UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, December 2, 2020
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 618, no persons are permitted to appear in court unless authorized by order of the court until further notice. All appearances of parties and attorneys shall be telephonic through CourtCall. The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

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

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

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

9:00 AM

1. 20-12600-B-13 **IN RE: FERNANDO/OLGA DIAZ**

MOTION TO CONFIRM PLAN
10-27-2020 [23]

FERNANDO DIAZ/MV
LAUREN FOLEY/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: No appearance is necessary. The court will issue the order.

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

LBR 9004-2(a)(6), (b)(5), (b)(6), & (e) and LBR 9014-1(c) & (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court and each new motion requires a new DCN.

Here, the motion, notice, plan, and certificate of service did not contain a DCN. *See* Doc. #23-26. Therefore, this motion and plan do not comply with the local rules. Each separate matter filed with the court must have a unique DCN linking together all relevant motion documents.

2. 20-12215-B-13 **IN RE: JONATHAN/CHRISTINA CURTIS**
WSL-1

MOTION TO CONFIRM PLAN
9-30-2020 [25]

JONATHAN CURTIS/MV
RAJ WADHWANI/ATTY. FOR DBT.

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

DISPOSITION: Denied as moot.

ORDER: The court will issue an order.

The debtors, Jonathan William Curtis and Christina Renee Curtis ("Debtors"), filed this motion to confirm a chapter 13 plan on September 30, 2020 pursuant to an order (Doc. #21) on an objection to confirmation to either file an amended plan or respond to the objection. Doc. #25. On October 28, 2020, Debtors again amended the plan and set it for confirmation hearing on the same date, December 2, 2020, in matter #3 below. *See* WSL-2. Accordingly, this motion to confirm will be DENIED AS MOOT because an updated plan was filed.

3. 20-12215-B-13 **IN RE: JONATHAN/CHRISTINA CURTIS**
WSL-2

MOTION TO CONFIRM PLAN
10-28-2020 [35]

JONATHAN CURTIS/MV
RAJ WADHWANI/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The chapter 13 trustee ("Trustee") filed an objection to Debtors' motion on grounds that the plan fails to provide for the submission of all or such portion of future earnings or income to Trustee as necessary to execute the plan under 11 U.S.C. § 1322(a). Doc. #41.

Jonathan William Curtis and Christina Renee Curtis ("Debtors") responded, agreeing to reduce the attorney's dividend to $44.00 per month effective month 1. Doc. #43. Debtors note that Trustee has requested proof of the mortgage payments for July 2020 through and including October 2020, state that they are looking for these

mortgage statements to submit to Trustee, and request that the plan be confirmed. *Id.* In response, Trustee withdrew his objection on November 23, 2020. Doc. #45.

Accordingly, this motion will be GRANTED. The confirmation order shall include the proposed provisions in Debtors' reply to which Trustee assented, the docket control number of the motion, and reference the plan by the date it was filed. Any order confirming the plan will need to be signed by the Trustee.

4. 17-13122-B-13 **IN RE: TANYA MADDOX**
RSW-1

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH NATHAN GARRELTS, WHEELER MACHINERY CORPORATION, AND WHEELER MACHINERY INSURANCE CORPORATION
11-4-2020 [52]

TANYA MADDOX/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

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

Under LBR 9014-1(d)(3)(B) & (f)(1)(B), motions filed on at least 28 days' notice require the movant to notify respondents that any opposition to the motion 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 and served on November 4, 2020 and set for hearing on December 2, 2020. Doc. #52-55. December 2, 2020 is exactly 28 days after November 4, 2020, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice stated:

> Opposition, if any, to the granting of the motion may be presented at the hearing on the motion. If opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

Doc. #53. This is incorrect. LBR 9014-1(d)(3)(B)(ii) requires "the notice of hearing shall advise potential respondents that the failure to file timely written opposition may result in the motion being resolved without oral argument and the striking of untimely written opposition." Because the hearing was set on 28 days' notice,

the notice should have stated that written opposition was required and should have contained the language of LBR 9014-1(f)(1)(B).

Therefore, this motion will be DENIED WITHOUT PREJUDICE.

5. 15-14827-B-13 **IN RE: BRIAN HOVEN**
LKW-6

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S)
11-10-2020 [105]

LEONARD WELSH/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.

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.

The motion will be GRANTED.

Brian Hoven's ("Debtor") counsel, Leonard K. Welsh of the Law Office of Leonard K. Welsh ("Movant"), requests approval of fees of $2,040.00 and costs of $59.20 for a total of $2,099.20 for services rendered from June 1, 2020 through November 5, 2020. Doc. #105. Debtor filed a declaration stating that he has no objection to this court authorizing the chapter 13 trustee ("Trustee") to pay $2,099.20 to Movant. Doc. #107.

This is Movant's sixth and final fee application.

According to the Rights and Responsibilities form, Movant was paid $3,432.50 by Debtor for services and costs through December 16, 2015. Doc. #7. All fees and costs after December 16, 2015 will be paid by application as approved by this court. *Id.*

The first chapter 13 plan that was filed on December 17, 2015, confirmed on March 21, 2016, and stated that Movant was paid $3,432.50 prior to the filing of the case and additional fees of $15,000.00 shall be paid through the plan. Doc. #23; #5 at ¶ 2.06. The remaining retainer of $67.50 appears to still be held in trust by Movant. *See* Doc. #105 at ¶ 6c. Additionally, Movant states that he has been requested and been paid $12,245.00 across the previous

five fee applications. *Id.* at ¶¶ 6d, 6e. By this court's estimate, there should be approximately $2,755 remaining in the plan, which appears to be adequate to fund this fee application.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) advising Debtor about the administration of the case and Debtor's duties as a debtor; (2) preparing and filing the fifth and sixth fee applications; (3) communicating with the chapter 13 trustee about the plan, plan payments, and the amounts needed to complete the plan; (4) delivering Debtor's plan payments to the chapter 13 trustee for May 2020 through October 2020. Doc. #105 at ¶ 7. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $2,040.00 in fees and $59.20 in costs. The Trustee will be authorized to pay $2,099.20 to Movant through the chapter 13 plan.

6. 16-11129-B-13 **IN RE: DAVID/LINDA MILAZZO**
LKW-15

MOTION FOR COMPENSATION BY THE LAW OFFICE OF LAW OFFICE OF LEONARD K. WELSH FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S)
10-30-2020 [224]

LEONARD WELSH/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the chapter 13 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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The motion will be GRANTED.

Linda Lynn Milazzo's ("Debtor") counsel, Leonard K. Welsh of the Law Office of Leonard K. Welsh ("Movant"), requests approval of fees of $8,707.50 and costs of $35.35 for a total of $8,742.85 for services rendered from July 1, 2018 through October 15, 2020. Doc. #224. Debtor filed a declaration stating that she has no objection to this court authorizing her to pay $8,742.85 to Movant. Doc. #226.

Joint Debtor David Young Milazzo ("Mr. Milazzo" or collectively "Debtors") died on September 19, 2020. Doc. #214. Debtor was substituted as Mr. Milazzo's successor for the purposes of this chapter 13 case on November 16, 2020. *See* Doc. #234.

This is Movant's seventh and final fee application.

According to the Rights and Responsibilities form, Movant was paid $3,282.50 by Debtors for services and costs through February 29, 2016. Doc. #7. All fees and costs after February 29, 2016 will be paid by application as approved by this court. *Id.*

The first chapter 13 plan that was filed, but not confirmed, on April 4, 2016 stated that Movant was paid $3,282.50 prior to the filing of the case and additional fees of $15,000.00 shall be paid through the plan. Doc. #5 at ¶ 2.06. Creditor Bank of America, N.A., objected to confirmation of the plan on May 2, 2016. Doc. #15. On May 6, 2016, Debtors filed an amended plan, which was confirmed on July 20, 2016. Doc. #23, #52-53; *see also* LKW-1. This plan also provided that Movant was paid $3,282.50 prior to the filing of the case and additional fees of $15,000 shall be paid through the plan. Doc. #23 at ¶ 2.06. Movant maintained a remaining retainer of $217.50, throughout the early phases of this case, which is visible in some of Movant's previous fee applications. *See*, *e.g.*, Doc. #106 at ¶ 6c. The remaining retainer appears to have been applied to Debtor's past due balance from the third fee application. *Cf.* Doc. #125 at ¶ 6c.

Debtors filed an amended plan on June 29, 2017, which was confirmed on September 13, 2017. LKW-6. The plan achieved its final evolutionary form when a motion to modify was filed on September 21, 2017 and confirmed on November 30, 2017. Doc. #168; *see also* LKW-8. This amendment increased Debtors' attorney's fees to $30,000.00 to be paid through the plan. Doc. #146 at ¶ 2.06.

Movant states that $32,993.42 has been authorized paid across all prior six fee applications. Doc. #224 at ¶ at 6d. But Movant contends he is due $17,675.92 in unpaid approved fees and costs, consisting of (a) $15,000.00 from the chapter 13 trustee and (b) $2,675.92 from Debtor. *Id.* at ¶ 6f. The newly incurred fees through the end of this case and requested in this fee application will be paid by Debtor from Mr. Milazzo's life insurance proceeds. *Id.* at 18.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) advising Debtors about a bank fraud; (2) advising about case administration after Mr. Milazzo's death and preparation of motion for omnibus relief upon death of a debtor; (3) assisting in applying for and receiving disability benefits payable to Mr. Milazzo, and aid and assistance benefits to Debtor by the Veterans Administration without requiring litigation; (4) advising Debtors about the sale of assets; (5) preparing and filing this fee application; (6) advising about available financing for their chapter 13 plan; (7) receipt of Franchise Tax Board's annual notice and treatment of its claim; (8) treatment of secured claims against Debtors' residence and assisting in curing defaults in payments and arrearages owed to Ditech; (9) and stopping a foreclosure sale. Doc. #224 at ¶ 7. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $8,707.50 in fees and $35.35 in costs. Debtor will be authorized to pay $8,742.85 to Movant, in addition to the outstanding fees previously approved by this court.

7. 15-13332-B-13 **IN RE: MARIA VILLALOBOS**
PK-2

MOTION TO MODIFY PLAN
10-1-2020 [31]

MARIA VILLALOBOS/MV
PATRICK KAVANAGH/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to January 6, 2020 at 9:00 a.m.

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

This motion to confirm a chapter 13 plan was filed and set for hearing by the debtor, Maria Villalobos ("Debtor"), on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Doc. #31.

The chapter 13 trustee ("Trustee") objected to Debtor's fully noticed motion on grounds that Debtor completed her final plan payment in June 2020 and she may no longer modify the plan as all payments were completed under the current confirmed plan. Doc. #40.

Debtor responded, disagreeing with Trustee's interpretation of caselaw and requesting that the plan be confirmed. Doc. #42.

On May 30, 2012, default judgment was entered against Debtor in favor of Creditor LVNV Funding, LLC ("LVNV"), in Kern County Superior Court for a total amount of $13,295.33, consisting of $9,887.85 in damages, $3,123.48 in prejudgment interest, and $284.00 in costs. Claim no. 8-1, 6-7. On June 8, 2012, an abstract of judgment was issued against Debtor in favor of LVNV in the amount of $13,295.33. Claim no. 8-2, 5-6. This was recorded in Kern County on June 25, 2012 encumbering Debtor's interest in real property located in Bakersfield, CA. *Id.*, 7.

Debtor filed chapter 13 bankruptcy on August 21, 2015. Doc. #1. Creditor filed a proof of claim on December 21, 2015 (amended August 5, 2020) as a second priority secured creditor. Claim no. 8-1. Debtor's Schedule D lists the Kern County Treasurer & Tax Collector ("KCTTC") and mortgagor Green Tree as a priority secured creditors. Doc. #1, Schedule D. LVNV is listed twice in Schedule F for "12 World Financial Network Nation" and "Factoring Company Account Citibank, South Dakota" in the amounts of $332.00 and $531.00, respectively. *Id.*, Schedule F. No unsecured priority claims are listed. *Id.*, Schedule E.

LVNV's first claim states that the debt was not acquired from anyone else. Claim no. 8-1 at ¶ 2. But the amended claim states that it was acquired from Citibank (South Dakota), N.A. Claim no. 8-2 at ¶ 2.

The chapter 13 plan was confirmed on January 5, 2016. Doc. #17. The plan provided for payments of $850 per month for 60 months. Doc. #5 at ¶ 1.01. The plan listed KCTTC as a Class 2A creditor and Green Tree as a Class 4 creditor. *Id.* at ¶¶ 2.09, 2.11. LVNV was not provided for in the plan. Class 7 included all other unsecured claims totaling $17,330.00 and was set to receive a 100% dividend. *Id.* at ¶ 2.15. No objections were filed contesting the plan.

Since confirmation, Debtor has continued to make monthly payments. August 2020 was scheduled to be month 60, but Trustee states that unsecured claims were less than scheduled, so the plan was completed after Debtor's payment on June 25, 2020. Doc. #40. LVNV was not provided for in the plan, and so Trustee did not make any payments to LVNV because it was not listed in Classes 1 or 2. Trustee contends that Debtor had no obligation under the plan to make any payments to LVNV either through the plan or directly. *Id.* As Debtor has completed all of her payments under § 1329(a), Trustee argues that the plan can no longer be modified. *Id.*, citing *Derham-Burk v. Mrdutt (In re Mrdutt)*, 600 B.R. 72, 81 (B.A.P. 9th Cir. 2019).

Debtor disagrees with Trustee's interpretation of *Mrdutt* and contends that it is distinguishable by both fact and law. Doc. #42. Debtor argues the situation in *Mrdutt* involved a debtor who "used unpaid house payments to lower the payment to unsecured creditors." *Id.*, 2. Meanwhile, here Debtor is seeking to pay a creditor that was not paid by replacing a 100% plan with another 100% plan. *Ibid.* Debtor contends that LVNV was "provided for" in the plan by being listed as an unsecured creditor on Schedule E/F. However, LVNV's original proof of claim did not include proof of security, which was

recently filed with their amended claim on August 5, 2020. Claim no. 8-2.

Debtor views *Mrdutt* as being a case about discharge of a claim with an "11th hour" amendment and not a case where a debtor is trying to pay a claim in full under Chapter 13. True enough, *Mrdutt* did involve a plan where unsecured claims received nothing. But that was a good faith issue discussed in *Mrdutt*. Payment of a secured claim is not an exception to the limits on modifications after payments are completed under § 1329(a). *Mrdutt*, 600 BR at 84.

Nor is this debtor in a situation where she is requesting a short amount of time to complete payments under the plan. See, *Profit v. Savage* (*In re Profit)*, 283 BR 567, 576 (B.A.P. 9th Cir. 2002). Rather, here, a modification is sought after payments are completed.

Debtor cites the unpublished case *In re Peru,* 16-1007, 2017 Bankr. LEXIS 755 (Bankr. D. Haw. March 21, 2017) in urging that the concept of "provided under the plan" is not precisely defined. Citing other cases, *Peru* mentions "provided for" means "dealt with." *Id.* *2. Debtor contends LVNV was "provided for" because they were listed as an unsecured creditor. But LVNV's secured claim was not "dealt with" by the plan. There was no effort to object to the claim or contest the extent or validity of the judgment lien. Based on the original claim, the judgment was entered years before this case was filed. The amended claim shows that the abstract was recorded three years before the bankruptcy was filed. Debtor knew or had reason to know of the existence of the claim before filing.

No provision of chapter 13 requires a secured claim to be provided for by the plan. If it is, there are types of treatment that are allowed. Here, Debtor completed payments and appears to be precluded from modifying. The CARES Act amendments to § 1329(d) did not change the requirement under § 1329(a) that a modification of the plan must occur before "the completion of payments under such plan."

Additionally, Debtor's counsel, Patrick Kavanagh, notes in his declaration that he did not prepare the petition or the original plan. Doc. #2. *See also* PK-1. The amended plan also modifies the fees for attorney compensation. Doc. #35 at ¶ 3.05. Debtor's original attorney, Vincent Gorski, originally opted to receive the no-look fee under LBR 2016-1(c). Doc. #5 at ¶ 3.05. Mr. Gorski was paid $1,000 before the case was filed and was set to receive $3,000 through the plan. *Ibid.* The new plan notes that Mr. Gorski received a total of $3,000 ($1,000 before filing and $2,000 through the plan) and states that he will file a motion in accordance with 11 U.S.C. §§ 329 and 330 for the remaining $1,000 in attorney's fees remaining in the plan. Doc. #35 at ¶ 3.05.

Unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, Debtor shall file and serve further written response not later than December 23, 2020. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support Debtor's

position. Trustee shall file and serve a reply, if any, by December 30, 2020.

8. 19-13437-B-13 **IN RE: JOSE REYES**
RSW-2

MOTION TO MODIFY PLAN
10-13-2020 [44]

JOSE REYES/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Continued to January 6, 2020 at 9:00 a.m.

ORDER: The court will issue an order.

This motion to confirm a chapter 13 plan was filed and set for hearing by the debtor, Jose Reyes ("Debtor"), on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). Doc. #44.

The chapter 13 trustee ("Trustee") objected to Debtor's fully noticed motion on grounds that the plan fails to provide for the submission of all or such portion of future earnings or income to Trustee as necessary to execute the plan under 11 U.S.C. § 1322(a). Doc. #52.

Debtor filed a response to Trustee's objection stating that he intends to have Trustee pay the three payments included in the forbearance agreement and requests that the court overrule the objection. Doc. #54.

Unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's opposition to confirmation is withdrawn, Debtor shall file and serve further written response not later than December 23, 2020. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support Debtor's position. Trustee shall file and serve a reply, if any, by December 30, 2020.

If Debtor elects to withdraw this plan and file a modified plan in lieu of filing a further response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than December 30, 2020. If Debtor does not timely file a modified plan or a written response, this motion will be denied on the grounds stated in the opposition without a further hearing.

9. 17-14638-B-13 **IN RE: TERESITA ERON**
PK-2

CONTINUED MOTION TO MODIFY PLAN
9-8-2020 [57]

TERESITA ERON/MV
PATRICK KAVANAGH/ATTY. FOR DBT.
RESPONSIVE PLEADING WITHDRAWN,

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 originally was set for hearing on November 4, 2020 on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1) and continued to December 2, 2020. Doc. #58; #70. The chapter 13 trustee ("Trustee") timely objected to the debtor's motion to confirm on the basis that the plan: (1) provides for payments more than 7 years after the time that the first payment was due; (2) fails to provide for the value of property to be distributed under the plan on account of each allowed unsecured claim at least in the amount that would have been paid under chapter 7; and (3) the debtor will not be able to make all plan payments based on Schedules I and J that were filed in December 2017. Doc. #64.

Teresita Eron ("Debtor") replied, stating: (1) the plan proposes to pay one creditor by month 77 and does not exceed 7 years; (2) conceding that the plan fails to provide for each allowed unsecured in at least what it would have been paid under chapter 7, Debtor proposed that the plan be extended to 82 months; and (3) the plan is feasible based on newly amended Schedules I and J, which reflect ability to afford payments. Doc. #67.

Per this court's last order, unless Trustee withdrew his objection, Debtor was to file and serve any further response with admissible evidence by November 18, 2020 or file and serve a confirmable modified plan by November 25, 2020. Doc. #70. Trustee withdrew his objection on November 5, 2020. Doc. #74.

Accordingly, this motion will be GRANTED. The confirmation order shall include the proposed provisions in Debtor's reply to which Trustee assented, the docket control number of the motion, and reference the plan by the date it was filed. Any order confirming the plan will need to be signed by the Trustee.

10. 15-12775-B-13 **IN RE: TERRI MALAMMA**
MHM-2

MOTION TO DISMISS CASE
10-20-2020 [33]

MICHAEL MEYER/MV
ROBERT WILLIAMS/ATTY. FOR DBT.

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

This motion was withdrawn by the chapter 13 trustee on November 15, 2020. Doc. #40. Accordingly, this motion will be dropped from calendar.

11. 20-12990-B-13 **IN RE: SIMPLICIO/SALUD SABERON**
KMM-1

OBJECTION TO CONFIRMATION OF PLAN BY TOWD POINT MORTGAGE TRUST ASSET-BACKED SECURITIES, SERIES 2019-SJ3
11-2-2020 [21]

TOWD POINT MORTGAGE TRUST
ASSET-BACKED SECURITIES,
ROBERT WILLIAMS/ATTY. FOR DBT.
KIRSTEN MARTINEZ/ATTY. FOR MV.
WITHDRAWN

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

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

This objection was withdrawn by Towd Point Mortgage Trust Asset-Backed Securities, Series 2019-SJ3, U.S. Bank National Association, as Indenture Trustee as serviced by Specialized Loan Servicing, LLC, on November 11, 2020. Doc. #87. Therefore, the objection will be dropped from calendar.

12. 20-12990-B-13 **IN RE: SIMPLICIO/SALUD SABERON**
RSW-1

MOTION TO VALUE COLLATERAL OF SPECIALIZED LOAN SERVICING/SLS
10-14-2020 [14]

SIMPLICIO SABERON/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the chapter 13 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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED.

The debtors, Simplicio Saberon, Jr., and Salud Saberon ("Debtors"), filed this motion to value the collateral of Towd Point Mortgage Trust Asset-Backed Securities, Series 2019-SJ3, U.S. Bank National Association, as Indenture Trustee ("Creditor"), as serviced by Specialized Loan Servicing, LLC ("SLS"). Doc. #14. The collateral securing the loan is a parcel of real property located at 2401 Carlita Road, Bakersfield, CA 93304 ("Property"). *Id.* The Property is encumbered by two deeds of trust. The first deed of trust is in favor of Wilmington Savings Fund Society, FSB, not in its individual capacity but solely as Owner Trustee of CSMC 2018-RPL4 Trust ("Wilmington"), as serviced by Select Portfolio Servicing, Inc. ("SPS"), in the amount of $232,355.24. *See* claim no. 3. Creditor holds the second deed of trust in the amount of $19,850.68. Claim no. 8.

Mr. Saberon filed a declaration stating his opinion that the house was worth no more than $206,561.00 on the date they filed bankruptcy. Doc. #16. Mr. Saberon states that Debtors reached this

opinion "by paying attention to house values in the area. Houses comparable to [Debtors'] in the neighborhood were selling for about the same price or less." *Ibid.* Creditor filed a statement of non-opposition in response to the motion, stating "[it] does not oppose Debtors' Motion, contingent upon Debtors' completion of the Chapter 13 Plan." Doc. #24.

Accordingly, Debtors listed Property in Schedule A/B with a value of $206,561.00. Doc. #1, Schedule A/B at ¶ 1.1. Schedule D provides for both Wilmington and Creditor through their loan servicers, SPS and SLS, respectively. *Id.*, Schedule D at ¶¶ 2.1, 2.2. Debtors exempted $1.00 in Property under California Code of Civil Procedure ("C.C.P.") § 703.140(b)(5) on Schedule C. *Id.*, Schedule C at ¶ 2. Property's value, first and second deeds of trust, and lack of equity can be illustrated as follows:

Fair market value of Property on petition date		$206,561.00
Amount of Wilmington's first priority deed of trust	-	$232,355.24
Extent to which first deed of trust is unsecured	=	**($25,794.24)**
Amount of Creditor's second deed of trust		$19,850.68

See Doc. #16; claim nos. 3, 8.

Debtors are competent to testify as to the value of the Property. Given the absence of contrary evidence, Mr. Saberon's opinion of value may be conclusive. *Enewally v. Washington Mutual Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Based on the evidence offered in support of the motion, Creditor's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. Debtors may proceed to obtain relief from this lien upon completion of the necessary requirements under applicable law. Since the chapter 13 plan has not been confirmed, the order shall specifically state that it is not effective until confirmation of the plan.

This ruling is only binding on the named respondent in the moving papers, Towd Point Mortgage Trust Asset-Backed Securities, Series 2019-SJ3, U.S. Bank National Association, as Indenture Trustee, as serviced by Specialized Loan Servicing, LLC, and any successor who takes an interest in the property after service of the motion.

13. 20-12598-B-13 **IN RE: DERRIKE/NICHOLE WADKINS**
RSW-2

MOTION TO VALUE COLLATERAL OF CHRYSLER CAPITAL
10-27-2020 [19]

DERRIKE WADKINS/MV
ROBERT WILLIAMS/ATTY. FOR DBT.
RESPONSIVE PLEADING

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

DISPOSITION: Granted pursuant to a stipulation.

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

This motion was filed on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). This motion will be GRANTED pursuant to the parties' stipulation.

Derrike Wadkins and Nichole Wadkins ("Debtors") filed this motion seeking to value a 2012 Dodge Journey ("Vehicle") for $4,175.00. Doc. #19. The Vehicle is encumbered by a purchase-money security interest in favor of Chrysler Capital ("Creditor") in the amount of $9,679.33. *See* claim no. 2. Creditor's proof claim lists the value of Vehicle to be $8,600.00. *Id.* at ¶ 9. Creditor timely opposed this motion, stating that it believes the replacement value of Vehicle is $8,300.00. Doc. #24.

On November 30, 2020, the parties executed a stipulation to value Vehicle at $8,300.00, with the balance allowed as a general unsecured claim pursuant to Creditor's proof of claim. Doc. #30.

11 U.S.C. § 1325(a)(*) (the hanging paragraph) states that 11 U.S.C. § 506 is not applicable to claims described in that paragraph if (1) the creditor has a purchase money security interest securing the debt that is the subject of the claim, (2) the debt was incurred within 910 days preceding the filing of the petition, and (3) the collateral is a motor vehicle acquired for the personal use of the debtor.

11 U.S.C. § 506(a)(1) limits a secured creditor's claim "to the extent of the value of such creditor's interest in the estate's interest in such property . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

Creditor has a purchase-money security interest, so the elements of § 1325(a)(*) are not met and § 506 is applicable. Doc. #21 at ¶ 1. Mr. Wadkins' declaration states that Debtors purchased the Vehicle in January 2015, which is more than 910 days prior to filing for bankruptcy. *Ibid.* Mr. Wadkins further purports his opinion that Vehicle, at the time of filing, "was worth no more than $4,175.00[,]" which was determined "by looking online at one of the

vehicle appraisal websites to get an idea of the amount of money for which this type of vehicle was being sold." *Id.* at ¶ 2. Mr. Wadkins also hints that his valuation standard is based on replacement value by noting "the amount we must pay is what it would cost for us to buy the same vehicle in the same condition." *Ibid.*

Meanwhile, Creditor's opposition contends the value of the Vehicle is $8,300.00. Doc. #24. Creditor relies on National Automobile Dealers Association ("NADA") Guides as a "market report" or "commercial publication" under Federal Rule of Evidence ("FRE") 803(17). *Id.* Debtors, meanwhile, rely on unnamed "vehicle appraisal websites." Doc. #21 at ¶ 2. Neither Debtors nor Creditor have established themselves as experts and cannot rely upon NADA Guides or unnamed vehicle appraisal websites in determining the replacement value of the Vehicle. *See* FRE 701, 702, 703.

However, as noted above, the parties executed a stipulation to value Vehicle at $8,300.00, with the balance to be allowed as a general unsecured claim pursuant to Creditor's proof of claim. Doc. #30.

This jurisdiction's local rules require a motion to value collateral be noticed and set for a hearing before a plan can be confirmed if the plan reduces an allowed secured claim in class 2 based on collateral value. *See* LBR 3015-1(i). Under the stipulation, Creditor's claim is not actually being impaired, and debtor no longer disputes the value asserted by Creditor, so the court does not require some other form of evidence is necessary to value the collateral at $8,300.00.

Accordingly, this motion will be GRANTED. Under the parties' stipulation (Doc. #30), the replacement value of Vehicle will be $8,300.00 and the remaining balance due on the loan will be allowed as a general unsecured claim.

The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

10:00 AM

1. 20-12314-B-7 **IN RE: SUCCURRA DAVIS**
AP-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-21-2020 [29]

SEATTLE BANK/MV
NEIL SCHWARTZ/ATTY. FOR DBT.
WENDY LOCKE/ATTY. FOR MV.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the 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 amount of damages). *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

The movant, Seattle Bank ("Movant"), seeks relief from the automatic stay retroactively to July 10, 2020 under 11 U.S.C. §§ 362(d)(1) & (2). Doc. #29; *see also* #33, Ex. 1.[1] The debtor, Succurra Davis

[1] The court notes that Movant's Exhibit #1 (Doc. #33), entitled "Trustee's Deed Upon Sale," is zoomed in, cropped, and mostly illegible. The address "2501 Blackstone Court, Bakersfield, CA 93304" is visible, as are references to a foreclosure sale on July 10, 2020 and a sale price of $153,000.00. It is unclear whether this exhibit was intentionally magnified and cropped as a form of redaction.

If so, in the future, Movant's counsel is advised to: (1) include the full document, not cropped portions enlarged to an 8-1/2" x 11" paper size; and (2) review LBR 9037-1 and Fed. R. Bankr. P. 9037 for guidelines on redaction of personally identifiable information. Counsel is encouraged to use customary black rectangles to remove sensitive information while keeping the document otherwise intact, rather than removing everything but the information it wants submitted into evidence.

("Debtor"), did not file written opposition and Debtor's default will be entered.

Movant acquired title to real property located at 2501 Blackstone Court, Bakersfield, CA 93304 ("Blackstone Court") at a foreclosure sale held on July 10, 2020. Doc. #31. Meanwhile, Debtor filed bankruptcy on July 10, 2020. Doc. #1. Movant states that it was preparing to file an unlawful detainer lawsuit in state court when it obtained information indicating that Debtor was in possession of Blackstone Court at the time the foreclosure sale occurred, and Debtor's petition was filed. Doc. #31. In its memorandum of points and authorities, Movant indicates that it wishes to prosecute an unlawful detainer action against Debtor to acquire possession of the property. Doc. #32 at 3. This seems to imply that Debtor may currently be living at Blackstone Court.

Interestingly, Debtor's petition indicates that she lived at a different property located on Cozy Court ("Cozy Court") in Bakersfield at the time of filing. Doc. #1, Form 101 at ¶ 5. Schedule A/B entirely omits any interest in Blackstone Court, but does state that Debtor owns $240,546 in equity in Cozy Court. *Id.*, Schedule A/B at ¶ 1.1. Debtor exempted $100,000 in Cozy Court equity under California Code of Civil Procedure ("C.C.P.") § 704.950. *Id.*, Schedule C at ¶ 2. Wells Fargo is listed as a Cozy Court creditor and no creditors with a security interest in Blackstone Court, including Movant, are listed in Schedule D. *Id.*, Schedule D at ¶ 2.3. Movant is also not listed in Schedule E/F. *Id.*, Schedule E/F. Debtor's Schedule G indicates no executory contracts and unexpired leases, and no codebtors are listed in Schedule H. *Id.* According to Form 107, Debtor's *Statement of Financial Affairs for Individuals Filing for Bankruptcy*, Debtor checked the box indicating "No" in response to the question, "During the last 3 years, have you lived anywhere other than where you live now?" *Id.*, Form 107 at ¶ 2. Movant is also not listed on the master address list. Doc. #4.

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

11 U.S.C. § 362(d)(2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization.

After review of the included evidence, the court finds that "cause" exists to lift the stay because Debtor does not reference Blackstone Court in her petition and does not appear to have any ownership interest, possessory or otherwise, in Blackstone Court. Movant has produced evidence that it holds title to Blackstone Court, Debtor has not made any payments since Movant acquired title, and there is no evidence that Debtor was making any regular payments entitling her to use of Blackstone Court prior to filing for bankruptcy. Doc. #31; #33, Ex. 1.

Additionally, the court finds that the debtor does not have an equity interest in Property, and this is a chapter 7 case, so Property is not necessary to an effective reorganization. *Id.*

However, in this case Movant seeks retroactive relief from the automatic stay, effective July 10, 2020 when Debtor filed for bankruptcy. The Ninth Circuit Court of Appeals has warned that retroactive relief should only be "applied in extreme circumstances." *In re Aheong*, 276 B.R. 233, 250 (B.A.P. 9th Cir. 2002) (citations omitted). When deciding a motion to annul the automatic stay, the court may consider the "*Fjeldsted*" factors:

> 1. Number of filings;
>
> 2. Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;
>
> 3. A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;
>
> 4. The Debtor's overall good faith (totality of circumstances test;
>
> 5. Whether creditors knew of the stay but nonetheless took action, thus compounding the problem;
>
> 6. Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;
>
> 7. The relative ease of restoring parties to the *status quo ante*;
>
> 8. The costs of annulment to debtors and creditors;
>
> 9. How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative contract;
>
> 10. Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;
>
> 11. Whether annulment of the stay will cause irreparable injury to the debtor;
>
> 12. Whether stay relief will promote judicial economy or other efficiencies.

In re Fjeldsted v. Lien (In re Fjelsted), 293 B.R. 12, 24-25 (B.A.P. 9th Cir. 2003). One factor alone may be dispositive. *Id.* The court finds that the *Fjeldsted* factors weigh in favor of Movant as follows:

1. *The number of Debtor's bankruptcy filings.* This is Debtor's second bankruptcy case, but the last case was filed on December 29, 2011 and Debtor received a discharge on April 30, 2012. *See In re Dontae Lamarr and Succura Malicca Davis*, case no. 11-63873 at Doc. #1, #15.

2. *Whether, in a repeat filing case, the circumstances indicate an intent to delay and hinder creditors.* There is nothing in the record indicating a scheme to delay or hinder creditors. The first two factors are not implicated, weighing against neither Movant nor Debtor.

3. *The extent of any prejudice to creditors and third parties, including to a bona fide purchaser.* Movant appears to be a bona fide purchaser because it actually purchased Blackstone Court and had no knowledge of the bankruptcy at the time of the foreclosure sale. Doc. #31. Movant will be prejudiced if it does not obtain stay relief because the foreclosure will have to be rescinded. However, there is no evidence regarding third parties with an interest in Blackstone Court in the record.

4. *Debtor's overall good faith.* Debtor appears to be acting in good faith. There is nothing in the record suggesting bad faith.

5. *Whether creditors knew of the stay but took action regardless, thereby compounding the problem.* Movant states that it had no knowledge of the bankruptcy at the time of the foreclosure. *Id.* Movant states in its points and authorities that it took no further action to obtain possession pending the outcome of this motion. Doc. #31 at 5.

6. *Debtor's compliance with the Code.* Other than Movant's implication that Debtor omitted an ownership interest in Blackstone Court in the schedules, Debtor appears to have complied with the Code.

7. *The relative ease of restoring the parties to the status quo ante.* It would not be easy to restore the parties to the *status quo ante* because Movant acquired the Blackstone Court via foreclosure sale in July 2020, nearly five months have passed, and the foreclosure sale would need to be rescinded. However, the *status quo ante*, according to the petition, does not involve Debtor holding any interest in Property, possessory or otherwise. This factor weighs toward Movant. Doc. #1.

8. *The costs of annulment to debtors and creditors.* Annulling the automatic stay does not appear to cost Debtor anything according to the petition. *Id.* Annulling the automatic stay also does not appear to cost other creditors anything, as no other creditors indicated in the petition appear to have an ownership interest in Blackstone Court either. *Id.* But to not annul the automatic stay would cost Movant the time and expenses it incurred in obtaining Blackstone Court, compounded by the five months it has waited in "limbo" for this matter to be resolved.

9. *How quickly the creditor moved for annulment and how quickly the debtor moved to set aside the sale.* Although five months have passed, Movant may have been delayed in finding out about the bankruptcy because it is not listed on the master address list. Doc. #4. Movant appears to have moved relatively quickly. Debtor has not moved to set aside the sale and therefore has not moved quickly with respect to this factor.

10. *After learning of the bankruptcy, whether creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief.* Movant states that it has moved expeditiously to seek stay relief and that it has taken no further action to gain possession of Blackstone Court pending the outcome of this motion. Doc. #32 at 5. This factor weighs toward Movant.

11. *Whether annulment of the stay will cause irreparable injury to the debtor.* Annulment of the stay would not appear to harm Debtor, as Debtor has not listed any interest in Blackstone Court in her petition. Doc. #1. The petition also indicates that Debtor lives at Cozy Court. *Id.* There is no evidence suggesting that Debtor will be harmed or prejudiced if the stay is annulled.

12. *Whether stay relief will promote judicial economy or other efficiencies.* Retroactive relief appears to promote judicial economy or efficiency because the foreclosure sale will not need to be rescinded and Movant may proceed in its efforts to obtain possession of Blackstone Court.

Therefore, the court finds that "cause" exists to retroactively annul the automatic stay. This motion will be GRANTED pursuant to 11 U.S.C. §§ 362(d)(1) & (2).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived because Debtor does not appear to have any interest in Property, possessory or otherwise.

2. 20-12626-B-7 **IN RE: HEATHER ROBERTS**
UST-1

MOTION TO DISMISS CASE PURSUANT TO 11 U.S.C. SECTION 707(B)
11-4-2020 [16]

TRACY HOPE DAVIS/MV
NEIL SCHWARTZ/ATTY. FOR DBT.
JORGE GAITAN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted effective December 14, 2020.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. Defaults will be entered as to all parties in interest except the debtor, Heather Roberts.

The United States Trustee ("UST") filed this motion for an order dismissing the case based on the abuse provisions of 11 U.S.C. §§ 707(b)(1), (b)(2) (*i.e.*, presumptive abuse), & (b)(3)(B) (totality of the circumstances abuse). Doc. #16. Heather Roberts ("Debtor") filed a declaration on the same date and at the same time as the UST's motion documents. Doc. #21. It is unclear whether this declaration was intended to be opposition to UST's motion. No certificate of service is attached to this declaration.

Debtor filed an additional response on November 24, 2020, which was after the November 18, 2020 deadline for written opposition under LBR 9014-1(f)(1)(B). Debtor contends that her deductible and medical expenses have increased, and claims she sent her updated insurance documentation to UST via email. Doc. #24.

UST contends that the case should be dismissed under §§ 707(b)(1) and (b)(2) because Debtor has monthly disposable income of $1,910.22[2] ($114,513.20 over 60 months), resulting in a 74% distribution to nonpriority unsecured creditors under another chapter.[3] Doc. #16. UST notes that Debtor made prior statements indicating her boyfriend, Mr. David Glass, is disabled and fighting cancer, which may increase their combined expenses, but no evidence of such statements nor of increased expenses has been presented. *Id.*, 2.

In the alternative, UST argues that the case should be dismissed for presumptive abuse under §§ 707(b)(1) and (b)(3)(B) because Debtor has monthly net income, after expenses, of at least $1,080.87[4] ($64,852 over 60 months), resulting in a 42% repayment to creditors under another chapter. Doc. #19 at ¶ 12.

After reviewing Debtor's meeting of creditor's testimony and documentation provided in the case, the UST filed a statement that the Debtor's case is presumed abusive under 11 U.S.C. § 707(b)(2) on October 5, 2020. Doc. #13. The deadline for filing a motion to dismiss under § 707(b)(2) was November 4, 2020, and therefore UST's motion is timely.

As noted above, Debtor filed a declaration on the same date as UST. The declaration stated:

---

[2] UST notes that this number includes an award of $7,292 received on March 6, 2020. Considering half of the award results in disposable income of $1,575, and none of the award results in $1,298. *See* Doc. #16, 2 at n.1.

[3] Schedule E/F list a total of $155,167 in nonpriority unsecured debt. *See* Doc. #1, Schedule E/F.

[4] This number does not include the $7,292 award and includes the IRS standard deduction for rent of $1,298. Doc. #16, 2 at n.3.

> (1) Debtor's employer supplies a car, and she makes payments through her paycheck every week for use of the car and maintenance. Debtor's employer also supplies a gas card, so she does not pay for that expense out of pocket.[5] Doc. #21 at ¶ 2.
>
> (2) Life insurance can only be shown through her paystubs, where it shows she has both life insurance for herself and her boyfriend. Debtor does not have access to her account. *Id.* at ¶ 3.
>
> (3) Debtor does not have a rental agreement with her boyfriend, David Glass. Debtor pays for all utilities, health insurance, and bills. *Id.* at ¶ 4.
>
> (4) Debtor uses credit cards to help pay medical related bills, groceries, and necessities. *Id.* at ¶ 5.

This declaration was filed at the same date and time as UST's motion, but did not appear to rebut UST's contentions and was not filed with proof of service.[6] Debtor filed another reply on November 24, 2020, which was untimely under LBR 9014-1(f)(1)(B) because it was not filed by November 18, fourteen days before the hearing. As part of her reply, Debtor states that deductible and medical expenses have increased, and she sent the new insurance documentation to the UST. Doc. #24.

Chapter 7 dismissal, generally

A chapter 7 case may be dismissed only after a notice and hearing and only for "cause," including three enumerated causes under 11 U.S.C. § 707(a). Section 707 states, in relevant part:

> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by

[5] Debtor's Schedule J indicates she has no transportation expenses. *See* Doc. #1, Schedule J at ¶ 12.

[6] At first glance, it appears as though UST filed this declaration (Doc. #21) to support the motion. All UST-1 documents, including Debtor's declaration, contain the same timestamp: 11/04/2020 at 3:29:29 p.m. But the header on the declaration is from Neil Schwartz, Debtor's attorney. Further, the proof of service (Doc. #22) omits the declaration entirely from the list of motion documents that were served on Debtor, Attorney, chapter 7 trustee, and a request for special notice. This seems to imply that it was not filed by the UST, despite having the same timestamp and appearing before UST's two certificates of service on the docket.

> paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. § 707(a). These statutorily enumerated grounds are not exclusive. *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 970 (9th Cir. 2007); *Hickman v. Hana (In re Hickman)*, 384 B.R. 832, 840 (B.A.P. 9th Cir. 2008). Under 11 U.S.C. § 707(b), an individual chapter 7 consumer debtor's case may be dismissed for presumed abuse or where abuse is demonstrated by bad faith or the totality of the circumstances of the debtor's financial condition.

11 U.S.C. § 707(b) states, in relevant part:

> (1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would abuse the provisions of this chapter. . . .

11 U.S.C. § 707(b)(1).

11 U.S.C. § 707(b)(2), presumptive abuse

The UST contends that that this case may be dismissed under 11 U.S.C. §§ 707(b)(1) and (b)(2) for presumptive abuse. Doc. #18. Section 707(b)(2) states:

> (2)
> (A)
> (i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $8,175, whichever is greater; or
> (II) $13,650.

11 U.S.C. § 707(b)(2)(A). 11 U.S.C. § 101(8) defines a "consumer debt" as "debt incurred by an individual primarily for personal, family or household purpose." When more than one-half of a Debtor's debts are consumer debts, the requirement for "primarily" consumer debts is met. *In re Price*, 353 F.3d 1135 (9th Cir. 2004); *In re Kelly*, 841 F.2d 908, 913 (9th Cir. 1988). Debtor has identified her debts as primarily consumer debts. Doc. #1.

Debtor claimed a household of two on her Current Monthly Income ("CMI") Form and Schedule J. Doc. #1, Schedule J at ¶ 2, Form 122A-1 at ¶ 13. Debtor is employed as an Inspector for Liberty Mutual and has been employed there for eight years. *Id.*, Schedule I at ¶ 1.

Debtor's boyfriend, Mr. Glass, is disabled and receives social security disability. *Id.* Debtor's current monthly income is defined by § 101(10A), which defines it as:

> the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on the last day of the calendar month immediately preceding the date of the commencement of the case. . . .

11 U.S.C. § 101(10A). Debtor's calculation of her total currently monthly income on her *Statement of Your Current Monthly Income*, Official Form 122A-1, is $8,682.99 (or $104,196 annually), which is above the median income of $79,271 for a household of two. Doc. #1, Form 122A-1 at ¶¶ 12-13. UST independently calculated Debtor's total current monthly income to be $9,315.15 (or $111,781.78 annually), which is still above the median income. Doc. #19 at ¶ 4. UST's CMI calculation made to Debtor's Form 122A-1 is illustrated in the table below ("UST CMI"). Uncontested entries were omitted.

Line on 122A-1	Current Monthly Income	Debtor Calculation	UST Calculation
2	Gross wages, salary, tips, bonuses, overtime, commission[7]	$8,682.99	$9,315.15
11	Calculate your total current monthly income	$8,682.99	$9,315.15
12	Calculate your current monthly income for the year[8]	**$104,195.88**	**$111,781.78**
13	Calculate the median family income that applies to you	$79,271.00	$79,271.00
14	Under or over median?	OVER	OVER

Doc. #20, Ex. A. Both situations result in a presumption of abuse. Using both Debtor's and UST's CMI calculations have the same result: Debtor earns more than the median family income for a household of two. UST also adjusted Debtor's Form 122A-2, as described in the following table ("UST Means Test"). Uncontested Lines were omitted.

---

[7] UST states that this number was calculated by subtracting Debtor's February 14, 2020 year to date income ("YTD") ($14,539.05) and her August 14, 2020 pay period income ("PPI") ($3,483.54) from her August 14, 2020 YTD ($70,404.43), adding back her February 14, 2020 PPI ($3,509.05), and dividing this total by six months, as follows:

```
August 14, 2020 YTD:          $70,404.43 (Doc. #20, Ex. A, 4)
February 14, 2020 YTD:      - $14,539.05 (Id., 3)
August 14, 2020 PPI:        - $ 3,483.54 (Id., 4)
February 14, 2020 PPI:      + $ 3,509.05 (Id., 3)
                            = $55,890.89 / 6 months = $9,315.148 per month.
```

See Doc. #19 at ¶ 4.

[8] The six month's income includes an award of $7,292 received on March 6, 2020. *Ibid.*

Line on 122A-2	Adjusted Income	Debtor Calculation	UST Calculation
1	Copy your total CMI [Line 11]	$8,682.99	$9,315.15
8	Insurance and operating expenses	$581.00	$598.00
12	Vehicle operation expenses[9]	$0.00	$184.17
14	Public transportation[10]	$224.00	$0.00
16	Taxes[11]	$2,372.51	$2,440.00
17	Involuntary deductions[12]	$1,864.18	$750.40
18	Life insurance[13]	$265.00	$45.89
22	Additional health care expenses, excluding insurance[14]	$0.00	$208.97
24	**Add all of the expenses allowed under IRS allowances[15]**	**$7,942.69**	**$6,863.43**
25	Health insurance, disability, insurance, and HSA expenses[16]	$693.33	$375.40
36	Average monthly chapter 13 administrative expense[17]	-	$166.11
38	Add all allowed deductions	$8,636.02	$7,404.93
	Presumption of Abuse[18]	$46.97	$1,910.22
39	**60-month disposable income**	**$2,818.20**	**$114,613.20**

[9] UST increased the vehicle operation expense based on Debtor's paystub for use of the company vehicle. Doc. #19 at ¶ 5a.

[10] UST contends that Debtor did not provide support for this expense. *Id.* at ¶ 5b.

[11] UST increased taxes consistent with Debtor's CMI tax liability. *Id.* at ¶ 5c.

[12] UST decreased involuntary deductions based on Debtor's August 28, 2020 paystub YTD deductions for her 401k and "Recog Offset." *Id.* at ¶ 5d.

[13] UST decreased life insurance based on Debtor's August 28, 2020 paystub YTD deductions for life insurance. *Id.* at ¶ 5e.

[14] UST increased additional health care expenses based on the difference between the HSA payroll deduction of $320.97 and the $112 medical expense given in line 7. *Id.* at ¶ 5f.

[15] This number reflects the sum of Debtor's expenses, but also includes omitted expenses of $1,298 for Food, clothing, and other items (Line 6), $112 for out-of-pocket health care allowances (Line 7), and $1,226 for mortgage and rent (Line 9). *See* Doc. #20, Ex. A, 2.

[16] UST decreased health insurance, disability insurance, and HSA expenses based on the August 28, 2020 paystub YTD deductions for medical, vision, and dental insurance. Doc. #19 at ¶ 5g.

[17] UST increased chapter 13 administrative expenses due to applicable district multiplier and chapter 13 administrative expenses. *Id.* at ¶ 5h.

[18] Line 1 minus Line 38 gives the monthly disposable income, which creates the presumption of abuse. Line 39 is obtained by multiplying by 60 months.

See also Doc. #20, Ex. A at 2.

Debtor may rebut the presumption of abuse by demonstrating "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." 11 U.S.C. § 707(b)(2)(B)(i); *see also Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) (the "special circumstances" exception is available only to the extent that "there is no reasonable alternative"); *In re Ransom*, 131 S. Ct. 716, 721 (2011) (if a chapter 7 debtor cannot rebut the presumption, the case may be dismissed); *In re Egebjerg*, 574 F.3d 1045 (9th Cir. 2009) (based upon the statutory language, the examples that constitute special circumstances are extraordinary and rare situations that strain the debtor's budget and are beyond the debtor's control).

UST contends that Debtor is required to itemize each additional expense or adjustment of income and provide supporting documentation and a detailed explanation of the special circumstances that make such expenses or adjustments to income necessary and reasonable. Doc. #18, 7, citing 11 U.S.C. § 707(b)(2)(B)(ii). Debtor must attest to the accuracy of the information under oath to properly comply with § 707(b)(2)(B)(iii). *Id.*, 7 citing *In re Katz*, 451 B.R. 512 (Bankr. C.D. Cal. 2011) (a debtor must provide adequate documentary evidence and sufficient detailed explanation under oath to support the special circumstances rebuttal).

UST included an email from Debtor dated October 13, 2020 wherein she states that as of January 1, 2021, her deductible is going to increase to $4,000 and "out of pocket is going up to $9000." Doc. #20, Ex. C. "When [Mr. Glass] goes for treatment anything up to the $4000 is directly out of [Debtor's] pocket and [she is] asked by the oncologist to pay them at the time of service." *Ibid.* Debtor states she has $4,000 ready to pay at Mr. Glass' first appointment in January 2021. *Ibid.* After the deductible is met, Debtor states she is required to pay her "15% percent copay which can be upwards of $1000 per shot until he reaches his out of pocket maximum." *Ibid.* Debtor adds that her insurance company has to approve the procedure, and if it does not, Debtor is responsible for 100% of the cost of the procedure. *Ibid.* If Mr. Glass has a procedure or treatment performed out-of-network, then Debtor has to pay another $4,000 deductible "on top of what [she has] already paid In-network." *Ibid.* Debtor concludes that "there is no way to say how much [she will] have to pay each month" but she needs to "find" $4,000 to ensure that Mr. Glass is able to receive treatment starting January 1, 2021. *Ibid.* Despite this email, Debtor did not provide documentation supporting these claims.

Debtor did offer a letter from a health provider for Mr. Glass stating the cancer treatments can cost $20,000 per month. Doc. #20, Ex. D. That is hearsay and inadmissible for that fact. But even if admitted, there is no evidence Debtor pays that amount on a monthly or other basis.

Debtor's response also includes as an exhibit her 2021 Benefits Election Confirmation Statement dated October 28, 2020 ("Benefits Statement"). Doc. #25, Ex. A. The Benefits Statement indicates that Debtor and Mr. Glass are both enrolled in the "Liberty Mutual Health Plan-CDHP Option 1."[19] *Id.*, 2. It also shows that Debtor's total cost per pay period for all of her benefits is $405.68. *Ibid.* In addition, it states that the IRS requires Debtor to pay "imputed income" on any Life Insurance above $50,000, and if a domestic partner is covered, she is required to pay imputed income on the value of health and dental coverage for domestic partner coverage. *Ibid.* As result, Debtor's paycheck is deducted an additional $306.89 per paycheck, which appears to result in a deduction of $712.57 per paycheck. *Ibid.* Lastly, the Benefits Statement indicates that Mr. Glass is covered as a dependent domestic partner with health, dental, and vision coverage. *Id.*, 3.

The UST contends that the presumption of abuse is not rebutted unless subtracting the additional expenses or income adjustments causes the Debtor's CMI, when multiplied by 60, to be less than the thresholds set out in the statute. 11 U.S.C. § 707(b)(2)(B)(iv); *see* UST CMI. Although Debtor provided explanation of her boyfriend's cancer and increased medical expenses, the UST contends that Debtor did not provide any support that this will affect her ability to fund a plan under another chapter, and therefore this case should be dismissed for presumptive abuse under 11 U.S.C. § 707(b)(2); *See* UST Means Test. Debtor did file her 2021 Benefits Summary, but there is still insufficient evidence documenting her monthly expenses. This matter will be called to inquire whether UST has acquired documentation since this matter was filed.

11 U.S.C. § 707(b)(3)(B), totality of the circumstances abuse

UST also argues that this case should be dismissed under 11 U.S.C. § 707(b)(3)(B). Section 707(b) provides that a chapter 7 case should be dismissed for abuse if the petition was filed in bad faith or the totality of the circumstances of Debtor's financial situation demonstrates abuse. Section (b)(3)(B) states as follows:

> (3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—
>
> > (B) the totality of the circumstances (including whether the debtor seeks to reject a personal

[19] No information about Liberty Mutual Health Plan-CDHP Option 1 was provided, so this court does not have evidence of in-network or out-of-network maxima, copays, or other details. Researching the plan name further, the court did stumble across a similarly titled Liberty Mutual Benefits Guide that contained similar details alleged by Debtor (*e.g.*, 15% in-network copay, and other similarities). However, this document is not before us as evidence and there is no indication that this is Debtor's plan, so this court cannot take judicial notice of or consider it.

> services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(3). Under the "totality of the circumstances" test, which is a "fact-intensive determination," a court must evaluate the totality of Debtor's financial situation, including assets, liabilities, reasonable expenses, and current and future income. *In re Hebbring*, 463 F.3d 902, 907-08 (9th Cir. 2006). Whether a debtor has the ability to repay a meaningful portion of her debts is the primary factor for abuse under this test. *In re Price*, 353 F.3d at 1140; *In re Kelly*, 841 F.2d at 914; *In re Gomez*, 220 B.R. 84, 88 (B.A.P. 9th Cir. 1998). Finding that Debtor has ability to pay a meaningful portion of her debts is solely sufficient for a finding of abuse. *Id.*

As above, UST used Debtor's August 28, 2020 pay statement to independently calculate Debtor's net Schedule I income in the table below ("UST Schedule I"). *See* Doc. #20, Ex. B. Lines that were not amended have been omitted.

Line on I	Income Category	Debtor Calculation	UST Adjustment
2	List monthly gross wages, salary, and commissions[20]	$7,394.76	$8,040.52
5a	Tax, Medicare, and Social Security deductions[21]	$1,947.76	$1,930.82
5c	Voluntary retirement contributions[22]	$591.59	$750.40
5e	Insurance[23]	$679.55	$421.29
5h	Company Car Personal	$0.00	$184.17
5h	GwL Donation	$0.00	$6.02
5h	Health Savings Account[24]	$0.00	$320.97
6	Total payroll deductions[25]	**$3,218.90**	**$3,613.66**
12	**Combined monthly net income**	**$4,175.86**	**$4,426.86**

[20] UST adjusted Debtor's wage based on her paystub. Doc. #19 at ¶ 9a.

[21] Debtor's tax deduction was decreased to represent her actual tax liability. Doc. #19 at ¶ 9b.

[22] Voluntary contribution to retirement payments was increased consistent with the use of YTD contributions on the date of filing. *Id.* at ¶ 9c.

[23] Insurance was decreased to be consistent with Debtor's pay statements. *Id.* at ¶ 9d.

[24] Deductions increased to include Company Car Personal, GwL Donation, and Health Savings Account, as outlined in the paystub. *Id.* at ¶ 9e.

[25] This is the sum of the above deductions under Line 5. Line 12 is obtained by subtracting Line 6 from Line 2.

After these adjustments, UST contends that Debtor's net Schedule I income should be $4,426.86. Doc. #19. at ¶ 10.

UST also adjusted Debtor's monthly expenses from $4,147.99 to $3,356.99 ("UST Schedule J") by decreasing rental or home ownership expenses from $2,100 to $1,298, which is the IRS standard deduction. *Id.* at ¶ 11. Debtor's documentation and testimony indicate $0 in rental expenses. *Id.* at ¶ 14a.

Taking UST Schedule I and UST Schedule J gives Debtor a monthly net income of $1,080.87 ($64,852 over 60 months). *Id.* at ¶ 12. This calculation does not include the aforementioned award of $7,292 received in March 2020. *Id.*, 5 at n.5. Based on this calculation, UST contends that Debtor is capable of paying at least 42% of her general unsecured debts under another chapter. Accordingly, UST contends that Debtor's net income is sufficient to repay a meaningful portion of her general unsecured debt within 60 months, and therefore this case should be dismissed.

Trustee also states that other circumstances warrant dismissal, including: (1) whether the debtor has a likelihood of sufficient future income to fund a plan that would pay a substantial portion of unsecured claims; (2) whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity; (3) whether the debtor's schedules suggest that the debtor obtained cash advancements and consumer goods on credit exceeding their ability to repay; (4) whether the debtor's proposed family budget is excessive or extravagant; (5) whether the debtor's statement of income and expenses misrepresents the Debtor's actual financial condition; and (6) whether the debtor engaged in "eve-of-bankruptcy" purchases. *In re Price*, 353 F.3d at 1139-1140 and *In re Ng*, 477 B.R. 118, 125-26 (B.A.P. 9th Cir. 2012) (adopting the *Price* factors).

UST contends that Debtor has a likelihood of sufficient future income because her gross wages for 2019 and 2018 were $88,814 and $87,000, respectively. Doc. #1, Form 107 at ¶ 4. There is no indication of Debtor having a pre-petition illness, disability, unemployment, or some other calamity in Debtor's schedules and statements. UST received a medical report dated September 24, 2020, from the Mr. Glass' oncologist, showing that he has been battling cancer for several years. UST evaluated the medical report and determined that it provided no evidence to support an increase in Debtor's expenses going forward. In response to the report, UST requested additional information to support the projected increase in expenses. Debtor provided a letter dated October 12, 2020, which indicates the total cost of treatments for Debtor's non-filing boyfriend "can be approximately $20,000 a month." Doc. #20 Ex. C. This was discussed earlier.

While requesting additional information regarding the amount of costs covered by insurance, Debtor's counsel provided email correspondence from the Debtor in which she explained that she will have a $4,000 deductible in 2021, in additional to out of pocket

copays for treatments. However, Debtor indicates that there is "no way to say how much" she will have to pay. *Id.*, Ex. D.

This is an insufficient rebuttal and accordingly, this court is inclined to grant the motion.

Conclusion

The matter will be called as scheduled to inquire whether UST has received adequate documentary evidence rebutting the presumption of abuse or that a meaningful portion of general unsecured creditors could be paid within 60 months under another chapter. If Debtor does not rebut with additional evidence, then this motion will be GRANTED under 11 U.S.C. §§ 707(b)(1), (b)(2), and (b)(3)(B). The dismissal will be effective as of December 14, 2020 so the debtor can assess her bankruptcy options, including conversion to chapter 13.

3. 20-12855-B-7 **IN RE: FRANCISCO JAIMES AND KRISTAL GARCIA**
DMG-1

MOTION TO DISMISS FRANCISCO GARCIA JAIMES
10-29-2020 [14]

FRANCISCO JAIMES/MV
D. GARDNER/ATTY. FOR DBT.

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

DISPOSITION: Granted.

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

This motion was set for hearing on 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 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.

Debtors Francisco Garcia Jaimes ("Mr. Garcia") and Kristal Alcantar Garcia ("Ms. Garcia" or collectively "Debtors") move this court for an order dismissing Mr. Garcia from this chapter 7 case. Doc. #14.

This motion will be GRANTED.

Debtors filed a joint chapter 7 case on August 31, 2020. Doc. #1. Debtors' counsel was notified by the United States Trustee ("UST") and informed that Mr. Garcia filed an individual chapter 7 case in the Central District of California in 2016, case no. 16-10859. Doc. #14, #16. Ms. Garcia filed a case in 2010, so she is eligible for chapter 7 and wishes to proceed. Doc. #14. Mr. Garcia intends to file for chapter 13 relief. Doc. #16.

Under 11 U.S.C. § 707, the court may dismiss a case under this chapter only after notice and a hearing and only for "cause," including three enumerated causes. *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 970 (9th Cir. 2007) citing *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184 (9th Cir. 2000), *superseded by statute on other grounds*. The Ninth Circuit created a two-part test:

> First, [a court] must consider whether the circumstances asserted to constitute "cause" is contemplated by any specific Code provision applicable to Chapter 7 petitions. If the asserted "cause" is contemplated by a specific Code provision, then it does not constitute "cause" under 707(a). If, however, the asserted "cause" is not contemplated by a specific Code provision, then [the court] must further consider whether the circumstances asserted otherwise meet the criteria for "cause" for discharge under § 707(a).

In re Sherman, 391 F.3d at 970 (citations omitted). Here, the asserted "cause" is that Mr. Garcia obtained a discharge in 2016 and is therefore ineligible for a discharge as contemplated in § 727(a)(8). Section 727 states, in relevant part:

> (a) The court shall grant the debtor a discharge, unless—
> (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition[.]

11 U.S.C. § 727(a)(8). "Cause" exists to dismiss the case as to Mr. Garcia because he is ineligible for a discharge under § 727. However, § 727(a)(8) does not warrant dismissal of the entire case, because Ms. Garcia's bankruptcy was in 2010 so she is eligible to receive a chapter 7 discharge. No parties in interest have filed any opposition to this motion.

Accordingly, this motion will be GRANTED, and the case dismissed for cause as to Joint Debtor Francisco Garcia Jaimes. Administration of the case may continue as to Joint Debtor Kristal Alcantar Garcia. The Clerk will remove Joint Debtor Francisco Garcia Jaimes from this case and, upon completion, only issue a discharge to Joint Debtor Kristal Alcantar Garcia if she completes the requirements under § 727.

10:30 AM

1. 20-12642-B-11 **IN RE: 3MB, LLC**

CONTINUED STATUS CONFERENCE RE: CHAPTER 11 VOLUNTARY PETITION
8-11-2020 [1]

LEONARD WELSH/ATTY. FOR DBT.

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

DISPOSITION: Continued to January 6, 2021 at 10:30 a.m.

ORDER: The court will issue an order.

Debtor-in-possession 3MB, LLC, filed an amended chapter 11 plan and disclosure statement set to be heard on January 6, 2021. *See* LKW-6. Accordingly, this status conference will be continued to January 6, 2021 at 10:30 a.m. to be heard in connection with the hearing to approve the disclosure statement.

2. 20-12642-B-11 **IN RE: 3MB, LLC**
LKW-7

MOTION FOR COMPENSATION FOR LEONARD K. WELSH, DEBTORS ATTORNEY(S)
11-10-2020 [99]

LEONARD WELSH/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.

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.

The motion will be GRANTED.

Leonard K. Welsh of the Law Office of Leonard K. Welsh ("Movant"), as counsel for the debtor-in-possession 3MB, LLC ("DIP"), requests approval of fees of $18,460.00 and costs of $222.55 for a total of $18,682.55 for services rendered from August 1, 2020 through October

31, 2020. Doc. #99. DIP's authorized representative, Mr. Robert Bell, filed a declaration stating that DIP has no objection to this court authorizing it to pay $18,682.55 to Movant. Doc. #102. Mr. Bell is also aware of a $5,000.00 held as retainer for DIP's fees and understands that DIP will be required to pay the balance of fees, $13,682.55, to Movant. *Id.* at ¶ 6.

This is Movant's first fee application.

Movant's employment was authorized on September 3, 2020. Doc. #29. The order specified that DIP was authorized to employ Movant pursuant to 11 U.S.C. § 328(a), subject to applicable terms and conditions of §§ 327, 329-331. *Id.* Compensation was set at the "lodestar rate" applicable at the time services are rendered per the Ninth Circuit decision in *In re Manoa Finance Co.*, 853 F.2d 687 (9th Cir. 1988). *Id.* at ¶ 3. The order further stated that monthly applications for interim compensation pursuant to § 331 would be entertained. *Id.* at ¶ 5.

As mentioned above, Movant currently holds a $5,000.00 retainer. Doc. #101 at ¶ 7. Form B2030, *Disclosure of Compensation of Attorney for Debtor(s)*, indicates that Movant was paid $6,717.00 by DIP. Of that pre-petition payment, Movant applied $1,717.00 to costs incurred before the filing of the chapter 11 case. Doc. #1, Form B2030. All fees and costs after August 4, 2020 will be paid by application as approved by this court. *Id.*

Movant indicates that the requested fees will be paid directly by DIP. Doc. #99 at ¶ 17. The $5,000 retainer will be applied and the balance of $13,682.55 will be paid from income generated by DIP from the operation of its business. *Ibid.* Movant additionally contends that his office as provided 69.20 hours of legal services. Doc. #101 at ¶ 5; #103, Ex. B. Based on Movant and DIP's legal agreement dated June 15, 2020, DIP has agreed to pay Movant an hourly rate of $350.00 per hour and his legal assistant $125.00 per hour. Doc. #103, Ex. C at 2.

Secured Creditor U.S. Bank, N.A., as Trustee, as successor-in-interest to Bank of America, N.A., as Trustee, as successor by merger to LaSalle Bank, N.A., as Trustee for the registered holders of Bear Stearns Commercial Mortgage Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-PWR16 ("US Bank"), previously filed a notice of non-consent to use of cash collateral. Doc. #10. US Bank holds a first priority lien and assignment of rents on all of DIPs personal and real property, including but not limited to any rents, income, or proceeds generated by the use of DIP's shopping center. *Id.* However, on November 13, 2020, US Bank filed a stipulation regarding the use of cash collateral, which was approved on November 16, 2020. Doc. #108, #110. US Bank was also served all motion documents pursuant to its request for special notice and may oppose this motion at the hearing. *See* Doc. #104.

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

expenses." Movant's services included, without limitation: (1) advising DIP about the administration of its chapter 11 case, its duties as DIP including filing monthly operating reports and paying quarterly fees; (2) preparing the Schedules of Assets and Liabilities, Statement of Financial Affairs, and other documents, including amendments; (3) assisting in setting up DIP bank accounts and preparing and filing its monthly operating reports for August and September 2020; (4) responding to US Bank's motion for order dismissing the bankruptcy, including preparing and filing opposition, and preparing for and participating in chapter 11 status conferences; (5) advising DIP about selling part of its real property and retaining Hilco Real Estate or another broker to assist in selling two pads; (6) preparing for and attending the meeting of creditors; (7) advising Debtor about the employment of professionals, preparing three motions for employment of professionals, and reviewing an application for admission to practice *pro hac vice*; (8) negotiating to use of cash collateral with US Bank and advising DIP about available financing; (9) reviewing DIP's 2019 income tax returns and advising DIP about tax issues; (10) advising DIP about treatment of claims, reviewing proofs of claim, and advising DIP about a trustee's sale scheduled for August 12, 2020; (11) advising DIP about its plan and disclosure statement; and (11) preparing and filing notice of stay proceedings in three state court lawsuits and preparation of a motion to compromise controversy in one of those lawsuits. Doc. #99 at ¶ 7. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

In the absence of opposition, Movant will be awarded $18,460.00 in fees and $222.55 in costs. After application of DIP's $5,000 retainer, DIP is authorized to pay $13.682.55 to Movant provided payment is consistent with DIP's and US Bank's agreement for use of cash collateral.

11:00 AM

1. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1059

STATUS CONFERENCE RE: COMPLAINT
10-7-2020 [1]

ATCHLEY ET AL V. DHILLON
WILLIAM ALEXANDER/ATTY. FOR PL.

NO RULING.

2. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1059 PWG-1

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION FOR SUMMARY JUDGMENT
10-28-2020 [8]

ATCHLEY ET AL V. DHILLON
PHILLIP GILLET/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted without leave to amend as to the first claim for relief and with leave to amend as to the second and third claims for relief.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order in conformance with the ruling below.

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

Introduction

On October 7, 2020, Creditor Virginia Lee Atchley, as Successor Trustee of the Atchley Living Trust ("Plaintiff") filed an adversary proceeding against debtor and defendant Jaspreet Dhillon ("Defendant") alleging three claims for relief: (1) conversion of fire insurance proceeds Defendant allegedly received in May 2018 for a fire loss of real property securing a debt owed by Defendant to Plaintiff is not dischargeable under 11 U.S.C. § 523(a)(6); (2) avoidance of an alleged fraudulent transfer of a property under 11 U.S.C. § 548 and California Code of Civil Procedure ("C.C.P.") §§ 3439, et seq.; and (3) conspiracy to commit fraudulent transfer. Doc. #1.

Defendant filed this motion to dismiss Plaintiff's adversary proceeding for failure to state a cause of action upon which relief

can be granted under Federal Rule of Civil Procedure[26] 12(b)(6) (made applicable in bankruptcy proceedings under Rule 7012). Doc. #8.

First, Defendant contends that the claim objecting to discharge is untimely and must be dismissed because the 60-day time limit for filing non-dischargeability complaints under Rule 4007(c) has expired. Doc. #10. Defendant contends that the stipulations entered into by him, as the debtor, and the chapter 7 trustee ("Trustee") were not legally sufficient to extend the deadline because they were not extended by noticed motion. Even if they were sufficient, Defendant argues that Plaintiff cannot "piggy back" onto Trustee's deadline extension. *Id.* And even if Plaintiff could use Trustee's deadline extension, it specified 75 days, which would expire on October 5, 2020 under 9006(a)(1)(C) and Plaintiff's complaint was filed on October 7, 2020. *Id.*; *see also* Doc. #1.

Second, Defendant argues that he needs a "short and plain statement" to give him notice of the action and that if Plaintiff is alleging fraud, it must be plead with particularity to state the circumstances constituting fraud under Civil Rules 8 and 9(b) (incorporated under Rules 7008 and 7009). *Id.*

Lastly, Defendant requests a more definite statement under Civil Rule 12(e). *Id.*

Plaintiff timely responded,[27] requesting that Defendant's motion be denied "pursuant to the principles of equity" and contending that the complaint is sufficiently pleaded. Doc. #22. Plaintiff claims that it relied on Defendant's stipulation with Trustee, which purported to extend the deadline to October 7, 2020. *Id.* Plaintiff believed that the stipulation was being filed with the court and that an order would be entered. *Id.*

This motion will be GRANTED WITHOUT LEAVE TO AMEND as to the first claim for relief and GRANTED WITH LEAVE TO AMEND as to the second and third claims for relief.

Background

Mount Vernon Property

According to the complaint, Plaintiff and Defendant's relationship began around March 2017, when Plaintiff sold Defendant a parcel of real property located at 3801 Mount Vernon Avenue, Bakersfield, CA 93306 ("Mount Vernon Property"). Doc. #1 at ¶ 5. As part of the transaction, Plaintiff agreed to "carry back $168,000.00 of the

[26] Future references to the Federal Rules of Civil Procedure will be shortened to "Civil Rule;" future reference to the Federal Rules of Bankruptcy Procedure will be shortened to "Rule."

[27] The court notes that Plaintiff's certificate of service contained the incorrect Docket Control Number ("DCN"), "WLA Doc. No.: 2". Doc. #17. This certificate of service also contained documents and pleadings related to other matters (as discussed further in matters #4 and #5 below) in violation of LBR 9004-2(e)(3). *See* WLA-2.

purchase price." *Ibid.* Defendant's obligation was memorialized by a note and secured by a first deed of trust, which was executed by Defendant and recorded on March 10, 2017. *Ibid.*

The first deed of trust required Defendant to maintain fire insurance on Mount Vernon Property and to name Plaintiff as a loss payee under the insurance policy. *Id.* at ¶ 6. Plaintiff purports receipt of a document entitled "Evidence of Property Insurance" that provided: (1) the fire insurance policy was effective on Mount Vernon Property as of March 20, 2017; and (2) Plaintiff is an additional insured under the policy. *Ibid.*

On December 10, 2017, Plaintiff alleges, Mount Vernon Property was significantly damaged by fire. *Id.* at ¶ 7. "For reasons then unknown to [Plaintiff], [Plaintiff] was apparently not listed or named as a loss payee or additional insured under the insurance policy." *Ibid.* Plaintiff believes that sometime after the fire loss, Defendant filed a claim under the insurance policy and signed a sworn affidavit that there was no loan or encumbrance on Mount Vernon Property. *Id.* at ¶ 8. On this basis, Plaintiff alleges that in May 2018, Defendant received a payout under the insurance policy for the fire loss of approximately $486,000.00. *Id.* at ¶ 9.

Plaintiff contends that Defendant ceased making payments on the note in July 2018 which provides for a principal balance of $168,000.00, plus 4% interest, $100 per month in late fees, and any legal fees and costs incurred as a result of any default under the note. *Id.* at ¶¶ 11-12. On March 22, 2019, Plaintiff filed an action alleging conversion, breach of contract, and judicial foreclosure in Kern County Superior Court. *Id.* at ¶ 13; *see also Virginia Lee Atchley v. Jaspreet Dhillon, et al.*, case no. BCV-19-100811. This case includes multiple insurance companies and is currently stayed as to Defendant pending the outcome of his chapter 7 bankruptcy case.

Westbluff Property

Plaintiff also alleges that Defendant owned real property located at 120 Westbluff Court, Bakersfield, CA 93305 ("Westbluff Property"). Doc. #1 at ¶ 14. Plaintiff believes Westbluff Property was purchased by Defendant in April 2017 for $195,000.00. *Id.* at ¶ 15. Plaintiff alleges that on April 1, 2019, Plaintiff sold the Westbluff Property to non-parties Armando Garza III and Armando Escamilla Garza for $15,000.00. These non-parties are not defendants in this adversary proceeding, but Plaintiff filed a state court action naming both as defendants on April 7, 2020. *Virginia Lee Atchley v. Garza, III, et al.*, case no. BCV-20-100846.

Debtor's Bankruptcy

Defendant filed bankruptcy on February 8, 2020. *See In re Jaspreet Dhillon*, case no. 20-10465, Doc. #1. Defendant received his discharge on October 13, 2020, which was prior to the conclusion of the 341 meeting of creditors on November 6, 2020. *Id.*, Doc. #27.

Defendant lists the Superior Court case in his petition in Form 107, *Statement of Financial Affairs for Individuals Filing for Bankruptcy*. *Id.*, Doc. #1, Form 107 at ¶ 9. Plaintiff is listed as a nonpriority unsecured creditor on Schedule E/F with a claim of $180,000.00. *Id.*, Schedule E/F at ¶ 4.47. Plaintiff has not filed a proof of claim, but the Form 309A, *Notice of Chapter 7 Bankruptcy Case*, indicates that there is no proof of claim deadline because it does not appear that there was property available to administer to pay creditors. *Id.*, Doc. #9 at ¶ 10. June 2, 2020 was the original deadline in which creditors may assert that Defendant is not entitled to receive a discharge of any debts under 11 U.S.C. §§ 727(a)(2)-(7), except certain debts from discharge under §§ 523(2), (4), or (6), or assert that a discharge should be denied under §§ 727(a)(8) or (9). *Id.* at ¶ 9. These dates were amended on April 11, 2020 due to COVID-19 and the deadline to file a complaint objecting to discharge or to determine dischargeability of certain types of debts was extended July 7, 2020. *Id.*, Doc. #13. The court sent both of these notices.

Stipulation Speculation

Defendant's former attorney, Neil E. Schwartz,[28] filed two stipulations. On July 6, 2020, Mr. Schwartz filed the first stipulation dated July 2, 2020 ("First Stipulation") with Trustee to extend the time to file an objection to discharge, file an objection to dischargeability of a debt, or file an objection to Defendant's claim of exemptions. *Id.*, Doc. #19. The First Stipulation stated: "It is hereby stipulated that the current deadlines be extended for 75 days from continued meeting of creditors July 10, 2020." *Ibid.* As noted in Defendant's motion, this stipulation would have extended the deadline until September 23, 2020 if it had complied with proper deadline extension procedure. Doc. #8.

No order was ever entered approving the First Stipulation. The docket contains an entry immediately subsequent to the certificate of service on this stipulation and states: "Contacted Jennifer from the Law Office of Neil M. Schwartz on 7/7/20 regarding Failure to Submit a Proposed Order or Notice of Hearing Re: [19] Stipulation to Extend Deadline[.]" *See Dhillon*, Doc. #20; docket generally.

On July 21, 2020, Mr. Schwartz and Trustee filed a second stipulation dated July 21, 2020 ("Second Stipulation"), which stated in relevant part:

> 2. The statutory deadline for filing complaints objecting to discharge and/or dischargeability of debts is July 7, 2020
>
> 3. The Trustee has requested certain financial information, which the Debtor has not yet provided. In order to ensure continued compliance with the Trustee's requests the

[28] On September 18, 2020, Defendant's current attorney, Phillip W. Gillet, Jr., filed a motion to substitute in for Mr. Schwartz as counsel, which was granted on September 21, 2020. *See Dhillon*, Doc. #23, #25.

> parties hereto stipulate and agree to a 75 day extension of the deadline to object to the Debtor's discharge in this case. . .
>
> NOW THEREFORE, IT IS HEREBY STIPULATED AS FOLLOWS:
>
> 1. The deadline for filing a complaint objecting to discharge in the within case s [sic] hereby extended to October 7, 2020.

Id., Doc. #21 (emphasis omitted). Again, no order approving the Second Stipulation was ever entered. The Second Stipulation was filed after the time period expired on July 7, 2020. Certificates of service indicate this stipulation was sent to the mailing list of parties. *Id.*, Doc. #20, #22. Defendant contends that these stipulations are not legally sufficient to extend the time as to those who are not parties to the stipulation because extension of these deadlines can only be done by order after noticed motion under Rule 4004(b)(1) as specified by Rules 4007(c) and 9006(b)(3), and therefore the deadline has expired. Doc. #10.

Motion to Dismiss Standard

Civil Rule 12(b)(6) states dismissal is warranted "for failure to state a claim upon which relief can be granted." Courts may dismiss a complaint if it "fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016) (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)); *see also Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). "A complaint need not state 'detailed factual allegations,' but must contain sufficient factual matter to 'state a claim to relief that is plausible on its face.'" *Doan v. Singh*, 617 F.App'x. 684, 685 (9th Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544-55 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

When considering a motion to dismiss, all material facts of the complaint are to be taken as true and should be viewed in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 662 (citing *Twombly*, 550 U.S. at 555). The court may also draw on its "judicial experience and common sense." *Id.* at 679. Additionally, the court may consider the following limited material without converting the motion to dismiss into a motion for summary judgment under Civil Rule 56 (made applicable under Rule 7056): (1) documents attached to the complaint as exhibits; (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial

notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*per curium*) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)).

Dismissal under Civil Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint. *ASARCO, LLC v. Union Pacific R. Co.*, 765 F. 3d 999, 1004 (9th Cir. 2014)

If Plaintiff alleges fraud, Civil Rule 9(b) imposes a heightened pleading requirement. Under Civil Rule 9(b), a plaintiff is required to "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The rule applies to claims arising under state law. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). "[W]hile a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the *circumstances* of the fraud must be stated with particularity is a federally imposed rule." *Hayduck v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (emphasis in original).

Allegations of fraud must "be 'specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (citations omitted). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

The Non-Dischargeability Claim is Time Barred

Plaintiff's first cause of action alleges conversion. Plaintiff believes she had the legal and contractual right to receive the proceeds of the fire insurance policy up to the amount she was owed under the note and alleges that Defendant intentionally interfered with Plaintiff's right to receive those proceeds by applying for, signing a sworn statement that there were no other loss payees, obtaining the first insurance proceeds of approximately $490,000 and paying none of it to Plaintiff. Doc. #1 at ¶¶ 18, 19.

Plaintiff contends she has been harmed by Defendant's receipt of the insurance proceeds and the value of her interest in Mount Vernon Property has diminished, now being worth "substantially less" than its fair market value at the time it was sold with a portion of equity secured by the note. *Id.* at ¶ 21. Additionally, Plaintiff alleges that Defendant's actions were willful and malicious and contained specific intent to deprive Plaintiff of her collateral in Mount Vernon Property when he signed the sworn statement that there were no additional payees or lienholders for Mount Vernon Property. *Id.* at ¶ 22.

As result, Plaintiff claims damages in the following amounts:

> (a) $168,000 in principal;
>
> (b) $560 per month in interest from July 2018 until the note has been paid in full;
>
> (c) $100 per month in late charges from August 2018 until the note has been paid in full;
>
> (d) expenses including property taxes, insurance, repairs, maintenance, and security; and
>
> (e) attorney's fees and costs incurred.

Id. at ¶ 23. Plaintiff maintains this conduct was "fraudulent, oppressive, and malicious" and believes she is also entitled to punitive damages according to proof. *Id.* at ¶ 24.

Meanwhile, Defendant argues that under Civil Rule 12(b)(6), no relief can be granted because the deadline to assert claims under 11 U.S.C. § 523(a)(6) has expired. Section 523(a)(6) provides, "a discharge under section 727 . . . of this title does not discharge an individual debtor from any debt— . . . for willful and malicious injury by the debtor to another entity or to the property of another entity. . ." 11 U.S.C. § 523(a)(6). Section 523(c) also provides:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in [(a)(6)] of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under [(a)(6)] of this section.

11 U.S.C. § 523(c)(1).[29] Defendant contends that the two stipulations between himself and the Trustee were not legally sufficient to extend the time because they were not done by noticed motion as required by Rules 4007 and 4004. Doc. #10.

If the stipulations were valid, Defendant argues that Plaintiff cannot "piggy back" on trustee's motion to extend the time without filing her own motion. *Id.* And even if Plaintiff could benefit from Trustee's extension of time with Defendant, the Second Stipulation stated that the parties "agree to a 75 day extension of the deadline[.]" *Dhillon*, Doc. #21. This stipulation was executed and filed on July 21, 2020. From July 21, 2020, the 75-day extension would end on Sunday, October 4, 2020. Under Rule 9006(a)(1)(C), because the period ends on a Sunday, it would be extended to October 5, 2020.

The stipulation later states "[t]he deadline for filing a complaint objecting to discharge in the within case s [sic] hereby extended to October 7, 2020[,]" which conflicts with the 75-day deadline ending

[29] Sections 523(a)(2) and (4) were omitted from this quotation. *See* 11 U.S.C. § 523(c)(1).

October 5, 2020. *Dhillon*, Doc. #21. However, this ambiguity is *de minimis* because neither the First Stipulation nor the Second Stipulation were properly authorized by court order.

Timing deadlines in § 523(a)(6) are governed by Rule 4007, which provides in part:

> Except as otherwise provided in subdivision (d), a complaint to determine dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On a motion of a party in interest, after hearing on notice, the court for cause may extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Rule 4007(c). Rule 4004(b) provides in part:

> On a motion of any party in interest, after notice and hearing, the court may for cause extend the time to object to discharge. Except as provided in subdivision (b)(2), the motion shall be filed before the time has expired.

Rule 4004(b)(1). The time limit cannot be extended without a noticed motion filed before the deadline expires. *Anwar v. Johnson*, 720 F.3d 1183, 1189 (9th Cir. 2013). As the *Anwar* court stated:

> Consistent with the plain language of [Rule] 4007(c) and 9006(b)(3), we have repeatedly held that the sixty-day time limit for filing nondischargeability complaints under 11 U.S.C. § 523(c) is "strict" and, without qualification, "cannot be extended unless a motion is made before the 60-day limit expires."

Id.; (citing *In re Kennerly*, 995 F.2d 145, 146 (9th Cir. 1993) ("[I]t may appear reasonable to conclude that the court implicitly granted such an extension . . . however, bankruptcy courts can only grant such extensions upon timely motion, as Rules 4007(c) and 9006(b)(3) make clear."); *Anwiler v. Patchett (In re Anwiler v. Pratchett (In re Anwiler)*, 958 F.2d 925, 927 (9th Cir. 1992) ("[A] court no longer has the discretion to set the deadline, nor can it *sua sponte* extend the time to file. . . . Absent a motion to extend, the date, once set, does not change."); *Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 37 F.3d 1354, 1358 (9th Cir. 1994) ("[I]f equitable powers to extend the time for filing under section 4007(c) exist at all, they are limited to 'situations where a court *explicitly misleads* a party.'") (emphasis in original) (citation omitted); *Jones v. Hill (In re Hill)*, 811 F.2d 484, 486 (9th Cir. 1987) (finding that the plaintiff was barred from filing its complaint because counsel's motion was made after the time limit had expired in violation of Rule 4007(c))).

Case law is well established that the deadline extension procedure is strict. *Williams v. Sanderson*, 723 F.3d 1094, 1097 (9th Cir. 2013) (finding that the bankruptcy court erred by *sua sponte* extending the time for plaintiffs to extend the time to file a non-dischargeability complaint after the deadline had passed and doing so without a showing or finding of cause). *Mostaffa Shahrestani v. Raed Yahia Alazzeh (In re Raed Yahia Alazzeh)*, 509 B.R. 689, 694-95 (B.A.P. 9th Cir. 2014) ("[Plaintiff] could not rely on [Defendant]'s agreement to extend the § 727 complaint Deadline. Any such extension is dependent upon the bankruptcy court granting a motion filed prior to the Deadline, for cause shown."); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (The Supreme Court noted, *arguendo*, that had the debtor asserted untimeliness of the creditor's complaint, he would have prevailed in creditor's adversary proceeding).

Plaintiff cites only one case as authority in the opposition to dismiss, *In re Anwiler*, *supra*. *Anwiler*, 958 F.2d 925. In *Anwiler*, the Ninth Circuit affirmed the Bankruptcy Appellate Panel, which reversed a bankruptcy court ruling dismissing a dischargeability and objection to discharge complaint on timeliness grounds. *Id.* at 929. But the reasons there for extending the deadline were much different. Two courts sent conflicting deadline notices. *Id.* at 926. The equitable basis to permit the late filing was the court correcting the *court's own mistakes* in sending the conflicting notices. *Id.* at 929. No conflicting court-set deadlines are at issue here. The COVID-19 pandemic resulted in the court sending two notices of discharge objection/dischargeability deadlines because the creditor's meeting was delayed. But the notices were neither ambiguous nor conflicting. Besides, the complaint here was filed months after the later deadline. So, Plaintiff here missed the later deadline set by the court.

A similar Trustee/Debtor-set conflicting deadline occurred in *Mandel v. Franzese* and is more applicable to this situation. *See Mandel v. Franzese (In re Franzese)*, No. CC-12-1360-DKiPa, 2013 Bankr. LEXIS 4642 (B.A.P. 9th Cir. July 2, 2013). In *Mandel*, the chapter 7 trustee and the debtor entered into a stipulation stating:

> The deadline for filing either a complaint objecting to the debtor's discharge under 11 U.S.C. § 727 and 11 U.S.C. § 523 or a motion to dismiss under § 727(b)(3) [sic] by the chapter 7 trustee currently set for February 13, 2012 is extended to April 13, 2012.

Id. at *3 (emphasis omitted). The *Mandel* court subsequently entered an order approving the stipulation and the deadline was extended further to August 13, 2012 after two further stipulations. *Ibid.* The debtor obtained a discharge and the plaintiff, Mandel, filed an adversary complaint to except its State Court Judgment from discharge on April 12, 2012. *Id.* at *4. The debtor filed a motion to dismiss under Civil Rule 12(b)(6) as the complaint was not timely filed under 4007(c) and Mandel opposed, arguing that the extension "misled Mandel and his counsel into believing that the deadline to file exception to discharge claims had been extended to April 13, 2012 for the benefit of all creditors." *Id.* at *4-*5. After hearing

argument, the bankruptcy court noted that Mandel was not a party to the original stipulation and granted the motion, finding that "the fact that the Trustee got a stipulation with the Debtor does not translate to a stipulation with the creditors." *Id.* at *5. Mandel appealed, but the Bankruptcy Appellate Panel noted that the bankruptcy court's order extending the deadline for the trustee under Rule 4007(c) did not grant or refer to creditors generally, and Mandel could not reasonably rely on the trustee's extension. *Id.* at *14. Under this reasoning, the court found no abuse of discretion or clear error and affirmed the bankruptcy court in granting the defendant's motion to dismiss. *Ibid.*

This case is similar to *Mandel* in that Debtor and Trustee entered into a stipulation purporting to extend the deadline. Although, unlike *Mandel*, the deadline was not extended as a matter of law because no order approving the stipulation and extending the deadline was entered, even if it had been, Plaintiff cannot rely on Trustee's extension without obtaining an extension for her claim, which would require court approval. As such, Plaintiff's claim under 11 U.S.C. § 523(a)(6) is time barred under Rules 4004(b)(1) and 4007(c).

Waiver and Equitable Estoppel

Other courts have also considered whether waiver or equitable estoppel could apply when the party asserting timeliness as a defense is at least partially responsible for confusion regarding the deadline.

The *Santos* court specifically considered whether equitable estoppel or waiver could be applied to extensions under Rules 4004(a) and (b), 4007(c), and 9006(b)(3). *Schunk v. Santos (In re Santos)*, 112 B.R. 1001 (B.A.P. 9th Cir. 1990). When considering whether to apply equitable estoppel, the court noted, "[a]ny application of estoppel which would eliminate or impair the court's exclusive control over extensions would be contrary to the rule as construed in this circuit." *Id.* at 1007. The court reasoned that equitable estoppel "requires reasonable reliance on the defendant's words or conduct in forebearing [sic] from taking the necessary action within the applicable limitations period." *Ibid.* If the deadline extension rules "clearly provide" that it must be filed before expiration of the deadline subject to court approval, then that defective deadline extension cannot be reasonably relied upon by a plaintiff seeking to assert equitable estoppel. *Ibid.*

The *Santos* court also briefly considered waiver and suggested that it could potentially apply to situations where debtor's counsel misleads creditor's counsel into believing a deadline extension had been approved by court order. *Id.* at 1008. The *Santos* court noted that this task involved fact finding and remanded to the bankruptcy court to consider the issue. *Ibid.* As *Santos* notes, to determine whether a waiver defense applies, a court should consider:

> 1) the obviousness of the defense's availability, 2) the state of the proceeding at which the defense is raised,

> 3) the time which has elapsed between the filing of the answer and the raising of the defense, 4) the amount of time and effort expended by the plaintiff in the case at the time the defense is raised, and 5) the prejudice resulting to the plaintiff which would result from allowing the defense to be asserted.

Ibid. (citing *In re Kleinoeder*, 54 Bankr. 33, 35 (Bankr. N.D. Ohio 1985)). The court added, "[a]nother factor which should be considered in this case is the debtors' counsel's suggestion that the appellant's counsel mislead him into believing that the late filing had been approved by the court." *Ibid.*

Estoppel is essentially unavailable to Plaintiff here. The complaint contains no allegations supporting a waiver defense based on the defendant misleading the plaintiff. So, there are no facts before the court to bring the issue into question. Accordingly, Defendant has made a *prima facie* showing that the Plaintiff has failed to state a claim upon which relief can be granted as to the first claim for relief, and therefore this claim will be dismissed without leave to amend.

Fraudulent Transfer Avoidance

Plaintiff's second claim is for voidable transfer under C.C.P. § 3439, et seq., which is the Uniform Voidable Transaction Act ("UVTA") under California law. Plaintiff alleges that Defendant transferred Westbluff Property with actual intent to hinder, delay, or defraud Plaintiff and his assets were unreasonably small, or he intended to incur debts beyond his ability to pay. Doc. #1 at ¶ 27.

Further, Plaintiff believes that Defendant did not receive reasonably equivalent value when he sold Westbluff Property for $15,000.00. *Id.* at ¶ 28. Plaintiff contends that Defendant was insolvent at the time of the transfer. *Id.* at ¶ 29. Under the UVTA, Plaintiff seeks to avoid the transfer so that she may satisfy her claim. The bankruptcy equivalent cause of action for avoidance of fraudulent transfer is found in 11 U.S.C. § 548.

Defendant contends that this claim must be pleaded with particularity because § 548 provides for "willful and malicious injury," which is subject to the heightened pleading standard of Civil Rule 9. Defendant claims that "willful" element requires Defendant to show that Debtor intended injury, reckless or negligent conduct is not enough. Doc. #10 citing *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). Defendant argues that malice requires: (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. *Id.* citing *In re Sicroff*, 401 F.3d 1101, 1106 (9th Cir. 2005). Defendant also notes that he does not know how much money was allegedly taken, his intentionality, or actions that caused the injury, and therefore the second claim is not available. Doc. #10.

Plaintiff's response expands on her voidable transfer allegations. Plaintiff claims that the transfer for $15,000 was "well below the

$195,000 debtor had purchased it for just two years prior." Doc. #22. Under the UVTA, Plaintiff asserts that a transfer is avoidable if it is "undertaken with intent to prevent a creditor from reaching" its interest. *Id.*, citing *Potter v. All. United Ins. Co.*, 37 Cal. App. 5th 894 (2019). Plaintiff states that fraud is proven when a transfer is made with intent to delay, hinder, or defraud creditors. *Ibid.* On this basis, Plaintiff alleges that Defendant transferred the property with intent to hinder her while being insolvent at the time of transfer. *Ibid.* Plaintiff believes these facts are sufficient for its cause of action, but requests leave to amend if this court disagrees. *Ibid.*

As noted above, the bankruptcy equivalent for the UVTA is 11 U.S.C. § 548. Section 548(a) states:

> (1) The *trustee* may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date of such transfer was made or such obligation was incurred, indebted; or
>
> (B)
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)
> (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1) (parentheses omitted). Section 548(a)(1) specifically states a trustee shall bring the action, not a creditor. Nothing in § 548 provides Plaintiff standing to set aside a fraudulent transfer.

The trustee is the representative of the estate and can sue and be sued. 11 U.S.C. § 323; *see also Haskell v. PWS Holding Corp. (In re PWS Holding Corp.)*, 303 F.3d 308 (3d Cir. 2002), *cert. denied* 538 U.S. 94 (2003). As no motions for relief from stay have been filed, Plaintiff is stayed from taking control of estate property. Though there is a discharge, that does not affect the stay of actions against property of the estate. Perhaps Trustee can be persuaded to abandon the claim, but this has not happened yet. And if it is abandoned, Plaintiff may proceed in state court as to the fraudulent transfer.

Plaintiff does not currently have standing to bring her claim under 11 U.S.C. § 548(a)(1) and therefore Defendant has made a *prima facie* showing that it is entitled to dismissal of the second claim with leave to amend.

Conspiracy

Plaintiff's third claim for relief is for Conspiracy to Commit Fraudulent Transfer. Plaintiff claims that Defendant sought to hinder, delay, and defraud Plaintiff in her efforts to collect the sums due. Doc. #1 at ¶ 32. Plaintiff alleges that Defendant conspired with non-parties Armando Garza III and Armando Escamilla Garza ("Co-Conspirators") to fraudulently transfer Westbluff Property to hinder, delay, and defraud Plaintiff's efforts to collect the debt owed to her. *Id.* at ¶ 33. Plaintiff believes that Defendant transferred Westbluff Property to Co-Conspirators without adequate consideration, harmed Plaintiff, and warrants her an award of punitive damages according to proof.

Defendant's motion requests a more definitive statement to narrow issues and disclose boundaries of claims and defenses. Under Civil Rule 12(e), on the basis that the complaint is so vague or ambiguous that it prevents Defendant from filing a response.

As noted, Co-Conspirators are not named defendants in this adversary proceeding. The court would likely abstain from hearing this claim even if it were properly pleaded because it implicates non-debtors involved in a pending lawsuit in Kern County Superior Court. Accordingly, Defendant has met his burden that he is entitled to dismissal of the third claim with leave to amend.

Conclusion

Plaintiff's first claim for non-dischargeability of a debt under 11 U.S.C. § 523(a)(6) is time barred under Rule 4007(c) and if the claim is construed as an objection to discharge, under 4004(a) and (b)(1). Plaintiff does not have standing for her second claim under 11 U.S.C. § 548(a)(1) and has not yet persuaded Trustee to abandon this claim, which currently belongs to the estate. The third claim contains allegations against non-parties and is currently being litigated in state court, so this court would abstain from hearing the claim.

Accordingly, this motion will be GRANTED WITHOUT LEAVE TO AMEND as to the first claim and GRANTED WITH LEAVE TO AMEND as to the second and third claims for relief. Plaintiff shall file an amended complaint, if any, within fourteen days of the entry of the order on this motion.

3. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
19-1123

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
12-19-2019 [11]

TULARE LOCAL HEALTHCARE
DISTRICT V. MEDLINE
MICHAEL WILHELM/ATTY. FOR PL.
RESPONSIVE PLEADING

NO RULING.

4. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1059 WLA-2

COUNTER MOTION FOR EXAMINATION
11-18-2020 [13]

ATCHLEY ET AL V. DHILLON
WILLIAM ALEXANDER/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue the order.

Creditor Virginia Lee Atchley, as Successor Trustee of the Atchley Living Trust ("Plaintiff") filed this countermotion seeking authorization to conduct a Federal Rule of Bankruptcy Procedure ("Rule") 2004 examination of Harjeet Randhawa, the ex-wife of the debtor, Jaspreet Dhillon ("Defendant"). This countermotion, along with another countermotion, were both filed in response to Defendant's motion to dismiss adversary proceeding in matter #2 above. *See* PWG-1.

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

First, LBR 9004-2(a)(6), (b)(5), (b)(6), & (e) and LBR 9014-1(c) & (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court. Each new motion requires a new DCN.

This motion has a DCN of WLA-2. Doc. #13. A Countermotion for an Order Revoking Discharge of Debtor with DCN WLA-2 was also filed on November 18, 2020 and set for hearing on December 2, 2020 in matter #5 below. Doc. #18. These motions do not comply with the local rules because they have the same DCN. Each separate matter filed with the court must have a different DCN. Notably, the certificate of service contained the DCN of "WLA Doc. No.: 2" and was duplicated for both countermotions and opposition to Defendant's motion to dismiss. *See* Doc. #17. Each matter must have a separate certificate of service with a separate DCN. LBR 9004-2(e)(3). Parties may not "recycle" documents, such as certificates of service, by refiling the same certificate under different matters. LBR 9004-2(c)(1).

Second, LBR 9014-1(f)(2)(C) states that no party in interest shall be required to file written opposition to motions filed with fewer than 28 days' notice. LBR 9014-1(d)(3)(B)(i) requires "[t]he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons served with any opposition." Thus, motions filed on (f)(2) notice should state: written opposition is not required; opposition, if any, shall be presented at the hearing on the motion; and if opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

This motion was filed and served on November 18, 2020 and set for hearing on December 2, 2020. Doc. #13-17. December 2, 2020 is exactly 14 days after November 18, 2020, and therefore this hearing was set on less than 28 days' notice under LBR 9014-1(f)(2). The notice quoted language from LBR 9014-1(f)(1)(B), purporting that written opposition must be filed by November 18, 2020, the same day that this motion was filed. Doc. #14. This is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that written opposition was not required and should have contained the language of LBR 9014-1(f)(2)(C).

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

5. 20-10465-B-7 **IN RE: JASPREET DHILLON**
20-1059 WLA-2

COUNTER MOTION FOR ORDER REVOKING DISCHARGE OF DEBTOR
11-18-2020 [18]

ATCHLEY ET AL V. DHILLON
WILLIAM ALEXANDER/ATTY. FOR MV.

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

DISPOSITION: Denied without prejudice.

ORDER: The court will issue the order.

Creditor Virginia Lee Atchley, as Successor Trustee of the Atchley Living Trust ("Plaintiff") filed this countermotion seeking an order revoking the discharge of the debtor, Jaspreet Dhillon ("Defendant"), under 11 U.S.C. § 727(d). This countermotion, along with another countermotion, were both filed in response to Defendant's motion to dismiss adversary proceeding in matter #2 above. *See* PWG-1.

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

First, LBR 9004-2(a)(6), (b)(5), (b)(6), & (e) and LBR 9014-1(c) & (e)(3) are the rules about Docket Control Numbers ("DCN"). These rules require the DCN to be in the caption page on all documents filed in every matter with the court. Each new motion requires a new DCN.

This motion has a DCN of WLA-2. Doc. #18. A Countermotion for Examination with DCN WLA-2 was also filed on November 18, 2020 and set for hearing on December 2, 2020 in matter #4 above. Doc. #13. These motions do not comply with the local rules because they have the same DCN. Each separate matter filed with the court must have a different DCN. Notably, the certificate of service contained the DCN of "WLA Doc. No.: 2" and was duplicated for both countermotions and opposition to Defendant's motion to dismiss. *See* Doc. #17. Each matter must have a separate certificate of service with a separate DCN. LBR 9004-2(e)(3). Parties may not "recycle" documents, such as certificates of service, by refiling the same certificate under different matters. LBR 9004-2(c)(1).

Second, LBR 9014-1(f)(2)(C) states that no party in interest shall be required to file written opposition to motions filed with fewer than 28 days' notice. LBR 9014-1(d)(3)(B)(i) requires "[t]he notice of hearing shall advise potential respondents whether and when written opposition must be filed, the deadline for filing and serving it, and the names and addresses of the persons served with any opposition." Thus, motions filed on (f)(2) notice should state: written opposition is not required; opposition, if any, shall be presented at the hearing on the motion; and if opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs.

This motion was filed and served on November 18, 2020 and set for hearing on December 2, 2020. Doc. #17-21. December 2, 2020 is exactly 14 days after November 18, 2020, and therefore this hearing was set on less than 28 days' notice under LBR 9014-1(f)(2). The notice quoted language from LBR 9014-1(f)(1)(B), purporting that written opposition must be filed by November 18, 2020, the same day that this motion was filed. Doc. #14. This is incorrect. Because the hearing was set on less than 28 days' notice, the notice should have stated that written opposition was not required and should have contained the language of LBR 9014-1(f)(2)(C).

Third, Federal Rule of Bankruptcy Procedure ("Rule") 7001(4) states that an action to object to or revoke a discharge, other than an

objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f) is an adversary proceeding. This motion seeks to revoke Defendant's discharge under § 727(d). Doc. #18. Under Rule 7001(4), this claim must be filed as a separate adversary proceeding, not as a motion in this adversary proceeding seeking conversion or avoidance of an allegedly fraudulent transfer. Doc. #1.

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

11:30 AM

1. 20-13123-B-7 **IN RE: ELEAZAR REYES MARTINEZ AND FLORENZA SANTIAGO DIAZ**

PRO SE REAFFIRMATION AGREEMENT WITH NISSAN MOTOR ACCEPTANCE CORPORATION
11-11-2020 [10]

OSCAR SWINTON/ATTY. FOR DBT.

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

DISPOSITION: Denied.

ORDER: The court will issue an order.

Counsel shall inform his clients that no appearance is necessary at this hearing.

Debtors were represented by counsel when they 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). In this case, the debtors' attorney affirmatively represented that the agreement established a presumption of undue hardship and that his opinion the debtors were not able to make the required payments. Therefore, the agreement does not meet the requirements of 11 U.S.C. § 524(c) and is not enforceable.