

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, August 26, 2021
Place: Department A – Courtroom #11
Fresno, California

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

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [20-11908](#)-A-13 **IN RE: BRIAN/STEPHANIE RICH**
[PBB-7](#)

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT
WITH ASPEN PROPERTIES GROUP, LLC
8-2-2021 [\[90\]](#)

STEPHANIE RICH/MV
PETER BUNTING/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was filed and served on at least 21 days' notice prior to the hearing date pursuant to Federal Rule of Bankruptcy Procedure 2002 and Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Brian Wayne Rich and Stephanie Lynn Rich (together, "Debtors"), the chapter 13 debtors, move the court for an order pursuant to Federal Rule of Bankruptcy Procedure 9019, approving the compromise and settlement of the adversary proceeding commenced by Debtors against Aspen Properties Group LLC ("Aspen"), adv. proc. no. 21-01003 ("Adversary Proceeding"). Doc. #90; Ex. A, Doc. #93.

Debtors commenced the Adversary Proceeding against Aspen objecting to claims filed by Aspen on the grounds that the claims overstated the amount of the post-petition principal and interest payments due. Decl. of Peter B. Bunting, Doc. #92. The complaint in the Adversary Proceeding also objected to Aspen's claims of attorney's fees and requested injunctive relief. Id. Aspen and Debtors have arrived at a proposed settlement, filed on the docket as Exhibit A, Doc. #93. The proposed settlement voids all claims filed by Aspen in the chapter 13 case except for amended Claim 1 filed on September 29, 2020. Id. Under the settlement, each party is responsible for its own costs and fees and Aspen's claim for attorney's fees in the chapter 13 case is disallowed. Id.

On a motion by the chapter 13 debtor and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. Martin v. Kane (In re A & C Props.), 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988).

It appears from the moving papers that Debtors have considered the standards of A & C Properties and Woodson. Doc. ##92, 93. Save for amended Claim 1, all of Aspen's claims will be determined void. Amended Claim 1 sets forth post-petition monthly payments at \$248.72. Further litigation will not increase benefits to Debtors, the bankruptcy estate, or any party in interest. The issues presented in the Adversary Proceeding are not complex and are reflected by the settlement agreement. The court concludes that the Woodson factors balance in favor of approving the compromise, and the compromise is in the best interests of the creditors and the estate.

Accordingly, the motion is GRANTED, and the settlement of the Adversary Proceeding is approved. Debtors are authorized, but not required, to execute any and all documents necessary to satisfy the terms of the proposed settlement agreement.

2. [21-10941](#)-A-13 **IN RE: LINDA HOGAN**
[SAH-2](#)

MOTION TO CONFIRM PLAN
6-30-2021 [[31](#)]

LINDA HOGAN/MV
SUSAN HEMB/ATTY. FOR DBT.
STIPULATION

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). On August 12, 2021, the chapter 13 trustee submitted a stipulation signed by the chapter 13 trustee, the debtor, and the debtor's counsel. Doc. #45. The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Pursuant to the stipulation, the order confirming the plan will strike the nonstandard provision decreasing plan payments beginning month 13 and will provide for the monthly payments of \$976.04 to continue for 60 months. The dividend to general unsecured creditors will increase from 0% to 13.98%.

This motion is GRANTED. The confirmation order shall be consistent with the stipulation filed August 12, 2021, Doc. #45.

MOTION FOR COMPENSATION FOR NEIL E. SCHWARTZ, DEBTORS ATTORNEY(S)
7-14-2021 [\[20\]](#)

NEIL SCHWARTZ/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

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

Neil E. Schwartz ("Movant"), counsel for Brandi Yuvonne Thresher ("Debtor"), the debtor in this chapter 13 case, requests allowance of interim compensation in the amount of \$5,700.00, and reimbursement for expenses in the amount of \$411.00 for services rendered from April 14, 2021 through July 14, 2021. Doc. #20.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). The court may allow reasonable compensation to the chapter 13 debtor's attorney for representing interests of the debtor in connection with the bankruptcy case. 11 U.S.C. § 330(a)(4). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) pre-petition consultation and fact gathering; (2) case administration; (3) original plan preparation and filing; and (4) fee application preparation. Doc. #22. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion on an interim basis.

This motion is GRANTED. The court allows interim compensation in the amount of \$5,700.00 and reimbursement for expenses in the amount of \$411.00. In light of a pre-petition retainer of \$1,000, the court authorizes \$5,111.00 to be paid in a manner consistent with the terms of the confirmed plan.

4. [20-12179](#)-A-13 **IN RE: BURRON/ANNA CUMMINGS**
[FW-4](#)

MOTION TO MODIFY PLAN
7-12-2021 [\[53\]](#)

ANNA CUMMINGS/MV
GABRIEL WADDELL/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

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

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

5. [18-11387](#)-A-13 **IN RE: DEVON BALDWIN**
[ALG-2](#)

MOTION FOR CONSENT TO ENTER INTO LOAN MODIFICATION AGREEMENT
7-14-2021 [\[32\]](#)

DEVON BALDWIN/MV
JANINE ESQUIVEL OJI/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not

materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Devon Cathleen Baldwin ("Debtor") seeks authorization to enter into a home loan modification agreement with Wells Fargo Home Mortgage ("Creditor"). Doc. #32; Ex. A, Doc. #35.

Debtor filed this chapter 13 bankruptcy case on April 10, 2018. Decl. of Debtor, Doc. #34. Debtor's confirmed chapter 13 plan pays a 100% dividend to unsecured creditors, and Debtor is current on plan payments. Id. Creditor holds a Class 4 claim that is paid directly by Debtor. The amount owing to Creditor by the first deed of trust is approximately \$210,607.91. Id. Creditor has proposed a home loan modification agreement that will forbear Debtor's \$21,953.92 arrearage. Id. The loan modification amount will be a partial claims mortgage, will subordinate the first deed of trust, and will be due November 1, 2042. Id. The monthly mortgage payment owed to Creditor under the first deed of trust will not change and Debtor will continue making payments to Creditor under the terms of the confirmed plan. Id.

This motion will be GRANTED. Debtor is authorized, but not required, to complete the loan modification with Creditor. Debtor shall continue making plan payments in accordance with the confirmed chapter 13 plan. Debtor must modify the plan if the payments under the modified loan prevent them from paying under the plan.

6. [19-11493](#)-A-13 **IN RE: KENNETH/LAVERNE BRISTER**
[TCS-4](#)

MOTION TO MODIFY PLAN
7-21-2021 [\[75\]](#)

LAVERNE BRISTER/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). On August 10, 2021, the chapter 13 trustee ("Trustee") filed an objection to the debtors' motion to modify the chapter 13 plan. Tr.'s Opp'n, Doc. #82. On August 19, 2021, Trustee withdrew his opposition in consideration of terms agreeable to the debtors and set forth in a stipulation and proposed order filed on August 19, 2021. Doc. ##84, 85. The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of

the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burke (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The confirmation order shall be consistent with the proposed order marked Exhibit A, Doc. #85.

7. [16-12253](#)-A-13 **IN RE: MARLENE LOPEZ**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
7-12-2021 [[74](#)]

MICHAEL MEYER/MV
PETER BUNTING/ATTY. FOR DBT.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: Movant withdrew the motion on August 16, 2021. Doc. #87.

1. [17-13859](#)-A-7 **IN RE: KYLE PENNINGTON**
[17-1091](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
12-16-2017 [[1](#)]

MARTINEZ V. PENNINGTON
KEVIN LITTLE/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to March 31, 2022, at 11:00 a.m.

ORDER: The court will issue an order.

Pursuant to the joint status conference statement filed on August 16, 2021 (Doc. #84), the status conference will be continued to March 31, 2022, at 11:00 a.m.

The parties shall file either joint or unilateral status report(s) not later than March 24, 2022.

2. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[21-1015](#) [CBC-6](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-14-2021 [[210](#)]

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part and denied in part.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The plaintiff filed written opposition on August 11, 2021. Doc. #224. The court is inclined to grant the motion to dismiss in part as to Counts 3, 4, and 5. The court is inclined to deny the motion to dismiss as to Counts 1 and 2.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopulos, Steven Altman ("Altman"), Cory Chartrand, and T2M Investments, LLC ("T2M"). Doc. #1. By the initial complaint, Plaintiff asserted ten causes of action against all defendants, primarily for fraud and breach of contract. After considering several motions to dismiss in

May, the only remaining defendants are T2M and Altman. On May 27, 2021, the court granted T2M's motion to dismiss in part and denied it in part and gave Plaintiff leave to amend causes of action against T2M for contract fraud, mortgage fraud, conspiracy to commit fraud, and contempt. Civil Minutes, Doc. #162; Order, Doc. #175. Plaintiff's amended complaint was to be filed by June 30, 2021. Doc. #175. Plaintiff's amended complaint ("Amended Complaint") was filed on July 1, 2021. Doc. #199.

The Amended Complaint includes amended causes of action for contract fraud, mortgage fraud, conspiracy to commit fraud, and contempt. Doc. #199. Although T2M's motion to dismiss was denied as to Plaintiff's cause of action for breach of contract, the Amended Complaint also includes an amended cause of action for breach of contract. Federal Rule of Civil Procedure ("Rule") 15 required Plaintiff to obtain either leave of court or the defendants' consent to amend the breach of contract claim. However, leave to amend should be freely given and the court will excuse Plaintiff's oversight in the name of judicial expediency. In that regard, the court will consider T2M's motion to dismiss the amended cause of action for breach of contract. Going forward, Plaintiff must obtain either leave of court or T2M's consent before further amending the complaint. The court will not consider any further amendment filed by Plaintiff unless Plaintiff complies with Rule 15 and LBR 7015-1.

The allegations in the Amended Complaint stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with T2M, over real property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The general scope of the Settlement Agreement called for Plaintiff to convey title of parcel 1 of the Property, APN 026-091-033 (the "Residence") to T2M and, in consideration, T2M was to release any claim or security interest a vacant lot, identified as parcel 2 of the Property, APN 026-091-032. Ex. A, Doc. #200.

T2M requests all claims against it be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. Having considered the Amended Complaint in its entirety, the court will:

1. Deny T2M's motion to dismiss Counts 1 and 2; and
2. Grant T2M's motion to dismiss Counts 3, 4, and 5 without leave to amend.

Pursuant to Federal Rule of Bankruptcy Procedure 7012, T2M shall file and serve an answer to Counts 1 and 2 of the Amended Complaint on or before September 9, 2021.

T2M's Objection to Plaintiff's Declaration

On August 18, 2021, T2M objected to the evidence presented by Plaintiff in connection with T2M's motion to dismiss the Amended Complaint. Doc. #231. These objections are overruled because the court has not considered any evidence outside of the Amended Complaint and exhibits thereto in ruling on T2M's motion to dismiss.

At this stage, the court only determines "whether, under any reasonable reading of the pleadings, [Plaintiff] may be entitled to relief, and [the court] must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Problems of proof are irrelevant. Id. Although Plaintiff's filings in connection with this motion are often captioned as declarations, for the purposes of the motion to dismiss, the court ignores all factual contentions

and considers the filings, filed by Plaintiff in pro se, as legal arguments rather than evidence.

Motion To Dismiss

T2M moves to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. "A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

T2M also seeks dismissal of the fraud allegations in the Amended Complaint because the fraud allegations do not satisfy the heightened pleading requirements of Rule 9(b). Rule 9(b) requires that "the circumstances constituting the alleged fraud 'be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)). While not identical, "[a] motion to dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim." Vess, 317 F.3d at 1107. Upon determining that "particular averments of fraud are insufficiently pled under Rule 9(b)," the bankruptcy court should disregard, or strip, those averments from the claim. Vess, 317 F.3d at 1105. "The court should then examine the allegations that remain to determine whether they state a claim" under "the ordinary pleading standards of Rule 8(a)." Id.

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

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

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). Here, the Amended Complaint specifically

refers to the Settlement Agreement, there is no dispute of the authenticity of the Settlement Agreement, and the Settlement Agreement was filed as an exhibit with the Amended Complaint. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss.

Count 1: Breach Of Contract

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

The Amended Complaint alleges sufficient facts to support each of the elements of breach of contract against T2M. Therefore, T2M's motion to dismiss Count 1 is DENIED.

Plaintiff alleges that Plaintiff, T2M, and Altman are parties to the Settlement Agreement. Plaintiff alleges that she performed under the Settlement Agreement by transferring the Residence to T2M via grant deed, as required by paragraph J(1) of the Settlement Agreement. Plaintiff alleges that T2M failed to fulfill its promises under the Settlement Agreement. Plaintiff generally alleges damages.

As in T2M's motion to dismiss the original complaint, T2M's motion to dismiss the Amended Complaint raises the argument that Plaintiff cannot show that she performed or that she is excused from performance. T2M points to language in the Settlement Agreement, referred to as the cooperation clause, which requires the parties to the Settlement Agreement to "cooperate fully with each other in the performance of this Agreement, and all documents and instruments executed in connection herewith, including executing any additional documents and instruments reasonable for or necessary to the full performance of this Agreement." Settlement Agreement p. 7, Ex. A, Doc. #200. T2M argues that Plaintiff did not perform under the Settlement Agreement because Plaintiff did not execute a deed in lieu of foreclosure which was necessary for T2M to sell the Residence. What T2M fails to account for is that the Settlement Agreement specifically required Plaintiff to transfer the Residence "by way of grant deed," which T2M admits Plaintiff did. Further, it is not obvious from the text of the Settlement Agreement that Plaintiff's assistance with T2M's sale of the Residence was part of the Settlement Agreement such that Plaintiff was contractually required under the cooperation clause to sign a different type of deed once T2M realized the grant deed was insufficient.

T2M is asking the court to do more than test the legal sufficiency of the allegations of the Amended Complaint. At this stage, the court is to accept all well-pleaded allegations as true.

Accordingly, T2M's motion to dismiss Count 1 breach of contract is DENIED.

Fraud Claims

"Fraud can be averred by specifically alleging fraud, or by alleging facts that necessarily constitute fraud (even if the word 'fraud' is not used)." Vess, 317 F.3d at 1105. Under California law, "[t]he elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., induce reliance; (4) justifiable reliance; and (5) resulting damage." Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 990 (2004). "In order to

satisfy these requirements, the plaintiff must 'actually [rely] on the alleged misrepresentations.'" Greenstein, 576 B.R. at 174 (quoting Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1256 (2009)) (internal punctuation omitted).

California recognizes a claim of promissory fraud as a "subspecies of fraud and deceit." Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996). "A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Id. (citations omitted). "However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of [a] promise, he will never reach a jury." Tenzer v. Superscope, 39 Cal. 3d 18, 30-31 (1985) (stating the standard at summary judgment).

"[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1062 (2012).

Count 2: Contract Fraud

On May 27, 2021, the court granted T2M's motion to dismiss the original complaint in part and denied it in part. Doc. #175. The court granted Plaintiff leave to amend the causes of action for contract fraud and mortgage fraud, indicating that Plaintiff may be asserting a claim of promissory fraud based on the allegations that T2M fraudulently induced Plaintiff to enter into the Settlement Agreement. See Civil Minutes, Doc. #162.

Having reviewed the Amended Complaint, Plaintiff states a claim that is plausible on its face and that satisfies the heightened pleading standard of Rule 9(b). T2M's motion to dismiss Count 2 is DENIED.

Viewing the Amended Complaint as a whole, Plaintiff adequately sets forth a cause of action for promissory fraud. Plaintiff alleges that T2M promised to release the lien on the Property when T2M entered into the Settlement Agreement. Plaintiff alleges that she relied on T2M's promises to perform under the Settlement Agreement. Plaintiff alleges that T2M did not do what T2M promised to do because T2M never canceled the mortgage or released the liens on the Property. Plaintiff alleges that T2M never had the intent to perform as promised. Plaintiff alleges damages, for example Plaintiff vacated the Property, had to rent a place to live, and Plaintiff asserts monetary damages from being unable to use the Property.

T2M does not argue that Plaintiff's claim is not legally sufficient but rather that Plaintiff is the party that breached the Settlement Agreement. A motion to dismiss tests the legal sufficiency of a claim, it does not weigh the moving party's theory of the case and does not consider the plaintiff's likelihood of success at trial.

T2M's motion to dismiss Count 2 is DENIED.

Count 3: Mortgage Fraud

Many of the allegations specifically enumerated in Count 3 speak to Plaintiff's claim for fraud, and, for the purposes of T2M's motion to dismiss, have been incorporated into the court's ruling on Count 2. However, a portion of the allegations in Count 3 claim that T2M committed fraud, or continues to commit fraud, by making representations to the court and by asserting damages for Plaintiff's breach of contract in state court.

The court already has dismissed with prejudice allegations against T2M for statements that are protected by California's litigation privilege. See Civil Minutes, Doc. #162. To be clear, statements made in judicial or quasi-judicial proceedings (such as at a hearing or in a complaint) made by a defendant or a defendant's lawyer in order to achieve the defendant's objects of the litigations (for example, to recover damages or assert a claim for relief) and that have some logical relation to the action are protected under California law. See Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 824-25 (B.A.P. 9th Cir. 2009).

Count 3 fails to allege facts sufficient to support an independent claim of mortgage fraud. Additionally, it appears that mortgage fraud is a criminal charge and not a civil cause of action. See Cal. Penal Code § 532f.

Because the Amended Complaint fails to allege sufficient facts to support a claim for mortgage fraud, T2M's motion to dismiss Count 3 is GRANTED. Because amendment would be futile, Count 3 is DISMISSED WITH PREJUDICE.

Count 4: Conspiracy to Commit Fraud

Having reviewed the Amended Complaint, Count 4 must be dismissed with prejudice, and T2M's motion to dismiss Count 4 for conspiracy to commit fraud is GRANTED.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994).

Count 4 does not contain any allegations of fraud or of a conspiracy. Count 4 essentially restates Plaintiff's allegations of breach of contract. Further, the Amended Complaint does not allege that T2M should be held responsible as a joint tortfeasor for damages resulting from the acts committed by another party. Rather, the Amended Complaint alleges that T2M itself committed fraud directly. Because a party cannot conspire with itself, there is no conspiracy allegation against T2M.

Because the Amended Complaint fails to allege sufficient facts to support a claim for conspiracy to commit fraud, T2M's motion to dismiss Count 4 is GRANTED. Because amendment would be futile, Count 4 is DISMISSED WITH PREJUDICE.

Count 5: Contempt

Having reviewed the Amended Complaint, Count 5 must be dismissed with prejudice, and T2M's motion to dismiss Count 5 for contempt is GRANTED.

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

offset any such debt as a personal liability of the debtor[.]” 11 U.S.C. § 524(a) (2) .

Together, §§ 524(a) (2) and 105(a) authorize the court to impose civil contempt sanctions for violation of the discharge order. When a party acts in violation of a debtor’s discharge, the court may award the debtor “compensatory damages, attorneys fees, and [coerce] the offending creditor’s compliance with the discharge injunction.” See Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). Relatively mild, non-compensatory fines against the offending creditor may be necessary in some circumstances. Dyer, 322 F.3d at 1193-94.

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

The court previously granted Plaintiff leave to amend allegations of contempt. Doc. #162. At that time, the court explained that the discharge injunction does not prevent a creditor from collecting monies owed to the creditor from the collateral that secures the debt owed to the creditor. Doc. #162; In re Fontaine, 603 B.R. 94, 113 (Bankr. D.N.M. 2019). To the extent T2M sought to collect on T2M’s lien that was secured by the Property, T2M has not violated a discharge order.

The remaining allegations related to Count 5 do not allege contempt and, in large part, were already subject to T2M’s previous motion to dismiss the initial complaint. Doc. #162. As the court stated in the Civil Minutes on May 27, 2021, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases).

Because the Amended Complaint fails to allege sufficient facts to support a claim for contempt, T2M’s motion to dismiss Count 5 is GRANTED. Because amendment would be futile, Count 5 is DISMISSED WITH PREJUDICE.

Plaintiff’s Requests to Amend

In Plaintiff’s responses to T2M’s motion to dismiss, Plaintiff repeatedly requests that Plaintiff should be allowed to amend the Amended Complaint as necessary for the furtherance of justice. Doc. ##225, 224, 235, 236. On August 20, 2021, Plaintiff specifically stated that she should be allowed to amend her pleading to include allegations of trespass and mail fraud against T2M. Doc. #235. This request is denied.

“A court is within its discretion to refuse amendment and dismiss the complaint if it concludes that the pleading as amended could not withstand a motion to dismiss.” Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993). Were Plaintiff to amend her complaint to allege trespass and mail fraud against T2M, those allegations could not withstand a motion to dismiss.

Plaintiff alleges that T2M trespassed onto the Residence and tampered with Plaintiff’s mailbox. ¶ 7, Doc. #235. “[I]n order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land

of another, which interfered with the plaintiff's exclusive possessory rights." McBride v. Smith, 18 Cal. App. 5th 1160, 1174 (2018). Here, it is undisputed that Plaintiff conveyed title and possession of the Residence to T2M prior to filing this adversary proceeding and that Plaintiff does not have exclusive possessory rights over the Residence. T2M cannot trespass on land it owns and for which Plaintiff does not have exclusive possessory rights. Moreover, there is no civil right of action for mail fraud. Because Plaintiff would be unable to allege facts supporting a plausible claim for relief for either trespass or mail fraud, the court denies Plaintiff's request to amend her pleading to include allegations of trespass and mail fraud against T2M.

Before filing an amended pleading, Plaintiff must first request leave of court or obtain T2M's consent. In addition to complying with Rule 15, Plaintiff must comply with LBR 7015-1.

3. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[21-1015](#) [SSA-2](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
7-13-2021 [\[204\]](#)

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

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The plaintiff filed written opposition on August 11, 2021. Doc. #222. The court is inclined to grant the motion to dismiss all claims against Steven Altman.

Sylvia Nicole ("Plaintiff") is a chapter 13 debtor pro se and the plaintiff in this adversary proceeding. On March 8, 2021, Plaintiff initiated this adversary proceeding against defendants Martin Eliopoulos, Steven Altman ("Altman"), Cory Chartrand, and T2M Investments, LLC ("T2M"). Doc. #1. By the initial complaint, Plaintiff asserted ten causes of action against all defendants, primarily for fraud and breach of contract. After considering several motions to dismiss in May, the only remaining defendants are T2M and Altman. On May 27, 2021, the court granted Altman's motion to dismiss in part and denied in part and gave Plaintiff leave to amend causes of action against Altman for breach of contract, contract fraud, mortgage fraud, conspiracy to commit fraud, and contempt. Civil Minutes, Doc. #161; Order, Doc. #173. Plaintiff's amended complaint was to be filed by June 30, 2021. Doc. #175. Plaintiff's amended complaint ("Amended Complaint") was filed on July 1, 2021. Doc. #199.

The Amended Complaint includes causes of action for breach of contract, contract fraud, mortgage fraud, conspiracy to commit fraud, and contempt. Doc. #199. The allegations in the Amended Complaint stem from a Settlement Agreement and Release dated August 2019 ("Settlement Agreement") executed to resolve Plaintiff's dispute, primarily with co-defendant T2M, over real

property located at 1521 S. 7th Street, Los Banos, CA 93635 (the "Property"). The general scope of the Settlement Agreement called for Plaintiff to convey title of parcel 1 of the Property, APN 026-091-033 (the "Residence") to T2M and, in consideration, T2M was to release any claim or security interest a vacant lot, identified as parcel 2 of the Property, APN 026-091-032. Ex. A, Doc. #200.

Altman's Objection to Plaintiff's Declaration and Memorandum of Points and Authorities

On August 24, 2021, Altman objected to the declarations and memorandum of points and authorities filed by Plaintiff between August 20, 2021 and August 23, 2021. Doc. ##233-238. These objections are overruled because the court has not considered any evidence outside of the Amended Complaint and exhibits thereto in ruling on Altman's motion to dismiss, and the court has not considered Plaintiff's late-filed memorandum of points and authorities in ruling on Altman's motion to dismiss.

At this stage, the court only determines "whether, under any reasonable reading of the pleadings, [Plaintiff] may be entitled to relief, and [the court] must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996). Problems of proof are irrelevant. Id. Although Plaintiff's filings in connection with this motion are often captioned as declarations, for the purposes of the motion to dismiss, the court ignores all factual contentions and considers the filings, filed by Plaintiff in pro se, as legal arguments rather than evidence.

Improper Service

Altman first states that service of the Amended Complaint was not made properly. The proof of service filed by Plaintiff regarding the Amended Complaint states that service was made on Altman at the address 1600 G Street, #103, Modesto CA 95354. Doc. #203. Altman states that he has never resided at that address and requests the court to dismiss the Amended Complaint for improper service.

In response, on August 12, 2021, Plaintiff filed a certificate of service stating that the Amended Complaint had been served on Altman at 201 Needham Street, Modesto, CA 95354, the correct address as stated by Altman. Doc. #226.

Because the court is dismissing all claims against Altman with prejudice, the court determines that any service deficiency will not deprive Altman of due process if the court rules on the merits of Altman's motion to dismiss.

Jurisdiction

Altman next requests dismissal of the Amended Complaint because Plaintiff does not properly state jurisdiction. The Amended Complaint states that this is an adversary proceeding pursuant to Fed. R. Bankr. 7001, but does not designate a subsection. Altman does not state what legal authority requires the pro se Plaintiff to specifically identify the applicable subsection. Additionally, Altman argues that Plaintiff's statement that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) warrants dismissal because that subsection refers to preferences, which is not an issue in this adversary proceeding. Altman does not offer any legal authority explaining why the pro se Plaintiff's amended complaint should be dismissed for this reason.

Altman also includes arguments opposing Plaintiff's ability to claim a homestead exemption in the Property. This is not a proceeding to determine Plaintiff's rights to an exemption. Because the court is dismissing all claims against Altman with prejudice, Altman's request to dismiss the Amended Complaint based on Plaintiff's failure to assert jurisdiction particularly is denied.

Standing

Altman further argues that Plaintiff does not have standing to pursue claims related to the Property. Altman requests the Amended Complaint be dismissed. This request is denied. Plaintiff is a party to the Settlement Agreement.

Motion To Dismiss

Finally, Altman requests all claims against him be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. Having considered the Amended Complaint in its entirety, the court will GRANT Altman's motion to dismiss all counts without leave to amend.

Altman moves to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. "A motion under Rule 12(b)(6) tests the formal sufficiency of the statement of the claim for relief." Greenstein v. Wells Fargo Bank, N.A. (In re Greenstein), 576 B.R. 139, 171 (Bankr. C.D. Cal. 2017). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Rule 8(a). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

The Ninth Circuit has held consistently that "leave to amend should be granted unless the [trial] court determines that the pleading could not possibly be cured by the allegation of other facts." Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001) (quotations and citations omitted). "This approach is required by Federal Rule of Civil Procedure 15(a) which provides that leave to amend should be freely granted 'when justice so requires.'" Id.

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

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (citations omitted). However, "a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." Id. (quoting Townsend v. Columbia Operations, 667 F.2d 844, 848-49 (9th Cir. 1982)). Here, the Amended Complaint specifically refers to the Settlement Agreement, there is no dispute of the authenticity of the Settlement Agreement, and the Settlement Agreement was filed as an exhibit with the Amended Complaint. Therefore, the court may consider the Settlement Agreement in ruling on the motion to dismiss.

Count 1: Breach Of Contract

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

The Amended Complaint fails to allege sufficient facts to support each of the elements of breach of contract against Altman. Therefore, Altman's motion to dismiss the claim of breach of contract is GRANTED. Because amendment would be futile, Plaintiff will not be granted leave to amend.

Considering the Amended Complaint as a whole, the allegations for breach of contract against Altman are that Altman was a party to the Settlement Agreement, Altman prepared the Settlement Agreement, Altman, as counsel for T2M, communicated with Plaintiff regarding Plaintiff's performance under the Settlement Agreement, and that Altman, along with T2M, continues to refuse to perform under the Settlement Agreement.

The Amended Complaint does not state a claim for relief for breach of contract against Altman, and no amendment could cure the defect. Although Plaintiff alleges that Altman was a party to the Settlement Agreement, the Settlement Agreement itself does not identify or define Altman as a party. Additionally, none of Plaintiff's allegations of breach of the Settlement Agreement include Altman. Besides the allegation that Altman did not sign the Settlement Agreement, the allegations of failure to perform under the Settlement Agreement are all directed toward T2M. Altman has no rights or duties under the Settlement Agreement. Even if Altman failed to sign the Settlement Agreement as Plaintiff alleges, Altman's failure to sign the Settlement Agreement is not alleged to be, nor would it be, a substantial factor in causing Plaintiff's harm. Altman could not have breached the Settlement Agreement because Altman had no rights or obligations, and Plaintiff does not allege that Altman had any rights or obligations under the Settlement Agreement. See Thompson v. Ill. Dep't of Pro. Regul., 300 F.3d 750, 754 (7th Cir. 2002) (stating the rule that "where a plaintiff attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim.").

Accordingly, Altman's motion to dismiss Count 1 breach of contract is GRANTED. Count 1 for breach of contract against Altman is DISMISSED WITH PREJUDICE.

Fraud Claims

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

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

is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." Id. (citations omitted). "However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of [a] promise, he will never reach a jury." Tenzer v. Superscope, 39 Cal. 3d 18, 30-31 (1985) (stating the standard at summary judgment).

"[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." Beckwith v. Dahl, 205 Cal. App. 4th 1039, 1062 (2012).

Counts 2 and 3: Contract Fraud and Mortgage Fraud

On May 27, 2021, the court granted Altman's motion to dismiss the original complaint in part and denied it in part. Doc. #173. The court granted Plaintiff leave to amend the causes of action for contract fraud and mortgage fraud, indicating that Plaintiff may be asserting a claim of promissory fraud based on the allegations that T2M and/or Altman fraudulently induced Plaintiff to enter into the Settlement Agreement. See Civil Minutes, Doc. #161.

Having reviewed the Amended Complaint, Plaintiff fails to state a claim against Altman upon which relief may be granted and Altman's motion to dismiss Counts 2 and 3 is GRANTED. Because amendment would be futile, Plaintiff is not granted leave to amend.

Viewing the Amended Complaint as a whole, Plaintiff does not set forth a cause of action for fraud against Altman. In the Amended Complaint, Plaintiff alleges that Altman did not sign the Settlement Agreement before sending the Settlement Agreement to Plaintiff for her to sign and that Altman misrepresented the date that he signed the Settlement Agreement. However, these allegations are not connected with any fraudulent conduct of Altman nor could they be. Assuming for purposes of this motion that the allegations are true, Altman's failure to sign the Settlement Agreement before emailing the Settlement Agreement to Plaintiff is of no consequence: it is not a fraudulent misrepresentation, it did not induce detrimental reliance, and it caused no damages. Plaintiff's fraud allegations, like the breach of contract allegations, are focused on T2M, and Altman's failure to sign, and then alleged lie about signing, is not a part of the alleged fraud.

The remaining allegations against Altman also fail to set forth a claim for relief in fraud. This court has already dismissed with prejudice allegations against Altman arising from Altman's statements in, or connected with, court proceedings. See Civil Minutes, Doc. #161. Although Plaintiff alleges that Altman, along with T2M, never intended to perform under the Settlement Agreement, this fails to allege a fraudulent inducement because Altman had no obligations to perform under the Settlement Agreement. Said plainly, Altman never promised to do anything in the Settlement Agreement. Additionally, Plaintiff's allegations that Altman never intended to remove the mortgage after Altman and T2M took possession of the Property fail to state a claim because Altman could not have removed the mortgage since Altman had no interest in the Property. Neither was Altman ever in a position to take possession of the Property. Plaintiff did not convey the Residence to T2M and Altman; Plaintiff only conveyed the Residence to T2M. T2M's subsequent lawsuits against Plaintiff, as alleged in the Amended Complaint, likewise fail to involve Altman in the fraud. As to the named counts, it appears that mortgage fraud is a criminal charge and not a civil cause of action. See Cal. Penal Code § 532f.

Accordingly, Altman's motion to dismiss Counts 2 and 3 for Contract Fraud and Mortgage Fraud is GRANTED. Counts 2 and 3 against Altman are DISMISSED WITH PREJUDICE.

Count 4: Conspiracy to Commit Fraud

Having reviewed the Amended Complaint, Count 4 must be dismissed with prejudice, and Altman's motion to dismiss Count 4 for conspiracy to commit fraud is GRANTED. Because amendment would be futile, Plaintiff will not be granted leave to amend.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-11 (1994).

Count 4 does not contain any allegations of fraud or of a conspiracy. As stated above, this court has already disposed of allegations against Altman related to Altman's representation of T2M. Civil Minutes, Doc. #161. Allegations against Altman that stem from statements made in judicial proceedings are subject to California's litigation privilege. Id.; Nilsen v. Neilson (In re Cedar Funding, Inc.), 419 B.R. 807, 824-25 (B.A.P. 9th Cir. 2009).

Plaintiff alleges that Altman failed to require T2M to perform under the contract. The court is aware of no duty imposed on counsel that requires counsel to police their clients and ensure their clients perform their contractual obligations.

Because the Amended Complaint fails to allege sufficient facts to support a claim for conspiracy to commit fraud, Altman's motion to dismiss Count 4 is GRANTED. Because amendment would be futile, Count 4 is DISMISSED WITH PREJUDICE.

Count 5: Contempt

Having reviewed the Amended Complaint, Count 5 must be dismissed with prejudice, and Altman's motion to dismiss Count 5 for contempt is GRANTED.

The bankruptcy court has civil contempt powers pursuant to 11 U.S.C. § 105(a). Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003) ("Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction)."). Under § 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(2).

Together, §§ 524(a)(2) and 105(a) authorize the court to impose civil contempt sanctions for violation of the discharge order. When a party acts in violation of a debtor's discharge, the court may award the debtor "compensatory damages, attorneys fees, and [coerce] the offending creditor's compliance with the discharge injunction." See Walls v. Wells Fargo Bank, 276 F.3d 502, 507 (9th Cir. 2002). Relatively mild, non-compensatory fines against the offending creditor may be necessary in some circumstances. Dyer, 322 F.3d at 1193-94.

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

The court previously granted Plaintiff leave to amend allegations of contempt. Doc. #161. At that time, the court explained that the discharge injunction does not prevent a creditor from collecting monies owed to the creditor from the collateral that secures the debt owed to the creditor. Doc. #161; In re Fontaine, 603 B.R. 94, 113 (Bankr. D.N.M. 2019). To the extent T2M sought to collect on T2M's lien secured by the Property, T2M has not violated any discharge. To the extent Altman was legal counsel for T2M at that time, Plaintiff cannot state a claim for relief against Altman.

The remaining allegations related to Count 5 do not allege contempt and, in large part, were already subject to Altman's previous motion to dismiss the initial complaint. Doc. #161. As the court stated in the Civil Minutes on May 27, 2021, federal law does not recognize a right of action for damages resulting from fraud on the court, perjury, or the presentation of false evidence. Greenstein, 576 B.R. at 178 (collecting cases).

Because the Amended Complaint fails to allege sufficient facts to support a claim for contempt, Altman's motion to dismiss Count 5 is GRANTED. Because amendment would be futile, Count 5 is DISMISSED WITH PREJUDICE.

Conclusion

Accordingly, Altman's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is GRANTED WITH PREJUDICE. All claims against Altman are dismissed. No leave to amend is granted.

4. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[21-1015](#) [SSA-3](#)

MOTION TO STRIKE AND/OR MOTION TO DISMISS ADVERSARY PROCEEDING/
NOTICE OF REMOVAL, MOTION FOR SANCTIONS, MOTION/APPLICATION FOR
COMPENSATION FOR STEVEN S. ALTMAN, DEFENDANTS ATTORNEY(S)
7-30-2021 [\[216\]](#)

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

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE. The motion and related pleadings as filed do not comply with the Local Rules of Practice ("LBR"). LBR 9014-

1(f)(2)(A) states that the procedure set forth in 9014-1(f)(2) "shall not be used for a motion filed in connection with an adversary proceeding." This motion was filed and served pursuant to LBR 9014-1(f)(2). The court urges counsel to review the local rules in order to be compliant in future matters. The rules can be accessed on the court's website at <http://www.caeb.uscourts.gov/LocalRules.aspx>.