

UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable Jennifer E. Niemann  
Hearing Date: Thursday, October 21, 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. [18-10405](#)-A-13     **IN RE: MARIA GUARDADO**  
[MHM-1](#)

MOTION TO DISMISS CASE  
9-20-2021    [[66](#)]

MICHAEL MEYER/MV  
THOMAS GILLIS/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WITHDRAWN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 October 5, 2021. Doc. #70.

2. [20-10509](#)-A-13     **IN RE: EDDIE CALDWELL**  
[TCS-4](#)

MOTION TO MODIFY PLAN  
7-30-2021    [[91](#)]

EDDIE CALDWELL/MV  
TIMOTHY SPRINGER/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.

MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY  
10-6-2021    [\[29\]](#)

ED PAINE/MV  
PATRICK KAVANAGH/ATTY. FOR MV.

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 14 days' notice prior to the hearing date pursuant to 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.

Relief from Stay as to the Residence

Brynish Lee ("Debtor"), the chapter 13 debtor pro se, filed for relief under the Bankruptcy Code on September 16, 2021. Doc. #1. Ed Paine, Trustee of the Paine Family Trust ("Movant"), moves the court for an order determining that there is no automatic stay in place with respect to the eviction of residential real property located at 7805 Dos Rios, Bakersfield, California (the "Residence") because Movant obtained a pre-petition judgment of possession. Doc. #29; see 11 U.S.C. § 362(d)(22). Alternatively, Movant requests relief from the automatic stay with respect to the Residence for cause under § 362(d)(1) with respect to an unlawful detainer action commenced by Movant with respect to the Residence, Case No. BCL-21-014110, Superior Court of California, County of Kern (the "Residence Action"). Doc. #29.

Turning first to Movant's request for an order determining that no automatic stay is in place under § 362(b)(22) with respect to the Residence, such a determination requires this court find that Movant possesses a final judgment of possession. 11 U.S.C. § 362(b)(22); Nicholson v. IFG Timber, LLC (In re Nicholson), BAP No. ID-18-1161, 2019 Bankr. LEXIS 1921 at \*6-10 (B.A.P. 9th Cir. June 18, 2019). However, Movant's Exhibit C, which Movant claims to be a judgment against Debtor for possession of the Residence, is simply a request for a clerk's judgment submitted by Movant that is not signed by a deputy clerk of the state court. Ex. C, Doc. #35. Accordingly, based on the evidence submitted, the court cannot determine that the automatic stay does not apply with respect to the Residence.

Turning to Movant's alternative request for relief from the automatic stay under § 362(d)(1), 11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

The court finds that "cause" exists to lift the stay to allow the conclusion of the Residence Action and permit Movant to obtain possession of the Residence should Movant prevail in the Residence Action. Movant commenced an unlawful detainer action against Debtor regarding the Residence on July 27, 2021. Ex. B, Doc. #35. The Complaint seeks possession of the Residence based on a 60-day notice to quit the Residence because Movant took the Residence off the rental market, pursuant to California Civil Code § 1946.2. Ex. B, Doc. #35.

In the bankruptcy proceedings, Debtor filed an Initial Statement About an Eviction Judgment Against You (Official Form 101A), certifying that Debtor deposited with the bankruptcy court clerk the rent that would be due to Movant during the 30 days after filing the bankruptcy petition. Doc. #10. On September 27, 2021, the bankruptcy clerk filed a note on the bankruptcy docket stating that Debtor did not deposit any rent as required by Form 101A. See Doc. Entry *Rental Deposit Procedure*, Sept. 28, 2021. On October 14, 2021, Debtor filed a Statement About an Eviction Judgment Against You (Official Form 101B), certifying that Debtor paid all amounts owed to Movant as stated in the judgment for possession within the 30 days after filing the bankruptcy petition. Doc. #42.

However, possession of the Residence is sought by Movant not based on unpaid rent; rather, possession is based on the 60-day notice to quit the Residence because Movant took the Residence off the rental market. Ex. B, Doc. #35. Accordingly, even though Debtor has filed pleadings in the bankruptcy court attesting to payment of unpaid amounts due to Movant, under California Civil Code § 1946.2, Movant may terminate the tenancy for "just cause," which includes withdrawal of the residential real property from the rental market. Cal. Civ. Code § 1946.2(a), (b)(2)(B). This may permit Movant to gain possession of the Residence even if Debtor has not defaulted in the payment of rent, but that issue is more appropriately determined by the state court in the Residence Action if it has not done so already.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to pursue the Residence Action and proceed under applicable non-bankruptcy law to enforce Movant's remedies to gain possession of the Residence should Movant prevail in the Residence Action. Movant does not seek, and the court is not authorizing, relief from the automatic stay to obtain or enforce a money judgment against Debtor with respect to the Residence. The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Debtor is in possession of the Residence, Movant no longer desires to use the Residence as a rental property, and the Residence Action is ongoing.

#### Relief from Stay as to the Commercial Property

Regarding a separate lease agreement, Movant seeks relief from the automatic stay for cause with respect to an unlawful detainer action commenced by Movant with respect to a commercial lot and adjacent vacant lot located at 517 H Street, Bakersfield, California and 513 H Street, Bakersfield, California, respectively (collectively, the "Commercial Property"), Case No. BCL-21-013545, Superior Court of California, County of Kern (the "Commercial Property Action"). Doc. #29.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

After review of the included evidence, the court finds that "cause" exists to lift the stay to allow the conclusion of the Commercial Property Action and

permit Movant to obtain possession of the Commercial Property should Movant prevail in the Commercial Property Action. Movant commenced the Commercial Property Action against Debtor on June 29, 2021. Ex. A, Doc. #35. The Complaint alleges Debtor has not paid rent due with respect to the Commercial Property from January 1, 2021. Ex. A, Doc. #35.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit Movant to pursue the Commercial Property Action and proceed under applicable non-bankruptcy law to enforce Movant's remedies to gain possession of the Commercial Property should Movant prevail in the Commercial Property Action. Movant does not seek, and the court is not authorizing, relief from the automatic stay to obtain or enforce a money judgment against Debtor with respect to the Commercial Property. The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Debtor is in possession of the Commercial Property, monthly rent on the Commercial Property is due as of January 1, 2021, and the Commercial Property Action is ongoing.

4. [18-13663](#)-A-13      **IN RE: ROUDNI/MELISSA HAROUN**  
[JRL-2](#)

MOTION TO MODIFY PLAN  
9-14-2021    [\[46\]](#)

MELISSA HAROUN/MV  
JERRY LOWE/ATTY. FOR DBT.  
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 after the hearing.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). Secured creditor Wilmington Savings Fund Society FSB As Trustee of Quercus Mortgage Investment Trust ("Creditor") opposes the debtors' motion to modify the chapter 13 plan. Doc. #53. The failure of other 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). Therefore, the defaults of the non-responding parties in interest are entered. This matter will proceed as scheduled.

The debtors filed their modified chapter 13 plan ("Plan") on September 14, 2021. Doc. #50. The Plan contains nonstandard provisions that the property securing Creditor's claim will be sold and the proceeds will satisfy Creditor's claim. Plan, Doc. #50. Creditor opposes the Plan because it fails to provide for post-petition monthly payments on the hope that the property will be sold in the future. Doc. #53.

Federal Rule of Bankruptcy Procedure 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." 11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof of claim filed under section

501, is deemed allowed unless a party in interest objects. Creditor filed its proof of claim on November 9, 2018. Claim 14.

Section 3.02 of the Plan provides that the proof of claim determines the amount and classification of a claim. Doc. #50. The Plan classifies Creditor in Class 1 which requires the trustee to pay all arrears and post-petition monthly payments. However, the Plan does not assert a monthly payment amount, but instead references the reader to see the non-standard provisions which state only that the debtors' residence will be sold with escrow closing within 60 days of the filing of the Plan. Doc. #50.

A chapter 13 debtor may sometimes provide for the sale of the debtor's property to pay a claim, but "bare assertions" that the debtor will sell the residence may not satisfy the feasibility requirement of § 1325(a)(6). In re Kincaid, 316 B.R. 735, 742 n.11 (Bankr. E.D. Cal. 2004). Under the Plan, the trustee will not send post-petition payments to Creditor, although Creditor is entitled to monthly payments from the trustee as a Class 1 creditor.

Creditor requests that confirmation of the Plan be denied, or alternatively that the Plan be amended to provide for post-petition payments paid by the trustee to continue for the remaining term of the Plan until the property is sold. Doc. #53.

The court is inclined to sustain Creditor's objection and deny confirmation of the modified Plan.

5. [19-14977](#)-A-13     **IN RE: JOSE/MARIA CHAVARRIA**  
[MAZ-4](#)

MOTION TO SELL  
9-17-2021    [\[76\]](#)

MARIA CHAVARRIA/MV  
MARK ZIMMERMAN/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 set for hearing on 28 days' notice as required by 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). Therefore, the defaults of the non-responding parties in interest are entered. This matter will proceed as scheduled to permit the debtors to supplement the record.

Jose L. Chavarria and Maria L. Chavarria (together, "Debtors"), the chapter 13 debtors, move to sell real property commonly referred to as 841 Fairway Avenue, Lemoore, CA 93245 (the "Property") free and clear of liens. Doc. #76. Debtors confirmed a second modified plan on February 17, 2021 (the "Plan"). Doc. #72, #75.

Regarding notice, Federal Rule of Bankruptcy Procedure ("Rule") 9014(b) requires a motion to sell free and clear of liens or other interests to be served "in the manner provided for service of a summons and complaint by Rule 7004." Debtors seek to sell the Property free and clear of the interests of Selene Finance LP. Doc. #72. Service of the motion to Selene Finance LP has not been shown to satisfy Rule 7004(b)(3) because the motion was not served on Selene Finance LP "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[.]" Fed. R. Bankr. P. 7004(b)(3). In any event, based on the proof of claim filed by Selene Finance LP on January 29, 2020, it appears that the creditor who actually holds the first deed of trust is U.S. Bank Trust National Association, not in its individual capacity but solely as Owner Trustee for VRMTG Asset Trust ("Bank"), and Selene Finance LP is only the authorized agent of Bank, not the holder of the first deed of trust. Claim #6. If that is the case, the motion does not name the actual party whose interests of which Debtors seek to sell the Property free and clear. Moreover, service of the motion on Bank does not comply with Rule 7004(h). In lieu of denying the motion on notice grounds, the court would be inclined to grant the motion free and clear of the interests of the first deed of trust holder if, prior to submitting an order granting the motion, Debtors can obtain the written consent of the first deed of trust holder to a sale of the Property free and clear of its lien. Alternatively, the court can grant the motion to sell, but not grant the motion free and clear of the interests of the first deed of trust holder.

Section 1303 gives the chapter 13 debtor "the rights and powers of a trustee" under § 363(b), (d), (e), (f), and (l). 11 U.S.C. § 1303. Debtors' Plan does not revest property of the estate in Debtors upon confirmation of the plan, so the Property remains property of the estate. Plan ¶ 6.01, Doc. #72.

Pursuant to § 363(b)(1), the chapter 13 debtor, after notice and a hearing, may "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Proposed sales under § 363(b) are reviewed to determine whether they are: (1) in the best interests of the estate resulting from a fair and reasonable price; (2) supported by a valid business judgment; and (3) proposed in good faith. In re Alaska Fishing Adventure, LLC, 594 B.R. 883, 887 (Bankr. D. Alaska 2018) (citing 240 N. Brand Partners, Ltd. v. Colony GFP Partners, L.P. (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996)).

Joint debtor Jose L. Chavarria states that Debtors received an offer from TDS Holdings LLC to sell the Property for \$315,000. Decl. of Jose L. Chavarria, Doc. #78. Jose Chavarria believes that the sale of the Property is in Debtors' best interest and in the best interest of the estate. The sale of the Property will result in payment in full to Selene Finance LP, the holder of the first deed of trust on the Property. Decl., Doc. #78. Debtors will use remaining proceeds to pay off creditors and/or reduce Plan payments. Decl., Doc. #78. Debtors expect to pay a real estate commission of \$3,150. Decl., Doc. #78. Jose Chavarria believes that the offer from TDS Holdings LLC is fair and reasonable and results from a fair price. Decl., Doc. #78.

The court finds that the sale of the Property is in the best interests of the estate resulting from a fair and reasonable price, supported by a valid business judgment, and proposed in good faith.

Although the motion is devoid of any citation to legal authority, it is styled as an application "to sell real property free and clear of lien." Doc. #76. In addition to the requirements of § 363(b), to sell property of the estate free and clear of liens Debtors must satisfy the requirements of 11 U.S.C. § 363(f).

Debtors may sell property under § 363(b) free and clear of any interest of an entity other than the estate only if: (1) applicable nonbankruptcy law permits the sale; (2) such entity consents; (3) the interest is a lien and the price at which the property is to be sold is greater than the aggregate value of all liens on the property; (4) the interest is in bona fide dispute; or (5) the entity could be compelled to accept a money satisfaction of the interest. 11 U.S.C. § 363(f).

Debtors believe that the Property is subject to a lien in favor of Selene Finance LP, the holder of a first deed of trust. Decl., Doc. #78. However, as discussed above, it appears that Selene Finance LP is the authorized agent for, and not the actual holder of, the first deed of trust, which appears to be Bank. The Debtors have not clearly stated in the motion that the only lien on the Property is the first deed of trust. Further, while Debtors indicate that the price for which the Property is to be sold is greater than the value of Selene Finance LP's lien, the numbers presented by Debtors are merely estimates and Debtors state that the "amounts are approximation and [Debtors] reserve the right to change amount of payment to" Selene Finance LP. Decl., Doc. #78. While the purpose of including this language may have been to allow for slight increases or decreases in payments, because the statutory elements of § 363(f) must be met for a sale free and clear of liens, it must be affirmatively shown that the price at which the Property is to be sold is greater than the aggregate value of all liens on the Property. The court is not convinced Debtors have made the requisite showing in the motion.

The court is inclined to GRANT the motion to sell, but first requests Debtors to supplement the record demonstrating that the sale price is greater than the aggregate value of all liens on the Property before granting the motion free and clear of the first deed of trust. Debtors also should be prepared to inform the court at the hearing how they wish to correct any notice issues with respect to the holder of the first deed of trust.

6. [21-10679](#)-A-13      **IN RE: SYLVIA NICOLE**  
[MHM-5](#)

MOTION TO DISMISS CASE  
9-22-2021    [\[224\]](#)

MICHAEL MEYER/MV  
CONT'D TO 11/18/21 PER ECF ORDER #240

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

DISPOSITION:      Continued to November 18, 2021 at 11:00 a.m.

NO ORDER REQUIRED.

On October 4, 2021, the court issued an order continuing the hearing on the motion to dismiss the case to November 18, 2021 at 11:00 a.m. Doc. #240.



1. [20-10705](#)-A-7     **IN RE: NORMA KELLY**  
[20-1028](#)

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT  
5-1-2020    [[1](#)]

NUVISION FEDERAL CREDIT UNION V. KELLY  
ALANA ANAYA/ATTY. FOR PL.  
CASE DISMISSED 10/18/21

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

DISPOSITION:     Dropped as moot.

NO ORDER REQUIRED.

This adversary proceeding was dismissed on October 18, 2021. Doc. #46.

2. [21-11450](#)-A-7     **IN RE: ANTHONY FLORES**  
[21-1036](#)

STATUS CONFERENCE RE: COMPLAINT  
8-24-2021    [[1](#)]

SAWUSCH ET AL V. FLORES  
JESSICA WELLINGTON/ATTY. FOR PL.

NO RULING.

At the adversary proceeding status conference, the parties should be prepared to explain to the court why they have not filed the discovery plan as required by the Order to Confer on Initial Disclosures and Setting Deadlines filed in this adversary proceeding on August 24, 2021. Doc. #5.

3. [21-10679](#)-A-13     **IN RE: SYLVIA NICOLE**  
[21-1023](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT  
5-26-2021    [[1](#)]

U.S. TRUSTEE V. NICOLE  
JUSTIN VALENCIA/ATTY. FOR PL.

NO RULING.

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL  
8-26-2021     [\[33\]](#)

U.S. TRUSTEE V. NICOLE  
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 after the hearing.

Sylvia Nicole ("Defendant") is a chapter 13 debtor pro se and the defendant in this adversary proceeding. On May 26, 2021, Tracy Hope Davis, the United States Trustee for the Eastern District of California ("UST"), initiated this adversary proceeding against Defendant. Doc. #1. By the complaint ("Complaint"), UST asserts two claims for relief against Defendant. The first claim for relief seeks dismissal of Defendant's chapter 13 bankruptcy case for cause pursuant to 11 U.S.C. § 1307(c). The second claim for relief seeks injunctive relief under 11 U.S.C. §§ 105(a), 349, and Federal Rule of Civil Procedure ("Rule") 65. The second claim for relief requests the court issue an injunction prohibiting Defendant from filing or causing to be filed any subsequent bankruptcy petition in the Eastern District of California for a period of two years without Defendant first obtaining the permission of the Chief Bankruptcy Judge of the Eastern District.

On June 28, 2021, Defendant moved to dismiss the Complaint, but withdrew the motion prior to the date set for hearing and before the court ruled on the motion. See Civil Minutes, Doc. #27. Based on the withdrawal of the motion to dismiss, the court ordered Defendant to file and serve an answer to the Complaint no later than August 26, 2021. Order, Doc. #29. Defendant never filed an answer. Instead, on August 26, 2021, Defendant filed the motion to dismiss the Complaint presently before the court ("Motion"). Doc. #33. In the Motion, Defendant asks the court to dismiss UST's "current adversary proceeding with prejudice for failure to state a viable claim." Doc. #33. The court construes this request as a motion to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). UST consents to entry of final orders and judgment by the bankruptcy court. Complaint ¶ 6, Doc. #1.

As a procedural matter, the Motion and supporting papers do not conform with the Local Rules of Practice ("LBR"). LBR 9004-2(d) requires the Proof of Service be filed as a separate document, and LBR 9004-2(b)(5) and (6) require the Proof of Service include, among other things, a caption, docket control number, and hearing information. See also LBR 9014-1(c), (e). The Proof of Service filed with the Motion was submitted as part of the supporting declaration without a caption. Doc. #35. The court encourages Defendant to review the local rules to ensure compliance in future matters or those matters may be denied without prejudice for failure to comply with the local rules.

As a further procedural matter, Defendant cites to no legal authority that permits Defendant to file a timely motion to dismiss, withdraw that motion to dismiss, then file another motion to dismiss instead of an answer as ordered by

this court. Nevertheless, having considered UST's Complaint in its entirety, the court is inclined to DENY the Motion. Because Defendant failed to comply with the court's order to file an answer to the Complaint no later than August 26, 2021, Defendant must file and serve an answer to the Complaint (and not another motion to dismiss) no later than November 4, 2021. If no answer is filed by Defendant on or before November 4, 2021, UST may seek entry of Defendant's default pursuant to Rule 55(a).

"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.

Defendant's Motion argues that her prior bankruptcy cases are not relevant to the current chapter 13 and cannot be used as a basis for dismissal under § 1307(c). Doc. #35. Defendant makes additional statements pertaining to why she filed the current chapter 13 case and the status of that case. However, at this stage of the adversary proceeding, under Rule 12(b)(6), the court tests the formal sufficiency of a claim for relief and does not consider evidence. Therefore, the court does not consider at this time whether there is cause to dismiss Defendant's bankruptcy case, only whether UST has stated a plausible claim for relief in the Complaint.

#### Sufficiency of First Claim for Relief

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. "Bad faith, as cause for the dismissal of a Chapter 13 petition with prejudice, involves the application of the 'totality of the circumstances' test. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999). The bankruptcy court should consider the following factors:

- (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition or plan in an inequitable manner;
- (2) the debtor's history of filings and dismissals;
- (3) whether the debtor only intended to defeat state court litigation; and
- (4) whether egregious behavior is present.

Id. (collecting cases) (citations and punctuation omitted). "A finding of bad faith does not require fraudulent intent by the debtor." Id. "Neither malice nor actual fraud is required to find a lack of good faith. . . . [M]alfeasance is not a prerequisite to bad faith." Id. (quoting In re Powers, 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991)).

The Complaint contains sufficient factual allegations to support the first claim for relief. Paragraphs 6 through 48 set forth the factual allegations supporting both claims for relief. The allegations of the Complaint are more than bare-bone assertions and legal conclusions; the Complaint contains nearly

15 pages of detailed factual allegations to support two causes of action. These factual allegations include, but are not limited to, allegations that Defendant misrepresented facts in her bankruptcy petition, allegations of Defendant's history of bankruptcy filings and dismissals, allegations that Defendant only intended to defeat state court litigation, and allegations that Defendant's conduct is egregious. Assuming the veracity of these allegations, UST sets forth a plausible claim under 11 U.S.C. § 1307(c).

#### Sufficiency of Second Claim for Relief

The second claim for relief seeks injunctive relief under 11 U.S.C. §§ 105(a), 349, and Rule 65. UST wants this court to dismiss Defendant's bankruptcy case with prejudice and issue an injunction prohibiting Defendant from filing or causing to be filed any subsequent petition for relief under the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of California for a period of two years without first obtaining permission of the Chief Bankruptcy Judge of the Eastern District of California.

"The phrase 'unless the court, for cause, orders otherwise' in Section 349(a) authorizes the bankruptcy court to dismiss the case with prejudice." Leavitt, 171 F.3d at 1223. The Ninth Circuit has held "that bad faith is 'cause' for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c)." Id. at 1224.

Recently, the Ninth Circuit Bankruptcy Appellate Panel stated that "'[c]ause' to impose a condition of prejudice on a dismissal is a more rigorous concept than 'cause' to dismiss a case." Duran v. Gudino (In re Duran), 630 B.R. 797, --; 2021 Bankr. LEXIS 1992 at \*12 (B.A.P. 9th Cir. July 27, 2021). When considering whether to dismiss a bankruptcy case with the added condition barring the debtor from refiling for some length of time, the court should consider the totality of the circumstances, "including whether the debtor made misrepresentations, the debtor's history of filings and dismissals, whether the debtor only intended to defeat state court litigation, and whether egregious behavior is present." In re Van Ness, 399 B.R. 897, 905 (Bankr. E.D. Cal. 2009). The difference in the analysis between "cause" to dismiss under § 1307(c) and "cause" to dismiss with the imposition of a temporary prohibition of filing for bankruptcy is a matter of degree. See Duran, 2021 Bankr. LEXIS 1992, at \*13-15.

The Complaint contains sufficient factual allegations to support the second claim for relief. Paragraphs 6 through 48 set forth the factual allegations supporting both claims for relief. These factual allegations include, but are not limited to, allegations that Defendant misrepresented facts in her bankruptcy petition, allegations of Defendant's history of bankruptcy filings and dismissals, allegations that Defendant only intended to defeat state court litigation, and allegations that Defendant's conduct is egregious. Assuming the veracity of these allegations and considering that the difference between dismissal without prejudice and dismissal with a temporary bar on refiling is a matter of degree, the court finds that UST alleges sufficient factual allegations to support the imposition of a two-year prohibition on bankruptcies filed by Defendant in the Eastern District of California.

#### Conclusion

Defendant's motion to dismiss is DENIED. Defendant must file an answer no later than November 4, 2021. If no answer is filed on or before November 4, 2021, UST may seek entry of Defendant's default pursuant to Rule 55(a).