UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, September 29, 2021
Place: Department B – Courtroom #13
Fresno, California

The court resumed in-person courtroom proceedings in Fresno ONLY on June 28, 2021. Parties may still appear telephonically provided that they comply with the court's telephonic appearance procedures. For more information click here.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

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

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

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

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

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

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

9:30 AM

1. 21-10300-B-13 **IN RE: DONALD/STEPHANIE SALKIN**
TCS-1

MOTION TO VALUE COLLATERAL OF VALLEY FIRST CREDIT UNION, TRIBUTE CAPITAL PARTNERS
8-26-2021 [54]

STEPHANIE SALKIN/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Donald Lee Salkin and Stephanie Austin Salkin ("Debtors") ask for an order valuing a 2018 Ford Explorer ("Vehicle") at $25,100. Doc. #54. The Vehicle is encumbered by a purchase-money security interest in favor of Valley First Credit Union ("Creditor").

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule").

Rule 3012(b) provides that a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 13 case. When the request is made in a chapter 13 plan, the plan must be served in the manner provided in Rule 7004. The court notes that the proposed chapter 13 plan is consistent with this motion and lists Creditor as a Class 2(B) creditor that includes claims reduced based on the value of collateral. Doc. #3. The original plan was filed within 13 days of the petition under Local Rule of Practice ("LBR") 3015-1(c)(1), which should have been served on the chapter 13 trustee ("Trustee"). LBR 3015-1(c)(2). LBR 3015-1(c)(3) then required Trustee to serve the plan on all creditors. The docket indicates that the chapter 13 plan was transmitted to the Bankruptcy Noticing Center for service (Doc. #9) and served on all creditors on February 21, 2021. Doc. #12. However, the BNC certificate of notice indicates that Creditor was notified by email. Creditor did not receive a copy of the chapter 13 plan by mail.

Creditor is listed in the master address list with the following address:

Valley First Credit Union
Attn: Bankruptcy
PO Box 1411
Modesto, CA 95353

Doc. #7. So, even if the BNC had mailed the chapter 13 plan to Creditor, the mailing address provided in the master address list would have been insufficient for Rule 7004 service.

Rule 3012(b) is silent as to whether a determination of value by motion or claim objection requires Rule 7004 service. However, Rule 9014(b) requires contested matters to be served upon the parties against whom relief is being sought pursuant to Rule 7004. "Valuations pursuant to 11 U.S.C. § 506(a) and [Rule] 3012 are contested matters and do not require the filing of an adversary proceeding." *In re Well*, 2009 Bankr. LEXIS 5679, at *4 (Cal. E.D. Bankr. May 7, 2009); *see also In re Johnson*, 2020 Bankr. LEXIS 1730, at *1 (Bankr. D.D.C. July 2, 2020) (denying motion to value a motor vehicle because the debtor did not affect proper service under Rule 7004, which is required under Rule 9014); *In re Kelley*, 2020 Bankr. LEXIS 1276, at **1-2 (Bankr. D.D.C. May 11, 2020) (reasoning that a motion to redeem a vehicle under § 722, which implicated § 506(a)(2) to the extent the vehicle was secured, initiated a contested matter requiring Rule 7004 service). Electronic service under Rule 9036 is precluded here because it "does not apply to any pleading or other paper required to be served in accordance with Rule 7004."

Rule 7004 allows service in the United States by first class mail on domestic or foreign corporations "by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process[.]" Rule 7004(b)(3).

Here, the certificate of service lists two attempts to serve Creditor:

1. President/CEO/Chief Financial Officer
   Valley First Credit Union
   1005 W. Orangeburg Ave.
   Modesto, CA 95350

2. Valley First CU c/o Tribute Capital Partners
   PO BOX 167762
   Irving Tx, 75016

Doc. #58. The first service attempt is to Creditor's primary mailing address, but the name of the President, CEO, or Chief Financial Officer is not included. There is a split in authority regarding whether service upon an unnamed officer is sufficient. *Addison v. Gibson Equip. Co. (In re Pittman Mech. Contractors)*, 180 B.R. 604 (Bankr. E.D. Va. 1995) ("Attn: President" is insufficient for Rule 7004(b)(3) service); *cf. Schwab v. Assocs. Commercial Corp. (In re C.V.H. Transp., Inc.)*, 254 B.R. 331 (Bankr. M.D. Pa. 2000) (finding that service directed to unnamed "officer, managing or general agent, or to any other agent authorized by appointment or by law to

receive service of process" was sufficient for Rule 7004(b)(3) service).

However, the Ninth Circuit has long required Rule 7004(b)(3) service to be directed to a named officer. *See In re Schoon*, 153 B.R. 48, 49 (Bankr. N.D. Cal. 1993) ("By addressing the envelope 'Attn: President' the debtors did not serve an officer, they served an *office*.") (emphasis in original); *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 98 (B.A.P. 9th Cir. 2004) ("Only if the notice is 'directed to a corporation and the attention of an officer or agent as identified in Rule 7004(b)(3),' can it be considered to have been received by a person who is charged with responding to service.") quoting *C.V.H. Transport*, 254 B.R. at 334.

The second service attempt was directed to the Rule 2002 notice address listed in Creditor's proof of claim. Claim #6. Providing notice under Rule 2002 is not sufficient when Rule 7004 service is required. *See In re Ass'n of Volleyball Prof'ls*, 256 B.R. 313, 319-20 (Bankr. C.D. Cal. 2000).

Therefore, this motion will be DENIED WITHOUT PREJUDICE because the service of the motion was insufficient. The proof of service does not indicate that the motion was mailed to a named officer of Creditor.

2. 18-11825-B-13 **IN RE: JESSICA RAMOS**
PLC-4

OBJECTION TO CLAIM OF RICHARD PARIS AND ORINE PARIS TRUSTEES, CLAIM NUMBER 3
9-14-2021 [106]

JESSICA RAMOS/MV
PETER CIANCHETTA/ATTY. FOR DBT.

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

DISPOSITION: Overruled without prejudice.

ORDER: The court will issue an order.

Jessica Ramos ("Debtor") objects to Proof of Claim No. 3 filed by Richard Paris and Orine Paris Trustees ("Creditor") filed on April 2, 2019 in the amount of $37,383.50. Claim #3-1.

This objection will be OVERRULED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule") and Local Rules of Practice ("LBR").

First, Rule 3007(a)(1) requires an objection to the allowance of a claim to be filed and served at least 30 days before any scheduled hearing or any deadline for the claimant to request a hearing.

LBR 3007-1(b) allows objections to proofs of claim to be filed on either 44- or 30-days' notice. LBR 3007-1(b)(1) provides the

procedure for objections filed on 44 days' notice. Any written opposition to objections on 44 days' notice shall be in writing and shall be filed and served by the responding party at least 14 days before the hearing. Objections filed on fewer than 44 days' notice still required the objection to be filed at least 30 days before the hearing. LBR 3007-1(b)(2). However, no party in interest shall be required to file written opposition and may instead present opposition at the hearing.

This objection was filed and served on September 14, 2021 and set for hearing on September 29, 2021. Doc. #110. September 14, 2021 is 15 days before the September 29, 2021 hearing, and therefore this hearing was set on less than 30 days' notice. The objection must be filed and served at least 30 days before the hearing.

Second, Creditor was served this objection at the following address:

> Larry Pars, Successor Trustee to the Richard Paris and Orin Paris Trust
> 338 W. Vermont
> Clovis, CA 93619

Doc. #110. Creditor was also sent a "courtesy copy" via email. *Id.* This is the same address listed in the schedules and master address list. Docs. #4; #10, *Sched. D*. Meanwhile, the notice address in Creditor's proofs of claim is listed as:

> Richard and Orin Paris Trustees
> 1446 E Austin Way
> Fresno CA 93704

Claims #2-2; #3-1.

Rule 3007(a)(2)(A) provides that a proof of claim objection and notice shall be served by first-class mail to the person most recently designated on the claimant's original or amended proof of claim as the person to receive notice, at the address so indicated.

LBR 3007-1(c) requires an objection to a proof of claim to be served on the claimant at the address on the proof of claim *and* the address listed in the schedules, if different from the claimant's address on the proof of claim. Since Creditor's proof of claim address is different than the address listed in the schedules, Creditor should have been served at both addresses.

The court notes that Creditor filed Proof of Claim No. 2 on September 25, 2018 that was amended on November 30, 2018 in the amount of $32,000.00. Claims #2-1; #2-2. Trustee is treating Claim #3 as an amendment to Claim #2, but both Claims #2 and #3 are inaccurate. To resolve those inaccuracies, Creditor and Debtor stipulated as to the amount of arrears owed in Claim #2 and Debtor filed this objection to Claim #3. Though Debtor's plan will be complete upon resolving the Creditor's proof of claim, Debtor must still properly serve Creditor on at least 30 days' notice. For the above reasons, this objection will be OVERRULED WITHOUT PREJUDICE.

3. 16-13640-B-13 **IN RE: JAMES/RACHAEL RAY**
DRJ-3

MOTION FOR COMPENSATION FOR DAVID R. JENKINS, DEBTORS ATTORNEY(S)
8-27-2021 [45]

DAVID JENKINS/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.

David R. Jenkins ("Applicant"), attorney for James Edward Ray, Jr., and Rachael Anne Ray ("Debtors"), requests final compensation in the amount of $2,575.00 under 11 U.S.C. § 330. Doc. #45. This amount consists solely of fees for reasonable compensation, with waived expenses, for services rendered from July 29, 2016 through July 12, 2021.

Debtors signed a statement of consent on August 23, 2021 indicating that they have received and read the fee application and approve the same. Doc. #47, Ex. D.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the 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 amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Section 3.05 of the confirmed chapter 13 plan provides that Applicant was paid $0.00 prior to the filing of this case and, subject to court approval, $2,575.00 shall be paid through this plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Docs. #7; #23. Applicant declares that he was paid $1,425.00 post-petition by third-party Arag Legal Insurance, which is disclosed in the

Disclosure of Attorney Compensation. Doc. #47, Ex. A; *cf.* Doc. #1, Form 2030.

This is Applicant's first and final request for compensation. Doc. #45. The source of funds for payment of the fees will be from the chapter 13 trustee in accordance with the confirmed chapter 13 plan.

Applicant provided 17.40 billable hours of legal services at a rate of $300 per hour, totaling $5,220.00, but Applicant has waived all fees exceeding **$2,575.00**. *Id.*; Doc. #47, Ex. A. Applicant also waived all expenses. *Id.*

11 U.S.C. § 330(a)(1)(A) & (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . .[a] professional person, or attorney" and "reimbursement for actual, necessary expenses."

Applicant's services included, without limitation: (1) advising Debtors about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition, schedules, and plan, and reviewing Debtors' financial information, the effects of exemptions and value of assets; (3) preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting documents to the trustee; (5) attending and completing the § 341 meeting of creditors; (6) confirming a chapter 13 plan; (7) prosecuting a motion to value real property (DRJ-2); and (8) preparing and filing this motion for compensation. Doc. #47, Exs. A, B, C. The court finds the services reasonable, actual, and necessary.

No party in interest timely filed written opposition. As noted above, Debtors have consented to the application. Accordingly, this motion will be GRANTED. Applicant will be awarded $2,575.00 in fees on a final basis pursuant to § 330. The chapter 13 trustee is authorized, in his discretion, to pay Applicant $2,575.00 in accordance with the chapter 13 plan for services rendered from July 29, 2016 through July 12, 2021.

4. 21-10443-B-13 **IN RE: JORGE LOPEZ**
MHM-4

MOTION TO DISMISS CASE
8-30-2021 [118]

MICHAEL MEYER/MV
DUSHAWN JOHNSON/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Federal Rules of Bankruptcy Procedure ("Rule").

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors and for failure to confirm a Chapter 13 Plan. Doc #118.

Jorge L. Lopez ("Debtor") did not file opposition.

The certificate of service listed the city for Debtor as Fresno, rather than Firebaugh as stated in the petition. Doc. #121. This appears to be a clerical error. The street number and name, as well as the state and zip code were correct, and Debtor's counsel was served at his correct address.

Rule 7004(b)(9) requires service on the debtor by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

Though Debtor's attorney was properly served pursuant to Rule 7004(g), Debtor still must be served in accordance with Rule 7004(b)(9). *See In re Johannsen*, 82 B.R. 547, 548 (Bankr. D. Mont. 1988) ("Rule 7004(b)(9) applies and proper service must be made by serving the Debtor and the attorney, both, not just either one. Numerous courts have held that service upon only one party is fatal.").

For the above reason, this motion will be DENIED WITHOUT PREJUDICE.

5. 19-10755-B-13 **IN RE: MICHAEL/CONSUELO PAVY**
SAH-1

MOTION TO MODIFY PLAN
8-9-2021 [32]

CONSUELO PAVY/MV
SUSAN HEMB/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.

Michael Pavy and Consuelo Pavy ("Debtors") seek confirmation of their Second Modified Chapter 13 Plan. Doc. #32.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the chapter 13 trustee, 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 amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

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

6. 20-12486-B-13 **IN RE: DOUGLAS/HEATHERLY MICHAEL**
FW-1

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR GABRIEL J. WADDELL, DEBTORS ATTORNEY(S)
8-17-2021 [59]

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.

Gabriel J. Waddell for Fear Waddell, P.C. ("Applicant"), attorney for Douglas Allan Michael and Heatherly Gene Michael ("Debtors"), requests interim compensation in the sum of $3,989.55 under 11 U.S.C. §§ 330 and 331. Doc. #59. This amount consists of $3,636.00 for reasonable compensation and $353.55 for reimbursement of actual, necessary expenses for services rendered from July 8, 2020 through August 10, 2021.

Debtors signed a statement of consent on August 16, 2021 indicating that they have read the fee application and approve the same. Doc. #61, Ex. E.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the 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 amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Section 3.05 of the confirmed plan provides that Applicant was paid $2,190.00 prior to the filing of this case and, subject to court approval, $8,000.00 shall be paid through this plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, and Fed. R. Bankr. P. 2002, 2016, and 2017. Docs. #2; #53. Applicant was paid $2,190.00 plus a filing fee of $310.00, for a total of $2,500.00. Doc. #59.

This is Applicant's first interim request for compensation. Doc. #59. The source of funds for payment of the fees will be from the chapter 13 trustee in accordance with the confirmed chapter 13 plan.

Applicant's office was paid **$2,500.00** in total pre-petition payments and provided 29.90 hours of legal services totaling **$6,136.00** in fees as follows:

FEE SUMMARY

Professional	Rate	Billed	Total
Gabriel J. Waddell (2020)	$320	12.30	$3,936.00
Gabriel J. Waddell (2021)	$330	1.30	+ $429.00
Katie Waddell (2021)	$230	1.00	+ $230.00
Kayla Schlaak (2020)	$100	14.20	+ $1,420.00
Kayla Schlaak (2021)	$110	1.10	+ $121.00
Total Hours & Fees		**29.90**	**= $6,136.00**
Pre-petition payment			**- $2,500.00**
Fees requested			**= $3,636.00**

Id., § 6; Doc. #61, Exs. B, C. Applicant also incurred $**435.92** in costs:

EXPENSES

Photocopying	$7.05
Postage	+ $14.00
Filing and CourtCall Fees	+ $332.50
Total Expenses	**= $353.55**

Ibid. These combined fees and expenses, after subtracting pre-petition payments, total **$3,989.55.**

11 U.S.C. § 330(a)(1)(A) & (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . .[a] professional person, or attorney" and "reimbursement for actual, necessary expenses."

Applicant's services included, without limitation: (1) advising Debtors about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition, schedules, and plan, and reviewing Debtors' financial information, the effects of exemptions and value of assets; (3) preparing the petition, schedules, statements, and chapter 13 plan; (4) preparing and sending § 341 meeting documents to the trustee; (5) attending and completing the § 341 meeting of creditors; (6) confirming a chapter 13 plan; (7) analyzing a stay relief motion (APN-1; APN-2); and (8) preparing and filing this motion for compensation. Doc. #61, Ex. A. The court finds the services and expenses reasonable, actual, and necessary.

No party in interest timely filed written opposition. As noted above, Debtors have consented to the application. Accordingly, this motion will be GRANTED. Applicant will be awarded $6,136.00 in fees on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to § 330. After deducting Applicant's pre-petition payments, the chapter 13 trustee is authorized, in his discretion, to pay Applicant $3,636.00 in accordance with the confirmed chapter 13 plan for services rendered and expenses incurred from July 8, 2020 through August 10, 2021.

7. 21-11590-B-13 **IN RE: JUAN PENA**

MOTION TO CONFIRM PLAN
8-24-2021 [17]

JUAN PENA/MV
LALEH ENSAFI/ATTY. FOR DBT.
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 will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Bankruptcy Rules ("LBR").

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e)(3), and LBR 9014-1(c), (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN. Here, the motion documents were not filed with a DCN in the caption linking them together. Docs. ##17-18; #20; #25. Each separate matter filed with the court must have a different DCN. All related papers to that matter, including the proof of service, must be filed separately and bear the same DCN. LBR 9014-1(c)(4).

Second, LBR 9014-1(d)(3)(B)(iii) requires the movant to notify respondents that they can determine (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a

tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at http://www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing.

Third, LBR 9004-2(c)(1) and LBR 9014-1(d)(4) require motions, notices, declarations, proofs of service, and other specified pleadings to be filed as separate documents. LBR 9004-2(e)(1) and LBR 9014-1(e)(3) require proofs of service to be filed as a separate document. LBR 9004-2(e)(2) states, "[c]opies of the pleadings and documents served SHALL NOT be attached to the proof of service filed with the court." Here, the motion, notice, declaration, and proof of service were combined into one document. Doc. #17. The amended notice and proof of service were also filed together, as was the response to the trustee's objection and its proof of service. Docs. #20; #25. Each of these pleadings must be filed separately and linked together with a DCN.

Fourth, the original and amended notices of hearing correctly state that written opposition is due not later than 14 days before the hearing. Docs. #17; #20. Both then state the deadline for filing written opposition is September 14, 2021. *Id.*, at 2, ¶¶ 15-16. This is incorrect. The hearing on this motion is scheduled for September 29, 2021, and 14 days before that date is September 15, 2021. The notices should not have misstated the opposition deadline.

For the above reasons, this motion will be DENIED WITHOUT PREJUDICE. The movant's next attempt should incorporate the concessions outlined in the response resolving the chapter 13 trustee's objections. Docs. #23; #25.

8. 18-11825-B-13 **IN RE: JESSICA RAMOS**
MHM-4

CONTINUED MOTION TO DISMISS CASE
8-10-2021 [101]

MICHAEL MEYER/MV
PETER CIANCHETTA/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted or continued.

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

This motion was continued to be heard with Jessica Ramos' ("Debtor") objection to a proof of claim in matter #2 above. PLC-4. Debtor was also directed to cure the remaining plan payment delinquency for months 36 and 1.

That objection will be overruled without prejudice because it was filed on less than 30 days' notice as required by Federal Rule of Bankruptcy Procedure ("Rule") 3007(a)(1) and Local Rule of Practice ("LBR") LBR 3007-1(b)(2). It was also not properly served on the claimant under Rule 3007(a)(2)(A) and LBR 3007-1(c).

Chapter 13 trustee Michael H. Meyer ("Trustee") previously asked the court to dismiss this case under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan and § 1307(c)(8) for termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan. Doc #101.

Debtor filed an *ex parte* motion for leave to file a late reply to Trustee's motion. Doc. #111. The motion was granted, allowing Debtor to file an untimely reply. Doc. #114. The reply stated that Debtor had resolved the difference in two claims filed by the claimant against her personal residence. Doc. #112. If the stipulation is approved, then Debtor will have completed the chapter 13 plan. Debtor believed she had paid the amounts required to complete the plan, but if there was a minor deficiency, she would pay it within 10 days of the hearing. Debtor requested the motion be denied or continued to September 29, 2021 to be heard in connection with the claim objection. This court continued the matter and entered the defaults of all parties except Debtor. Docs. #115; #117.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for "cause". "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan and § 1307(c)(8) for termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan.

The court has looked at the schedules and there appear to be insignificant assets in the estate to be administered for the benefit of unsecured claims. Doc. #10, *Scheds. A/B, C, D*. Debtor's real and personal property is fully exempted or encumbered, except for $150 in unexempted equity in a vehicle valued at $3,200. *Id.* Costs for the sale of the vehicle would exceed the net to the estate. Therefore, dismissal serves the interests of creditors and the estate.

However, if the final plan payment and delinquency were paid, then Debtor will have completed the plan. Debtor's objection was overruled for procedural reasons.

This matter will be called as scheduled to inquire whether Debtor has paid the plan delinquency. If not, this motion may be granted. If Debtor has cured the outstanding plan balance, this motion may be CONTINUED to November 17, 2021. This would give the Debtor 49 days from the hearing to file a conforming objection to claim.

11:00 AM

1. 20-12036-B-7 **IN RE: SANDRA SANCHEZ**
21-1016

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-30-2021 [1]

SALVEN V. SANCHEZ ET AL
ANTHONY JOHNSTON/ATTY. FOR PL.

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

DISPOSITION: Continued to October 27, 2021 at 11:00 a.m.

ORDER: The court will issue an order.

The parties resolved this adversary proceeding by stipulation filed in the underlying bankruptcy case on July 29, 2021. Bankr. Case No. 20-12036, ADJ-2. The court approved the stipulation on September 24, 2021. *Id.*, Doc. #67. Accordingly, this status conference will be continued to October 27, 2021 at 11:00 a.m. The continuance will accommodate the submission of an appropriate dismissal of the adversary proceeding.

2. 14-14343-B-13 **IN RE: RICHARD KELLEY**
21-1021 RH-2

MOTION FOR ENTRY OF DEFAULT JUDGMENT
8-27-2021 [21]

KELLEY V. LANDSKRONER
ROBERT HAWKINS/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part.

ORDER: The minutes of the hearing will be the court's findings and conclusions

Debtor Richard William Kelley ("Plaintiff") seeks entry of a judgment against Alexis Landskroner ("Defendant") for declaratory relief to effectuate the entry of discharge in his bankruptcy case. Doc. #21.

There is no opposition from Defendant.

This motion will be GRANTED IN PART.

Plaintiff's motion was filed on 28 days' pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of Defendant and any other non-responding parties to timely

file written opposition may be deemed a waiver of any opposition to the granting of this motion. Therefore, the defaults of the above-mentioned parties in interest are entered.

The United States District Court for the Eastern District of California has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) because this is a case arising under title 11. This court has jurisdiction to hear and determine this matter by reference from the District Court under 28 U.S.C. § 157(a). This is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A), (H).

Plaintiff requests the court take judicial notice of certain documents from the underlying bankruptcy case. Doc. #24. The court may take judicial notice of all documents and other pleadings filed in this adversary proceeding, the underlying bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Gmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, but not the truth or falsity of such documents as they relate to making findings of fact. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

The court entered Defendant's default on July 20, 2021. Doc. #13. Plaintiff was directed to apply for a default judgment and set a "prove up" hearing within 30 days of entry of default. *Id.* This motion was due not later than August 19, 2021. However, it was filed on August 27, 2021, which is eight days late. Doc. #27. The entry of default provides:

> Failure to comply with this order may result in the imposition of sanctions pursuant to Fed.R.Civ.P. 16(f), including, without limitation, dismissal of this adversary proceeding without further notice or hearing.

Doc. #13. Plaintiff filed a status report on July 23, 2021 acknowledging that Defendant's default order was entered on July 20, 2021. Doc. #16. Plaintiff stated that it will schedule a prove up hearing and apply for a default judgment within 30 days but failed to do so. *Id.*, ¶ 2. The court will inquire at the hearing the reasons that this motion was not timely filed.

Defendant is the servicer for or successor to Pensco Trust Company FBO Ronald D. Landskroner IRA No. LA14E ("Pensco"), which was a creditor in Plaintiff's chapter 13 proceeding as defined in 11 U.S.C. § 101(10). Doc. #25, Exs. A, B. Pensco held a loan secured by a second priority deed of trust against Plaintiff's real property located at 9050 East Browning Avenue, Clovis, California ("Property"). *Id.*; Doc. #23.

Plaintiff filed his chapter 13 petition on September 4, 2014. Bankr. Case No. 14-14343 ("Bankr.") Doc. #1. The chapter 13 plan provided that Pensco would be treated as a wholly unsecured creditor, Class 2 claims reduced to $0 based on the value of collateral. Doc. #24, RJN #1, §§ 2.09(d), 7.05. Defendant declared herself to be the current holder of the beneficial interest of the note as the sole

beneficiary of the IRA, who was the custodian for Pensco. Her husband, Ronald Landskroner, had passed away in 2012. Bankr. Doc. #25.

Defendant objected to the chapter 13 plan (RWR-1) and objected to Plaintiff's motion to value its collateral (PLF-1). Doc. #24, RJN #2, #4. The plan was confirmed by stipulation on condition that it must be modified within 30 days of the hearing on the motion to value and its related objection if the second deed of trust was not determined to be wholly unsecured. *Id.*, RJN #5.

The motion to value collateral was scheduled and, after evidentiary hearing, the court issued a memorandum decision on June 25, 2015 finding that Pensco's claim was wholly unsecured. *Id.*, RJN ##6-7.

On September 25, 2015, Pensco's deed of trust was assigned to Defendant, along with the note and other obligations. Doc. #25, Ex. B. It was recorded on September 29, 2015. Since then, Defendant holds all legal and beneficial right and interest and is subject to the obligations of the note and deed of trust.

Defendant completed his chapter 13 plan, and a discharge was entered on November 25, 2019. Doc. #24, RJN #8. Plaintiff then sought to have a reconveyance of the deed of trust filed by the Defendant as required by California Civ. Code ("Civ. Code") § 2941(a).

On December 6, 2019, Plaintiff's prior attorney sent a letter to Defendant's attorney requesting compliance with Civ. Code § 2941(a) and citing a basis for the request. Doc. #25, Ex. C. A second letter was sent on March 18, 2020 directly to Defendant with Substitution of Trustee and Full Reconveyance forms. *Id.*, Ex. D.

On June 6, 2020, Plaintiff's prior attorney spoke with Defendant by telephone. Plaintiff declares that Defendant indicated that she would not sign the documentation to file a reconveyance and demanded $10,000 to execute the documents for recording. Doc. #23. However, this is hearsay within hearsay and is not admissible. Fed. R. Evid. 801, 802.

Plaintiff filed this adversary proceeding seeking declaratory relief to effectuate the discharge order rendering the debt to Defendant as unsecured and allowing Plaintiff to benefit from the discharge. Doc. #1. Plaintiff seeks an order stating that the debt owed to Pensco based on the promissory note dated July 29, 2004 has been discharged. Further, Plaintiff asks that the lien created by the deed of trust filed July 30, 2004, and thereafter assigned to Defendant on September 29, 2015, is avoided, void, unenforceable, and not otherwise impair Property.

Plaintiff cites three causes of action:

1. Declaratory relief pursuant to 11 U.S.C. § 524 and Civ. Code § 2941(a) that the debt owed to Defendant is discharged, that the lien created by the deed of trust is of no value or effect, avoidable, and is avoided as a matter of law.

2. Intentional violation of the discharge injunction under 11 U.S.C. § 524(a)(2). Plaintiff seeks attorney fees and costs incurred to enforce the order entered June 25, 2015, and the discharge entered November 25, 2019. Plaintiff alleges that Defendant acted with requisite intent to deny Plaintiff the benefit of the discharge and acted purposely in failing to comply with C.C. § 2941(a).

3. Punitive damages for intentional violation of the discharge injunction.

Doc. #1.

This motion will be GRANTED IN PART. As to the first cause of action, the court issued a memorandum opinion and order on the motion to value collateral finding that Defendant's deed of trust was wholly unsecured. Under the confirmed chapter 13 plan, Defendant's claim was listed in Class 2(B) and was reduced to $0.00 based on the value of the collateral.

Plaintiff has completed the chapter 13 plan and the discharge of Defendant's debt has been entered. Defendant was required under Civ. Code § 2941 to execute a certificate of discharge within 30 days after satisfaction and deliver the certificate to Plaintiff but failed to do so. The court will enter judgment against Defendant in favor of Plaintiff for declaratory relief that the lien created by the deed of trust is of no value, avoidable, and avoided as a matter of law.

The motion will be DENIED IN PART WITHOUT PREJUDICE as to fees and costs because they were not specifically reserved in the motion. Any request for attorney fees shall be by seasonably brought motion in conformance with Fed. R. Civ. P. 54(d)(2) (as incorporated by Fed. R. Bankr. P. 7054).

The request for punitive damages will be DENIED WITH PREJUDICE because Plaintiff failed to provide admissible evidence in support of a punitive damages award.

3. 20-13855-B-11 **IN RE: MOHOMMAD KHAN**
20-1068 MK-16

AMENDED MOTION TO VACATE
9-24-2021 [81]

U.S. TRUSTEE V. KHAN
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Pro se debtor Mohommad Khan ("Defendant") moves to vacate the default entered on June 30, 2021 and set aside the judgment entered July 6, 2021. Doc. #77.

Tracy Hope Davis, United States Trustee for Region 17 ("Plaintiff") timely opposed. Doc. #79.

On September 24, 2021, Defendant filed an amended motion to vacate, setting the hearing for November 17, 2021 at 11:00 a.m. Doc. #81. Continuances without a court order are not permitted in the Local Rules of Practice ("LBR"). LBR 9014-1(j).

Since no written application for a continuance has been received by the court before this hearing, the request to continue this motion will be DENIED for failure to comply with LBR 9014-1(j).

Further, LBR 9004-2(c)(1), (d)(1), and LBR 9014-1(d)(4) require motions exhibits, and other specified pleadings to be filed as separate documents. LBR 9004-2(d)(2) and (3) require exhibits to include an exhibit index at the start of the document identifying by exhibit number or letter each exhibit with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets. Here, the motion and exhibits were combined into one document, not filed separately, not consecutively numbered, and did not include an exhibit index. Doc. #77.

The motion, notice, and exhibits do not appear to have been served as required by LBR 9014-1(e)(1) and Rules 7004 and 9014. No proof of service was filed pursuant to LBR 9014-1(e)(2) and (3). Nor was the amended motion served or noticed.

The above are grounds enough to deny the motion. When a bankruptcy court operates within its local rules, there is no abuse of discretion in application of those local rules. *In re Nguyen,* 447 B.R. 268, 281 (B.A.P. 9th Cir. 2011) (*en banc*).

Nowhere in the motion does Defendant establish the requirements of Federal Rules of Civil Procedure ("Civil Rule") 59(e) or 60 (incorporated by Federal Rules of Bankruptcy Procedure 9023 and 9024). A Rule 59(e) motion to alter or amend judgment requires one of the following: (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003). The Defendant fails to cite any authority or provide any legal argument for why the judgment should be vacated.

Meanwhile, Rule 60(a) pertains to corrections based on clerical mistakes, oversights, and omissions, which is not applicable. Rule 60(b) allows the court to relieve a party from an order for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) void judgment; (5) satisfied, released, or discharged judgment; (6) any other reason that

justifies relief. None of these are presented and Defendant's only ground would be under Rule 60(b)(6).

For relief under Rule 60(b)(6), Defendant must show that he suffered an injury as result of the judgment and that circumstances beyond his control prevented him from taking timely action to protect his interests. *United States v. Alpine Land & Reservoir, Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Rule 60(b)(6) is to be used sparingly "as an equitable remedy to prevent manifest injustice . . . only where extraordinary circumstances prevent a party from taking timely action to prevent or correct an erroneous judgment." *Ibid.*

Neither Rules 59 nor 60 may be used to take a "second bite at the apple." *Alexander v. Bleau (In re Negrete)*, 183 B.R. 195, 198 (B.A.P. 9th Cir. 1995), *aff'd*, 103 F.3d 139 (9th Cir. 1996). Defendant continues to repeat previous failed arguments and claims that have continually been raised through this proceeding and the underlying bankruptcy case.

The tardy *ex parte* "application" to continue the hearing is meritless and has no impact on this hearing. This is Mr. Kahn's motion. He requests a hearing in mid-November when he filed his "amended" motion. The facts upon which this motion is based occurred months ago. There is nothing presented to the court that would change this result if the hearing was held nearly two months later than now.

More fundamentally, this court has discretion to decide contested matters without a hearing provided there are no material facts outside the record. *Zurich Am. Ins. Co. v. Int'l Fibercom, Inc (In re Int'l Fibercom, Inc.)*, 503 F. 3d 933, 939 (9th Cir. 2007); *Tyler v. Nicholson (In re Nicholson)*, 435 B.R. 622, 636 (B.A.P. 9th Cir. 2010). The court here has read and considered both the motion and late filed pleadings and the arguments both supporting and opposing the motion. The court can decide the motion without going outside the record. See, *Lowenschuss v. Selnick (In re Lowenschuss)*, 170 F.3d 923, 929 (9th Cir. 1999).

Since there is no need for further hearing because of the state of the record on this motion, there is no need for an amended motion or a continued hearing.

For the above reasons, this motion will be DENIED.

4. 20-11296-B-7 **IN RE: KYLE/DEANNA MAURIN**
20-1044

PRE-TRIAL CONFERENCE RE: COMPLAINT
7-10-2020 [1]

KAPITUS SERVICING, INC. V.
MAURIN
MICHAEL MYERS/ATTY. FOR PL.
CONTINUED TO 12/15/2021 PER AMENDED ECF ORDER #60

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

DISPOSITION: Continued to December 15, 2021 at 11:00 a.m.

NO ORDER REQUIRED.

Due to ongoing negotiations and mediation scheduled on October 4, 2021, the parties stipulated to modify the scheduling order. Doc. #58. The stipulation was approved on September 27, 2021 and the court continued this pre-trial conference to December 15, 2021 at 11:00 a.m. Doc. #60.

5. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 MRH-3

MOTION TO COMPEL, AND/OR MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL, MOTION TO STAY
8-27-2021 [63]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL HOGUE/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

Medline Industries, Inc. ("Defendant") moves for an order to compel arbitration of all claims related to this adversary proceeding and dismissal of this case. Doc. #63. Alternatively, if the case is not dismissed, Defendant asks to stay the proceeding pending completion of arbitration.

Tulare Local Healthcare District ("Plaintiff" or "Debtor") timely opposed, arguing that Defendant waived its right to compel arbitration due to unreasonable delay in seeking to enforce the arbitration agreement. Doc. #83. Notwithstanding the waiver, Plaintiff insists the motion should be denied because application of

the arbitration agreement with respect to this preference action conflicts with the Bankruptcy Code.

Defendant replied, contending that it has not unreasonably delayed asserting its rights under the arbitration agreement and that Plaintiff has not been prejudiced. Doc. #90. Further, Defendant argues that the arbitration agreement does not conflict with the Bankruptcy Code.

This motion will be DENIED.

Defendant's motion was filed on 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

The United States District Court for the Eastern District of California has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) because this is a case arising under title 11. This court has jurisdiction to hear and determine this matter by reference from the District Court under 28 U.S.C. § 157(a). This is a "core" proceeding under 28 U.S.C. § 157(b)(2)(A), (F), and (O).

The court may take judicial notice of all documents and other pleadings filed in this adversary proceeding, the underlying bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Gmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

Background

Prior to filing bankruptcy, the Debtor executed a Distribution Service Agreement ("DSA") on May 1, 2013 with Defendant's predecessor in interest, Professional Hospital Supply, Inc. ("PHS"). Doc. #65, Ex. A. The DSA contains an arbitration clause with broad language requiring any and all disputes arising out of or relating to the agreement to be submitted to binding arbitration in Riverside County, California, and settled pursuant to the rules and procedures of the American Arbitration Association. *Id.*, § 27.

Debtor filed bankruptcy on September 9, 2017. Bankr. Case No. 17-13797 ("Bankr.") Doc. #1. On January 26, 2018, the court entered the order for relief. Bankr. Doc. #379. Plaintiff filed Proof of Claim No. 208 on April 9, 2018 in the amount of $328,123.58. Claim #208-1. Plaintiff's chapter 9 plan was confirmed on August 16, 2019. Doc. #1618. Under the plan, all executory contracts not assumed were deemed to be rejected, except for the Provider Agreements between the Plaintiff, Medicare, Medi-Cal, Medicaid, and the State of California. Doc. #1440, Art. II, § 2.2.3. The plan provided Plaintiff with all lawful powers and authority of the Bankruptcy Code pursuant to 11 U.S.C. §§ 901, 1123(b)(3). *Id.*, Art. V, § 5.4.2. Further, under the plan, the statute of limitation for Plaintiff to commence actions to recover preferential transfers under § 547 was January 27, 2020, which is two years after entry of the order for relief. *Id.*, § 5.4.3.

On November 4, 2019, Plaintiff filed this adversary proceeding alleging that Plaintiff made transfers totaling $507,128.12 to

Defendant within 90 days before the petition was filed. Doc. #1. Plaintiff's First Amended Complaint was filed on December 19, 2019. Doc. #11. Plaintiff cites three causes of action:

1. Avoidance of pre-petition preferential transfers within 90 days of the petition date under 11 U.S.C. § 547.

2. Recovery of avoided transfers pursuant to 11 U.S.C. § 550.

3. Disallowance of claims under 11 U.S.C. § 502(d).

Defendant filed an answer on January 17, 2021 and asserted twelve affirmative defenses. Doc. #25. Though arbitration was not among those defenses, Defendant provided notice that it intends to rely on any other defenses that become available or apparent during discovery and reserved its right to assert those defenses. The court issued a scheduling order on March 16, 2020. Doc. #28. The pre-trial conference scheduled for November 13, 2020 was vacated on October 6, 2020. Doc. #46. The court issued a second scheduling order on February 25, 2021. Doc. #56.

Defendant moved to extend the deadlines in the second scheduling order on August 9, 2021. MRH-2. That motion was heard on September 22, 2021, continued to September 29, 2021, and is the subject of matter #6 below.

In the interim, Defendant filed this motion on August 27, 2021.

On August 31, 2021, Plaintiff filed a motion for summary judgment that is scheduled for October 13, 2021. WJH-2. Defendant also has filed a motion to defer consideration of Plaintiff's motion for summary judgment. MRH-4.

Contentions

Defendant contends that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") requires the court to compel arbitration and dismiss or stay these proceedings until arbitration is finalized. Doc. #63. Defendant argues that the arbitration agreement is valid under California Law and applies to all of Plaintiff's claims because they arise from and relate to the DSA.

In response, Plaintiff argues that Defendant waived its right to compel arbitration due to its unreasonable delay in seeking to enforce the arbitration agreement. Doc. #83. Because Defendant has participated fully in litigation and waited two years since this proceeding began before asserting its right to arbitrate, Plaintiff argues that Defendant's motion should be denied. Plaintiff further insists that Defendant filed this motion in an effort to extend its time to conduct discovery in connection with its recent motion to extend the deadlines of this court's scheduling order. MRH-2.

Further, Plaintiff states that it will be prejudiced if forced to arbitrate now because it has produced thousands of pages of documents in discovery and intends to file a motion for summary

judgment, which has been time consuming, laborious, and could have been avoided had Defendant sought to compel arbitration sooner.

Lastly, Plaintiff argues that, notwithstanding Defendant's waiver, the motion should be denied because this is a preference action involving exclusively bankruptcy law. Due to the large number of creditors, their interests as affected by the confirmed chapter 9 plan, and the issues centralized in bankruptcy law, Plaintiff urges that this proceeding should be determined by the bankruptcy court and not an arbitrator.

In reply, Defendant urges the court to grant the motion because it has not waived its right to arbitrate. Doc. #90. Defendant argues that Plaintiff has not established that Defendant had knowledge of the arbitration clause, acted inconsistently with arbitration, or caused unreasonable delay, and has failed to establish that it will be prejudiced.

Defendant further argues that arbitration does not conflict with the Bankruptcy Code because the FAA is not inconsistent, and the likelihood of piecemeal litigation is unlikely since there is only one other adversary proceeding pending.

Discussion

To determine whether to compel arbitration, the court must consider (1) whether a valid arbitration agreement exists, and if so, (2) whether the agreement "encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys.*, 207 F.3d 1136-30 (9th Cir. 2000).

A party may waive its right to compel arbitration. *Shearline Boatworks, LLC v. Trost*, 820 F. Supp.2d 695. 698 (E.D. N.C. 2011). Waiver is determined by considering (1) the delay in seeking arbitration; (2) the extent of the movant's "trial-oriented activity"; and (3) the extent to which the respondent would be prejudiced by compelling arbitration. *Id.*; *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016) ("a party's extended silence and delay in moving for arbitration" may constitute waiver); *see also Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754, 759 (9th Cir. 1988).

The court declines to decide whether Defendant waived the right to compel arbitration. There may be evidence suggesting Defendant has waived arbitration here. But deciding whether there is a waiver is unnecessary to this ruling.

The court has discretion to decline to enforce an otherwise applicable arbitration provision when an arbitration would conflict the underlying purpose of the Bankruptcy Code of having bankruptcy law issues determined by bankruptcy courts, centralizing resolution of bankruptcy disputes, and protecting parties from piecemeal litigation. *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1022-23 (9th Cir. 2012).; *In re EPD Inv. Co., LLC*, 821 F.3d 1146, 1150 (9th Cir. 2016) (affirming lower court's denial to compel arbitration because the arbitration

provision was enforceable against the trustee, who was not bound by the agreement).

First, the threshold inquiry is whether the parties agreed to arbitrate. *In re Bethlehem Steel Corp.*, 390 B.R. 784, 789 (Bankr. S.D.N.Y. 2008). If so, the court must consider the scope of the arbitration agreement and whether it applies to this particular dispute. *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales, Practices & Prods. Liab. Litig.*, 828 F. Supp. 2d 1150, 1157 (C.D. Cal. 2011), citing *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1130 (9th Cir. 2008). If federal statutory claims are asserted, the court must consider whether Congress intended for those claims to be non-arbitrable. *Bethlehem Steel Corp.*, 390 B.R. at 789. Lastly, if some of the claims are arbitrable, then the court must decide whether to stay the remaining claims pending arbitration. *Id.*

The parties agreed to arbitrate under the DSA. Defendant was assigned PHS's rights under the agreement.

Next, the scope of the arbitration agreement is very broad because it covers "a dispute arising out of or relating to this Agreement, or the breach, termination, or validity of this Agreement," provided that those disputes have not been resolved or settled by the parties. Doc. #65, Ex. A. But that does not mean that this preference dispute is arbitrable.

This is not a contractual dispute. The preference action is not between Plaintiff and another contracting party. Rather, Plaintiff is exercising the rights of a trustee under 11 U.S.C. § 544 in accordance with the confirmed chapter 9 plan. "Generally, the right to compel arbitration derives from a contractual right, and '[t]hat contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration.'" *Toyota Motor Corp.*, 828 F. Supp. 2d at 1158, quoting *Britton v. Co-op Banking Group*, 4 F.3d 742, 744 (9th Cir. 1993).

This preference action is a statutory cause of action that would ordinarily belong "to the trustee, not to the bankrupt, and the trustee asserts them for the benefit of the bankrupt's creditors, whose rights the trustee enforces." *Bethlehem Steel Corp.*, 390 B.R. at 789, quoting *Allegaert v. Perot*, 548 F.2d 432, 435-36 (2d Cir. 1977). The claim is derivative of this bankruptcy and would not exist but for the filing of the chapter 9 petition and subsequent confirmation of the plan. Under the confirmed chapter 9 plan, "the Debtor shall have and may enforce all lawful powers and authority under the Bankruptcy Code to the extent of and consistent with its authority under the Plan." Doc. #1440, Art. V., § 5.4.2. But for the bankruptcy, the preference claims would not exist.

Since this proceeding consists of federal statutory claims under 11 U.S.C. §§ 502, 547, and 550, the court must determine whether Congress intended for these statutory claims to be non-arbitrable. Plaintiff's enforcement powers under these sections are derived from the confirmed chapter 9 plan under §§ 901 and 1123(b)(3). Doc. #1440, Art. V, § 5.4.2. The plan allows Debtor to commence actions to recover preferential transfers under § 547 until January 27,

2020, which it did here. Bankr. Doc. #1440, Art. V, § 5.4.3. Other courts have declined to compel arbitration where federal policy favors litigation and not arbitration. *Bethlehem Steel Corp.*, 390 B.R. at 795; *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989); *OHC Liquidation Tr. v. Am. Bankers Ins. Co. (In re Oakwood Homes Corp.)*, Nos. 02-13396 (PJW), 04-56928 (PBL), 2005 Bankr. LEXIS 429, at *14 (Bankr. D. Del. Mar. 18, 2005) ("[E]ven if §§ 547 and 548 were found to be claims derivative of the Debtor, this court would exercise its discretion in favor of declining to enforce the arbitration agreement as contrary to the objectives of the Bankruptcy Code[.]").

The FAA provides that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This mandate "may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987).

Since this is a core proceeding, the court must consider whether arbitrating the dispute would severely conflict with the Bankruptcy Code. *Bethlehem Steel Corp.*, 390 B.R. at 794. "If a severe conflict is found, then the court can properly conclude that, with respect to the particular Code provision involved, Congress intended to override the [FAA]'s general policy favoring enforcement of arbitration agreements." *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006); *EPD Inv. Co., LLC*, 821 F.3d at 1150 ("[I]n a core [Bankruptcy] proceeding . . . . a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code.").

A stated above, the contractual parties to the contract containing the arbitration clause here are not the same.

Enforcing the arbitration clause would conflict with the bankruptcy code here:

1. The issue before the court is uniquely a bankruptcy issue and unrelated to the contractual disputes which may arise under the DSA. This bankruptcy issue should be decided by a bankruptcy court.

2. A confirmed plan centralizes the resolution of these disputes. Creditors and other parties in interest have a large interest in keeping the pursuit of claims by the reorganized debtor in one forum. This is true for many reasons including the creditor's interests in knowing when distributions commence and what they can expect to receive.

3. Permitting arbitration to proceed would result in piece meal litigation which should be avoided. Defendant's contention that the few remaining pending litigations militate against this factor is

unpersuasive. Any number (including one or two) pending actions in different fora would be piece meal. When the underlying dispute here does not stem from the DSA, there is a strong interest in avoiding a separate forum for this action.

The court also finds that a severe conflict exists here. "[T]here is no absolute time limit on the arbitration, with the pace of proceedings resting on decisions of arbitrators." *Thorpe Insulation Co.*, 671 F.3d at 1023 (9th Cir. 2012). This is a chapter 9 case involving a large number of creditors and implementation of the chapter 9 plan could be hindered if forced to await the resolution of arbitration, which itself could further complicate and delay the resolution of this bankruptcy. The court has a strong interest in deciding this dispute rather than a non-bankruptcy arbitrator. The court will use its discretion to decline enforcement of the arbitration clause.

This matter will be called and proceed as scheduled. The court is inclined to DENY this motion.

6. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
20-1002

SCHEDULING CONFERENCE RE: COMPLAINT
1-14-2020 [1]

TULARE LOCAL HEALTHCARE
DISTRICT V. BAKER & HOSTETLER
RILEY WALTER/ATTY. FOR PL.
CONT'D TO 6/29/22 PER ECF ORDER #46

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

DISPOSITION: Continued to June 29, 2022 at 11:00 a.m.

NO ORDER REQUIRED.

Since this adversary proceeding requires a resolution to a related criminal matter now pending in the Tulare County Superior Court and a civil matter pending in Kern County Superior Court, the parties agreed to continue this scheduling conference. Doc. #44. On August 31, 2021, the court approved the stipulation and continued this scheduling conference to June 29, 2021 at 11:00 a.m. Doc. #46. Per the stipulation, the parties shall file a joint status report not later than June 1, 2022.

7. 14-14343-B-13 **IN RE: RICHARD KELLEY**
21-1021

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-24-2021 [1]

KELLEY V. LANDSKRONER
ROBERT HAWKINS/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar.

ORDER: The court will issue an order.

The court intends to enter the Defendant's default judgment in favor of Plaintiff in matter #2 above. Accordingly, this status conference will be dropped from calendar.

8. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123 MRH-2

CONTINUED MOTION TO EXTEND TIME
8-9-2021 [58]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL HOGUE/ATTY. FOR MV.

NO RULING.