

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement  
Fresno Federal Courthouse  
2500 Tulare Street, 5<sup>th</sup> Floor  
Courtroom 11, Department A  
Fresno, California

**PRE-HEARING DISPOSITIONS**

**DAY: WEDNESDAY**  
**DATE: SEPTEMBER 9, 2015**  
**CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

**GENERAL DESIGNATIONS**

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

**COURT'S ERRORS IN FINAL RULINGS**

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [13-17712](#)-A-13 RUBEN OLVERA AND GLORIA PRETRIAL CONFERENCE RE: AMENDED  
[14-1133](#) CHAVEZ COMPLAINT  
STRAIN V. VALENCIA 1-20-15 [[14](#)]  
PETER FEAR/Atty. for pl.  
RESPONSIVE PLEADING

**No tentative ruling.**

2. [15-10635](#)-A-7 JOHN JANDA STATUS CONFERENCE RE: AMENDED  
[15-1084](#) COMPLAINT  
PICART ET AL V. JANDA ET AL 7-20-15 [[7](#)]  
HECTOR PICART/Atty. for pl.  
RESPONSIVE PLEADING

**No tentative ruling.**

3. [14-15952](#)-A-7 AUSTREBERTO MAGANA CONTINUED STATUS CONFERENCE RE:  
[15-1059](#) COMPLAINT  
HAWKINS V. MAGANA 5-12-15 [[1](#)]  
ROBERT HAWKINS/Atty. for pl.

**No tentative ruling.**

4. [14-15952](#)-A-7 AUSTREBERTO MAGANA MOTION FOR ENTRY OF DEFAULT  
[15-1059](#) RHT-1 JUDGMENT  
HAWKINS V. MAGANA 8-6-15 [[16](#)]  
ROBERT HAWKINS/Atty. for mv.

### **Final Ruling**

**Motion:** Entry of Default Judgment

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Denied without prejudice

**Order:** Civil minute order

### **DEFAULT JUDGMENT**

#### Procedural Background

The trustee moves for entry of default judgment in this case. Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). Defendant has failed to plead or otherwise defend in this matter. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

### Insufficient Grounds Pleaded for Revocation of Discharge

Although the complaint does not specify the specific statutory subsection and paragraph, the court construes the complaint as seeking relief under § 727(d)(2). This statutory provision allows for revocation of discharge if "the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and *knowingly and fraudulently* failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee." 11 U.S.C. § 727(d)(2) (emphasis added). Accepting the trustee's factual allegations in the complaint as true, the court cannot find that a revocation of discharge is justified.

First, the complaint states that Defendant *knowingly and fraudulently* failed to deliver or surrender copies of his 2014 Federal and state tax returns. This allegation is conclusory. Further, the complaint lacks sufficient factual detail from which the court can conclude that Defendant's failure to deliver or surrender his tax returns was do. "For purposes of a § 727(d)(2) revocation, the debtor's conduct must be both 'knowing' and 'fraudulent.' This requires *actual fraudulent intent*; 'constructive' fraud will not suffice." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 22:1773, at 22-215 (rev. 2014). Such intent may be inferred from the surrounding circumstances. *Id.* From the complaint, however, there are insufficient "surrounding circumstances" from which the court can infer fraudulent intent of Defendant. From the facts alleged, many explanations might be inferred from the Defendant's failures. Defendant's failure may have resulted from forgetfulness or lack of knowledge. Defendant's failure to deliver refunds may have resulted from the Defendant's having never received them.

Second, the complaint alleges the failure to deliver *tax returns*. The prove-up declaration alleges the failure to deliver or surrender *tax refunds*. Although they are related, they are not the same. Further, the complaint does not affirmatively allege that the Defendant actually received possession, custody or control of such tax refunds. In short, the complaint's allegation does not show that the Defendant failed to deliver or surrender "property" to the trustee.

### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

The trustee's motion for entry of default judgment has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

5. [14-15856](#)-A-7 SOHIL ESCHEIK  
[15-1029](#)  
NEXTGEAR CAPITAL, INC. V.  
ESCHEIK  
MATTHEW QUALL/Atty. for pl.

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
3-16-15 [[1](#)]

**No tentative ruling.**

6. [14-10258](#)-A-7 HEATHER BRANDT  
[14-1136](#)  
MANFREDO V. BRANDT  
GABRIEL WADDELL/Atty. for mv.

MOTION FOR SUMMARY JUDGMENT  
8-12-15 [[30](#)]

### **Final Ruling**

Motion: Summary Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order, plaintiff shall lodge judgment

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

### **SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *Id.* Meeting this initial burden requires the moving party to show only "an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* The Ninth Circuit has explained that the non-moving party's "burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *Id.* "In

fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.*

A party may support or oppose a motion for summary judgment with affidavits or declarations that are "made on personal knowledge" and that "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)). "Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

Failure "to properly address another party's assertion of fact as required by Rule 56(c)" permits the court to "consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). If facts are considered undisputed because a party fails to properly address them, the court may "grant summary judgment if the motion and supporting materials—including facts considered undisputed—show the movant is entitled to it." Fed. R. Civ. P. 56(e)(3).

This is an adversary proceeding for turnover. In response to the plaintiff's previous motion for summary judgment the court issued partial findings under Rule 55(g), which foreclosed every issue except the question of whether the assets were community property under 11 U.S.C. § 541(a)(2). See Civil Minutes, June 26, 2015, ECF # 25; Order, filed July 1, 2015, ECF # 28. Plaintiff's citation to *In re Mantle*, 153 F.3d 1082 (9th Cir. 1998), and the declaration of Heather Brandt ¶¶ 2-3, filed August 12, 2015, ECF # 32, resolve that issue. Defendant has offered no opposition. The motion will be granted. The court will issue a civil minute order (below). Not later than 7 days after the civil minute order issues the trustee will lodge a judgment consistent with the findings herein.

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Trudi Manfredo's motion for summary judgment has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted.

7. [14-13458](#)-A-7 PEDRO ESPINOZA AND MARIA CONTINUED STATUS CONFERENCE RE:  
[15-1068](#) BLANCO COMPLAINT  
HAWKINS V. ESPINOZA ET AL 5-20-15 [[1](#)]  
ROBERT HAWKINS/Atty. for pl.  
RESPONSIVE PLEADING

**Final Ruling**

The adversary proceeding dismissed, the status conference is concluded.

8. [14-13458](#)-A-7 PEDRO ESPINOZA AND MARIA MOTION TO DISMISS ADVERSARY  
[15-1068](#) BLANCO RHT-1 PROCEEDING/NOTICE OF REMOVAL  
HAWKINS V. ESPINOZA ET AL 8-11-15 [[17](#)]  
ROBERT HAWKINS/Atty. for mv.

**Final Ruling**

**Motion:** Dismiss Adversary Proceeding

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Granted

**Order:** Prepared by the movant

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

For the reasons stated in the motion, the court grants the motion. This adversary proceeding is hereby dismissed.

9. [15-10972](#)-A-7 RUDY/JOAN PAREDES CONTINUED STATUS CONFERENCE RE:  
[15-1079](#) QUIROZ V. PAREDES COMPLAINT  
MICHAEL BERGER/Atty. for pl. 6-15-15 [[1](#)]

**Final Ruling**

The status conference is continued to October 27, 2015, at 10:00 a.m.

10. [15-10972](#)-A-7 RUDY/JOAN PAREDES MOTION FOR ENTRY OF DEFAULT  
[15-1079](#) JUDGMENT  
QUIROZ V. PAREDES 8-4-15 [[10](#)]  
MICHAEL BERGER/Atty. for mv.

**Final Ruling**

Motion: Default Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order, judgment lodged by plaintiff

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987).

Domestic support obligations are not dischargeable in Chapter 7. 11 U.S.C. § 523(a)(15). The motion will be granted. Not later than 10 days hence, the plaintiff will lodge a judgment consistent with the findings herein.

11. [13-16682](#)-A-7 RICHARD/BARBARA GRENINGER CONTINUED STATUS CONFERENCE  
[14-1111](#) AMENDED COMPLAINT  
SALVEN V. STRAIN 3-20-15 [[39](#)]  
ROBERT HAWKINS/Atty. for pl.

**No tentative ruling.**

12. [15-12482](#)-A-7 RAUL/ANGELA CORTEZ STATUS CONFERENCE RE: COMPLAINT  
[15-1090](#) 7-12-15 [[1](#)]  
CORTEZ V. DISCOVER BANK  
TIMOTHY SPRINGER/Atty. for pl.

**Final Ruling**

The matter is continued to October 21, 2015, at 10:00 a.m. to allow the plaintiff to prove up the default.

13. [15-10983](#)-A-7 TAMRA WOLFE CONTINUED STATUS CONFERENCE RE:  
[15-1063](#) COMPLAINT  
WOLFE V. DEUTSCHE NATIONAL 5-19-15 [[1](#)]  
TRUST COMPANY ET AL  
TAMRA WOLFE/Atty. for pl.

**Final Ruling**

The matter is continued to September 30, 2015, at 10:00 a.m.

14. [15-11390](#)-A-7 RICHARD CABELLO AND STATUS CONFERENCE RE: COMPLAINT  
[15-1086](#) KRISTI ROZA-CABELLO 7-6-15 [[1](#)]  
BLANK V. CABELLO ET AL  
CURTIS BLANK/Atty. for pl.

**Final Ruling**

The matter is continued to September 15, 2015, at 10:00 a.m.