UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, October 21, 2020
Place: Department B – Courtroom #13
Fresno, California

ALL APPEARANCES MUST BE TELEPHONIC
(Please see the court's website for instructions.)

Pursuant to District Court General Order 618, no persons are permitted to appear in court unless authorized by order of the court until further notice. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

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. 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. 20-11901-B-13 **IN RE: PAUL/DARLENE HOLLAND**
PBB-4

MOTION TO CONFIRM PLAN
8-28-2020 [64]

PAUL HOLLAND/MV
PETER BUNTING/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 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, 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.

2. 17-14112-B-13 **IN RE: ARMANDO NATERA**
TAT-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-25-2020 [55]

ROGER WARD/MV
GABRIEL WADDELL/ATTY. FOR DBT.
THOMAS TRAPANI/ATTY. FOR MV.
DISMISSED 01/03/2018

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 Rules of Practice ("LBR").

First, LBR 9014-1(f)(2)(C) states that motions filed on less than 28 days' notice, but at least 14 days' notice, require the movant to notify the respondent or respondents that no party in interest shall be required to file written opposition to the motion. Opposition, if any, shall be presented at the hearing on the motion. If opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

This motion was filed on September 25, 2020 and set for hearing on October 21, 2020. Doc. #55. October 21, 2020 is 26 days after September 25, 2020, and therefore this hearing was set on less than 28 days' notice under LBR 9014-1(f)(2). The motion (Doc. #55) did contain the notice language that opposition was not required and, if any, shall be presented at the hearing, which is consistent with LBR 9014-1(f)(2). However, the notice (Doc. #56) was silent as to how or when opposition may be presented, which is incorrect. Because the hearing was set on less than 28 days' notice, the notice (Doc. #56)—not the motion—should have stated that no written opposition was required, but would be permitted at the time of the hearing. Because this motion was filed, served, and noticed on less than 28 days' notice, the language of LBR 9014-1(f)(2)(C) needed to have been included in the notice.

Second, the notice (Doc. #56) did not contain the language required under LBR 9014-1(d)(3)(B)(iii). The motion (Doc. #55) did not contain this language either, even though it only needed to be included in the notice. LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

Third, the exhibits submitted with a Request for Judicial Notice (Doc. #60) did not contain a properly formatted exhibit index or numbered pages as required by LBR 9004-2(d)(2) & (3). LBR

9004-2(d)(2) requires that exhibits shall include an exhibit index at the start of the document listing and identifying each exhibit document with an exhibit number or letter and shall state the page number at which each exhibit is located within the document. LBR 9004-2(d)(2). LBR 9004-2(d)(3) requires that the exhibit document pages, including the exhibit page, and any separator, cover, or divider sheets, shall be consecutively numbered.

While there is an exhibit index before the exhibits, this index does not state the page number at which each exhibit is located within the overall document. Doc. #60, 2-3 at ¶¶ 1-18. Additionally, the exhibit document is numbered until page 4, at which point the page numbers stop. *Id.*, 4-116. Each exhibit must continue in consecutive numbering through the duration of the whole document.

For the foregoing reasons, this motion will be DENIED WITHOUT PREJUDICE.

3. 20-12512-B-13 **IN RE: CRYSTAL MENDOZA**
MHM-1

MOTION TO DISMISS CASE
9-3-2020 [21]

MICHAEL MEYER/MV

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.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

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 amount of damages). *Televideo Systems, 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.

Here, the chapter 13 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. Doc #21. Debtor did not oppose.

The record shows that there has been unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtor failed to appear at the scheduled 341 meeting of creditors, failed to file complete and accurate schedules, failed to set a plan for hearing, and failed to provide the Credit Counseling Certificate. Accordingly, the motion will be GRANTED, and the case dismissed.

4. 19-10516-B-13 **IN RE: FRANK CRUZ**
TCS-3

MOTION TO MODIFY PLAN
9-11-2020 [180]

FRANK CRUZ/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 18, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

Secured Creditor Salas Financial ("Salas") has filed an objection to the debtor's fully noticed motion to modify a chapter 13 plan. Doc. #188. Unless this case is voluntarily converted to chapter 7, dismissed, or Salas' opposition to confirmation is withdrawn, the debtor shall file and serve a written response not later than November 4, 2020. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtor's position. Salas shall file and serve a reply, if any, by November 11, 2020.

If the debtor elects to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than November 11, 2020. If the debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the opposition without a further hearing.

5. 18-14020-B-13 **IN RE: JOSEPH/CLAUDIA CARRILLO**
JRL-2

CONTINUED MOTION TO MODIFY PLAN
8-14-2020 [32]

JOSEPH CARRILLO/MV
JERRY LOWE/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

This motion will be DENIED AS MOOT. By prior order of the court (Doc. #41), the debtor had until either October 7, 2020 to file and serve a written response to the chapter 13 trustee's objection to confirmation, or until October 14, 2020 to file, serve, and set for hearing a confirmable modified plan or the objection would be sustained on the grounds therein. The debtors filed a statement withdrawing the motion (Doc. #43) and an amended plan (Doc. #46). *See* JRL-3. Therefore, this motion will be DENIED AS MOOT.

6. 20-12125-B-13 **IN RE: JOLYNN DURAN**
MHM-1

MOTION TO DISMISS CASE
9-9-2020 [34]

MICHAEL MEYER/MV
DISMISSED 9/24/20

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

An order dismissing this case was entered on September 24, 2020. Doc. #47. Therefore, this motion will be DENIED AS MOOT.

7. 18-14737-B-13 **IN RE: CHRISTINE MENDOZA**
JHK-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-10-2020 [18]

ACAR LEASING LTD/MV
SCOTT LYONS/ATTY. FOR DBT.
JOHN KIM/ATTY. FOR MV.

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 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 amount of damages). *Televideo Systems, 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.

The movant, Acar Leasing Ltd. ("Movant"), seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) concerning a lease for a 2017 Chevrolet Traverse ("Vehicle"). Doc. #18. This lease was assumed under the chapter 13 plan. *See* Doc. #4 at ¶ 4.02. The lease matured on August 16, 2020, and the debtor returned the Vehicle to Movant on August 19, 2020. Doc. #21.

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "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 because the lease has matured and the debtor surrendered the Vehicle to Movant. Doc. #21.

Accordingly, the motion will be GRANTED pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim.

The 14-day stay under Fed R. Bankr. P. 4001(a)(3) will be ordered waived because the property is a depreciating asset and the debtor has already surrendered the Vehicle.

8. 17-14843-B-13 **IN RE: MATTHEW/MYRA ALLRED**
KMM-1

MOTION TO APPROVE LOAN MODIFICATION
9-10-2020 [58]

SPECIALIZED LOAN SERVICING, LLC./MV
SCOTT LYONS/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.

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 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 amount of damages). *Televideo Systems, 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.

Creditor Specialized Loan Servicing, LLC ("Movant"), as the loan servicer for MEB Loan Trust IV, U.S. Bank, N.A., seeks authorization from this court to enter into a loan modification agreement with the debtors. Doc. #58.

This motion will be GRANTED.

On July 7, 2008, the debtors executed a promissory note and deed of trust in favor of Bank of America, N.A., with a principal of $150,000.00, which was secured by a parcel of residential real property commonly known as 413 N. Francis Ave., Exeter, CA 93221 ("Property") and recorded in Tulare County on July 25, 2008. Doc. #61, Ex. A & B. The original interest rate appears to be a variable interest rate depending upon a variety of factors,

including the current index and repayment option, with a maximum interest rate of 24.0000%. *Id.*, Ex. A at 1. The original maturity date was set for July 7, 2033. *Ibid.* The deed of trust was assigned to Movant on October 15, 2019 and recorded on October 30, 2019. *Id.*, Ex. C.

The debtors entered into a modification agreement with Movant on June 25, 2020 to modify the loan to bring it current as of the modification effective date and adjust the maturity date, the amount of interest-bearing principal, and the interest rate of the obligation to Movant. *Id.*, Ex. D.

Under the terms of the modification, the new principal balance will be $161,547.34 with an interest rate of 2.999% across 480 payments of $958.73, including escrow payments, beginning July 25, 2020. *Id.* The new maturity date is set for May 31, 2060. *Id.*, Ex. D at 2. Movant has stated it shall withdraw or amend its proof of claim upon approval of this modification.

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

9. 19-13343-B-13 **IN RE: CHRISTINA CORONEL**
RSW-5

CONTINUED MOTION TO MODIFY PLAN
6-16-2020 [74]

CHRISTINA CORONEL/MV
ROBERT WILLIAMS/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. Pursuant to the court's prior order (Doc. #88), the debtor was to either (1) file and serve a status report to inform the court and the chapter 13 trustee on the issue of the spousal waiver and if the debtor still believes the plan as modified is confirmable, or (2) file, serve, and set for hearing a motion to confirm a modified plan not later than October 14, 2020, or the motion would be denied on the grounds stated in the opposition. The debtor did neither. Therefore, this motion will be DENIED WITHOUT PREJUDICE.

10. 17-13445-B-13 **IN RE: FROYLAN/MARGARET GARCIA**
PBB-1

CONTINUED MOTION TO MODIFY PLAN
8-4-2020 [38]

FROYLAN GARCIA/MV
PETER BUNTING/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. Pursuant to the court's prior order (Doc. #48), the debtors were to either (1) file and serve a written response to the chapter 13 trustee's opposition to this motion not later than October 7, 2020, or (2) file, serve, and set for hearing a motion to confirm a modified plan not later than October 14, 2020, or the motion would be denied on the grounds stated in the opposition. The debtors did neither. Therefore, the motion will be DENIED WITHOUT PREJUDICE.

11. 17-13150-B-13 **IN RE: GERARDO CORONA AND GUADALUPE SERRATO**
MHM-3

MOTION TO DISMISS CASE
9-17-2020 [72]

MICHAEL MEYER/MV
THOMAS GILLIS/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.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown.

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 amount of damages). *Televideo Systems, 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.

Here, the chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan. Payments are delinquent in the amount of $655.00 as of September 17, 2020. Doc #72. Debtors did not oppose.

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.

Accordingly, the motion will be GRANTED. The case will be dismissed.

12. 18-12050-B-13 **IN RE: GENEVIEVE SANTOS**
ALG-2

MOTION TO MODIFY PLAN
8-26-2020 [65]

GENEVIEVE SANTOS/MV
JANINE ESQUIVEL OJI/ATTY. FOR DBT.
JANINE ESQUIVEL/ATTY. FOR MV.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

This motion was withdrawn by the debtor on September 29, 2020. Doc. #85. Therefore, the motion will be dropped from calendar.

13. 18-13354-B-13 **IN RE: DAHNE FRAKER**
TCS-5

MOTION TO MODIFY PLAN
9-11-2020 [67]

DAHNE FRAKER/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 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, 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.

14. 20-12359-B-13 **IN RE: CARINA LOERA**
MHM-1

MOTION TO DISMISS CASE
9-21-2020 [18]

MICHAEL MEYER/MV
MARK ZIMMERMAN/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 12, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c) for debtor's failure to confirm a chapter 13 plan. Doc. #18. Debtor timely responded (Doc. #28), stating that a motion to value collateral (Doc. #22) is set for hearing on November 12, 2020 at 9:30 a.m. *See* MAZ-1. The debtor's chapter 13 plan provides that the Class 2 claim of Creditor Safe 1 CU for a 2017 Chevy Silverado was to be valued and reduced based on the value of the collateral. Doc. #3 at ¶ 3.08(c) & (d). The chapter 13 plan cannot be confirmed until an order valuing the collateral is entered. Doc. #20. Therefore, this motion will be continued to that date and time to be heard in conjunction with the motion to value collateral.

15. 20-12664-B-13 **IN RE: NIOMI/CARLOS MEJIA**
STL-1

OBJECTION TO CONFIRMATION OF PLAN BY ASHLAND CAPITAL FUND, LLC
9-28-2020 [23]

ASHLAND CAPITAL FUND, LLC/MV
KATHERINE WALKER/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained in part, overruled in part. The debtors shall file a modified plan.

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

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. 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.

Secured Creditor Ashland Capital Fund, LLC ("Creditor"), dba Allied Servicing Corporation (Claim #3-1), objects to the debtors' chapter 13 plan confirmation because:

> (1) the plan attempts to avoid a second position deed of trust in violation of 11 U.S.C. § 1322(b)(2) since there is no evidence suggesting that its lien is wholly unsecured;
>
> (2) the plan fails to provide for the curing of default or the required maintenance on Creditor's secured claim pursuant to 11 U.S.C. § 1322(b)(5), the final payment of which is due after the final plan payment, and the plan fails to acknowledge its pre-petition arrears;

(3) the plan is "vague and ambiguous" and fails to provide for other secured claims in violation of 11 U.S.C. §§ 1325(a)(5)(B)(ii) & 1322(b)(5); and

(4) the plan is not feasible because the debtor will not be able to make all the payments under the plan to comply with the plan as required by 11 U.S.C. § 1325(a)(6).

Doc. #23. Creditor is secured by a parcel of residential real property commonly known as 12034 Maywood Drive, Madera, CA 93636 ("Property"). Claim #3-1. The Property is properly listed in the debtors' Schedule A/B and D, as Allied Servicing Corporation. Doc. #11, Schedule A/B, Schedule D at ¶ 2.1. The debtors are *pro se.*

This objection will be SUSTAINED IN PART and OVERRULED IN PART.

First, Creditor contends that the plan attempts to avoid a second deed of trust and there is no evidence proving that its lien is wholly unsecured. Doc. #23. Creditor is listed in the plan as a Class 2(C) claim as Allied Servicing Corporation, which indicates its secured claim will be reduced to $0 based on the value of Property. Doc #12 at ¶ 3.08. Sections 1.04 and 3.08(c) of the plan require separately served and filed motions to value collateral for claims classified in class 2. Doc. #4. As of October 15, 2020, the debtors have not filed any such motion. Therefore, this objection will be SUSTAINED.

Second, Creditor claims that the plan does not provide for the curing of default or maintenance payments on its secured lien and fails to account for its pre-petition arrears of $89,875.58. Doc. #22; Claim #3-1.

A secured creditor's claim need not be "provided for" by the plan. If a claim is provided for by the plan, § 1325(a)(5) governs its treatment. There is nothing in §§ 1322 or 1325 requiring that a secured creditor's claim be "provided for" in the plan.

Section 3.11(b) of the plan states that a secured creditor whose claim is not provided for may seek stay relief. *See* Doc. #12. Section 3.01 of the plan provides that it is the proof of claim, not the plan itself, that determines the amount to be repaid under the plan. *Id.* If the plan is confirmed, Creditor will have stay relief. This objection will be OVERRULED.

Third, Creditor claims the plan is "vague and ambiguous" because it fails to provide for other secured liens, including its own, due to an anticipated future motion to avoid its lien. As result, the plan is vague and ambiguous because other creditors will not have enough information to determine the plan's feasibility. As discussed above, the debtors have not yet filed any motions to avoid any liens. This objection will be SUSTAINED IN PART.

Fourth, Creditor claims that the plan is not feasible under 11 U.S.C. § 1325(a)(6) because the debtors do not have sufficient income to fund the plan. Doc. #23. At the time Creditor filed the motion, debtors' Schedule J indicated the debtors had $1,760.00

(Doc. #11) in monthly net income, $1,758 of which is used to fund the plan (Doc. #12). However, the debtors filed an amended Schedule J on October 7, 2020, after Creditor's motion was filed, indicating that the debtors have a monthly net income of $345.13, which is not enough to fund their proposed plan. Doc. #23 at ¶ 23c.

The court finds that the plan as currently proposed is not feasible and therefore cannot be confirmed. Unless opposition is presented at the hearing, the court finds that the plan payment will be greater than the amount that the debtors can pay. The debtors must file and serve a modified plan and set a confirmation hearing.

This objection will be SUSTAINED IN PART and OVERRULED IN PART. Debtors shall file a modified plan and set it for hearing in conformance with the local rules.

16. 17-10480-B-13 **IN RE: JOSE DIAZ**
MHM-2

MOTION TO DISMISS CASE
9-17-2020 [34]

MICHAEL MEYER/MV
THOMAS GILLIS/ATTY. FOR DBT.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on October 9, 2020. (Doc. #38). Therefore, the matter will be dropped from calendar.

17. 17-13188-B-13 **IN RE: JOHN/FLORINDA TORRES**
PBB-2

MOTION TO MODIFY PLAN
9-2-2020 [38]

JOHN TORRES/MV
PETER BUNTING/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 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(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 amount of damages). *Televideo Systems, 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.

18. 20-12288-B-13 **IN RE: FRANCISCO/MELISSA RAMIREZ**
SAH-5

MOTION TO CONFIRM PLAN
9-22-2020 [47]

FRANCISCO RAMIREZ/MV
SUSAN HEMB/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 Local Rules of Practice (“LBR”).

LBR 3015-1(d)(1) requires any plan set for a confirmation hearing be set on at least 35 days’ notice. This motion was filed and served on September 22, 2020 and set for hearing on October 21, 2020. Doc. #47, #48. October 21, 2020 is twenty-nine (29) days after September 22, 2020, and therefore this hearing was set on less than 35 days’ notice as required by LBR 3015-1. Therefore, the motion will be DENIED WITHOUT PREJUDICE.

19. 20-11492-B-13 **IN RE: THOMAS LOGAN**
MHM-2

MOTION TO DISMISS CASE
9-22-2020 [41]

MICHAEL MEYER/MV
PETER BUNTING/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 12, 2020 at 9:30 a.m.

ORDER: The court will issue an order.

The chapter 13 trustee asks the court to dismiss this case under 11 U.S.C. § 1307(c) for debtor's failure to confirm a chapter 13 plan. Doc. #41. Debtor timely responded (Doc. #55), stating that two motions to value collateral (Doc. #45, #50) are both set for hearing on November 12, 2020 at 9:30 a.m. *See* PBB-2, PBB-3.

The debtor's chapter 13 plan provides that two Class 2 claims, (1) Creditor Capital One Auto Finance for a 2014 Cadillac XTS Luxury, and (2) Creditor Kendell A. DC Mendonca for real property located at 1106 E. Howard Ct., Visalia, CA 93292, were to be valued and reduced based on their value. Doc. #2 at ¶ 3.08(c) & (d). The chapter 13 plan cannot be confirmed until orders valuing each collateral are entered. Doc. #43. Therefore, this motion will be continued to that date and time to be heard in conjunction with the two motions to value collateral.

20. 20-13310-B-13 **IN RE: EARL/YOLONDA ALLEN**
SL-1

MOTION TO IMPOSE AUTOMATIC STAY
10-15-2020 [11]

EARL ALLEN/MV
SCOTT LYONS/ATTY. FOR DBT.
OST 10/15/20

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 court will issue an order.

This motion to impose the automatic stay was filed with an order shortening time and Local Rule of Practice 9014-1(f)(3). Doc. #10. Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written

response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Joint debtor, Yolanda Ann Allen, filed a declaration stating that the debtors' home is subject to a foreclosure sale, which is scheduled to be held on October 27, 2020. Doc. #9. The date of this hearing, October 21, 2020, is the only hearing date between the filing date and the foreclosure sale. The debtors filed this motion with an order shortening time seeking to have this matter heard before the foreclosure sale. *Id.*

This court granted the motion for an order shortening time, which stated that the notice of hearing shall be mailed to all parties in interest and the chapter 13 trustee by first-class mail on or before October 15, 2020. Doc. #10. The order further specified that the beneficiary of the foreclosing deed of trust and the foreclosure service shall be serviced so that the motion documents would have been received by close of business on October 16, 2020. *Id.* The certificate of service indicates that all parties in interest were served, including the National Default Servicing Corporation, by "Regular U.S. Postal Mail." Doc. #14. The court will inquire at the hearing about whether the foreclosure service and the beneficiary of the foreclosing deed of trust were adequately served before the close of business on October 16, 2020. If they were not adequately served, then this matter may be continued to allow for additional time for opposition to respond.

Under 11 U.S.C. § 362(c)(4)(A), if a debtor has two or more cases pending within the previous year that were dismissed, the automatic stay will not go into effect when the later case is filed. This was case was filed on October 14, 2020. Doc. #1. Debtor had two cases that were pending but dismissed in the past year, case no. 20-10097 (filed on January 13, 2020 and dismissed on April 6, 2020) and case no. 20-11639 (filed on May 8, 2020 and is pending dismissal as of October 15, 2020).

11 U.S.C. § 362(c)(4)(B) allows the court to impose the stay to any or all creditors, subject to any limitations the court may impose, if within 30 days after the filing of the later case, and at the request of a party in interest, the court may order they stay to take effect after a notice and hearing. The debtor must demonstrate that the filing of the later case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under

the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable. Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition." *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288, n.11 (B.A.P. 9th Cir. 2016) (*citations omitted*) (overruled on other grounds by *Taggart v. Lorenzen*, No. 18-489, 2019 U.S. LEXIS 3890 (June 3, 2019)).

In this case, the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith because two or more previous cases under this title in which the individual was a debtor were within the 1-year period. 11 U.S.C. § 362(c)(4)(D)(i)(I).

However, based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the presumption has been rebutted, the debtors' petition was filed in good faith, and it intends to grant the motion to extend the automatic stay as to all creditors.

The first case (20-10097) was filed on January 13, 2020 and dismissed on April 6, 2020. The first case was dismissed because the debtors did not provide the trustee with requested documents under 11 U.S.C. § 521(a)(3)-(3). *See* case no. 20-10097, Doc. #30. The debtors did not provide all pages of the most recent Federal Tax Return and did not file complete and accurate schedules, statements, and a plan. *Id.*, Doc. #30. The debtors did not provide the trustee with required 2019 tax return (for the most recent tax year ending immediately before the commencement of the case and for which a Federal Income Tax Return was filed) no later than 7 days before the date first set for the first meeting of creditors. 11 U.S.C. § 521(e)(2)(A)-(B). The debtors failed to appear at the meeting of creditors as required by 11 U.S.C. §§ 341, 343. Additionally, the debtors did not confirm a plan within a reasonable time. The court found that 84 days without confirming a plan constituted unreasonable delay by the debtors that is prejudicial to creditors, and therefore cause existed to dismiss the case under § 1307(c)(1).

The second case (20-11639) was filed on May 8, 2020 and a proposed order on a motion to dismiss was filed on October 15, 2020 (Doc. #23). The second case will be dismissed because the debtors became delinquent in the amount of $4,350.00, which was due to be paid to the chapter 13 trustee not later than October 13, 2020. *See* case no. 20-11639, Doc. #21. As of October 15, 2020, the debtors had not yet cured that delinquency. *Id.*, Doc. #23.

Ms. Allen filed a second declaration stating that the second case was dismissed for the failure to make their plan payments timely. Doc. #13. Ms. Allen states that "[she] procrastinated and waited too long and did not send the plan payments on time." *Id.* at ¶ 4. Ms. Allen's business, "Five Dollar Jewelry," is dependent on sales events at craft shows, trade shows, and her home to make sales. Due to the COVID-19 Pandemic, which began in March, her business has seen a drastic decline causing it to grind "to a total halt." *Ibid.*

She expected that the shelter-in-place restrictions would be lifted months ago, but that has not happened. Ms. Allen has continued to purchase inventory—approximately "$1,000.00-plus per month over [her] actual sales"–from her vendor in anticipation of major sales events that were canceled due to COVID-19. Ms. Allen adds that she did not "communicate with [her] husband about this situation, and he was blind-sided when he found out [they] were behind." *Id.* at ¶ 4.

Ms. Allen contends that they are preparing a plan in which the debtors will pay all of their secured creditors and 100% of their unsecured creditors because of the following reasons:

(1) The debtors are closing Ms. Allen's business, "Five Dollar Jewelry," permanently because its losses outweigh the income it is providing. The business has been taking consistent losses for the last six months, especially during the shelter-in-place restrictions caused by COVID-19.
(2) With the business closed, the debtors estimate they will save more than $1,500.00 per month because they no longer will be purchasing inventory for the business. Additionally, Ms. Allen will be able to focus her time and energy on making sure the plan payments and living expenses are paid on time.

Id. at ¶ 5.

The debtors maintain that this new case has been filed in good faith and express a willingness to maintain their plan payments for an extended period.

The motion will be GRANTED and the automatic stay imposed for all purposes as to all parties who received notice, unless terminated by further order of this court. 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). If so, the court will issue an order which may contain conditions or limitations permissible under § 362(c)(4)(B).

11:00 AM

1. 19-15103-B-7 **IN RE: NATHAN/AMY PERRY**
20-1017

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-15-2020 [1]

RICHNER ET AL V. PERRY
RICHARD FREEMAN/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

2. 17-14112-B-13 **IN RE: ARMANDO NATERA**
20-1035

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-5-2020 [1]

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 18, 2020 at 11:00 a.m.

ORDER: The court will issue an order.

A Motion to Dismiss Adversary Proceeding is set for hearing on October 28, 2020. *See* Doc. #45-46. This status conference will be continued to November 18, 2020 at 11:00 a.m. to be heard after this motion to dismiss.

3. 17-14112-B-13 **IN RE: ARMANDO NATERA**
20-1035 FW-1

MOTION TO STRIKE
9-3-2020 [33]

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part with leave to amend. Denied in part. Amended answer to be filed and served within 14 calendar days of date of entry of order.

ORDER: Plaintiff to submit proposed order.

Plaintiff Armando Natera ("Plaintiff") asks the court to strike thirty-six (36) affirmative defenses contained in co-defendant Roger L. Ward and Sandra S. Ward's ("Defendant") answer to plaintiff's complaint. Though many of the defenses are not pertinent, some are. So, the court will strike the enumerated defenses, but the Defendants' have leave to amend as set forth below.

Background

The complaint alleges one claim for relief: violation of the automatic stay. Plaintiff seeks declaratory relief that Plaintiff is the owner of a mobile home on certain property in Pixley and located in Tulare County, California, known as 2430 East Orrland Avenue ("Property"). Also, Plaintiff's complaint asks for an unspecified amount of actual damages, costs and attorney's fees, and punitive damages.

The complaint alleges that when Plaintiff filed his bankruptcy case on October 25, 2017, a foreclosure sale of his interest in the Property was about to occur on the same date. Though the bankruptcy was filed before the scheduled sale that day, Plaintiff alleges, the foreclosure sale occurred any way and was void. The beneficiary of the foreclosing deed of trust, Richard Barnes individually and as Trustee of the Richard Allen Barnes Trust ("Barnes"), was the successful bidder at the sale. Despite notice of the filing, the complaint alleges, the foreclosure trustee ("Parker") recorded a Trustee's Deed Upon Sale five days after the foreclosure sale.

Weeks later, Barnes started eviction proceedings, the complaint says, culminating in Plaintiff's eviction from the Property in February 2018. A month after that, Barnes transferred the Property to the Lincicum's—also defendants in this case—who allegedly had knowledge of Plaintiff's bankruptcy. Three months after the Lincicum's allegedly had title to the Property, they transferred the Property to the current claimed title holders, Defendants. The complaint states on information and belief the Defendants also knew of Plaintiff's bankruptcy case but prosecuted state court proceedings to gain title to the mobile home on the Property.

Plaintiff's bankruptcy case was dismissed January 3, 2018. A year and a half later, Plaintiff's bankruptcy case was re-opened, and this adversary proceeding was filed.

Pleading Status

Barnes, Parker and Defendants filed answers to the complaint. Lincicum filed a motion to dismiss under Fed. R. Civ. Proc. 12 (b) (6) (made applicable to bankruptcy adversary proceedings by Fed. R. Bankr. Proc 7012), which is also on this calendar. Only Defendants answer is at issue on this motion to strike. Defendants' answer contains thirty-six affirmative defenses.

Parties' Contentions

Plaintiff contends that there is no factual basis pled by Defendants in any of the affirmative defenses. Some of the defenses, Plaintiff's urge, are inapplicable in federal courts which is a "notice pleading" jurisdiction. Also, Plaintiff's assert a scattershot attack on the defenses largely claiming they are "redundant, immaterial, impertinent and scandalous." Finally, Plaintiff's contend, without authority that they should be awarded attorney's fees for bringing the motion.

Defendants argue that federal courts do not apply the same pleading standards applicable to plaintiffs in complaints to pleading affirmative defenses. They also conclude that they pled enough here and provided fair notice. Defendants point to the limited time they had compared to Plaintiffs to prepare the pleading. Motions to Strike are also disfavored, defendants contend, so the motion should be denied. Finally, focusing on Fed. R. Bankr. Proc. 9011, Defendant's claim no attorney's fees should be awarded as sanctions because the defenses they pled were warranted by existing law.

Motions to Strike

Fed. R. Civ. Proc. 12 (f) grants authority to the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[1]

On these motions, the court must view the pleading in a light most favorable to the pleader. *In re 2TheMart.com, Inc. Sec. Litig.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000). A Motion to Strike will not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. *Loi Nguyen v. Durham School Services, L.P.*, 358 F. Supp. 3d 1056, 1058 (C.D. Cal. 2013). An affirmative defense is legally insufficient if it clearly lacks merit under any set of facts the defendant might allege. *McArdle v. A.T. & T Mobility, LLC*, 657 F. Supp. 2d 1140, 1149-50 (N.D. Cal. 2009).

Fed. R. Civ. Proc 8 (b) says a party must "affirmatively state" any avoidance or affirmative defense. Contrast that standard with Rule 8 (a) (2) requiring of plaintiffs a short and plain statement "of the claim showing the pleader is entitled to the relief." That said, fair notice of an affirmative defense generally requires that the defendant state the nature and grounds for the affirmative defense. *Roe v. City of San Diego*, 289 F.R.D. 604, 608 (S.D. Cal. 2013) citations omitted. The defendant must articulate the defense clearly enough that the plaintiff is "not a victim of unfair surprise." *Woodfield v. Bauman*, 193 F. 3d 352, 362 (5th Cir. 1999). For some affirmative defenses, merely pleading the name of the defense may be

[1] Notably, this motion was filed 22 days after service of the answer. Service of the answer was made electronically on August 12, 2020 (Doc. 21). This motion was filed September 3, 2020, 22 days thereafter and technically untimely. Fed. R. Civ. Proc. 12 (f) (2). But Defendants did not raise the issue. The court will consider the motion on the merits.

sufficient. *Mag Instrument, Inc v. J.S. Prod., Inc.*, 595 F. Supp. 2d 1102, 1108 (C.D. Cal. 2008).

Leave to amend should be freely given when doing so would not cause prejudice to the opposite party. *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 440 (C.D. Cal. 2013).

The court will group the defenses for ease of following the rulings.

First (Failure to State a Cause of Action), Third (Statute of Limitations), Fourteenth (Fair, Reasonable, Good Faith), Seventeen (Failure to Join Responsible Parties), Twenty First (Subject to Demurrer), Thirty Third (Failure to State Punitive Damage Claim), Thirty Fourth (Punitive Damages Unconstitutional)Thirty Fifth (Punitive Damages an Excessive Fine), Thirty Sixth (Punitive Damages Violate Law)

All the above affirmative defenses are STRICKEN WITH LEAVE TO AMEND.

Each of these affirmative defenses rely on California law which is not at issue in this adversary proceeding since the claim only relates to a claim established by federal statute. So, these defenses are largely immaterial. Further, as currently pled all the defenses except those dealing with punitive damages, have very doubtful application to the claim alleged. *See*, *Loi Nguyen* and *McArdle.*

Separately, the statute of limitations defense is unavailable. Congress did not establish any limitations period for damage claims under § 362 (k). *Stanwyck v. Bogen (In re Stanwyck)*, 450 BR 181, 193 (Bankr. C.D. Cal. 2011) (collecting cases).

The punitive damage defenses as pled ignore the wording of § 362 (k) which authorizes an award of punitive damages in "appropriate circumstances." So, the defenses are more in the nature of denials or claims of failure of proof by the Plaintiff and not defenses. They are also part of the law not a violation of law.

Defendants' issues with allowability of punitive damages at this stage seem unfounded. First, no punitive damages are generally available in these matters without actual damages. *In re McHenry*, 179 BR 165, 168 (B.A.P. 9th Cir. 1995). Second, generally proof of reckless or callous disregard for the rights of others needs to be established before punitive damages are awarded. *In re Bloom*, 875 F. 2d 224,228 (9th Cir. 1989)

What is more, if a constitutional challenge is going to be asserted, then Defendants should plead the challenge affirmatively. The Supreme Court in *State Farm Mut. Auto Ins. V. Campbell*, 538 U.S. 416, 418 (2003) set forth the factors a court should weigh when awarding punitive damages. *See also*, *Lansaw v. Zokaites (In re Lansaw)*, 853 F. 3d 657, 671 (3d Cir. 2017).

Fourth (Comparative Fault), Fifth (Impute Fault to Plaintiff), Sixth (Declaration of Comparative Indemnification), Seventh (Assumption of the Risk), Eighth (Assumption of Risk Knowledge of Hazard), Ninth

(Failure to Mitigate), Fifteenth (Reasonable Notice), Eighteenth (Injuries Caused by Others), Nineteenth (Cross-Demands for Money), Twenty Seventh (Loss by Market Conditions) Twenty Ninth (Intervening or Superseding Acts of Third Parties), Thirty First (Fraud of Others)

All these affirmative defenses are STRICKEN WITH LEAVE TO AMEND. Each of these defenses either implicate third party fault or relate to failure of proof by Plaintiff and are not appropriate affirmative defenses to this claim.

Plaintiff is going to have to prove damages are caused by the alleged stay violation. If the violation should be attributed to others either in this adversary proceeding or a stranger to the proceeding, then either a cross claim or third-party complaint should be filed or properly pled in the answer. *See* Fed. R. Civ. P. 7 (Fed. R. Bankr. P. 7007).

Further, most of the defenses relate to a negligence claim which is not alleged. Section 362 (k) requires a willful violation of the automatic stay which is not negligence. Generally, willful violation of the stay requires knowledge of the stay and intentional acts. *In re Bloom*, 875 F. 2d at p. 227; *Johnson Envt'l Corp. v. Knight (In re Goodman)*, 991 F. 2d 613, 618 (9th Cir. 1993). Good faith does not change a willfulness finding nor escape damage liability. *Id.* Thus, negligence defenses are irrelevant.

Second (Failure to State a Claim), Tenth (Ratification), Eleventh (Unclean Hands), Thirteenth (Laches)

MOTION IS DENIED.

These defenses, as pled, are sufficient to put Plaintiff on notice of the basis for the defense and its' grounds. Issues concerning proof of the defense can be handled in discovery or through the pre-trial order process.

Twelfth (Release, Waiver and Estoppel), Sixteenth (Failure to Preserve Evidence), Twenty Second (Changed Circumstances), Twenty Fourth (In Pari Delicto), Twenty Sixth (Ratification by Action or Conduct), Thirty Second (Equitable Estoppel)

All these defenses are STRICKEN WITH LEAVE TO AMEND.

The twelfth, twenty fourth, and twenty sixth defenses appear redundant to defenses already pled.

The sixteenth is vaguely pled. No evidence or type of evidence at issue is even pled.

The twenty second, as pled, relates to a contract defense which is completely irrelevant. Alternatively, it is repetitive of the thirteenth affirmative defense (Laches).

The thirty second defense does not include all the elements and should be amended. See, *Allen v. A.H. Robbins Co. Inc.,* 752 F. 2d 1365, 1371 n. 3 (9th Cir. 1985).

Twentieth (Right to Amend), Twenty Fifth (Failure of Conditions Precedent), Twenty Eighth (Superior Knowledge), Thirtieth (Prior Knowledge)

The defenses are STRICKEN WITHOUT LEAVE TO AMEND.

The right to amend the pleading can be asserted by motion and is not a defense to a claim.

Failure of conditions precedent has no basis in an action for alleged violation of the stay. Plaintiff has not pled a breach of contract theory against Defendants. Further, Fed. R. Civ. Proc. 9 (c) (Fed. R. Bankr. P. 7009) requires specificity in describing a failed condition precedent even if it was relevant to this claim. The defense does not plead failure of a specific condition.

Superior knowledge or prior knowledge relates to negligent tort claims not claims for willful violation of statute. There is no allegation in the complaint or Defendants affirmative defenses that Plaintiff intentionally misled Defendants in any manner relevant to the claim at issue. Lack of Defendants' knowledge is not a defense, but Plaintiff will need to prove knowledge of the stay applying to the facts here.

Finally, Plaintiff's request for an award of attorney's fees is DENIED. Plaintiff has not provided a factual or legal basis for such an award. If Plaintiff seeks an award under Fed. R. Bankr. P. 9011 there is no proof of compliance with 9011 (c) (1) (A). Nor is the request presented as a separate motion required by the rule. *Id.*

The motion is GRANTED IN PART, LEAVE TO AMEND IS GRANTED IN PART, the motion is DENIED IN PART.

4. 17-14112-B-13 **IN RE: ARMANDO NATERA**
20-1035 FW-3

MOTION TO DISMISS CAUSE(S) OF ACTION FROM CROSS-COMPLAINT
9-4-2020 [39]

NATERA V. BARNES ET AL
GABRIEL WADDELL/ATTY. FOR MV.

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 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). Defendant Richard

Barnes filed a notice of non-opposition stating that he agrees to dismiss his cross-complaint because no discharge has been entered nor is being sought. Doc. #50. Defendant reserves the right to enforce a claim for damages contingent upon the outcome of these proceedings.

This motion was filed in response to Defendant's cross-complaint. *See* Doc. #28. Because a crossclaim is litigated by parties on the same side of the main litigation, and this is a claim against an opposing party in the principal action, it should be designated as a counterclaim as opposed to a crossclaim. *See* Fed. R. Civ. P. ("FRCP") 13. For consistency with the moving papers, this counterclaim will be referenced as a "crossclaim" for the purposes of this ruling.

The crossclaim seeks a determination of non-dischargeability for a Defendant's debt which is alleged to have been obtained through actual fraud and false pretenses.

Plaintiff reopened his chapter 13 bankruptcy case solely to bring an adversary proceeding to enforce the automatic stay. No trustee has been appointed and Plaintiff is not making any plan payments, and thus is not seeking nor entitled to a discharge. As a result, Plaintiff contends that the crossclaim is moot.

Plaintiff also alleges that the crossclaim was filed on August 14, 2020, which is beyond the deadline allowed for filing such an action. For that reason, Plaintiff suggests that the crossclaim fails to properly state a claim and this court does not have subject matter jurisdiction to hear the crossclaim.

Plaintiff filed his chapter 13 bankruptcy on October 25, 2017. *See* case no. 17-14112, Doc. #1. The original meeting of creditors was scheduled for December 12, 2017. *Id.* The deadline to object to debtor's discharge or to challenge the dischargeability of debts was February 12, 2018. *See* Doc. #42, Ex. A.

Plaintiff's bankruptcy case was dismissed on January 3, 2018. *Id.*, Ex. B. Plaintiff reopened his bankruptcy matter to bring an adversary proceeding to enforce the automatic stay. *Id.*, Ex. C. This crossclaim was filed on August 14, 2020. Doc. #28.

Reopening a case is a purely ministerial act, which lacks independent legal significance and determines nothing with respect to the merits of the case. *In re Menk*, 241 B.R. 896, 913 (B.A.P. 9th Cir. 1999). The reopening of the bankruptcy matter did not result in the re-appointment of a chapter 13 trustee, or the reinstatement of any chapter 13 plan. Reopening was not done under Federal Rules of Bankruptcy Procedure ("FRBP") 9023 or 9024, which could operate to reinstate a plan or the automatic stay in some circumstances.

Plaintiff has not filed a chapter 13 plan in the reopened case and would not be entitled to do so. In chapter 13, the debtor only receives a discharge after the completion of plan payments. 11 U.S.C. § 1328(a). In this case, since Plaintiff is not making plan payments, and could not do so because there is no appointed chapter

13 trustee, he is not entitled to receive a discharge in this case. Since Plaintiff is not seeking a discharge and the claim for relief of the crossclaim relates to whether certain claims would be dischargeable, there is no case or controversy raised by the crossclaim and the crossclaim is therefore moot. The crossclaim fails to state a claim upon which relief could be granted and will be dismissed pursuant to FRCP 12(b)(6), applicable to these proceedings under FRBP 7012(b).

Additionally, the crossclaim does not comply with the deadlines for objecting to the dischargeability of debts and will be dismissed pursuant to FRCP 12(b)(1) and (6).

11 U.S.C. § 523(a)(2) provides that debts incurred by the debtor by false pretenses or actual fraud are not discharged. Section 523(c) provides that debtor "shall be discharged" of any debts covered or allegedly covered by § 523(a)(2) unless the creditor requests an exception to discharge.

The time limit for a creditor to request an exception to discharge under § 523(c) in a chapter 13 case is established by FRBP 4007(c), which sets the deadline to object to dischargeability at 60 days from the first scheduled 341 meeting of creditors. This deadline may be extended for cause, but the motion to enlarge time must be filed before the time has expired.

FRBP 9006(b)(3) provides that the court "may enlarge the time for taking action under Rules . . . 4007(c) . . . only to the extent and under the conditions stated in those rules." This limitation is strictly construed. *Herndon v. De La Cruz*, 176 B.R. 19, 22 (B.A.P. 9th Cir. 1994). The only exception to the strict application of the deadline noted by the *Herndon* court is if the creditor did not receive proper notice of the bankruptcy code and rules. *Herndon*, 176 B.R. at 22.

Here, the crossclaim did not contain any allegations that Defendant did not receive notice of the bankruptcy. An order reopening a case does not extend the time to file a non-dischargeability complaint. *In re Daniels*, 34 B.R. 782, 783 (B.A.P. 9th Cir. 1983). As a result, the time limitation is strictly construed and no exception to the rule has been pled in the crossclaim, so no jurisdiction exists to hear the causes of action in the complaint. "[T]he bankruptcy court has no discretion to enlarge the time of filing a complaint to determine dischargeability if the request is made after the deadline for filing of the complaint." *Osborn v. Ricketts*, 80 B.R. 495, 496 (B.A.P. 9th Cir. 1987) (*internal citations omitted*).

Therefore, the crossclaim does not comply with the required timeframes for filing of non-dischargeability actions. Defendant does not oppose this contention, but reserves the right to enforce a claim for damages contingent upon the outcome of these proceedings.

For the above reasons and because counter-claimant does not oppose dismissal, the counterclaim (denoted a crossclaim) will be DISMISSED WITHOUT LEAVE TO AMEND.

5. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
20-1049

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-2-2020 [7]

GUILLERMO V. LOCKE ET AL

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Bankruptcy Rules ("LBR").

The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules of Bankruptcy Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most up-to-date rules can be found at the court's website, www.caeb.uscourts.gov, towards the middle of the page under "Court Information," "Local Rules & General Orders." The newest rules came into effect on April 9, 2018.

First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e) 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, this motion (Doc. #7) did not contain a DCN and therefore does not comply with the local rules. Each separate matter filed with the court must have a different DCN.

Second, LBR 9014-1(f)(1)(B) states that Motions filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was filed on September 2, 2020 and set for hearing on October 21, 2020. Doc. #7, #13. October 21, 2020 is forty-nine (49) days after September 2, 2020, and therefore this hearing was set on more than 28 days' notice under LBR 9014-1(f)(1). The notice was silent as to how or when opposition must be filed. Doc. #13. This is incorrect. Because the hearing was set on more than 28 days' notice, the notice should have stated that written opposition was required at least 14 days' before the hearing. The language of 9014-1(f)(1)(B) needed to be included in the notice.

Third, the notice did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument

or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

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

6. 20-11657-B-7 **IN RE: MARICEL/CHRISTOPHER LOCKE**
20-1049

STATUS CONFERENCE RE: COMPLAINT
8-10-2020 [1]

GUILLERMO V. LOCKE ET AL
GILBERT ZAVALA/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

7. 19-13569-B-7 **IN RE: JOHN ESPINOZA**
20-1021

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-8-2020 [1]

FEAR V. ESPINOZA ET AL
KELSEY SEIB/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar.

ORDER: The court will issue an order.

A default judgment will be entered in this adversary proceeding (KAS-3) in matter #8, below. The status conference will be dropped from calendar and may be reset by any party on 10 days' notice. The clerk of the court will close the adversary proceeding without notice in 60 days unless the adversary proceeding has been concluded or set for a further status conference within that time. Either party may request an extension of this time up to 30 days by *ex parte* application for cause. After the adversary proceeding has been closed, the parties will have to file an application to reopen the adversary proceeding if further action is required. The court will issue an order.

8. 19-13569-B-7 **IN RE: JOHN ESPINOZA**
20-1021 KAS-3

MOTION FOR ENTRY OF DEFAULT JUDGMENT
9-22-2020 [51]

FEAR V. ESPINOZA ET AL
KELSEY SEIB/ATTY. FOR MV.

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 for entry of default judgment was filed pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 7055.

Plaintiff Peter L. Fear, the chapter 7 bankruptcy trustee for the estate of John Espinoza ("Plaintiff") filed this motion for entry of default judgment. Doc. #51.

This motion will be GRANTED.

Background

The Debtor, John Espinoza ("Debtor"), mistakenly transferred title of a residential parcel of real property located at 25591 Honda Rd., Madera, CA 93638 ("Property") to Defendant Juan Castillo ("Castillo") on May 11, 2016. Debtor thought he was giving a right of first refusal to purchase the Property. The grant deed was recorded in Madera County on November 10, 2016 and states that the transfer was a gift with a document transfer tax of $0.00. Doc. #56, Ex. A. Castillo never expressed an intent to exercise the right of first refusal nor did he pay Debtor to purchase the Property.

Two years later, on November 14, 2018, Castillo executed a grant deed in favor of Defendant Nicole Santillan Valenzuela ("Valenzuela"). The deed was recorded in Madera County on November 15, 2018 and also states that the transfer was a gift and no documentary transfer tax was paid. *Id.*, Ex. B.

Debtor filed bankruptcy on August 21, 2019. *See In re Espinoza*, Case No. 19-13569, Doc. #1. Debtor amended his schedules two times. The most recent was filed on October 7, 2019. *Id.*, Doc. #40. Schedule A/B indicates that Debtor had an ownership interest in Property. *Id.*, Doc. #40, Schedule A/B at ¶ 1.2. Debtor did not exempt the Property, instead claiming a homestead exemption for his residence under C.C.P. § 704.950, a different property in Fresno, California. *Id.*, Doc. #40, Schedule C at ¶ 2.

The meeting of creditors was concluded as to Debtor on October 24, 2019, wherein he testified that he believed the title to the Property was still in his name and that he did not intend to

transfer title. The order of discharge was entered on December 31, 2019. *Id.*, Doc. #65.

This adversary proceeding was filed on April 8, 2020. The summons and complaint were timely served on Defendants with a copy to Debtor and his attorney, Jerry Lowe, on April 10, 2020. *See* Doc. #1, #3, #6.

The Defendants were required to file an Answer or other responsive pleading not later than May 10, 2020. No such Answer or other responsive pleading was filed. The Defendants defaults were entered on June 3, 2020. *See* Doc. #14, #16, #18.

Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, 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 Plaintiff has done here.

Plaintiff requests that the court enters judgment against Defendants avoiding the transfers and requiring Valenzuela to surrender the property to the estate by executing a grant deed in favor of the estate. Doc. #51.

Fraudulent Transfer Avoidance

11 U.S.C. § 548(a)(1) provides, in relevant part:

> The trustee may avoid any transfer . . . of an interest of the debtor in property . . . [t]hat was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily-
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and (ii) (I) was insolvent on the date that such transfer was made or became insolvent as a result of such transfer;
>
> (III) intended to incur, or believed that Debtor would incur, debts that would be beyond Debtor’s ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract, and not in the ordinary course of business.

11 U.S.C. § 548(a)(1). Section 544(b)(1) provides that a trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable by applicable law by a creditor holding an unsecured claim that is allowable under § 502. When § 544(b)(1) is read in conjunction with California Civil Code § 3439, a trustee may bring an action to avoid fraudulent transfers of estate assets transferred not later than 4 years after the transfer was made.

Civil Code § 3439.04 provides:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
> (B) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Civil Code § 3439.04.

Here, the Property was transferred twice in four years preceding the date of the petition. The first transfer occurred on May 11, 2016, within 4 years of the petition date, where Debtor unknowingly or mistakenly executed a grant deed in favor of Castillo, transferring title to the Property for no consideration. Doc. #56, Ex. A. The grant deed states the transfer was a gift and no transfer tax was paid. Castillo never expressed his intent to exercise the right of first refusal, nor did he pay any money to Debtor to purchase the property.

The second transfer between Castillo and Valenzuela occurred on November 14, 2018, less than one year before Debtor filed his bankruptcy petition. On November 14, 2018, Castillo transferred the Property as a gift and no documentary transfer tax was paid. *Id.*, Ex. B. Despite the transfer, Valenzuela continued to pay rent to the Debtor, who testified at the meeting of creditors that he believed the title to Property was still in his name.

Under 11 U.S.C. § 544, the Plaintiff is permitted to step into the shoes of an unsecured creditor who may have an action under California law under the Uniform Voidable Transaction Act ("UVTA") within the statute of limitations if such transfer was made by actual or constructive fraud. Constructive Fraud includes transfers made for less than "reasonably equivalent value," leaving the Debtor

insolvent, or with unreasonably small assets for operations. *In re AFI Holding, Inc.*, 525 F.3d 700, 703 (9th Cir. 2008). "Where state statutes are similar to the Bankruptcy Code, cases analyzing the Bankruptcy Code provisions are persuasive authority. Here, California's fraudulent transfer statutes are similar in form and substance to the Bankruptcy Code's fraudulent transfer provisions." *Ibid.* (*internal citations omitted*).

Debtor transferred the Property to Castillo for no value. The transfer made Debtor insolvent, or he became insolvent shortly thereafter. As shown in the Debtor's schedules, at the time of the transfer he was indebted to Calvary SPV 1, LLC, Rushmore Loan Management, Universal Recovery Corporation, and others. Each of these creditors would have had standing under California law to bring an action to avoid the transfer of the Property for no value to Castillo. When Debtor filed bankruptcy, the trustee obtained the right to step into the shoes of Debtor's creditors and exercise his avoidance rights under 11 U.S.C. §§ 544 & 548, as well as California Civil Code § 3439 *et seq.*

Under 11 U.S.C. § 550(a), to the extent that a transfer is avoided under 11 U.S.C. § 548, a trustee may recover for the benefit of the estate, the property transferred, or the value of the property transferred from the initial transferee. The trustee may recover from any immediate or mediate transferee of the initial transferee if the transferee took for no value. A trustee who has proven that an avoidable transfer exists may skip over the initial transferee and seek recovery from a subsequent transferee under § 550. *In re AVI, Inc.*, 389 B.R. 721, 734 (B.A.P. 9th Cir. 2008).

Valenzuela is the mediate or immediate transferee of the initial transferee, Castillo. Both grant deeds recorded by Castillo and Valenzuela on November 10, 2016 and November 14, 2018 demonstrate that both Castillo and Valenzuela received the property for no value in return. Because Valenzuela took the Property for no value, the Plaintiff is able to recover the Property from Valenzuela under § 550.

On June 9, 2020, the court entered the default of Defendants. Valenzuela contacted the Plaintiff's counsel to inquire about executing a deed to transfer her interest in the Property to the estate. After discussing her options, she stated her desire to transfer the Property back to the estate. *See* Doc. #55 at ¶¶ 8-9.

Judgment will be entered in favor of Plaintiff. The fraudulent transfer of the Property will be avoided, and Plaintiff can recover and turnover the Property. Judgment avoiding the transfers may be entered. The court finds that title to the property should be in the debtor's bankruptcy estate subject to administration by the Trustee. The Property should be turned over to the Trustee.

9. 20-12269-B-7 **IN RE: ANTHONY VILLA**
20-1054

STATUS CONFERENCE RE: COMPLAINT
8-17-2020 [1]

VOKSHORI LAW GROUP V. VILLA
NIMA VOKSHORI/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to November 12, 2020.

ORDER: The court will issue an order.

A motion to dismiss is set for hearing on November 12, 2020. *See* TCS-2. Accordingly, this status conference will be continued to November 12, 2020.

10. 17-11570-B-13 **IN RE: GREGGORY KIRKPATRICK**
19-1100 JLW-7

MOTION BY JODY L. WINTER TO WITHDRAW AS ATTORNEY
9-10-2020 [91]

KIRKPATRICK V. CALLISON ET AL

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 will submit a proposed order after hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

The court notes that the motion, memorandum of points and authorities, declaration, and certificate of service (Doc. #91-94) were filed on September 10, 2020, and the notice of hearing and certificate of service were filed concurrently with a memo re: calendar correction (Doc. #95-97) on September 15, 2020.

This motion will be GRANTED.

Pursuant to Local Rule of Practice ("LBR") 2017-1(e), Jodi L. Winter of LloydWinter, P.C. ("Attorney"), may withdraw as the attorney for Defendants Christopher Callison and Perla Perez ("Defendants") in this adversary proceeding.

LBR 2017-1(e) states that an attorney who has appeared may not withdraw leaving the client *in propria persona* without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal of an attorney is governed by the Rules of Professional Conduct of the State Bar of California, and Attorney shall conform to the requirements of those rules.

Defendants have filed a declaration stating they have presented a defense to the adversary proceeding initiated by Debtor in this action, which is nearly resolved other than one outstanding issue for hearing. Doc. #93. Prior to the adversary proceeding, Defendants engaged in the matter *pro se* and without representation. At this time, Defendants seek to terminate the services of Attorney and have been informed of the risks of proceeding in this matter and of the upcoming deadlines in this case. *Id.*

Here, the affidavit required under LBR 2017-1(e) is not from Attorney, but from Defendants. *See* Doc. #93. The affidavit does not list the Defendants last known address, nor does it state the Attorney's efforts to notify the clients of the withdrawal motion. However, based on the declaration, the withdrawal appears to be at Defendants' request, and they have consented to this withdrawal. Defendants appear to understand the risks of proceeding without counsel.

The authority and duty of Attorney as attorney for Defendants in the adversary proceeding shall continue until the court enters the order. The order submitted shall state the debtor's last known address.

11. 19-13374-B-7 **IN RE: KENNETH HUDSON**
19-1128 NES-2

MOTION OBJECTING TO THE PROPOSED FILING DATES
9-2-2020 [81]

BROWN V. HUDSON
NEIL SCHWARTZ/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Overruled without prejudice.

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

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

The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules of Bankruptcy

Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most up-to-date rules can be found at the court's website, www.caeb.uscourts.gov, towards the middle of the page under "Court Information," "Local Rules & General Orders." The newest rules came into effect on April 9, 2018.

The court notes that Mr. Schwartz has withdrawn as counsel of record for the movant, Kevin Hudson. See Doc. #90. Mr. Hudson is urged to review the LBR before filing another motion or objection.

LBR 9014-1(f)(1)(B), incorporating motions under 9014-1(a), states that objections filed on at least 28 days' notice require the movant to notify the respondent or respondents that any opposition to the objection must be in writing and must be filed with the court at least 14 days preceding the date or continued date of the hearing.

This objection was filed and served on September 2, 2020 and set for hearing on October 21, 2020. Doc. #81, #82. October 21, 2020 is forty-nine (49) days after September 2, 2020, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice of hearing (Doc. #82) was silent as to how respondents could oppose the objection, if at all. That is incorrect. Because the hearing was set on 28 days' notice, the notice should have stated that written opposition was required and must be filed and served not less 14 days before the hearing date. The language of LBR 9014-1(f)(1)(B) needed to have been included in the notice.

Second, the notice did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

Despite these procedural errors, the court must treat *pro se* litigants "with great leniency when evaluation compliance with the technical rules of civil procedure." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (*citing Draper v. Coombs*, 795 F.2d 915, 924 (9th Cir. 1986), *inter alia*). "Thus, before dismissing a *pro se* complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity amend effectively." *Ferdik*, 963 F.2d at 1261 (*citing Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)). Even with that great leniency, the court is still constrained by the law. *See King v. Burwell*, 135 S. Ct. 2480, 2505 (2015).

The court notes that the movant's use of a Docket Control Number (NES-2) was an improvement because it complied with LBR 9004-2(a)(6), (b)(5), (b)(6), and LBR 9014-1(c) & (e)(2). However, for the above procedural errors, this objection will be OVERRULED WITHOUT PREJUDICE.

12. 19-13374-B-7 **IN RE: KENNETH HUDSON**
20-1027 NES-1

MOTION TO COMPEL ABANDONMENT
9-2-2020 [21]

ROYALTY LENDING II, LTD. V.
HUDSON ET AL
NEIL SCHWARTZ/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

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

This motion will be DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

The LBR "are intended to supplement and shall be construed consistently with and subordinate to the Federal Rules of Bankruptcy Procedure and those portions of the Federal Rules of Civil Procedure that are incorporated by the Federal Rules of Bankruptcy Procedure." LBR 1001-1(b). The most up-to-date rules can be found at the court's website, www.caeb.uscourts.gov, towards the middle of the page under "Court Information," "Local Rules & General Orders." The newest rules came into effect on April 9, 2018.

The court notes that Mr. Schwartz has withdrawn as counsel of record for the movant, Kevin Hudson. *See Brown v. Hudson (In re Hudson)*, Case No. 19-01128, Doc. #90. Mr. Hudson is urged to review the LBR before filing another motion to compel.

First, as stated in this court's previous order (Doc. #27), this motion is still not scheduled on the appropriate calendar. *See* Doc. #26. The motion should have been scheduled on the regular Chapter 7 law and motion calendar—typically these are held on Tuesday at 1:30 p.m. for the Fresno calendar or Wednesday at 10:00 a.m. for the monthly Bakersfield calendar. As specified in LBR 9014-1(b)(2), this court's motion calendar and instructions for self-setting hearings are posted on the Court's website (www.caeb.uscourts.gov).

Second, LBR 9014-1(d)(4) requires that all motions, notices, memoranda of points and authorities, exhibits, proofs of service, *inter alia*, shall be filed as separate documents. The movant may not "recycle" documents for motions that were previously denied. The movant's amended notice of hearing (Doc. #28) needed to be refiled with a new docket control number, new motion, new exhibits, a new memorandum of points and authorities, and a new proof of service, even if the contents of those documents are substantially similar or the same as the previously-denied motion. If the movant refiles this motion on the appropriate calendar, he needs to ensure all necessary

documents for that specific motion are filed together under the same, unique Docket Control Number.

Third, LBR 9014-1(c) requires that each new motion contain a new Docket Control Number ("DCN"). The motion to compel abandonment, which was filed by the movant on August 4, 2020 and denied without prejudice on September 4, 2020 (Doc. #27), contains the DCN of NES-1. This motion—which is the old motion filed under the amended notice (Doc. #28)—also has a DCN of NES-1.

Despite these procedural errors, the court must treat *pro se* litigants "with great leniency when evaluation compliance with the technical rules of civil procedure." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (*citing Draper v. Coombs*, 795 F.2d 915, 924 (9th Cir. 1986), *inter alia*). "Thus, before dismissing a *pro se* complaint the district court must provide the litigant with notice of the deficiencies in his complaint in order to ensure that the litigant uses the opportunity amend effectively." *Ferdik*, 963 F.2d at 1261 (*citing Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)). Even with that great leniency, the court is still constrained by the law. *See King v. Burwell*, 135 S. Ct. 2480, 2505 (2015).

The court notes that the amended notice of hearing (Doc. #28) was an improvement because it complied with LBR 9014-1(f)(1)(B) and LBR 9014-1(d)(3)(B)(iii). However, for the above procedural errors, this motion will be DENIED WITHOUT PREJUDICE.

13. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A CALIFORNIA LOCAL HEALTH CARE DISTRICT**
20-1050

STATUS CONFERENCE RE: COMPLAINT
8-11-2020 [1]

COALINGA REGIONAL MEDICAL CENTER, A CALIFORNIA LOC V. MICHAEL WILHELM/ATTY. FOR PL.
DISMISSED 9/28/20

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

A notice of dismissal was filed on September 28, 2020 dismissing the case with prejudice. Doc. #7. Therefore, the status conference will be dropped from calendar.

14. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A CALIFORNIA LOCAL HEALTH CARE DISTRICT**
20-1051

STATUS CONFERENCE RE: COMPLAINT
8-11-2020 [1]

COALINGA REGIONAL MEDICAL
CENTER, A CALIFORNIA LOC V.
MICHAEL WILHELM/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

15. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A CALIFORNIA LOCAL HEALTH CARE DISTRICT**
20-1052

STATUS CONFERENCE RE: COMPLAINT
8-11-2020 [1]

COALINGA REGIONAL MEDICAL
CENTER, A CALIFORNIA LOC V.
MICHAEL WILHELM/ATTY. FOR PL.
DISMISSED 9/21/20

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

A notice of dismissal was filed on September 21, 2020 dismissing the case with prejudice. Doc. #7. Therefore, the status conference will be dropped from calendar.

16. 18-13677-B-9 **IN RE: COALINGA REGIONAL MEDICAL CENTER, A CALIFORNIA LOCAL HEALTH CARE DISTRICT**
20-1053

STATUS CONFERENCE RE: COMPLAINT
8-13-2020 [1]

COALINGA REGIONAL MEDICAL
CENTER, A CALIFORNIA LOC V.
MICHAEL WILHELM/ATTY. FOR PL.
DISMISSED 9/29/20

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

A notice of dismissal was filed September 29, 2020 dismissing the case with prejudice. Doc. #7. Therefore, the status conference will be dropped from calendar.