UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, October 24, 2018
Place: Department B – Courtroom #13
Fresno, California

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. 11-19905-B-7 **IN RE: RICHARD MCINTYRE**
FW-3

CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH KORY EVANS AND KRIS EVANS
8-28-2018 [41]

JAMES SALVEN/MV
TIMOTHY SPRINGER
PETER FEAR/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 is GRANTED. This motion was continued to allow movant to supply supplemental evidence. The court has reviewed that evidence, and believes that movant has met his burden of proof.

It appears from the moving papers that the trustee has considered the standards of In re Woodson, 839 F.2d 610, 620 (9th Cir. 1987) and In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986):

a. the probability of success in the litigation;
b. the difficulties, if any, to be encountered in the matter of collection;
c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
d. the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Accordingly, it appears that the compromise pursuant to Federal Rule of Bankruptcy Procedure 9019 is a reasonable exercise of the trustee's business judgment. The order should be limited to the claims compromised as described in the motion.

The trustee requests approval of a settlement agreement between the estate the debtor's step-sons. The claim was precipitated by a settlement debtor received in a wrongful death case debtor filed with regards to the death of his spouse. Doc. #41.

Under the terms of the compromise, debtor's two step-sons shall be owners of two-thirds of the net proceeds from the claim, each being the beneficial owner of $72,684.78. *Id.* That amount is not property of the estate. The remainder, $72,684.78, shall be paid to creditors in accordance with the Order Granting Motion to Approve Stipulation Resolving Amount of Exemption Claimed in Lawsuit Proceeds. Doc. #40. And the bankruptcy estate shall be the undisputed owner of 100% of the legal interest in the claim. Doc. #41.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: the probability of success is high because the trustee believes that the "law is clear" and he would prevail, but the settlement achieves the same result as litigation likely would; collection will be very easy as the money is available and being held in a third-party trust account; the litigation is not complex but would require hiring special counsel and moving forward would decrease the net to the estate due to the legal fees; and the creditors will greatly benefit from the net to the estate; the settlement is equitable and fair. According to the Trustee, the one-third of net proceeds the estate is to receive is enough to satisfy all allowed claims and administrative expenses. Doc. #41, p.6.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

This ruling is not authorizing the payment of any fees or costs associated with the litigation.

2. 11-19905-B-7 **IN RE: RICHARD MCINTYRE**
FW-4

CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH PHILIP HENRY
9-5-2018 [49]

JAMES SALVEN/MV
TIMOTHY SPRINGER
PETER FEAR/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 is GRANTED. This motion was originally set on 14 days' notice, but no opposition was presented at the hearing on September 26, 2018 at 9:30 a.m. Therefore, there will be no hearing on this matter.

It appears from the moving papers that the trustee has considered the standards of In re Woodson, 839 F.2d 610, 620 (9th Cir. 1987) and In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986):

a. the probability of success in the litigation;
b. the difficulties, if any, to be encountered in the matter of collection;
c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
d. the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Accordingly, it appears that the compromise pursuant to Federal Rule of Bankruptcy Procedure 9019 is a reasonable exercise of the trustee's business judgment. The order should be limited to the claims compromised as described in the motion.

The trustee requests approval of a settlement agreement between the estate the attorney debtor retained to litigate a wrongful death claim. Doc. #49.

Under the terms of the compromise, Mr. Philip Henry ("Attorney") agrees that any transfer of interest by debtor to Attorney to the proceeds of the claim shall be avoided, and the transfer so avoided is preserved for the benefit of the bankruptcy estate; Attorney is entitled to assert a general unsecured claim of $129,342.33, which is 40% of the settlement minus 10% (10% to pay the 10% common benefit fee assessed by order of the court in which the litigation over the claim was held); Upon approval of this agreement by the bankruptcy court, Attorney's claim shall be deemed to have been timely filed, and; the parties further agree to a mutual release of all claims by and between each other, including a waiver of the provisions of California Code of Civil Procedure § 1542. *Id.*

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: the probability of success is high because the trustee believes that the law is clear and he would prevail; collection will be very easy as the money is available and being held in a third-party trust account; the litigation is complex but recent cases out of the Eastern District of New York (In re Ross, 548 B.R. 632; Mendelsohn v. Ross, 251 F.Supp.3d 518 (E.D.N.Y. 2017) makes ascertaining whether Attorney could defeat trustee's assertion that the claim is property of the estate or a § 549 avoidance action is uncertain. But, In re Carroll, 586 B.R. 775 (Bankr. E.D. Cal. 2018) seems to support the Trustee's litigation position here. The creditors will greatly benefit from the net to the estate. The settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

This ruling is not authorizing the payment of any fees or costs associated with the litigation.

3. 11-19905-B-7 **IN RE: RICHARD MCINTYRE**
FW-5

CONTINUED MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT
9-5-2018 [56]

JAMES SALVEN/MV
TIMOTHY SPRINGER
PETER FEAR/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 is GRANTED. This motion was continued to allow movant to provide supplemental evidence. Movant provided two supplemental declarations on October 17, 2018. Doc. ##72, 73.

Mr. Philip Henry, debtor's state court counsel in a wrongful death lawsuit, stated in his declaration that some critical terms of the settlement were that the identity of the defendant, the identity of the product at subject in the litigation, the amount of the settlement, inter alia, were confidential. Doc. #73.

Mr. Salven's declaration provided a detailed breakdown of how the settlement monies would be distributed in the various settlements and how much would be left to pay administrative claims and unsecured creditors. Doc. #72.

It appears from the moving papers that the trustee has considered the standards of In re Woodson, 839 F.2d 610, 620 (9th Cir. 1987) and In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986):

a. the probability of success in the litigation;
b. the difficulties, if any, to be encountered in the matter of collection;
c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
d. the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Accordingly, it appears that the compromise pursuant to Federal Rule of Bankruptcy Procedure 9019 is a reasonable exercise of the trustee's business judgment. The order should be limited to the claims compromised as described in the motion.

The trustee requests approval of a settlement agreement between the estate and the manufacturer of an allegedly defective product that resulted in the debtor bringing a wrongful death lawsuit in state court against said manufacturer.

The terms of the compromise are confidential. *See* doc. #72. However, the court finds that the supplemental evidence provided meets movant's burden of proof.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: the probability of success is far from assured as the defendants assert affirmative defenses like the statute of limitations; collection will be very easy as the defendant/manufacturer grosses billions of dollars yearly and the offered funds are being held in the trust account of Mr. Henry; the litigation is incredibly complex and moving forward would decrease the net to the estate due to the legal fees; and the creditors will greatly benefit from the net to the estate, that would otherwise not exist; the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

4. 18-13306-B-7 **IN RE: GARY ROIDT**
TMT-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
9-19-2018 [13]

SUSAN HEMB

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

DISPOSITION: Conditionally denied.

ORDER: The court will issue the order.

The chapter 7 trustee's motion to dismiss is CONDITIONALLY DENIED.

The debtors shall attend the meeting of creditors rescheduled for November 19, 2018 at 8:30 a.m. If the debtor fails to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtors' discharge or file motions for abuse, other than presumed abuse, under § 707, is extended to 60 days after the conclusion of the meeting of creditors.

5. 13-12414-B-7 **IN RE: CLYDE/RACHEL ABLES**
TGM-1

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
8-15-2018 [65]

THE BANK OF NEW YORK MELLON/MV
SCOTT LYONS
TYNEIA MERRITT/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: This matter will proceed as a scheduling conference.

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

The hearing on this motion was continued to this date by stipulation of the parties. Doc. #84. This matter will be called as scheduled and will proceed as a scheduling conference.

This matter is now deemed to be a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The parties shall be prepared for the court to set an early evidentiary hearing.

The debtors' discharge was entered on October 18, 2018. Doc. #86. Therefore, the relief requested as to the debtor's interest is DENIED AS MOOT pursuant to 11 U.S.C. § 362(c)(2).

Based on the record, the factual issues appear to include: how the debtors' payments that were made during their chapter 13 case were applied to their mortgage account.

6. 18-13526-B-7 **IN RE: SUSANNA SAESEE**
JHW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-19-2018 [12]

SANTANDER CONSUMER USA,
INC./MV
ROSALINA NUNEZ
SHERYL ITH/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 relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtor's and the trustee's defaults will be entered. The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The collateral is a 2011 Toyota Rav4. Doc. #17. The collateral has a value of $11,025.00 and debtor owes $15,270.65. *Id.* The proposed order shall specifically describe the property or action to which the order relates.

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

7. 18-13758-B-7 **IN RE: DONNIE/KELLY BROOKS**
SL-1

MOTION TO COMPEL ABANDONMENT
9-24-2018 [11]

DONNIE BROOKS/MV
STEPHEN LABIAK

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 Rules of Practice ("LBR").

First, the motion was not noticed correctly. 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 24, 2018 and set for hearing on October 24, 2018. Doc. #24. There is no date on the certificate of service (doc. #14), so the court does not know when, if ever, the papers were actually served. October 24, 2018 is 30 days after September 24, 2018, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice stated that written opposition was not required and may be presented at the hearing. Doc. #12. That is incorrect. Because the hearing was set on 28 days' notice, the notice should have stated that written opposition was required. Because this motion was filed and set for hearing on 28 days' notice, 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.

Third, the certificate of service does not show that the actual motion was served. Additionally, it states that two declarations were served, yet only one declaration was filed with the court.

8. 10-12664-B-7 **IN RE: CHARLES BLANKENSHIP**
DRJ-2

RESCHEDULED HEARING RE: MOTION TO AVOID LIEN OF AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.
9-20-2018 [24]

CHARLES BLANKENSHIP/MV
GARY HUSS

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied without prejudice.

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

This motion is DENIED WITHOUT PREJUDICE. Constitutional due process requires that the movant make a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

On debtor's amended Schedule C (doc. #28), debtor does not actually claim any value exempt on the real property located at "3330 E. Douglas Ave., Visalia, CA." Unless the debtor claims *some* amount as exempt, the court cannot set aside the lien the judgment debtor wishes to avoid.

9. 18-13170-B-7 **IN RE: SHAUN PATTERSON**
CAS-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-19-2018 [12]

FINANCIAL SERVICES VEHICLE
TRUST/MV
NEIL SCHWARTZ
CHERYL SKIGIN/ATTY. FOR MV.

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

DISPOSITION: Denied as moot.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion relates to an executory contract or lease of personal property. The case was filed on July 31, 2018 and the lease was not assumed by the chapter 7 trustee within the time prescribed in 11 U.S.C. § 365(d)(1). Pursuant to § 365 (p)(1), the leased property is

no longer property of the estate and the automatic stay under § 362(a) has already terminated by operation of law.

Movant may submit an order denying the motion as moot, and confirming that the automatic stay has already terminated on the grounds set forth above. No other relief will be granted. No attorney fees will be awarded in relation to this motion.

10. 16-12687-B-7 **IN RE: LORAINE GOODWIN MILLER**
TGM-3

OBJECTION TO CLAIM OF LORAINE GOODWIN, CLAIM NUMBER 8
9-10-2018 [158]

JAMES SALVEN/MV
TRUDI MANFREDO/ATTY. FOR MV.

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

DISPOSITION: Overruled without prejudice.

ORDER: The court will issue an order.

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

LBR 9014-1(c) requires every motion to include a Docket Control Number ("DCN"). LBR 9014-1(c)(3) states that the repeated use of Docket Control Numbers is not allowed.

The DCN on this objection is TGM-3. TGM-3 was previously used on July 14, 2017. Therefore, this objection is not in compliance with the LBR, and is OVERRULED WITHOUT PREJUDICE.

11. 16-12687-B-7 **IN RE: LORAINE GOODWIN MILLER**
TGM-4

OBJECTION TO CLAIM OF LORAINE GOODWIN, CLAIM NUMBER 11
9-10-2018 [164]

JAMES SALVEN/MV
TRUDI MANFREDO/ATTY. FOR MV.

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

DISPOSITION: Overruled without prejudice.

ORDER: The court will issue an order.

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

LBR 9014-1(c) requires every motion to include a Docket Control Number ("DCN"). LBR 9014-1(c)(3) states that the repeated use of Docket Control Numbers is not allowed.

The DCN on this objection is TGM-4. TGM-4 was previously used on July 19, 2017. Therefore, this objection is not in compliance with the LBR, and is OVERRULED WITHOUT PREJUDICE.

12. 16-12687-B-7 **IN RE: LORAINE GOODWIN MILLER**
TGM-5

OBJECTION TO CLAIM OF LORAINE GOODWIN, CLAIM NUMBER 13
9-10-2018 [170]

JAMES SALVEN/MV
TRUDI MANFREDO/ATTY. FOR MV.

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

DISPOSITION: Sustained.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(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 objection is SUSTAINED.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states that a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim. If a party objects to a proof of claim, the burden of proof is on the objecting party. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. BAP 2000).

Debtor and claimant Loraine Goodwin ("Claimant" and "Debtor") filed claim no. 13 in the amount of $5,000.00 on November 29, 2016 for "Down payment for purchase of property." She claimed $2,775.00 of this amount as priority under 11 U.S.C. § 507(a)(7).

The trustee objected to this claim on three grounds. First, that it is not entitled to priority status because it was a deposit made into escrow for the purchase of commercial real property, which is not covered under § 507(a)(7). Second, The facts and issues in this case were previously litigated, and trustee's objection to Debtor's claim of exemption was sustained, and issue preclusion thus bars this litigation. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008). Third, the trustee's duty is to liquidate estate assets, not give assets back to the debtor. *See* 11 U.S.C. § 704.

Claim no. 13 filed by Debtor is disallowed in its entirety.

13. 16-12687-B-7 **IN RE: LORAINE GOODWIN MILLER**
TGM-6

OBJECTION TO CLAIM OF LORAINE GOODWIN MILLER, CLAIM NUMBER 9
9-10-2018 [176]

JAMES SALVEN/MV
TRUDI MANFREDO/ATTY. FOR MV.

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

DISPOSITION: Sustained.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This objection was set for hearing on 44 days' notice as required by Local Rule of Practice ("LBR") 3007-1(b)(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 objection is SUSTAINED.

11 U.S.C. § 502(a) states that a claim or interest, evidenced by a proof filed under section 501, is deemed allowed, unless a party in interest objects.

Federal Rule of Bankruptcy Procedure 3001(f) states that a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim. If a party objects to a proof of claim, the burden of proof is on the objecting party. Lundell v. Anchor Constr. Specialists, Inc., 223 F.3d 1035, 1039 (9th Cir. BAP 2000).

Debtor and claimant Loraine Goodwin ("Claimant" and "Debtor") filed claim no. 9 in the amount of $5,244.00 on November 18, 2016 as a priority claim on behalf of the California Franchise Tax Board.

The trustee objected to this claim on the grounds that the claim's supporting documents are not actually from the California Franchise Tax Board, but the Internal Revenue Service. The Franchise Tax Board has not filed a claim in this case.

Therefore, claim no. 9 filed by Debtor is disallowed in its entirety.

14. 18-13399-B-7 **IN RE: ROBERTO SOSA URTIZ AND YANET DE SOSA**
RAS-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
9-17-2018 [18]

HITACHI CAPITAL AMERICA
CORP./MV
REBECCA TOMILOWITZ
RICHARD SOLOMON/ATTY. FOR MV.

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 Rules of Practice ("LBR").

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.

11:00 AM

1. 18-12470-B-7 **IN RE: MARIA TORRES**

PRO SE REAFFIRMATION AGREEMENT WITH NUVISION FEDERAL CREDIT UNION
10-4-2018 [29]

IRMA EDMONDS

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

DISPOSITION: Dropped.

ORDER: The court will issue an order.

Debtor's counsel will inform debtor that no appearance is necessary.

The court is not approving or denying approval of the reaffirmation agreement. Debtor was represented by counsel when she entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), if the debtor is represented by counsel, the agreement must be accompanied by an affidavit of the debtor's attorney attesting to the referenced items before the agreement will have legal effect. *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). The reaffirmation agreement, in the absence of a declaration by debtor's counsel, does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable.

The court notes that the debtor's attorney filed a declaration in support of the reaffirmation agreement on October 4, 2018. (Doc. #31). The declaration does attest to all requirements set forth in 11 U.S.C. § 524(c)(A) – (C). But, the declaration does not attest to the fact that counsel represented the debtor during the course of negotiating the agreement. The debtor's motion (doc. #29) states affirmatively that counsel did not represent the debtor in the course of negotiating the re-affirmation agreement. Counsel also did not sign the form certification accompanying the re-affirmation agreement. The debtor shall have 14 days to refile the reaffirmation agreement properly signed and endorsed by the attorney.

1:30 PM

1. 18-12011-B-7 **IN RE: ARSHAD HUSSAIN**
   18-1054

   STATUS CONFERENCE RE: COMPLAINT
   8-24-2018 [1]

   RASUL V. HUSSAIN
   ALICIA HINTON/ATTY. FOR PL.

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

DISPOSITION: Continued to November 14, 2018 at 1:30 p.m.

ORDER: The court will issue an order.

The court approved the parties' stipulation extending the defendant's time to respond to the complaint. That date is October 26, 2018, which is after this hearing. Therefore, this status conference will be continued to November 14, 2018 at 1:30 p.m. Counsel shall file and serve joint or unilateral status reports not later than November 7, 2018.

2. 18-12017-B-7 **IN RE: BEN/LORI KUYKENDALL**
   18-1053

   STATUS CONFERENCE RE: COMPLAINT
   8-24-2018 [1]

   KUYKENDALL V. CAPITAL
   COLLECTIONS, LLC
   SHANE REICH/ATTY. FOR PL.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: The parties have reached a settlement.

The plaintiffs request that this adversary proceeding be dismissed pursuant to Federal Rule of Civil Procedure 41 and Federal Rule of Bankruptcy Procedure 7041.

Fed. R. Civ. P. 41(a)(1)(A)(i) (incorporated by Fed. R. Bankr. P. 7041) states that the plaintiff may dismiss the matter before the opposing party serves an answer.

The plaintiff filed this request for dismissal before the defendant filed an answer. Therefore, this status conference is dropped from calendar and the adversary proceeding is DISMISSED.

3. 17-11028-B-11 **IN RE: PACE DIVERSIFIED CORPORATION**
18-1006

PRE-TRIAL CONFERENCE RE: COMPLAINT
2-5-2018 [1]

PACE DIVERSIFIED CORPORATION
ET AL V. MACPHERSON OIL
T. BELDEN/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to February 7, 2019 at 11:00 a.m.

ORDER: The court will issue an order.

By court order and stipulation of the parties, this pre-trial conference is continued to February 7, 2019 at 11:00 a.m. in Bakersfield, CA.

Plaintiffs' deadline to file and serve their pre-trial statements is extended to December 14, 2018. Defendant's deadline to file and serve its pre-trial statement is extended to January 14, 2019. The parties' deadline to file a joint pre-trial statement is extended to January 28, 2019.

4. 17-14678-B-7 **IN RE: SEAN MOONEY**
18-1037

CONTINUED STATUS CONFERENCE RE: COMPLAINT
6-27-2018 [1]

FEAR V. MOONEY
TRUDI MANFREDO/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to December 19, 2018 at 1:30 p.m.

ORDER: The court will issue an order.

The parties have settled the matter. The court will review the docket prior to the continued status conference. If documents finalizing the dismissal of this case are not filed by December 12, 2018, the court will issue an order to show cause why the case should not be dismissed. The court will issue the order.

5. 17-13297-B-7 **IN RE: ROBERT BENDER AND DEBORAH HALLE**
17-1088

PRE-TRIAL CONFERENCE RE: COMPLAINT
12-5-2017 [1]

ICON ENTERTAINMENT GROUP, INC.
V. BENDER ET AL
PHILLIP GILLET/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

6. 17-13297-B-7 **IN RE: ROBERT BENDER AND DEBORAH HALLE**
17-1088 DMG-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-26-2018 [22]

ICON ENTERTAINMENT GROUP, INC.
V. BENDER ET AL
D. GARDNER/ATTY. FOR MV.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

Defendants Robert Bender and Deborah Halle ("Defendant") bring this motion on the grounds that Plaintiff Icon Entertainment Group, Inc., a California Corporation, doing business as ICON concerts ("Plaintiff") has failed to prosecute this case. Doc. #22. Defendant alleges that Plaintiff has failed to comply with this court's Scheduling Order issued on March 9, 2018.

Plaintiff timely opposed this motion, stating, among other reasons, that his failure to comply with the court's scheduling order was due to deadlines being miscalendered and serious familial health problems. Plaintiff only states that Defendant's counsel did not contact him concerning counsel's errors only to "counter the appropriateness of a terminating sanction without some type of mitigation by the other side." Doc. #30.

Defendant replied, essentially stating that this proceeding has been pending for 10 months, Plaintiff had sufficient notice of the various deadlines and matters that needed to be taken care of in this case and therefore the case should be dismissed. Doc. #32

Defendant filed this motion under Federal Rules of Civil Procedure 37(b)(2)(A)(v) and 41(b) (incorporated by Federal Rules of Bankruptcy Procedure 7037 and 7041).

Fed. R. Civ. P. 37(b)(2)(A)(v) states, "If a party…fails to obey an order to provide or permit discovery, including an order under Rule 26(f)(, 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following: dismissing the action or proceeding in whole or in part."

Fed. R. Civ. P. 41(b) states, "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule…operates as an adjudication on the merits."

Failure to Prosecute

The bankruptcy court has discretion to dismiss an adversary proceeding based upon a plaintiff's failure to prosecute. Al-Torki v. Kaempen, 78 F.3d 1381, 1384 (9th Cir. 1996); Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994). In determining whether to dismiss a case for lack of prosecution, the bankruptcy court must weigh the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). "Dismissal is a harsh penalty and is to be imposed only in extreme circumstances." Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986). All five factors need not be present to support dismissal. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1022 (9th Cir. 2002).

Expeditious Resolution and Docket Management-These two factors weigh slightly in favor of dismissal. This adversary proceeding has been pending for nearly 11 months. The court issued a scheduling order over seven months ago. Plaintiff has not complied with the scheduling order and has not pursued the case until the defendant filed this motion. Plaintiff provided no initial disclosures and has not complied with the other discovery deadlines set forth in the scheduling order. The pretrial conference was scheduled to be heard today. The defendant has complied with the orders of the court. The interest of the defendant in an expeditious resolution is clear since the defendant is entitled to a fresh start or at least a prompt resolution of the discharge disputes raised in this adversary proceeding.

In addition to other excuses discussed below, the plaintiff has no real explanation for the failures outlined by the defendant except that the parties were hoping to resolve the matter before a Superior Court case was filed. But, no stay relief motion has been filed to date. Further, this court made all counsel well aware at the outset

that this case had to move along since state court litigation was contemplated. This court is not a "place holder" for the convenience of a party. The court has its own calendar requirements including limited trial dates. These factors weigh in favor of dismissal under Fed. R. Civ. P. 41.

Prejudice to the defendant-This factor weighs against dismissal. Prejudice is not weighed in a vacuum. Instead, the bankruptcy court typically must weigh the extent of and reason for the plaintiff's delay against any showing of a risk of prejudice. Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275, 1280-81 (9th Cir. 1980). That a defendant is impacted by the mere existence of pending litigation against them is not prejudice contemplated by the delay of a fresh start. See, Barr v. Barr (In re Barr), 217 B.R. 626 (Bankr. W.D. Wash. 1998). Here defendants' counsel makes two excuses for the delay: his distraction from his duties due to the health of a family member and the inexperience of his staff. The latter excuse is really no excuse. Counsel must take responsibility for staff errors. Plaintiff's counsel does. The timing of counsel's family health issues does not fully explain the delay. The health issues were known fairly early in the litigation process. Some accommodation could have been made if the court had been asked in an appropriate motion. Plaintiff's counsel does not adequately explain that delay.

On the other hand, how is defendant prejudiced? If a plaintiff can provide an excuse for its conduct that is "anything but frivolous, the burden of production shifts to the defendant to show at least some actual prejudice." Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1453 (9th Cir. 1994). Trial courts must exercise discretion by weighing time, excuse and prejudice to determine "whether there has been *sufficient* delay or prejudice to justify a dismissal of the plaintiff's case." *Id.* (citing Nealey, 662 F.2d at 1281)).

Yes, there has been delay but presumably, since defendant's counsel apparently did not contact plaintiff about the missed deadlines, there could not have been a substantial expenditure of attorney's fees by defendant before this motion was filed. Defendant's counsel does not quantify what, if anything was expended due to plaintiff's delays. The mere existence of the lawsuit is not prejudicial. No specific prejudice has been discussed by defense counsel in defendants' submissions. The "protracted litigation" which defendants claim is unaffordable will have to be experienced anyway whether in this or another court.

Any prejudice suffered by defendants can be at least partially remedied by sanctions discussed below.

Public policy deciding cases on their merits-This factor militates against dismissal. The public policy favoring merits decisions does not by itself preclude dismissal of a lawsuit for lack of prosecution. Rio Props., 284 F.3d at 1022. Here the policy is significant because the debtors deserve their fresh start or the

knowledge that the alleged debt owed to plaintiff will not be discharged. Filing a lawsuit and allowing it to be dormant so other parties can be sued in another forum is not condoned. But, this is militated by the reality that a dischargeability case must be filed by a certain date.

It is not uncommon for state court litigation to complete before a dischargeability determination is made by a bankruptcy court. The only difference here is no state court case was pending on this claim when the bankruptcy case was filed. Still, the debtors had to know there was a risk that an adversary proceeding would be filed contesting dischargeability. The facts have to be tried somewhere and this case may involve other parties but that calculus is left to another day. The issue is that the state court case was recently filed. The question is whether that was good faith or gamesmanship. Plaintiff's counsel has testified in the declaration that another attorney has been involved in the state court aspect of the case. Thus all parties knew what risks would face this case in terms of timing of the trial in this court.

Defendants' cite to Morris v. Morgan Stanley & Co, 942 F.2d 648, 652 (9th Cir. 1991) is not persuasive. Defendants' cite the case to argue that a court's warning about dismissal for failure to prosecute is not necessary when the request is by noticed motion. True enough, but in Morris the trial court found one party misused the arbitration stay and the court had warned the party about dilatory tactics at five separate status conferences. *Id.* The court of appeals used the five part test in affirming dismissal and noted the trial court did not abuse its discretion. Here, the court is not denying the motion because of a lack of warning but based on application of the five part test.

Less Drastic Sanctions-This factor militates against dismissal. The Ninth Circuit has identified three factors that indicate whether a trial court has adequately considered alternatives: (1) Did the court explicitly discuss the feasibility of less drastic sanctions and explain why alternative sanctions would be inadequate? (2) Did the court implement alternative methods of sanctioning or curing the malfeasance before ordering dismissal? (3) Did the court warn the plaintiff of the possibility of dismissal before actually ordering dismissal? Allen v. Bayer Corp. (In re:Phenylpropanolamine (PPA) Prods. Liab. Litig.), 460 F.3d 1217 (9th Cir. 2006) (citations omitted). Here, the defendant has had to file a motion to get this case "on track." The defendant should not have to shoulder the expense of the motion. On the other hand, there is nothing in the record showing that defense counsel warned plaintiff's counsel of his nonfeasance. Yet, it is not defense counsel's job to prosecute the action against his client. A monetary sanction is adequate to compensate defendants' at this time.

Defense counsel may file a motion requesting attorney's fees supported by sufficient evidence of the fees expended to prepare and appear for the hearing on this motion. Said motion is to be heard on

regular notice and is to be filed and served on or before November 7, 2018. Alternatively, in lieu of filing the motion, the court finds, based on the court's experience and knowledge of both counsel, that $600 is a reasonable monetary sanction awardable against plaintiff's counsel and payable to defense counsel within 10 days of the date defense counsel notifies plaintiff's counsel that defendants elect the alternative. If defendants elect to accept the alternative, they shall advise the court on or before November 7, 2018.

The court warns plaintiff's counsel that further delays or violations of court orders may result in terminating sanctions.

Violation of Discovery Order

Defendant's alternative theory for terminating sanctions is the plaintiff's violation of court ordered scheduling deadlines. Fed. R. Civ. P. 37(c) provides the penalties that may be imposed if a party fails to make disclosures as required under Fed. R. Civ. P. 26. A party attempting to avoid sanctions has the burden of proof as to why its actions were either "substantially justified or harmless." Yeti by Molly, Ltd. v. Decker Outdoor Corp., 259 F.3d 1101, 1106-7 (9th Cir. 2001). Factors to consider when determining if a violation is harmless include: "(1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." Lanard Toys, Ltd. v. Novelty, Inc., 375 F.App'x 705, 713 (9th Cir. 2010) (citing David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003).

Here defendants must be surprised because no disclosures were made or witnesses identified or documents described. Defendant may be able to cure the prejudice but that will cause schedule disruption. No trial has occurred since the trial has not been scheduled. The court does not find bad faith by plaintiff here for reasons indicated above. Also, the expense defendants incurred is offset by the sanctions awarded.

This motion to dismiss is DENIED. Sanctions are awarded as indicated above.