff or any other party in the proceeding to serve any pleading or paper on the party in default for failure to appear.⁷ Because a party in default for failure to appear is not entitled to service, any service on such a party is entirely gratuitous, so that a purported error in such service is necessarily harmless.^{7.1}

6.

No service under Rule 5 on party failing to appear. Fed. R. Civ. P. 5(a)(2).

7.

No service under Rule 5 on party failing to appear. Fed. R. Civ. P. 5(a)(2).

1st Circuit *Cutting v. Allentown*, 936 F.2d 18, 21 (1st Cir. 1991) (if defendant was served with summons and did not appear and file answer, plaintiff need not serve subsequent papers).

2d Circuit *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 126 (2d Cir. 1979) (service under Fed. R. Civ. P. 5 on party over whom court has no in personam jurisdiction is invalid); *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 541–542 (2d Cir. 1963) (court noted that Fed. R. Civ. P. 5(a)'s provision that “ ‘no service need be made on parties in default for failure to appear’ ... clearly intended to apply only to parties who have never made an appearance” (citing Moore's)).

5th Circuit *Baldwin v. Taishang Gypsum Co., Ltd. (In re Chinese-Manufactured Drywall Prods. Liab. Litig.)*, 742 F.3d 576, 593–594 (5th Cir. 2014) (amended complaint and motion for intervention were not required to be served on defendant in default for failure to appear because neither paper presented new claims for relief, so Fed. R. Civ. P. 5(a)(2) excused service and default judgment was not void).

7th Circuit *Cent. Ill. Carpenters Health & Welfare Trust Fund v. Con-Tech Carpentry, LLC*, 806 F.3d 935, 937 (7th Cir. 2015) (when defendant defaulted by failing to appear, service of subsequent motion papers was excused by Fed. R. Civ. P. 5(a)(2)).

10th Circuit *See Oklahoma Radio Assocs. v. FDIC*, 969 F.2d 940, 943 (10th Cir. 1992) (Fed. R. Civ. P. 4 required only if necessary for court to formally assert its jurisdiction over person).

D.C. Circuit *Barry v. Islamic Republic of Iran*, 437 F. Supp. 3d 15, 41 n.31 (D.D.C. 2020) (though Fed. R. Civ. P. 25(a)(3) provides for service on all parties of motion to substitute when party dies, particular defendant was in default for failure to appear, so Fed. R. Civ. P. 5(a)(3) applied and excused service on that defendant).

7.1

Error necessarily harmless. *E.g.*, *Cent. Ill. Carpenters Health & Welfare Trust Fund v. Con-Tech Carpentry, LLC*, 806 F.3d 935, 937 (7th Cir. 2015) (when defendant defaulted by failing to appear, service of subsequent motion papers was excused by Fed. R. Civ. P. 5(a)(2), so whether plaintiff served counsel or party was inconsequential).

Here, service of the summons was effectuated on Defendant by publication and Defendant did not respond, thus Defendant was in default for failing to appear. Therefore, it does not appear that a Rule 55 Default Judgment needed to be served to Defendant. Thus, failure to serve Defendant by publication does not make insufficient notice.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The hearing on the Motion for Entry of Default Judgment is continued to 11:00 a.m. on September 21, 2023.

REQUEST FOR CONTINUANCE

On August 11, 2023, Plaintiff filed a request for continuance, as Plaintiff's Counsel is out of town and unavailable to attend the August 24, 2023 hearing. The court construes the document to be an *Ex Parte Motion* (as required by Fed. R. Bankr. P. 9013) to continue the hearing.

Upon consideration of the *Ex Parte Motion*, the court continues the hearing on the Motion for Entry of Default Judgment to September 21, 2023 at 11:00 a.m.

The court shall issue an 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 the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), 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 for Entry of Default judgment is continued to **11:00 a.m. on September 21, 2023**.

5. [18-25851-E-13](#) **ROBERT HUNTER**
[22-2088](#)
CAE-1

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
9-1-22 [[1](#)]

**HUNTER V. PEACHTREE GROUP
TRUST**

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Unknown

Adv. Filed: 9/1/22
Summons Reissued: 9/15/22 [Dckt 6]
Answer: none

Nature of Action:
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:
Continued from 8/8/23 to be conducted in conjunction with the hearing on the Motion for Entry of Default Judgment.

<p>The Adversary Proceeding Status Conference is continued to 11:00 a.m. on September 21, 2023.</p>
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**HUNTER V. PEACHTREE GROUP
TRUST**

**MOTION FOR ENTRY OF DEFAULT
JUDGMENT AND/OR MOTION FOR
COMPENSATION FOR PETER G.
MACALUSO, PLAINTIFFS
ATTORNEY(S)
7-3-23 [33]**

Final Ruling: No appearance at the August 24, 2023 Hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided.

The Proof of Service does not state that the Motion and supporting pleadings were served on Defendant. Rather, it states that the Summons was served by publication, pursuant to court order, Dckt. 15, on February 23, 2023, March 2, 2023, March 9, 2023, and March 16, 2023.

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The court shall issue an 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 the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), 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 for Entry of Default judgment is continued to 11:00 a.m. on September 21, 2023.

Final Ruling: No appearance at the August 24, 2023 hearing is required.

Plaintiffs Martin Alberto Ortega and Maria Del Carmen Ortega (“Plaintiff”) and Defendant George Tedeschi, having filed a Stipulation to Set Aside Default and for Dismissal of Motion, on August 17, 2023, Dckt. 36; pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rules of Bankruptcy Procedure 7041; **the Motion for Entry of Default Judgment was dismissed without prejudice, and the matter is removed from the calendar.**

The Motion for Entry of Default Judgment is dismissed pursuant to the Stipulation of the Parties.

The court also vacates Defendant George Tedeschi default (Dckt. 16).

On August 17, 2023, Plaintiff-Debtors Martin and Maria Ortega and Defendant George Tedeschi filed their Stipulation to vacate Defendant’s default and dismiss Plaintiffs’ Motion for Entry of Default Judgment. Dckt. 36. The Stipulation provides that the deadline for filing an answer or other responsive pleading shall be no later than twenty-eight days after the order setting aside the default.

As provided in Federal Rule of Civil Procedure 41(a)(1)(A)(ii), the Parties to this Adversary Proceeding may stipulate to the dismissal of the Motion, with no order of the court required.

However, their “mere” stipulation that the default ordered by the court be vacated does not make that happen. Rather, the request for such an order must be made by Motion. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007.

The Pleading filed does not state that it is a motion requesting such relief, but merely an agreement between the parties. Federal Rule of Civil Procedure 55(c), incorporated into Federal Rule of Bankruptcy Procedure 7055, expressly provides that “The court may set aside an entry of a default for good cause shown”

Though the Parties to this Adversary Proceeding are represented by experienced counsel, it appears that this Stipulation has several clerical errors, i.e. failing to identify it as a Joint Motion and Stipulation to: (1) Dismiss the Motion For Entry of Default Judgment and (2) Vacate the Default Judgment. Considering the terms of the Stipulation and the good faith, hard work demonstrated by the Parties and their respective counsel, the court construes this Pleading to be an *Ex Parte* Motion and Stipulation.

Defendant stating that he is actively prosecuting his defense and Plaintiff-Debtors agreeing to vacating the dismissal, good cause is shown for vacating the dismissal. As is well established, if a defendant demonstrates early in the lawsuit that they will prosecute their defense should not be deprived a day in court by virtue of a default.

The Motion to Vacate the Dismissal is granted.

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

ORDER VACATING DEFAULT OF DEFENDANT

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

The Ex Parte Motion and Stipulation for Vacating the Default of Defendant George Tedeschi, Dckt. 36, having been presented to the court, Plaintiff-Debtors Martin and Maria Ortega joining in the request and agreeing to a new deadline for filing an answer or responsive pleading to the Complaint, Plaintiff-Debtors and Defendant having dismissed (no order of the court required; Fed. R. Civ. P. 41(a)(1)(A)(ii), Fed. R. Bankr. P. 7041) the Motion for Entry of Default Judgment by Stipulation (Dckt. 36), and good cause appearing,

IT IS ORDERED that the Default of George Tedeschi entered on June 7, 2023, Dckt. 16, is vacated.

IT IS FURTHER ORDERED that Defendant George Tedeschi shall file an answer or other responsive pleading to the Complaint on or before September 28, 2023.