UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, November 3, 2021
Place: Department B – 510 19th Street
Bakersfield, California

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

Pursuant to District Court General Order 631, courthouses for the Eastern District of California will be reopened to the public effective June 14, 2021.

At this time, when in-person hearings in Bakersfield will resume is to be determined. No persons are permitted to appear in court for the time being. 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, **and all parties will need to appear at the hearing unless otherwise ordered.** The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

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

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

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

9:00 AM

1. 18-11505-B-13 PK-7 **IN RE: MIGUEL GONZALEZ AND ADRIANA MELENDREZ-GONZALEZ**

MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTORS ATTORNEY(S)
10-13-2021 [97]

PATRICK KAVANAGH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after hearing.

Patrick Kavanagh of the Law Office of Patrick Kavanagh ("Applicant"), attorney for Miguel Angel Gonzalez and Adriana Melendrez-Gonzalez ("Debtors"), requests interim compensation in the sum of $5,300.00 pursuant to 11 U.S.C. §§ 330 and 331. Doc. #97. Reimbursement of expenses is waived, so this amount consists solely of fees as reasonable compensation for services rendered from February 21, 2018 through October 11, 2021. *Id.*

Debtors signed a statement of consent indicating that they had read the fee application and approve the same. Doc. #104.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, the court is inclined to GRANT this motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary. All parties in interest were notified at least 21 days before the hearing pursuant to Fed. R. Bankr. P. 2002(a)(6). Docs. ##101-03.

Debtors filed chapter 13 bankruptcy on April 17, 2018. As noted above, the *Rights and Responsibilities* Form EDC 3-096 provides that initial fees of $6,000.00 were charged in this case and $0.00 was

paid prior to filing the petition. This is consistent with section 3.05 of the original chapter 13 plan, which states that Debtors paid $0.00 prior to filing and, subject to court approval, additional fees of $6,000.00 shall be paid through the plan by filing a motion in conformance with 11 U.S.C. §§ 329, 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #28. These same terms are reflected in the First and Second Amended Plans. Docs. #46; #78. Currently, the Second Amended Plan is the operative plan in this case. Doc. #89. Applicant agreed to file this bankruptcy with no money down because Debtors' prior case was dismissed without entry of discharge. Doc. #99, Ex. A.

This is Applicant's first interim fee application. Applicant's office provided 19.2 billable hours of services at $300.00 per hour, totaling $5,760.00 fees. Applicant waived $460.00 in fees and all of his expenses, limiting this motion to **$5,300.00** total. Docs. #97, §§ 5, 7; #99, Exs. B, C.

The source of funds for payment of the fees will be from the chapter 13 trustee in accordance with the confirmed chapter 13 plan. Doc. #97. Since this is the first application, there are still $6,000.00 in funds remaining in the plan for attorney fees, so payment of these fees will not affect plan feasibility. *Id.*, § 9(3).

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

Applicant's services included, without limitation: (1) refiling a prior, dismissed case with no money down from the Debtors; (2) preparing, filing, and successfully prosecuting motions to extend the automatic stay (PK-1), value collateral (PK-5), and confirm a chapter 13 plan (PK-6); and (3) preparing and filing this fee application. The court finds the services reasonable and necessary.

Written opposition was not required and may be presented at the hearing. As noted above, Debtors consented to the Trustee paying this application. Doc. #104.

In the absence of opposition, the court is inclined to GRANT this motion. Applicant shall be awarded $5,300.00 in fees on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to § 330. The chapter 13 trustee will be authorized, in his discretion, to pay Applicant $5,300.00 in accordance with the confirmed chapter 13 plan as reasonable compensation for services rendered from February 21, 2018 through October 11, 2021.

2. 21-12131-B-13 **IN RE: ANGELA DAWOOD**
MHM-1

MOTION TO DISMISS CASE
9-21-2021 [20]

MICHAEL MEYER/MV
PHILLIP GILLET/ATTY. FOR DBT.

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

DISPOSITION: Granted.

ORDER: The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by debtor that is prejudicial to creditors and 11 U.S.C. § 109(h) for failure to timely complete an approved credit counseling briefing. Doc #20.

No party in interest timely filed written opposition. Angela A. Dawood ("Debtor") filed late opposition on October 25, 2021, but it was not filed at least 14 days before the hearing. Doc. #25. No motion seeking leave to file a late response pursuant to Fed. R. Bankr. P. 9006(b)(1) accompanied Debtor's opposition, so it will be stricken. The motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the Debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 109(h) requires prospective chapter 13 debtors to receive an approved credit counseling briefing during the 180-days preceding the filing of the petition.

Debtor filed voluntary chapter 13 bankruptcy on September 1, 2021 at 11:07:17 p.m. Pacific Daylight Time ("PDT"). Doc. #1. As part of her petition, Debtor indicated that she had received a briefing from an approved credit counseling agency within the 180 days before filing, but she did not have a certificate of completion, so Debtor was

required to file a copy of the certificate and payment plan, if any, within 14 days of the petition date. *Id.*, Form 101, ¶ 15.

On September 15, 2021, Debtor filed the certificate of counseling. Doc. #16. It states that Debtor was provided with an approved credit counseling briefing from CC Advising, Inc. on September 2, 2021 at 2:11 p.m. Eastern Daylight Time ("EDT"), which is approximately 11:11 a.m. PDT, or 11 hours and four minutes after the petition was filed. Thus, Debtor had not completed a briefing from an approved credit counseling agency within the 180 days prior to the petition date and was therefore not eligible to be a debtor under 11 U.S.C. § 109(h). Trustee declares the same and seeks dismissal. Docs. #20; #22.

11 U.S.C. § 1307(c) permits dismissal or conversion of a chapter 13 case 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).

The record shows that there has been unreasonable delay by the Debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) and Debtor failed to timely complete credit counseling as required by 11 U.S.C. § 109(h). Debtor was not eligible to be a debtor when the petition was filed on September 1, 2021, and her ineligibility is cause for dismissal. Eleven hours and 4 minutes later, Debtor became eligible, but she was not so on the date of filing. Had Debtor waited 52 minutes and 43 seconds to file the petition, then she would have become eligible to be a debtor on the petition date. However, the change in eligibility would not have altered the misleading nature of Debtor's credit counseling selection in the petition. Debtor stated that she had received a briefing from an approved credit counseling agency *before* filing the bankruptcy petition. Doc. #1, Form 101, ¶ 15. Debtor then signed the petition, declaring under penalty of perjury that the information provided in the petition was true and correct. *Id.*, Part 7, at 6. So, had Debtor merely waited 52 minutes and 43 seconds, that statement would have still been neither true nor correct because Debtor did not in fact complete the briefing until September 2, 2021 at 11:11 a.m. PDT. Doc. #16.

Though the court will strike Debtor's late opposition, considering it leaves this result unchanged.

In the late response, Debtor declares that she began her credit counseling course on the evening of September 1, 2021. Doc. #25. However, Debtor did not realize that the final portion of the briefing had to be completed with a representative via "chat."[1] The company that provided the credit counseling service, CC Advising, Inc., closed at midnight EDT. As result, Debtor was unable to complete the briefing on September 1, 2021 and completed the final portion on September 2, 2021.

Debtor states that there is an imminent unlawful detainer with an application for prejudgment eviction filed with Kern County Superior

Court. *Id.*, ¶ 6. If this case is dismissed, Debtor will lose the protection of the automatic stay. So, Debtor asks the court to use its discretion under § 109(h)(3) to waive the requirement by determining that completion of the course on September 2, 2021 meets the requirements of § 109(h)(1). Debtor adds that "[t]he prehearing judgment date was held on [September 2, 2021]." *Id.*, ¶ 7.

Debtor could have selected the credit counseling option indicating that she had asked for credit counseling services from an approved agency but was unable to obtain those services during the seven days after she made her request, and exigent circumstances merit a 30-day temporary waiver of the requirement. Debtor could have argued that she was unable to obtain the services within seven days of the request on the basis that on the first day, the agency was closed at midnight EDT, and for the remaining six days, an unlawful detainer action was pending and scheduled, and Debtor would no longer need the credit counseling certificate and the protection of the automatic stay if said action proceeded. Better yet, Debtor could have completed the counseling briefing prior to filing the petition.

But Debtor did not do any of these. Instead, she selected that she had already received the briefing despite having not done so, declared this statement to be true and correct under penalty of perjury, filed the petition, and on the 14th day after filing, filed the briefing with the hope that it would go unnoticed. When the Trustee did notice, he moved to dismiss. Debtor disregarded the opposition filing deadline, and then filed an untimely declaration asking the court to use its discretion under § 109(h)(3) to waive the pre-filing completion of credit counseling requirement.

11 U.S.C. § 109(h)(3) provides that subsection (h)(1) (requiring completion of credit counseling during the 180-day period before the petition date) shall not apply to a debtor who submits to the court a certification that:

> (i) describes exigent circumstances that merit a waiver of the requirements of (h)(1);
> (ii) states that Debtor requested credit counseling services from an approved agency but was unable to obtain a briefing during the seven-day period beginning on the date Debtor made the request; and
> (iii) is satisfactory to the court.

Here, Debtor provides few details for each of these elements. Though Debtor hints that there may be exigent circumstances warranting a temporary waiver, the "imminence" of the pending unlawful detainer action is not known. Minimal information is provided as to the exigency of the circumstances described; only that: (1) there is or was an unlawful detainer action pending at some time on or around the September 1, 2021 petition date and (2) the "prehearing judgment date was held" on September 2, 2021, which presumably means that a hearing occurred on September 2 2021. So, Debtor had the benefit of the automatic stay at that time and has continued to benefit from it for two months. Though these circumstances may have warranted a temporary waiver on September 1, 2021 assuming the other statutory

conditions were present, now whether they remain sufficiently urgent is absent.

The court notes that this is Debtor's first bankruptcy. Debtor may file another petition if the need for automatic stay protection has persisted. Upon refiling, the automatic stay would expire 30 days after filing under 11 U.S.C. § 362(c)(3)(A). Debtor may extend the stay under § 362(c)(3)(B) with a noticed hearing before the expiration of that 30-day period. So, Debtor is still able to obtain the protections of the Bankruptcy Code and embark on the proposed 60-month journey outlined in the chapter 13 plan. Plus, Debtor is now eligible under § 109(h) to be a debtor. Her September 2, 2021 credit counseling certificate will remain valid for any future bankruptcy filing for 180 days from the certificate date.

As to the second element, after Debtor requested credit counseling services, she was unable to obtain a briefing for only one day. This is evidenced by her successful completion of the briefing on September 2, 2021, a little more than eleven hours after her request was presumably made. The details concerning her request for counseling are not provided: (1) Who specifically from CC Advising, Inc. did Debtor request the briefing from? (2) When was it requested? (3) Upon learning that advising was available, what other efforts were made to obtain the briefing from another company immediately? As noted above, an argument exists that she was "unable" to complete the counseling because she needed to file bankruptcy before the unlawful detainer hearing that was scheduled for the following day, but that argument is not before this court.

Had that argument been presented, the next question would be whether Debtor's explanation is satisfactory to the court. The court need not determine this element because the first two are not satisfied. Debtor has not established that exigent circumstances warrant temporarily waiving the pre-filing credit counseling certification requirement.

Moreover, Debtor was not prevented from obtaining a credit counseling briefing during the seven-day period after she requested credit counseling services. As mentioned, there is no explanation in the late filed opposition why the debtor waited to file until September 1, 2021. Most unlawful detainer hearings require several days or weeks of notice. Indeed, a Claim of Right of Possession under California law can be filed ten days after service of the unlawful detainer pleadings. *See*, Cal. Civ. Proc. Code §§ 415.46, 1174.25. The plaintiff must file and serve a motion if the plaintiff seeks a pre-judgment writ of possession. Cal. Civ. Proc. Code § 1166a. Why, then, did Debtor choose to wait until the last moment to file her petition?

The elements of 11 U.S.C. § 109(h)(3) are not met and Debtor's request for a waiver under that subsection would have been DENIED. But since no motion for leave to file a late response was filed, Debtor's opposition is instead STRICKEN. This motion will be GRANTED, and the case will be dismissed.

[1] It is unclear whether "via chat" refers to telephonic or online instant messaging communication.

3. 18-11141-B-13 **IN RE: ELENA HARPER**
MHM-4

MOTION TO DISMISS CASE
9-10-2021 [92]

MICHAEL MEYER/MV
NICHOLAS WAJDA/ATTY. FOR DBT.
RESPONSIVE PLEADING
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Chapter 13 trustee Michael H. Meyer withdrew this motion to dismiss on October 29, 2021. Doc. #99. Accordingly, this matter will be DROPPED FROM CALENDAR.

4. 21-10976-B-13 **IN RE: MARK HALL AND LOUISE JURACEK HALL**
PK-6

MOTION FOR COMPENSATION FOR PATRICK KAVANAGH, DEBTORS ATTORNEY(S)
10-8-2021 [84]

PATRICK KAVANAGH/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

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

Patrick Kavanagh of the Law Office of Patrick Kavanagh ("Applicant"), attorney for Mark Stephen Hall and Louise Clara Juracek Hall ("Debtors"), requests interim compensation in the sum of $12,000.00 pursuant to 11 U.S.C. §§ 330 and 331. Doc. #84. Reimbursement of expenses is waived, so this amount consists solely of fees as reasonable compensation for services rendered from April 18, 2021 through September 17, 2021. *Id.*

Debtors signed a statement of consent indicating that they had read the fee application and approve the same. Doc. #89.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, the court is inclined to GRANT this motion.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary. All parties in interest were notified at least 21 days before the hearing pursuant to Fed. R. Bankr. P. 2002(a)(6). Docs. ##87-88.

Debtors filed bankruptcy on April 19, 2021. Doc. #1. The *Rights and Responsibilities* Form EDC 3-096 indicates that initial fees charged in this case were $12,000.00, and of this amount, $2,607.00 was paid by the Debtors prior to filing the petition. Doc. #24. This is consistent with section 3.05 of the original chapter 13 plan, which states that Debtors paid $2,607.00 prior to filing and, subject to court approval, additional fees of $9,393.00 shall be paid through the plan by filing a motion in conformance with 11 U.S.C. §§ 329, 330, Fed. R. Bankr. P. 2002, 2016, and 2017. Doc. #23. These same terms are reflected in the First Modified Plan, which is the operative plan in this case. Docs. #42; #81.

This is Applicant's first interim fee application. Applicant's office provided 58.40 billable hours of services at $300.00 per hour, totaling $17,190.00 fees. But Applicant waived $5,190.00 in fees and all expenses, limiting this request to **$12,000.00**. Docs. #84, §§ 5-7; #86, Exs. B, C.

The source of funds for payment of the fees will be from the $2,607.00 retainer with the remaining $9,393.00 to be paid by the chapter 13 trustee in accordance with the confirmed chapter 13 plan. Doc. #84. Since this is the first application, there are still $9,393.00 in funds remaining in the plan for attorney fees, so payment of these fees will not affect plan feasibility. *Id.*, § 9(3); Doc. #86, Ex. A.

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

Applicant's services included, without limitation: (1) advising Debtors about bankruptcy and non-bankruptcy alternatives; (2) gathering information and documents to prepare the petition, reviewing Debtor's financial information, and preparing and filing the petition, schedules, statements, and chapter 13 plan; (3) preparing and sending § 341 meeting documents to the trustee and attending and completing the § 341 meeting of creditors; (4) preparing, filing, and prosecuting confirmation of the First Modified Plan (PK-2); (5) filing a motion to sell real property and negotiating with the IRS to stipulate as to treatment of its tax

lien (PK-4); and (6) preparing and filing this fee application. The court finds the services reasonable and necessary.

Written opposition was not required and may be presented at the hearing. As noted above, Debtors consented to the Trustee paying this application. Doc. #89.

In the absence of opposition, the court is inclined to GRANT this motion. Applicant shall be awarded $12,000.00 in fees on an interim basis under 11 U.S.C. § 331, subject to final review pursuant to § 330. After drawing from the $2,607.00 retainer, the chapter 13 trustee will be authorized, in his discretion, to pay Applicant $9,393.00 in accordance with the confirmed chapter 13 plan as reasonable compensation for services rendered from April 18, 2021 through September 17, 2021.

10:00 AM

1. 21-11249-B-7 **IN RE: JANET QUISMORIO**
JSP-1

MOTION TO AVOID LIEN OF BANK OF AMERICA, N.A.
9-9-2021 [13]

JANET QUISMORIO/MV
JOSEPH PEARL/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.

Janet M. Quismorio ("Debtor") seeks to avoid a judicial lien in favor of Bank of America, N.A. ("Creditor") in the amount of $13,518.63 and encumbering residential real property located at 225 Calle Felix, Delano, CA 93215 ("Property").[2] Doc. #13.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 7 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

To avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). § 522(f)(1); *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003), quoting *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), *aff'd*, 24 F.3d 247 (9th Cir. 1994).

Here, a judgment was entered against Debtor in favor of Creditor in the sum of $13,518.63 on May 17, 2019. Doc. #15, Ex. A. The abstract of judgment was issued on June 13, 2019 and recorded in Kern County on June 24, 2019. *Id.* That lien attached to Debtor's interest in Property. Doc. #16.

As of the petition date, Property had an approximate value of $260,000.00. *Id.*; Doc. #1, *Sched. A/B*. The only unavoidable lien encumbering Property is a deed of trust in favor of Flagstar Bank in the amount of $136,399.00. *Id.*, *Sched. D*. Debtor claimed a homestead exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of $123,601.00. *Id.*, *Sched. C*. Property's encumbrances can be illustrated below:

Fair Market Value of Property	$260,000.00
Total amount of unavoidable liens	- $136,399.00
Remaining unencumbered equity	= $123,601.00
Debtor's "homestead" exemption	- $123,601.00
Remaining equity for judicial liens	= $0.00
Creditor's judicial lien	- $13,518.63
Extent exemption impaired	= ($13,518.63)

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is insufficient equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

Debtor has established the four elements necessary to avoid a lien under § 522(f)(1). Therefore, this motion will be GRANTED.

[2] Debtor complied with Rule 7004(h) by serving Brian T. Moynihan, Creditor's Chief Executive Officer, by certified mail at its mailing address on September 24, 2021. Doc. #19.

11:00 AM

1. 20-13200-B-7 **IN RE: MICHAEL/JOYCE EDGAR**
21-1001

PRE-TRIAL CONFERENCE RE: COMPLAINT
1-5-2021 [1]

FIRST NATIONAL BANK OF OMAHA
V. EDGAR ET AL
CORY ROONEY/ATTY. FOR PL.
RESPONSIVE PLEADING

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Fed. R. Civ. P. 41(a)(1)(A)(ii) (applicable under Fed. R. Bankr. P. 7041) allows the plaintiff to dismiss an action without a court order by filing a stipulation of dismissal signed by all parties who have appeared.

The parties, by and through their attorneys, stipulated to dismiss this adversary proceeding with prejudice on June 1, 2021. Doc. #17. The stipulation was signed by all parties who have made an appearance, so it is an effective dismissal under Fed. R. Civ. P. 41. The adversary proceeding was closed on September 8, 2021.

Accordingly, this pre-trial conference will be DROPPED FROM CALENDAR because the adversary proceeding has already been dismissed.

2. 21-10734-B-7 **IN RE: MANUEL GONZALES**
21-1030

MOTION FOR ENTRY OF DEFAULT JUDGMENT
9-28-2021 [28]

STRATA FEDERAL CREDIT UNION V.
GONZALES, III
BRANDON ORMONDE/ATTY. FOR MV.

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 an order.

Secured creditor Strata Federal Credit Union ("Plaintiff") seeks entry of a default judgment against debtor Manuel Gonzales, III

("Defendant") finding that the debts owed by Defendant are nondischargeable pursuant to 11 U.S.C. § 523. Under the issue preclusion doctrine, Plaintiff seeks judgment (1) determining that Defendant owes Plaintiff the judgment sum of $29,282.10; (2) determining that the debt owed by Defendant is nondischargeable; (3) awarding costs and fees; and (4) for such other and further relief the court deems just and equitable.

There is no opposition from Defendant.

The court intends to DENY the motion WITHOUT PREJUDICE for failure to make a *prima facie* showing that Plaintiff is entitled to the relief sought and failure to comply with the LBR.[3]

Plaintiff's motion was filed on 28 days' notice pursuant to LBR 9014-1(f)(1) and will proceed as scheduled. Defendant and his attorney were properly served the following in accordance with Rules 7004(b)(1) and (9): the complaint on July 14, 2021, the request for entry of default on August 27, 2021, and this motion and supporting documentation on September 28, 2021. Docs. ##7-8; #13; #34.

This motion does not procedurally comply with the LBR. First, LBR 9004-2(a)(6), (b)(5), (b)(6), (e)(3), LBR 9014-1(c), and (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN. Here, the motion and supporting documents omitted a DCN. Docs. ##28-34. Each separate matter filed with the court must have a different DCN linking it to all other related pleadings.

Second, LBR 9014-1(d)(3)(B)(iii) requires the movant to notify respondents that they can determine (a) whether the matter has been resolved without oral argument; (b) whether the court has issued a tentative ruling that can be viewed by checking the pre-hearing dispositions on the court's website at http://www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing; and (c) parties appearing telephonically must view the pre-hearing dispositions prior to the hearing. Here, the court website and the above disclosure are not included in the notice of hearing. Doc. #29.

Third, the notice of hearing says that the motion is "brought pursuant to Local Rule 4001, Part 2." Doc. #29. Though this court does have LBR 4001-1, there is no such "Part 2" as referenced in the motion and it concerns stay relief, use of cash collateral, and post-petition credit, none of which are relevant here. Based on subsequent language used, the court believes Plaintiff may have intended to cite to the procedure specified in LBR 9014-1(f)(1).

Fourth, LBR 9004-2(d)(2) and (3) require exhibits to include an exhibit index at the start of the document identifying each exhibit by its exhibit number or letter with the page number at which it is located, and use consecutively numbered exhibit pages, including any separator, cover, or divider sheets. Here, the exhibits filed in support of the motion properly contained an exhibit index with the page numbers of each exhibit. Doc. #30. The first page is properly numbered "1" but the remaining pages are not consecutively numbered,

including any separator, cover, or divider sheets. The local rules require the entire document to be consecutively numbered.

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

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

Plaintiff requests the court take judicial notice of certain documents from its lawsuit against Plaintiff in Kern County Superior Court entitled, Case No. BCL 20-011736. The court may take judicial notice of all documents and other pleadings filed in this adversary proceeding, the underlying bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Gmt. Serv., LLC)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the requested documents, as well as the pleadings filed in this adversary proceeding, and Defendant's underlying chapter 7 bankruptcy case, Case No. 21-10734, but not the truth or falsity of such documents as related to findings of fact. *In re Harmony Holdings, LLC*, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008).

The court entered Defendant's default on August 30, 2021 and Plaintiff was directed to apply for a default judgment and set this "prove up" hearing within 30 days of entry of default. Doc. #14. Plaintiff properly applied for default judgment on September 28, 2021 and has complied with the previous order.

BACKGROUND

On or about July 1, 2019, Plaintiff and Defendant executed a written loan agreement ("Loan Agreement") to refinance Defendant's 2018 Toyota Camry ("Vehicle") in the amount of $23,977.57 at 4.44% interest to be paid back in monthly payments of $405.31 beginning August 15, 2019. Doc. #31; *see also* Doc. #30, Ex. A. Under the Loan Agreement, Plaintiff agreed that Vehicle would be the collateral securing the refinance. *Id.*, Ex. A, at 3, 7. Prior to executing the Loan Agreement, Defendant was the registered owner of Vehicle, which was encumbered by Bank of the West. Doc. #31.

On July 5, 2019, Plaintiff issued a $23,977.57 check to Bank of the West to payoff its security interest. Doc. #30, Ex. B. Plaintiff included an Authorization for Payoff and Demand for Certificate of Title. *Id.* Plaintiff alleges that it did not receive the Certificate of Title. After contacting Defendant, Plaintiff learned that Bank of the West had sent the Certificate of Title to Defendant. Doc. #31. Shortly thereafter, Plaintiff learned that Defendant had used Vehicle as collateral to obtain a second loan from Check Into Cash. *Id.*; Doc. #30, Ex. D.

Defendant defaulted under the Loan Agreement on October 15, 2019 and did not make a single payment. Doc. #31.

On March 4, 2020, Plaintiff filed a complaint in Kern County Superior Court, Case No. BCL 20-011736, alleging breach of contract, fraud, negligence, and breach of implied contract. The Kern County complaint is included in Plaintiff's Request for Judicial Notice ("RJN"). *See* RJN #1. The Kern County Superior Court entered judgment by default on August 19, 2020 in the amount of $29,282.10. Doc. #32, RJN #2. This amount consisted of $24,595.83 in damages, $559.13 in prejudgment interest at 4.44%, $3,459.58 in attorney fees, and $667.56 in costs. *Id.*

Defendant filed bankruptcy on March 27, 2021. Bankr. Case No. 21-10734 ("Bankr.") Doc. #1. The § 341(a) meeting of creditors was held and concluded on May 21, 2021. *See* Bankr. docket. Plaintiff included a transcript of the meeting, contending that Defendant acknowledged that he refinanced Vehicle on July 1, 2019, agreed to provide Vehicle as collateral for the loan, had received the Certificate of Title in the mail, and had used Vehicle to obtain a loan from Check Into Cash. Doc. #33.

Plaintiff filed this adversary proceeding on July 8, 2021 asserting three causes of action for nondischargeability: (1) for a refinance of credit to the extent it was obtained by false pretenses, a false representation, or actual fraud under 11 U.S.C. § 523(a)(2)(A); (2) refinance of credit to the extent it was obtained by use of a statement in writing that is materially false under § 523(a)(2)(B); and (3) for willful and malicious injury under § 523(a)(6). Doc. #1.

Plaintiff seeks to give the Kern County judgment a preclusive effect under the doctrine of collateral estoppel (issue preclusion) to make the state court judgment nondischargeable.

Plaintiff alleges that Defendant had no intention of using Vehicle as security for the Loan Agreement. Doc. #31. Plaintiff relied on Defendant's representations and the Loan Agreement before releasing a check to Bank of the West. Despite several attempts to contact Defendant, Defendant refused to answer any correspondence or phone calls.

Plaintiff claims it suffered damage in the form of being unable to secure its lien rights with Vehicle as the result of Defendant's intentional actions. Since Plaintiff was unable to perfect its lien on Vehicle, it was unable to repossess Vehicle to mitigate its damages.

DISCUSSION

I. Default Judgment Standard

Civil Rule 55 (applicable under Rule 7055) governs default judgments. "To obtain a default judgment of nondischargeability of a loan debt, a two-step process is required: (1) entry of the party's default (normally by the clerk), and (2) entry of default judgment."

In re McGee, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006), citing *Brooks v. United States*, 29 F.Supp 2d 613, 618 (N.D. Cal. 1998), *aff'd mem.*, 162 F.3d 1167 (9th Cir. 1998). "[A] default establishes the well-pleaded allegations of a complaint unless they are . . . contrary to facts judicially noticed or to uncontroverted material in the file." *Anderson v. Air West Inc. (In re Consol. Pretrial Proceedings in Air West Secs. Litig.)*, 436 F.Supp 1281, 1285-86 (N.D. Cal. 1977), citing *Thomson v. Wooster*, 114 U.S. 104, 114 (1885). Thus, a default judgment based solely on the pleadings may only be granted if the factual allegations are well-pled and only for relief sufficiently asserted in the complaint. *Benny v. Pipes*, 799 F.2d 487, 495 (9th Cir. 1986), *amended on other grounds*, 807 F.2d 1514 (9th Cir. 1987).

The court has broad discretion to require that a plaintiff prove up a case and require the plaintiff to establish the necessary facts to determine whether a valid claim exists supporting relief against the defaulting party. Entry of default does not automatically entitle a plaintiff to a default judgment. *Beltran*, 182 B.R. at 823; *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) ("Rule 55 gives the court considerable leeway as to what it may require as a prerequisite to entry of a default judgment.").

II. Collateral Estoppel

Collateral estoppel is applicable to proceedings brought under § 523(a) for exception of discharge. *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991). Under 28 U.S.C. § 1738, the preclusive effect of a state court judgment is determined by the law of the state in which the judgment was issued. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995); *see also Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). "Collateral estoppel precludes re-litigation of issues argued and decided in prior proceedings." *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). Issue preclusion applies if five "threshold requirements" are met:

(1) The judgment is final;
(2) The issues are identical;
(3) The proceeding was actually litigated;
(4) The issues were necessarily decided in favor of the former proceeding; and
(5) The parties are the same or are in privity.

Ibid.; *see also Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001). State law collateral estoppel principals apply. *Ibid.* The party asserting issue preclusion has the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. *In re Lambert*, 233 F. App'x 598, 599 (9th Cir. 2007).

In California, a default judgment is given an issue preclusive effect if the defendant had actual knowledge of the litigation and had an opportunity to participate and the issues were actually litigated. *In re Kaut*, 596 B.R. 698, 703 (Bankr. E.D. Cal. 2019); *Cal-Micro Inc. v. Cantrell*, 329 F.3d 119 (9th Cir. 2003).

After the five threshold factors are met, application of issue preclusion is discretionary. *Lopez v. Emerg. Serv. Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 103, 107-08 (B.A.P. 9th Cir. 2007). In exercising that discretion, this court needs to consider the circumstances of the particular case and whether application of the doctrine is fair and consistent with the policies underlying it. *Baldwin v. Kilpatrick (In re Baldwin)*, 249 F.3d 912, 919-20 (9th Cir. 2001).

A. Final Judgment

The Kern County Superior Court issued a judgment by default on August 19, 2020. Doc. #32, RJN #2. The judgment is final and binding. Defendant's opportunity to appeal has lapsed.

B. Identical Issues

It is unclear whether the issues in that judgment are identical to the issues presented to this court. Plaintiff asserts three causes of action under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(6). But the complaint filed in Kern County Superior Court alleged (1) breach of contract for failing to provide Vehicle as security for the Loan Agreement; (2) breach of contract for failing to make the required payments in the Loan Agreement; (3) fraud by making false representations and failing to make even a single loan payment under the Loan Agreement; (4) negligence as to Bank of the West in failing to send the Certificate of Title to Plaintiff; and (5) breach of implied contract as to Bank of the West. Doc. #32, RJN #1. The judgment with respect to Defendant, meanwhile, is silent as to which causes of action the judgment was entered. The state court considered Plaintiff's written declaration, but that declaration is not provided here.

Notably, Plaintiff requested $50,000 in punitive damages with respect to its fraud cause of action. Doc. #32, RJN #1. The punitive damages were not awarded. *Id.* RJN #2. This supports the inference that the state court judgment was solely for breach of contract.

1. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) excepts from discharge "any debt . . . for money, property, services, or an extension, renewal, or refinance of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud[.]" To establish that a fraud judgment is nondischargeable under § 523(a)(2)(A) based on collateral estoppel, the following statutory elements must be met:

> (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct.

In re Harmon, 250 F.3d at 1246. "A promise made without any intention of performing it constitutes fraud." *Union Flower Mkt., Ltd. v. S. Cal. Flower Mkt., Inc.*, 10 Cal. 2d 671, 676 (1938). "'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Lazar v. Superior Court*, 12 Cal. 4th 631 (1996) citing *Union Flower Mkt.*, 10 Cal. 2d at 675.

The elements of § 523(a)(2)(A) "mirror the elements of common law fraud" and match those for actual fraud under California law. *Tobin v. Sans Souci Ltd. Pshp. (In re Tobin)*, 258 B.R. 199 (B.A.P. 9th Cir. 2001) (internal citations omitted), quoting *Youngie v. Gonya (In re Younie)*, 211 B.R. 367, 373-74 (B.A.P. 9th Cir. 1997), *aff'd*, 163 F.3d 609 (9th Cir. 1998).

Plaintiff contends here that the Kern County Superior Court judgment is nondischargeable under § 523(a)(2)(A). Doc. #1.

1. Misrepresentation, fraudulent omission, or deceptive conduct: Plaintiff insists that Defendant's acceptance of the Loan Agreement by signing it constitutes false pretenses, false representations, or actual fraud. *Id.*

2-3. Knowledge of the falsity and intent to deceive: Plaintiff argues that Defendant had the intent to deceive Plaintiff. However, no evidence is presented as to Defendant's state of mind at the time the Loan Agreement was executed. In fact, the transcript Plaintiff provides from the 341 meeting seems to indicate that Defendant did not understand the process in which a vehicle becomes security for a loan agreement. Doc. #33, at 6, ¶¶ 2-5, 8-10, 15-16 ("I'm not familiar with the processes of title and the company's procedure. . . . I'm not familiar with all bank's operator, but they mailed me the title. I don't know why they did, but they did mail it to me. . . . You know what, I don't know which one. I'm not too familiar. I know somebody repossessed it.").

4. Justifiable reliance: This determination is based on the qualities and characteristics of the particular plaintiff and the circumstances of the particular case. *Citibank (South Dakota) N.A. v. Eashi (In re Eashi)*, 87 F.3d 1082, 1090 (9th Cir. 1996). Based on the record, the justifiable reliance was Plaintiff's reliance on Bank of the West to comply with the demand for the certificate of title. Plaintiff's due diligence regarding Defendant is not presented.

5. Damage proximately caused by the creditor's reliance: Plaintiff claims to have been damaged in the amount of $29,282.10 as the result of relying on Defendant's statements and conduct. Doc. #31. The state court's judgment awarded damages totaling $29,282.10, which includes attorney's fees and costs. Doc. #32, RJN #2. But the judgment does not specify the legal theory upon which the court relied, and the extent of damages is unknown.

2. § 523(a)(2)(B)

To succeed under § 523(a)(2)(B), Plaintiff must prove by a preponderance of the evidence:

(1) a representation of fact by the debtor;
(2) that was material;
(3) that the debtor knew at the time to be false;
(4) that the debtor made with the intention of deceiving the creditor;
(5) upon which the creditor relied;
(6) that the creditor's reliance with reasonable; and
(7) that damage proximately resulted from the representation.

McGee, 359 B.R. at 772, citing *Candland v. Ins. Co. of N. Am. (In re Candland)*, 90 F.3d 1466, 1469 (9th Cir. 1996); *cf. Grogan*, 498 U.S. at 291. Exceptions to discharge are to be construed strictly against the creditor and in favor of the debtor. *Klapp v. Landsman (In re Klapp)*, 706 F.2d 998, 999 (9th Cir. 1983).

1. Representation of fact: Plaintiff argues that Defendant represented that Vehicle would be collateral in the Loan Agreement.

2. Material: This representation was material.

3-4. Knowledge of falsity and intent to deceive: Plaintiff insists that Defendant made the representation to induce Plaintiff to release a check to payoff the amount owed to Bank of the West. Doc. #1. But again, it is unclear whether Defendant knew this representation was false at the time it was made. The transcript provided by Plaintiff appears to indicate that Defendant did not understand the nature of using the Vehicle as security for the Loan Agreement. Doc. #33. Though he acknowledged providing Vehicle as collateral for the Loan Agreement and that he received the Certificate of Title in the mail, it is unclear from the record whether Defendant intended to misrepresent that Vehicle would be used as security for the Loan Agreement, and whether Defendant intended to deceive Plaintiff.

It seems more likely that Defendant's receipt of the Certificate of Title resulted from a "mishap" in which Bank of the West mailed the certificate to Defendant rather than to Plaintiff. Though Defendant obtained a second secured loan using Vehicle as collateral, there is no evidence that this was not caused by his lack of understanding that Plaintiff's security interest in Vehicle had not been perfected.

5-6. Reasonable reliance: Plaintiff reasonably relied on the statements contained in the Loan Agreement and that reliance was reasonable. Section 523(a)(2)(B) requires a stricter standard of proof than § 523(a)(2)(A). "Justifiable" reliance is more demanding than mere "reasonable" reliance. *Field v. Mans*, 516 U.S. 59, 77 (1995). If reliance is not "justifiable", then it could not have been "reasonable." *Id.*, at 66-77; *McGee*, 359 B.R. at n.6

7. Damages: Plaintiff also clearly suffered damages proximately caused by Defendant's failure to turn over the Certificate of Title to Plaintiff. But the extent of those damages is unclear. The state court awarded $24,595.83 in damages, which represented the amount due under the Loan Agreement that was to be secured by Vehicle, along with $559.123 in prejudgment interest, $3,459.58 in attorney fees, and $667.56 in costs. The damage suffered by Plaintiff here is its inability to perfect its security interest in the loan, which caused it to be unable to repossess Vehicle. The damages, then, should either be the value of the Vehicle (repossession) or the value of the Loan Agreement (payment), whichever is lower. No evidence as to value of Vehicle is provided.

3. § 523(a)(6)

Plaintiff must prove that Defendant willfully and maliciously injured it to have the debt deemed nondischargeable under § 523(a)(6). The court must separately inquire as to whether the injury was willful and whether it was malicious. *In re Su*, 259 B.R. 909, 914 (B.A.P. 9th Cir. 2001), *aff'd*, 290 F.3d 1140 (9th Cir. 2002).

"The willful injury requirement of § 523(a)(6) is met when it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001), *cert. den.*, 533 U.S. 930 (2001). "In order to apply this 'subjective standard,' the court must examine the debtor's state of mind and 'actual knowledge that harm to the creditor was substantially certain.' *Christen v. Himber (In re Himber)*, 296 B.R. 217, 226 (Bankr. C.D. Cal. 2002), quoting *Su*, 290 F.3d at 1146.

Here, as noted above, it is unclear whether Defendant had a subjective motive to inflict injury or that injury was substantially certain to occur. Plaintiff's strongest argument is that Defendant knew the Certificate of Title he received in the mail was intended for Plaintiff, and despite that knowledge, he proceeded to obtain a second vehicle loan from Check Into Cash. In obtaining the second loan, if Defendant had a subjective motive to inflict injury or was substantially certain that Plaintiff would be injured as the result of using the Certificate of Title to obtain a second loan, then this element would be satisfied.

More importantly, Plaintiff has not proven that Defendant acted maliciously in withholding the Certificate of Title from Defendant. An injury is malicious if caused by "a wrongful act, done intentionally, which necessarily causes injury, and which is done without just cause or excuse." *Jercich*, 238 F.3d at 1208. Though Defendant's act was wrong, caused injury, and was done without just cause or excuse, there is no evidence that he subjectively intended or was substantially certain that the effect of his executing the Loan Agreement or obtaining a second loan with Vehicle as collateral would injure Plaintiff.

The Ninth Circuit has stated that "willful and malicious conduct" in the context of § 523(a)(6) refers to a wrongful act that is done intentionally, necessarily produces harm, and is without just cause or excuse, even without proof of a specific intent to injure. *In re Cecchini*, 780 F.2d 1440, 1443 (9th Cir. 1986). A "reckless disregard" for the rights of another is not sufficient to prove that a wrongful act is deliberate. *Id.*; *Newsom*, 186 B.R. at 973.

From the record, it appears that Bank of the West erred in sending the Certificate of Title to Defendant. It does not seem likely that Defendant knew that he would receive the Certificate of Title in the mail at the time he executed the Loan Agreement.

While Defendant may have acted recklessly by using the Certificate of Title to obtain a second loan, the record does not contain evidence that he deliberately sought to deprive Plaintiff of its ability to perfect its lien. Had the state court awarded punitive damages, Defendant's "malice" could have been inferred. *Newsom*, 186 B.R. at 973. But no punitive damage award was included with the judgment.

Lastly, as mentioned above, the extent of damages is still not adequate.

C. Remaining Issues

Next, the issues must be "actually" litigated in the state court proceeding, "necessarily decided," and the parties must be the same or in privity with one another. *Lucido*, 51 Cal. 3d at 341.

Default judgments are deemed to be actually litigated provided that the elements are properly raised in the complaint. *Newsom v. Moore (In re Moore)*, 186 B.R. 962, 971 (1985) ("[A]n issue is actually litigated when it is properly raised in the pleadings, or otherwise, and is submitted for determination, and is determined, noting that a determination may be based on a failure of proof.").

Plaintiff raised fraud in the state court complaint, which was submitted for a determination. The court found in favor of the Plaintiff. But as noted above, it is unknown for which causes of action the state court entered its default judgment.

The same problems arise when considering whether the judgment was necessarily decided. Since it is not clear which causes of action the state court ruled on, we cannot know whether the state court ruled on the cause of action for fraud.

The parties are the same. Even though the state court complaint named Defendant, Bank of the West, and Does 1-5, the judgment provided is specifically against Defendant.

After all elements are met, the court must consider the public policy factors when deciding whether to apply collateral estoppel. "Even when the five threshold criteria for issue preclusion are met, a bankruptcy court must conduct an 'inquiry into whether imposition of issue preclusion in the particular setting would be fair and

consistent with sound public policy' before applying issue preclusion." *Delannoy v. Woodlan Colonial, L.P. (In re Delannoy)*, 615 B.R. 572, 582 (B.A.P. 9th Cir. 2020 (quoting *Khaligh v. Hadaegh (In re Khaligh)*, 338 B.R. 817, 824-25 (B.A.P. 9th Cir. 2006), *aff'd* 506 F.3d 956 (9th Cir. 2007)). "Three fundamental policies should be considered: 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.'" *Delannoy*, 615 B.R. at 582 (quoting *Lucido v. Superior Court*, 51 Cal.3d at 343); *see also Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez)*, 367 B.R. 99, 103 (B.A.P. 9th Cir. 2007).

The first inquiry is into the integrity of the judicial system and whether application of collateral estoppel would create the possibility of inconsistent verdicts. *Baldwin*, 249 F.3d at 920, citing *Lucido*, 51 Cal.3d at 343-44. Second, we consider whether application of collateral estoppel would promote judicial economy. *Id.*, 51 Cal.3d at 350; *cf. Baldwin*, 249 F.3d at 920 ("Relying on the state court's determination allows the bankruptcy court to conserve judicial resources."). Lastly, the court must consider whether application of collateral estoppel will protect the parties from vexatious litigation. *Ibid.*

Here, Plaintiff has not alleged whether application of issue preclusion would be fair and consistent with public policy.

CONCLUSION

Plaintiff refinanced Defendant's loan with Bank of the West, provided a check with the payoff proceeds as well as an Authorization for Payoff and Demand for Certificate of Title. Defendant was sent the title directly from Bank of the West instead of Plaintiff. Defendant knew that the Vehicle was to be used as collateral for the Loan Agreement but used the title to obtain a second secured loan in favor of Check Into Cash. Plaintiff was never able to gain secured title to Vehicle and Vehicle was repossessed by a third party. By using Vehicle for a different secured loan with Check Into Cash, Plaintiff alleges that Defendant willfully and maliciously injured Plaintiff by failing to turn over title so Plaintiff could secure the loan. Doc. #31. However, it is not clear whether Defendant acted maliciously or had actual knowledge that Plaintiff would be substantially harmed.

Finally, the damages that should be nondischargeable, if other elements are proven, are the loan balance or the value of Vehicle when the loan was made, whichever is less. Plaintiff's presentation does not cover that necessary proof. The Superior Court judgment is not specific as to the basis for the damage award.

The motion will be DENIED WITHOUT PREJUDICE to submission of further proof. Counsel shall be prepared to discuss further scheduling at the hearing.

[3] The Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California ("LBR") are intended to supplement and be construed consistently with and subordinate to the Federal Rules of Bankruptcy Procedure ("Rule") and incorporated portions of the Federal Rules of Civil Procedure ("Civil Rule"). The most up-to-date version of the LBR can be located on the court website at http://www.caeb.uscourts.gov/LocalRules.aspx.

3. 21-10734-B-7 **IN RE: MANUEL GONZALES**
21-1030

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-8-2021 [1]

STRATA FEDERAL CREDIT UNION V.
GONZALES, III
BRANDON ORMONDE/ATTY. FOR PL.

NO RULING.