

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

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

PRE-HEARING DISPOSITIONS

DAY: THURSDAY
DATE: OCTOBER 22, 2015
CALENDAR: 10:00 A.M. CHAPTERS 13 AND 12 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

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

COURT'S ERRORS IN FINAL RULINGS

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

1. [15-12513](#)-A-13 ANTONIO GUTIERREZ CONTINUED STATUS CONFERENCE RE:
[15-1083](#) COMPLAINT
U.S. TRUSTEE V. GUTIERREZ 7-8-15 [[1](#)]
TERRI DIDION/Atty. for pl.

No tentative ruling.

2. [15-12513](#)-A-13 ANTONIO GUTIERREZ MOTION FOR ENTRY OF DEFAULT
[15-1083](#) UST-1 JUDGMENT
U.S. TRUSTEE V. GUTIERREZ 9-11-15 [[13](#)]
TERRI DIDION/Atty. for mv.

Tentative Ruling

Motion: Entry of Default Judgment Dismissing Case with Prejudice and Enjoining Future Serial Filings for Two Years without Leave of Court

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

Disposition: Granted in part (injunctive relief), denied in part (dismissal with prejudice)

Order: Prepared by moving party

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b) (2), *incorporated by* Fed R. Bankr. P. 7055.

The plaintiff has requested that the court enter default judgment against the defendant on the claims brought in this action. Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court will grant the motion and enter default judgment for the plaintiff on the claims brought against defendant in this adversary proceeding.

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and are cumulative. *See In re Casse*, 198 F.3d. 327, 337-41 (2d Cir. 1999).

In cases where cause is found under § 349(a), a filing bar may exceed the 180-day limit described in § 109(g). *See, e.g., id.* at 341; *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). *But see In re Frieouf*, 938 F.2d 1099, 1103-04 (10th Cir. 1991). In *Leavitt*, the Ninth Circuit B.A.P. noted that § 349 was intended to authorize courts to control abusive filings, notwithstanding the limits of § 109(g). *See In re Leavitt*, 209 B.R. 935, 942 (B.A.P. 9th Cir. 1997).

Section 349(a) invokes a "cause" standard. In *Leavitt*, the panel held that "egregious" conduct must be present to find "cause" under § 349, but "a finding of bad faith constitutes such egregiousness." *Id.* at 939 (upholding the bankruptcy court's decision that debtors' inequitable proposal of Chapter 13 plan merely to avoid an adverse state court judgment was an unfair manipulation of the Code). In this circuit, a finding of bad faith is sufficient "cause" for barring future filings pursuant to § 349(a). *Id.* at 939. The overall test used to determine bad faith is to consider the totality of the circumstances. See, e.g., *In re Leavitt*, 209 B.R. at 939; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In determining whether bad faith exists, "[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

The court concludes that a filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found. The court may find cause to bar a debtor from re-filing if the debtor: (1) acted inequitably in filing a case or proposing a plan, (2) misrepresented the facts, (3) unfairly manipulated the Code, or (4) proposed a plan in an inequitable manner. These factors are disjunctive.

The debtor has filed 4 bankruptcy cases between June 27, 2014 and June 25, 2015, within a one-year period. The debtor filed a 5th bankruptcy case on August 27, 2015. The court takes judicial notice of the 5th bankruptcy case, case no. 15-13394, and the orders entered in that case.

All five bankruptcy cases filed by the debtor in 2014 and 2015 have been dismissed. Most of the cases were dismissed for failure to timely file documents, including debtor's 5th case. Many of the cases, including the 5th, were filed without proper disclosure of prior cases. No filing fees were paid.

Based on the undisputed facts, the court finds cause to impose a filing bar exceeding the 180-day limit in § 109(g). The facts show debtor has unfairly manipulated the Code without genuine intent to prosecute the debtor's cases to discharge or reorganization.

The court will deny the claim for dismissal with prejudice as moot. But the debtor will be enjoined from filing another bankruptcy petition in the Eastern District of California without leave of court for a two-year period commencing on the entry of the order dismissing the debtor's bankruptcy case. During such time, leave of court will not be granted to file a petition unless the following conditions have been met: (1) the request for leave of court to file a petition is accompanied by a cashier's check made payable to the Clerk of Court for the full amount of the filing fee and documents that include the completed schedules and statements prepared and ready to be filed, (2) reasonable assurances are provided that debtor will appear at the § 341 meeting, and (3) the debtor shows a material change in circumstances that warrant the filing of a subsequent petition.

3. [15-13222](#)-A-13 TOMASA AVILA STATUS CONFERENCE RE: COMPLAINT
[15-1107](#) 8-27-15 [[1](#)]
U.S. TRUSTEE V. AVILA
TERRI DIDION/Atty. for pl.

Final Ruling

The status conference is continued to December 9, 2015, at 10:00 a.m. to allow judgment to be entered.

4. [09-60526](#)-A-13 REGINALDO/MEREDITH GARCIA CONTINUED STATUS CONFERENCE RE:
[15-1094](#) COMPLAINT
GARCIA ET AL V. MORTGAGE 7-21-15 [[1](#)]
ELECTRONIC REGISTRATION
GABRIEL WADDELL/Atty. for pl.

No tentative ruling.

5. [15-12953](#)-A-13 CYNTHIA MARTINEZ MOTION FOR ENTRY OF DEFAULT
[15-1101](#) UST-1 JUDGMENT
U.S. TRUSTEE V. MARTINEZ 9-21-15 [[10](#)]
ROBIN TUBESING/Atty. for mv.

Final Ruling

Motion: Entry of Default Judgment Enjoining Future Serial Filings for Two Years without Leave of Court

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

Disposition: Granted

Order: Prepared by moving party

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055.

The plaintiff has requested that the court enter default judgment against the defendant on the claims brought in this action. Having accepted the well-pleaded facts in the complaint as true, and for the reasons stated in the motion and supporting papers, the court will grant the motion and enter default judgment for the plaintiff on the claims brought against defendant in this adversary proceeding.

The court has the authority to preclude serial, abusive bankruptcy filings. A number of remedies exist to redress such abuses: (1) dismissal with prejudice that bars the subsequent discharge of existing, dischargeable debt in the case to be dismissed, 11 U.S.C. § 349(a); (2) dismissal with prejudice that bars future petitions from being filed or an injunction against future filings, 11 U.S.C. §§ 105(a), 349(a); *see also Kistler v. Johnson*, No. 07-2257, 2008 WL 483605 (Bankr. E.D. Cal. Feb. 15, 2008) (McManus, J.) (unpublished decision). These provisions and remedies complement each other and

are cumulative. See *In re Casse*, 198 F.3d 327, 337-41 (2d Cir. 1999).

In cases where cause is found under § 349(a), a filing bar may exceed the 180-day limit described in § 109(g). See, e.g., *id.* at 341; *In re Tomlin*, 105 F.3d 933 (4th Cir. 1997). But see *In re Frieouf*, 938 F.2d 1099, 1103-04 (10th Cir. 1991). In *Leavitt*, the Ninth Circuit B.A.P. noted that § 349 was intended to authorize courts to control abusive filings, notwithstanding the limits of § 109(g). See *In re Leavitt*, 209 B.R. 935, 942 (B.A.P. 9th Cir. 1997).

Section 349(a) invokes a "cause" standard. In *Leavitt*, the panel held that "egregious" conduct must be present to find "cause" under § 349, but "a finding of bad faith constitutes such egregiousness." *Id.* at 939 (upholding the bankruptcy court's decision that debtors' inequitable proposal of Chapter 13 plan merely to avoid an adverse state court judgment was an unfair manipulation of the Code). In this circuit, a finding of bad faith is sufficient "cause" for barring future filings pursuant to § 349(a). *Id.* at 939. The overall test used to determine bad faith is to consider the totality of the circumstances. See, e.g., *In re Leavitt*, 209 B.R. at 939; *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In determining whether bad faith exists, "[a] bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed [a plan] in an inequitable manner." *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir. 1982).

The court concludes that a filing bar may be ordered pursuant to § 349 if the appropriate objective factors are found. The court may find cause to bar a debtor from re-filing if the debtor: (1) acted inequitably in filing a case or proposing a plan, (2) misrepresented the facts, (3) unfairly manipulated the Code, or (4) proposed a plan in an inequitable manner. These factors are disjunctive.

Here, the debtor has filed 4 abusive bankruptcy cases between June 2014 and July 2015. In each case, the debtor failed to disclose one or more prior bankruptcy cases in the prior 8 years as required on the voluntary petition. In 3 of the cases, including the most recent case filed July 27, 2015, the debtor's case was dismissed for failure to file documents timely. In one of the cases, the debtor's case was dismissed for failure to pay court filing fees.

Based on the undisputed facts, the court finds cause to impose a filing bar exceeding the 180-day limit in § 109(g). The facts show debtor has unfairly manipulated the Code without genuine intent to prosecute the debtor's cases to discharge or reorganization.

The debtor will be enjoined from filing another bankruptcy petition in the Eastern District of California without leave of court for a two-year period commencing on the entry of the order dismissing the debtor's bankruptcy case. During such time, leave of court will not be granted to file a petition unless the following conditions have been met: (1) the request for leave of court to file a petition is accompanied by a cashier's check made payable to the Clerk of Court for the full amount of the filing fee and documents that include the completed schedules and statements prepared and ready to be filed, (2) reasonable assurances are provided that debtor will appear at the § 341 meeting, and (3) the debtor shows a material change in circumstances that warrant the filing of a subsequent petition.

6. [10-11779](#)-A-12 WILLIAM BUCHNOFF
[15-1070](#)
BUCHNOFF V. COUNTY OF FRESNO;
OFFICE OF
HENRY NUNEZ/Atty. for pl.
- CONTINUED STATUS CONFERENCE RE:
COMPLAINT
5-21-15 [[1](#)]

No tentative ruling.

7. [13-15181](#)-A-13 LINDSAY LEMONS
[13-1124](#)
STORMS ET AL V. LEMONS
GLEN GATES/Atty. for pl.
DISMISSED
- CONTINUED STATUS CONFERENCE RE:
COMPLAINT
11-12-13 [[1](#)]

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

8. [13-15181](#)-A-13 LINDSAY LEMONS
- STATUS CONFERENCE RE: VOLUNTARY
PETITION
7-30-13 [[1](#)]
- SCOTT LYONS/Atty. for dbt.
DISMISSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

9. [15-12953](#)-A-13 CYNTHIA MARTINEZ
[15-1101](#)
U.S. TRUSTEE V. MARTINEZ
ROBIN TUBESING/Atty. for pl.
- RESCHEDULED STATUS CONFERENCE
RE: COMPLAINT
8-12-15 [[1](#)]

Final Ruling

The status conference is continued to November 12, 2015, at 10:00 a.m. to allow entry of judgment.