

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Thomas C. Holman
Bankruptcy Judge
Sacramento, California

September 2, 2008 at 9:30 A.M.

1. [08-28327](#)-B-7 JEANNIE TAYLOR HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-4-08 [[20](#)]

Tentative Ruling: None.

2. [08-29641](#)-B-7 RONALD/NICOLE PRESSLEY HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-7-08 [[10](#)]

Tentative Ruling: None.

3. [08-29453](#)-B-7 CONCHITA CASTRODES HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-1-08 [[10](#)]

Tentative Ruling: None.

4. [08-29856](#)-B-7 EDWIN MALO AND LADIZ MORALES HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-8-08 [[13](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the bankruptcy case was dismissed by order entered on August 22, 2008. (Dkt. 25). No monetary sanctions are imposed.

The court will issue a minute order.

5. [08-30761](#)-B-7 JANE VELASCO

HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
AND/OR IMPOSITION OF SANCTIONS
FOR FAILURE TO TENDER FEES OR
AN APPLICATION TO PAY FEES IN
INSTALLMENTS WITH BANKRUPTCY
PETITION
8-7-08 [[9](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the debtor paid the missing fee on August 8, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

6. [08-26262](#)-B-7 ANASTACIO/ELSA HUDLEY

HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-7-08 [[41](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the debtors filed the missing document on August 13, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

7. [08-30283](#)-B-7 LYDIA GONZALEZ

HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-6-08 [[5](#)]

Tentative Ruling: None.

8. [08-29889](#)-B-7 JAMES GRANDISON

HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-8-08 [[12](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the debtor filed the missing documents on August 25, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

9. [08-30095](#)-B-11 5244 OAKRIDGE TRUST HEARING - ORDER TO SHOW
CAUSE RE: DISMISSAL OF CASE
7-31-08 [[8](#)]

Tentative Ruling: None.

10. [08-22310](#)-B-7 MARIO/ANNA DERENZI HEARING - MOTION FOR
JHW #1 RELIEF FROM AUTOMATIC STAY
DAIMLERCHRYSLER FINANCIAL 8-1-08 [[27](#)]
SERVICES AMERICAS LLC, VS.

Tentative Ruling: The motion is denied as moot. Considering the automatic extension provided in Bankruptcy Rule 9006(a), the automatic stay terminated with respect to the collateral, a 2005 Chrysler Pacifica (VIN 2C8GF8425R506969) (the "Collateral"), at 12:01 a.m. on August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtors did not file a statement of intention with respect to the Collateral within the time allowed by law. The debtors had until August 25, 2008, 30 days after entry of the order converting this case to one under chapter 7 plus the automatic extension provided by Bankruptcy Rule 9006(a), to file a statement of intention that addressed the Collateral. Because they did not timely file such a statement of intention, and because the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

11. [08-26410](#)-B-7 RAMIRO/CLAUDIA GOLDANI HEARING - MOTION FOR
DMM #1 RELIEF FROM AUTOMATIC STAY
WACHOVIA MORTGAGE, FSB, VS. 8-4-08 [[15](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1789 Harwood Way, Sacramento, CA 95835 (APN 225-1080-046) (the "Property") and to obtain possession of the Property following the sale,

all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$380,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$400,213.66. Considering these figures, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make six (6) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

12. 08-28013-B-7 KENNETH/LISA GONZALEZ HEARING - MOTION FOR
PPR #1 RELIEF FROM AUTOMATIC STAY
GREENPOINT MORTGAGE 8-4-08 [30]
FUNDING, INC., VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1540 Cold Springs Road, Placerville, CA 95667 (APN 321-050-08-100) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$280,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$293,940.50. Without considering the junior liens of \$64,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make nine (9) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

13. [07-27516](#)-B-7 JAY/GLORIA STOVEL HEARING - MOTION FOR
JMS #1 RELIEF FROM AUTOMATIC STAY
CHASE HOME FINANCE, LLC, VS. 7-31-08 [[99](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 4205 Albertville Way, Sacramento, CA 95843 (APN 203-1700-053) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$180,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$158,601.01. Considering the senior liens of \$89,400.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make twenty-six (26) mortgage payments. The lack of written opposition by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property, less the amount of the senior liens, exceeds the amount of movant's claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

14. [08-28620](#)-B-7 RAY/MARTHA FREEDMAN HEARING - MOTION FOR
JAY #1 RELIEF FROM AUTOMATIC STAY
USAA FEDERAL SAVINGS BANK, VS. OR IN THE ALTERNATIVE FOR
ADEQUATE PROTECTION
7-22-08 [[10](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties

in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 1999 Alfa Ideal RV (VIN 1AU256027XA007668) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim including any attorneys' fees awarded herein. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$17,280.00. Movant holds a lien on the Collateral in the amount of \$17,758.69. There is no equity in the Collateral, and it is not necessary for an effective reorganization or rehabilitation. The lack of written opposition by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. Movant also alleges without dispute that debtors have not made one (1) payment. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

15. [08-28824](#)-B-7 HILARIO/MARIA QUINTANA HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
DEUTSCHE BANK NATIONAL 7-31-08 [[17](#)]
TRUST COMPANY, VS.

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

16. [08-30124](#)-B-7 DAVID/TAMMY GRANLEES HEARING - MOTION FOR
JHW #1 RELIEF FROM AUTOMATIC STAY
DAIMLERCHRYSLER FINANCIAL 8-1-08 [[8](#)]
SERVICES AMERICAS LLC, VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against

the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 2006 Dodge Ram 3500 (VIN 3D7LX38C36G262954) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim including any attorneys' fees awarded herein. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$23,000.00. Movant holds a lien on the Collateral in the amount of \$23,172.77. There is no equity in the Collateral, and it is not necessary for an effective reorganization or rehabilitation. The lack of written opposition by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. Movant also alleges without dispute that debtors have not made two (2) payments. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

17. [08-30124](#)-B-7 DAVID/TAMMY GRANLEES HEARING - MOTION FOR
JHW #2 RELIEF FROM AUTOMATIC STAY
DAIMLERCHRYSLER FINANCIAL 8-1-08 [[14](#)]
SERVICES AMERICAS LLC, VS.

Tentative Ruling: This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied as moot. Considering the automatic extension provided in Bankruptcy Rule 9006(a), the automatic stay terminated with respect to the collateral, a 2006 Dodge Durango (VIN 1D8HB58286F169786) (the "Collateral") at 12:01 a.m. on Tuesday, August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtors did not file a statement of intention with respect to the Collateral within the time allowed by 11 U.S.C. § 521(a)(2) and Federal Rule of Bankruptcy Procedure 1019(1)(B). The debtors filed a statement of intention when they filed this case on July 24, 2008, but that statement did not list the Collateral. The debtors had until August 25, 2008, 30 days after the filing of the petition plus the automatic extension provided by Bankruptcy Rule 9006(a), to file a statement of intention that addressed the Collateral. Because they did not file such a statement of intention timely and because the Collateral is personal property, the automatic stay terminated with respect to the Collateral at 12:01 a.m. on Tuesday, August 26, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

18. 08-21325-B-7 AYALEW MERGIA
JMO #1
ANN MARIE ADAMS, VS.

HEARING - MOTION
TO ANNUL THE AUTOMATIC STAY
7-30-08 [20]

DISCHARGED 5-20-08

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied without prejudice. The requests for relief in debtor's response (Dkt. 27) are denied. Debtor's supplemental reply filed August 27, 2008 (Dkt. 30) is stricken as untimely and procedurally improper.

Through the motion, the movant seeks retroactive relief from the automatic stay to validate the entry of the judgment in Sacramento County Superior Court case no. 06FL03291 (the "State Court Action") on March 17, 2008, which occurred after this case was commenced on February 5, 2008. However, while movant cites several out-of-circuit cases that she contends support annulment of the automatic stay, movant has not addressed the Ninth Circuit standards for annulment or retroactive relief found in Nat'l Env'tl. Waste Corp. v. City of Riverside (In re Nat'l Env'tl Waste Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997) and Fjeldsted v. Curry (In re Fjeldsted), 293 B.R. 12, 24-25 (9th Cir. BAP 2003) (suggesting twelve factors for consideration in balancing the equities). Based on the foregoing, the movant has not shown that it is legally entitled to the relief that it seeks by this motion.

Through the opposition (Dkt. 27), debtor seeks a variety of forms of relief, all of which are rooted in debtor's central argument that the judgment of the State Court Action is null and void. In other words, debtor's primary request is a request that this court review the validity of the judgment of the State Court Action. Such a review would violate the Rooker-Feldman doctrine. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Accordingly, debtor's request that this court declare the judgment of the State Court Action null and void is denied. Because debtor's subsequent requests for relief also entail this court's review of the validity of the judgment in the State Court Action, the balance of debtor's requests are also denied.

Debtor's supplemental reply filed August 27, 2008 (Dkt. 30) is stricken as untimely and procedurally improper. The instant motion was filed pursuant to LBR 9014-1(f)(1) on thirty-four days' notice. Motions filed pursuant to LBR 9014-1(f)(1) permit opposition, if any, to be filed at least fourteen calendar days preceding the date of the hearing and replies, if any, to be filed at least seven calendar days preceding the date of the hearing. Here, debtor's supplemental reply was untimely filed on August 27, 2008, only six calendar days preceding the hearing. The supplemental reply fails to comply with the LBR 9014-1(f)(1).

The court will issue a minute order.

19. [08-21325](#)-B-7 AYALEW MERGIA
[08-2206](#)
ANN ADAMS, VS.

HEARING - ORDER RE:
MOTION TO DISMISS
7-24-08 [[19](#)]

AYALEW MERGIA

DISCHARGED 5-20-08

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

Plaintiff and cross-defendant Ann Marie Adams' ("Adams") evidentiary objections are sustained. Defendant and cross-complainant Ayalew Mergia's ("Mergia") motion to dismiss the initial complaint filed April 16, 2008 (Dkt. 1) (the "Complaint") is denied. The requests for relief contained in Mergia's reply, filed August 18, 2008, (Dkt. 25) are denied.

The court will provide a brief factual and procedural background of the instant case. Adams commenced the instant adversary proceeding on April 16, 2008 by filing the Complaint. On May 12, 2008, Mergia filed an answer to the Complaint. (Dkt. 7). On June 3, 2008, Mergia filed a supplemental declaration to his answer. (Dkt. 10). Among other things, the supplemental declaration requested that the Complaint be dismissed without further hearing. (Dkt. 10 at 6).

On June 25, 2008, a status conference was held in which the court construed Mergia's answer to include a counter-claim. (Dkt. 13). On July 23, 2008 the court held a further status conference and construed Mergia's answer to also include a motion for dismissal of the adversary proceeding, based on the request in the supplemental declaration. (Dkt. 18) The court then set for hearing Mergia's motion to dismiss and established a briefing schedule. (Dkt. 19).

Adams timely filed written opposition to the motion to dismiss on August 14, 2008 (Dkt. 21). Adams also timely filed evidentiary objections to the motion to dismiss on August 14, 2008 (Dkt. 22). Mergia timely filed a reply on August 18, 2008 (Dkt. 25).

Adams' evidentiary objections are sustained for the reasons stated in Adams' objections. (Dkt. 22).

Mergia's motion to dismiss is denied for the reasons stated in Adams' opposition. (Dkt. 22). Mergia has failed to show that he is legally entitled to dismissal of the Complaint. Mergia argues that the Complaint should be dismissed because Mergia is unemployed, has no income or ability to pay any debt owed to Adams, and is suffering from various health ailments. (Dkt. 10 at 6, lines 3-25). These allegations, with nothing more, fail to show that Mergia is entitled to dismissal of the Complaint.

Mergia's reply, entitled "request to null and void the state court's decree" (Dkt. 25), also seeks a variety of forms of relief. These

requests for relief are rooted in Mergia's central argument that the judgment of the Sacramento County Superior Court case no. 06FL03291 (the "State Court Action") is null and void. In other words, Mergia's primary request is a request that this court review the validity of the judgment of the State Court Action. Such a review would violate the Rooker-Feldman doctrine. Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Accordingly, Mergia's request that this court declare the judgment of the State Court Action null and void is denied. Because Mergia's subsequent requests for relief also entail this court's review of the validity of the judgment in the State Court Action, the balance of Mergia's requests are also denied.

The court will issue a minute order.

20. 08-26459-B-7 CYNTHIA GORDON HEARING - MOTION FOR
DMM #1 RELIEF FROM AUTOMATIC STAY
WACHOVIA MORTGAGE, FSB, VS. 8-4-08 [25]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part and denied in part. As to the debtor, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 201 Schooner Way, Vallejo, CA 94690 (APN 62-102-030) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtor received her discharge on August 28, 2008. The automatic stay as to the debtor ended on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$350,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$478,532.74. Without considering the junior lien of \$50,796.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make nine (9) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

21. [08-26663](#)-B-7 VIJAY/ANUPAMA VIJ HEARING - MOTION FOR
PD #1 RELIEF FROM AUTOMATIC STAY
WASHINGTON MUTUAL BANK, 7-22-08 [[17](#)]
ET AL., VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 4715 Antelope Circle, Fairfield, CA 94534 (APN 0181-354-040) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$371,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$436,137.61. Without considering the senior lien of \$3,558.82, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

22. [08-28664](#)-B-7 TED WYSOCKI HEARING - MOTION FOR
ND #1 RELIEF FROM AUTOMATIC STAY
WELLS FARGO BANK NATIONAL ON REAL PROPERTY
ASSOCIATION, VS. 8-4-08 [[13](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved

without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 610 Morada Lane, Stockton, CA 95210 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$175,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$259,140.80. Without considering the junior lien of \$59,408.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make eleven (11) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

Counsel for the movant shall submit an order consistent with the foregoing ruling.

23. 08-26468-B-11 EL DORADO HILLS SELF- HEARING - MOTION FOR
APN #1 STORAGE, LLC RELIEF FROM AUTOMATIC STAY
NISSAN-INFINITY, LT, VS. 8-4-08 [[107](#)]

Tentative Ruling: The motion is denied without prejudice.

Through this motion, the movant seeks relief from the automatic stay as to a leased 2005 Nissan Titan SE (VIN 1N6AA06B95N524975) (the "Vehicle").

Although the moving papers refer to a lease and a security agreement, movant has filed a copy of a motor vehicle lease agreement executed by the debtor on April 25, 2005 regarding the Vehicle. On the record before it, the court assumes for purposes of this motion that the Vehicle is the subject of an unexpired lease.

The motion does not show cause for relief from the automatic stay under 11 U.S.C. § 362(d)(1). The movant alleges that the debtor is one month in pre-petition arrears and three months in post-petition arrears. As a general rule, a failure to make monthly contractual payments is not cause for relief from the automatic stay in a chapter 11 case. In re Air Beds, Inc., 92 B.R. 419, 422 (9th Cir. BAP 1988) ("The general rule is that a distribution on pre-petition debt in a Chapter 11 case should not take place except pursuant to a confirmed plan of reorganization, absent extraordinary circumstances."). However, in this situation, 11 U.S.C. § 365(d)(5) requires the debtor to timely perform the debtor's obligations

under the lease that arise more than 60 days after the order for relief (the petition filing date in a voluntary case such as this one). The debtor alleges without dispute that it has complied with this requirement by tendering three (3) monthly payments to the movant in respect of its obligations under Section 365(d)(5). The debtor further alleges without dispute that the Vehicle is insured and properly maintained. Thus, the debtor is currently in compliance with its post-petition obligations to the movant.

Pursuant to 11 U.S.C. § 365(d)(2), the debtor may assume or reject an unexpired lease of personal property of the debtor at any time before the confirmation of a plan but the court, on the request for any party to such a contract or lease, may order the trustee to determine within a specified time whether to assume or reject such contract or lease. No plan has not yet been confirmed in this case. No party to the subject vehicle lease agreement has requested that the court set a date upon which debtor must assume or reject the subject lease. Accordingly, the debtor is not yet required to assume or reject the subject lease. If the subject lease is assumed, any pre-assumption monetary defaults must be provided for under 11 U.S.C. § 365(b). If the subject lease is rejected, any pre-assumption monetary defaults will become part of the movant's claim under 11 U.S.C. § 365(g).

Relief under 11 U.S.C. § 362(d)(2) is also not appropriate. The movant has not carried its burden of showing lack of equity in the Vehicle, and the debtor alleges without dispute that the Vehicle is necessary to an effective reorganization.

The court will issue a minute order.

24. [08-27369](#)-B-7 DONALD/LISA BARTOLOMEI HEARING - MOTION FOR
DMM #1 RELIEF FROM AUTOMATIC STAY
WACHOVIA MORTGAGE, FSB, VS. 8-4-08 [[18](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 1029 Valais Lane, Manteca, California (APN 200-280-05) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$375,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$634,476.46. Without considering the junior lien of \$124,983.00, there is no equity in the Property, and the Property is not necessary to an effective

reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors has failed to make seven (7) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

25. [08-28572](#)-B-7 ERIC/KELLY ANDERSON HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
MORTGAGE ELECTRONIC REGISTRATION 8-4-08 [[10](#)]
SYSTEMS, INC., VS.

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, because debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 842 Moss Avenue, Chico, CA 95926 (APN 045-430-032) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$240,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$285,677.28. Considering these figures, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make five (5) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

26. [07-28474](#)-B-7 PAULA PIPPIN HEARING - MOTION FOR
RDW #1 RELIEF FROM AUTOMATIC STAY
AMERICAN GENERAL FINANCIAL 8-5-08 [[120](#)]
SERVICES, INC., VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-

1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 2001 Chevrolet Silverado (VIN 1GCEK19T71E118490) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim including any attorneys' fees awarded herein. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$11,357.50. Movant holds a lien on the Collateral in the amount of \$12,773.82. There is no equity in the Collateral, and it is not necessary for an effective reorganization or rehabilitation. The lack of written opposition by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. The debtor has filed a statement of intent to surrender the Collateral. Movant also alleges without dispute that debtor has not madeten (10) payments. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

27. 08-24875-B-7 FRANK/KARIN PETERNEL HEARING - MOTION FOR
MEA #1 RELIEF FROM AUTOMATIC STAY
ACT PROPERTIES, LLC, VS. 7-24-08 [15]

DISCHARGED 8-6-08

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 716 Yellowstone Court, Tracy, CA 95377 (APN 240-340-21) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is

denied.

The debtors received their discharge on August 6, 2008. The automatic stay as to the debtors ended on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$520,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$540,806.01. Without considering the junior lien of \$132,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make four (4) mortgage payments. Debtors have filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

28. 08-25075-B-7 SILVERIO PALMERO
JHW #1
DAIMLERCHRYSLER FINANCIAL
SERVICES AMERICAS LLC, VS.

HEARING - MOTION
CONFIRMING TERMINATION OF
THE AUTOMATIC STAY
7-22-08 [[18](#)]

DISCHARGED 7-29-08

Tentative Ruling: The motion is denied as moot. The automatic stay terminated with respect to the collateral, a 2006 Chrysler 300 (VIN 2C3KA53G06H531414) (the "Collateral") at 12:01 a.m. on June 20, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate.

The motion is moot because the debtor's statement of intention states that he will reaffirm his obligation to movant regarding the Collateral. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtor had until Thursday, June 19, 2008 to perform his stated intention. There is no evidence that he did so. Thus, as the Collateral is personal property, the automatic stay terminated at 12:01 a.m. on June 20, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

29. [08-29577](#)-B-7 ELIJAH ZUCKER
APN #1
WELLS FARGO BANK, VS.

HEARING - MOTION FOR
RELIEF FROM AUTOMATIC STAY
8-4-08 [[9](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit the movant to obtain possession of its collateral, a 2000 Renegade M-38A 300 HP Motor Home (VIN 4SLG8BN28Y1102049) (the "Collateral"), to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant claims without dispute that the value of the Collateral is \$66,860.00. Movant holds a lien on the Collateral in the amount of \$94,750.81. There is no equity in the Collateral, and it is not necessary for an effective reorganization or rehabilitation. The lack of written opposition by the trustee shows that the trustee cannot administer the Collateral for the benefit of creditors. Movant also alleges without dispute that debtor has not made five (5) payments. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of the Collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

30. [08-27980](#)-B-7 GINA MARTIN
JAY #1
JPMORGAN CHASE BANK, VS.

HEARING - MOTION FOR
RELIEF FROM THE AUTOMATIC
STAY OR IN THE ALTERNATIVE,
FOR ADEQUATE PROTECTION
7-30-08 [[22](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 803 Carrion Circle, Winters, CA 95694 (APN 003-410-27-1) (the "Property") and to obtain possession of the Property following the sale, all in

accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$362,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$94,399.13. Considering the senior lien of \$377,600.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make seven (7) mortgage payments. Debtor has filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property, less the amount of the senior lien, exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

31. 08-27685-B-7 PETRO KOLOTYUK HEARING - MOTION FOR
APN #1 RELIEF FROM AUTOMATIC STAY
TOYOTA LEASE TRUST, VS. 8-4-08 [28]

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied as moot. Considering the automatic extension of Bankruptcy Rule 9006(a), the automatic stay terminated as to the subject vehicle, a leased 2006 Toyota Highlander (VIN JTEGD21A060140060) (the "Vehicle") at 12:01 a.m. on August 12, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtor's possessory interest in the Vehicle has from that date no longer been property of the estate. The court awards no fees and costs.

Debtor's petition was filed under chapter 7 on June 10, 2008. Pursuant to the applicable terms of 11 U.S.C. § 365(d)(1), the trustee may assume or reject an unexpired lease of personal property of the debtor within 60 days after the order for relief. In this case, as of August 11, 2008, sixty days after the filing of debtor's petition plus the automatic extension provided in Bankruptcy Rule 9006(a), the chapter 7 trustee had not assumed or rejected the lease of the Vehicle. Pursuant to 11 U.S.C. § 365(p)(1), where a lease of personal property is rejected or not timely assumed by the trustee under section 362(d), the debtor's interest in the leased property is no longer property of the estate and the automatic stay under section 362(a) is automatically terminated. Thus, the automatic stay terminated with respect to the Vehicle at 12:01 a.m. on August 12, 2008 by operation of 11 U.S.C. § 365(p)(1), and the debtor's

possessory interest in the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

Because the movant has not established that it is the holder of a secured claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

32. [08-28187](#)-B-7 JOSE/GUILLERMINA RODRIGUEZ HEARING - MOTION FOR
DMM #1 RELIEF FROM AUTOMATIC STAY
WACHOVIA MORTGAGE, FSB, VS. 8-4-08 [[19](#)]

Disposition Without Oral Argument: The motion is denied as moot because the bankruptcy case was automatically dismissed at 12:01 am on August 5, 2008 pursuant to 11 U.S.C. § 521(i), which dismissal was confirmed by order entered on August 8, 2008. (Dkt. 25).

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

33. [08-26889](#)-B-7 DAVID/NATALIA MURAOKA HEARING - MOTION FOR
MDE #1 RELIEF FROM AUTOMATIC STAY
LITTON LOAN SERVICING, 7-25-08 [[14](#)]
LP, ET AL., VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 8832 Liscarney Way, Sacramento, CA 95828 (APN 115-0760-038) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$295,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$369,511.82. Without considering the junior lien of \$86,943.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. Debtors have filed a statement of intent to surrender

the Property. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

34. [08-26099](#)-B-7 NAI SAECHAO HEARING - MOTION FOR
WGM #1 RELIEF FROM AUTOMATIC STAY
AMERICAN HOME MORTGAGE ON REAL PROPERTY
SERVICING, INC., VS. 8-6-08 [[15](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

35. [08-26099](#)-B-7 NAI SAECHAO HEARING - MOTION FOR
WGM #1 RELIEF FROM AUTOMATIC STAY
AMERICAN HOME MORTGAGE ON REAL PROPERTY
SERVICING, INC., VS. 8-8-08 [[22](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

36. [00-24312](#)-B-13J RICKY/CINDY COX CONT. HEARING - MOTION
[07-2386](#) SW #2 TO DISMISS CLAIMS IN FIRST
RICKY/CINDY COX, VS. AMENDED COMPLAINT FOR FAILURE
WELLS FARGO BANK, ET AL. TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED
6-12-08 [[102](#)]
DISCHARGED 3-30-07
CONT. FROM 8-5-08

Tentative Ruling: None.

DISCHARGED 2-13-08
CONT. FROM 8-5-08

Tentative Ruling: This matter continued from August 5, 2008 to permit the trustee to submit supplemental briefing on the compromise element of the subject motion. The trustee timely filed supplemental briefing. Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The instant motion involves both a sale of a cause of action and a compromise of a claim. The court has evaluated both aspects of the motion, as set forth individually below. Pursuant to 11 U.S.C. § 363(b)(1) and Bankruptcy Rule 9019, the motion is granted, and the trustee is authorized to sell the Ellis Claim to Ellis for \$10,000 cash, or to an overbidder for an amount approved at the hearing.

First, the trustee seeks to sell the estate's interest in a cause of action ("Ellis Claim") which was originally initiated by debtors against F.J. Ellis ("Ellis") in the Siskiyou County Superior Court and which was later removed to the United States Bankruptcy Court, Eastern District of California, case no. 07-2411, on November 21, 2007. The Ellis Claim was ultimately dismissed without leave to amend by order entered on March 28, 2008. (Dkt. 33 in case no. 07-2411). In short, the Ellis Claim was dismissed based upon the court's finding that the plaintiff-debtors lacked standing to prosecute the Ellis Claim. The trustee now seeks to sell the estate's interest in the Ellis Claim to Ellis for \$10,000.00.

The trustee has made no request for a finding of good faith under 11 U.S.C. § 363(m), and the court makes no such finding.

Secondly, the trustee's sale of the Ellis Claim to Ellis necessarily involves a compromise with Ellis. Through the instant motion, the trustee seeks to relinquish the Ellis Claim against Ellis for the amount of \$10,000.00.

The court has great latitude in approving compromise agreements. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988). The court is required to consider all factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Protective Committee For Independent Stockholders Of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). The court will not simply approve a compromise proffered by a party without proper and sufficient evidence supporting the compromise, even in the absence of objections.

Those factors a court considers in its analysis include: (a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily

attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The party proposing the compromise has the burden of persuading the bankruptcy court that the compromise is fair and equitable and should be approved. Id.

The trustee asserts the compromise is fair and equitable. The trustee first asserts that the outcome of the litigation of the Ellis Claim is uncertain. The trustee's argument next focuses on the assertion that the costs, risks, and delay of litigation outweigh any benefit to litigation and that administration of the bankruptcy estate may be concluded sooner if the compromise is approved.

Accordingly, the court finds that the trustee has carried the burden of persuading the court that the proposed compromise is fair and equitable.

Debtors' supplemental briefing is unpersuasive. The debtors contend that the proposed compromise of the Ellis Claim is not fair and equitable. Debtors argue that the proceeds generated by the sale and compromise may be attained through sale of other assets of the estate and that the instant motion will terminate debtors' opportunity to adjudicate the Ellis Claim. Even if the court accepts debtors' assertions as true, debtors have failed to show that these contentions warrant denial of the instant motion. Debtors' argument fails to evaluate the A&C factors and, instead, alters the focus of the "fair and equitable" standard. To assess the "fair and equitable" standard, the interests of creditors, which are said to be "paramount", are evaluated. Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425; Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988); In re A&C Properties, 784 F.2d at 1380-1381. Debtors' argument, however, proceeds from the assumption that the debtors' interests are paramount under the "fair and equitable" standard. In short, debtors' opposition focuses on debtors' self-interests to the exclusion of creditors' interests. Debtors fail to acknowledge that the proposed compromise will generate \$10,000.00 cash into the estate for the benefit of creditors, that no creditor has opposed the motion, and that the interests of creditors weighs in favor of granting the motion. Based on the foregoing, debtors have not shown that the A&C factors weigh in favor of denial of the compromise.

The court will issue a minute order.

41. [08-20237](#)-B-7 LEONIELYN CUARESMA
BCC #1

HEARING - APPLICATION FOR
ORDER AUTHORIZING EMPLOYMENT
OF ACCOUNTANT, BACHECKI,
CROM & CO., LLP, BY TRUSTEE,
PREM N. DHAWAN FOR A FLAT
RATE OF COMPENSATION
7-18-08 [[71](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

42. [08-25342](#)-B-11 DIAMOND CREEK PARTNERS, LTD CONT. HEARING - DEBTOR'S
HLC #5 MOTION TO EMPLOY ORDINARY
COURSE BUSINESS COUNSEL
6-16-08 [[69](#)]

CONT. FROM 8-5-08,7-15-08

Tentative Ruling: This matter continued most recently from August 5, 2008. The court notes that the applicant filed a supplemental declaration on July 22, 2008 (Dkt. 132) and a second supplemental declaration on August 5, 2008 (Dkt. 155). The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). In this instance, the court issues a tentative ruling.

In the absence of any opposition, the motion is granted to the extent set forth herein. Pursuant to 11 U.S.C. § 327(a) and Bankruptcy Rule 2014, the debtor's request to employ Real Estate Law Group ("RELG") for the purposes stated in the application is granted. RELG's effective date of employment shall be May 19, 2008. RELG's compensation shall be paid by offset against its current retainer, which offset shall be approved by the court only after a noticed motion under 11 U.S.C. § 330, and which retainer may be supplemented by Stephen Des Jardins as necessary. Nothing herein restricts any right of subrogation to which Des Jardins may be entitled by reason of his payments to RELG in connection with RELG's employment by the debtor.

The court finds that RELG is a disinterested person as that term is defined in 11 U.S.C. § 101(14). The court further finds that the supplemental declaration submitted by RELG (Dkt. 132) is sufficient evidence of compliance with California Rule of Professional Conduct 3-310(F) such that supplementation of RELG's fees by Des Jardins will not interfere with RELG's independence of professional judgment or with the lawyer-client relationship.

Counsel for the debtor shall submit an order approving RELG's employment that conforms to the foregoing ruling.

43. [08-25342](#)-B-11 DIAMOND CREEK PARTNERS HEARING - FIRST
HLC #8 INTERIM APPLICATION FOR
COMPENSATION BY ATTORNEY FOR
CHAPTER 11 DEBTOR (\$66,462.50
FEES; \$1,267.60 EXPENSES)
8-6-08 [[157](#)]

Disposition Without Oral Argument: The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). Therefore, this matter is resolved without oral argument.

The motion is granted to the extent set forth herein. The application is approved for a total of \$66,462.50 in fees and costs of \$1,267.60. Of that amount, \$67,730.10 shall be paid in funds held by the attorney. The court authorizes applicant to offset the foregoing award of fees and costs against his current retainer.

On April 25, 2008, the debtor filed a chapter 11 petition. By order entered on July 21, 2008 (Dkt. 113) (the "Order"), the court authorized the debtor to retain applicant as bankruptcy counsel in this case. The Order further approved applicant's employment retroactive to April 25, 2008. The debtor's attorney seeks compensation for services for the period of April 25, 2008 through July 31, 2008, equaling \$66,462.50 in attorney's fees. As set forth in the attorney's application, the approved fees are reasonable compensation for actual, necessary and beneficial services.

Except as so ordered, the motion is denied.

The court will issue a minute order.

44. [06-20251](#)-B-7 GEORGE'S EQUIPMENT HEARING - OBJECTION TO
MPD #17 COMPANY, INC. PROOF OF CLAIM NO. 35 BY DON
 CLEARWATER BUSINESS BROKER
 FILED MAY 12, 2006 IN THE
 AMOUNT OF \$50,000.00
 7-16-08 [\[159\]](#)

Disposition Without Oral Argument: This objection has been filed pursuant to LBR 3007-1(d)(1). The failure of any party in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 3007-1(d)(1). Therefore, the objection to claim No. 35 on the court's claims register, filed by Don Clearwater dba Clearwater Business Broker, ("Claim") is resolved without oral argument.

The objection is sustained and the Claim is disallowed, except to the extent already paid by the trustee.

The chapter 7 trustee questions the validity and nature of this claim. A properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). However, when an objection is made and that objection is supported by evidence sufficient to rebut the prima facie evidence of the proof of claim, then the burden is on the creditor to prove the claim.

Here, the trustee provides evidence that the Claim is unenforceable against the debtor and property of the debtor pursuant to 11 U.S.C. § 502(b)(1). The trustee points out that the Claim is unenforceable due to the terms of a business listing agreement (the "Agreement") involving sale of the debtor's business, George's Equipment Company, which forms the basis of the Claim. In particular, the trustee refers to paragraph 6(a) of the Agreement which provides that creditor is entitled to compensation of either ten percent of the listing price of \$500,000.00 or the contract price if one was entered into, payable at the time of the sale. (POC 35 at 4). The trustee then explains that creditor never

produced a buyer for the subject business and, therefore, failed to generate a sale of the business. Accordingly, trustee argues, claimant is not entitled to compensation pursuant to the Agreement, and the Claim should be disallowed. By failing to respond to the objection, the creditor has failed to carry its burden. Accordingly, the objection is sustained and the Claim is disallowed, except to the extent already paid by the trustee.

The court will issue a minute order.

45. [06-20251](#)-B-7 GEORGE'S EQUIPMENT HEARING - OBJECTION TO
MPD #18 COMPANY, INC. PROOF OF CLAIM NO. 37 BY DORI
M. CRAMER FILED JUNE 5, 2006
IN THE AMOUNT OF \$11,058.00
7-16-08 [[165](#)]

Disposition Without Oral Argument: This objection has been filed pursuant to LBR 3007-1(d)(1). The failure of any party in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 3007-1(d)(1). Therefore, the objection to claim No. 37 on the court's claims register, filed Dori M. Cramer, ("Claim") is resolved without oral argument.

The objection is sustained except to the extent already paid by the trustee. The trustee's request to disallow the priority status of the Claim is granted. The trustee's request to fix the allowed amount of the Claim at \$1,181.00 is granted. The Claim is allowed as a general unsecured claim in the amount of \$1,181.00.

The chapter 7 trustee questions the validity and nature of the Claim. A properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). However, when an objection is made and that objection is supported by evidence sufficient to rebut the prima facie evidence of the proof of claim, then the burden is on the creditor to prove the claim.

Here, the trustee first provides evidence that the Claim is not entitled to priority status. The trustee points out that the Claim itself fails to specify the basis on which the Claim is entitled to priority status. The trustee next argues that no portion of the claimed items of damage, which form the basis of the Claim, fall within the terms of 11 U.S.C. § 507(a). By failing to respond to the objection, the creditor has failed to carry its burden. Accordingly, the objection as to the priority status of the Claim is sustained, and the priority status of the Claim is disallowed, except to the extent already paid by the trustee.

The trustee next provides evidence that the amount of \$9,877.00 of the Claim should be disallowed. The trustee points out that the Claim is comprised of the following items of damage: (1) \$456.00 to haul off tires; (2) \$560.00 for two dumpster charges; (3) \$3,200 for 80 hours of clean up at \$40.00 per hour; (4) \$3,894.00 bid to replace doors; (5) \$1,288.00 bid to replace Lodi sectionals; (6) \$350.00 proposal to replace gutters; (7) \$156.00 to haul off waste oil; and (8) \$1,154.00 for insurance coverage for 1-year. The trustee then argues that items no. 3, 4, 5, and 6 should be disallowed because the creditor has furnished no

47. [06-20251](#)-B-7 GEORGE'S EQUIPMENT
MPD #20 COMPANY, INC.

HEARING - OBJECTION
TO PROOF OF CLAIM NO. 41 BY
CA EMPLOYMENT DEVELOPMENT DEPT.
FILED SEPTEMBER 6, 2006 IN THE
AMOUNT OF \$2,000.00
7-17-08 [[170](#)]

Tentative Ruling: This objection has been filed pursuant to LBR 3007-1(d)(1). In this instance, the court issues the following tentative ruling.

The objection is overruled as moot.

On July 25, 2008, creditor Employment Development Department filed a notice of withdrawal of claim no. 43 on the court's claims registry, stating that claim no. 43 replaced claim no. 41 on the court's claims registry. (Dkt. 188). Here, the trustee objects to claim no. 41 on court's claims registry. Based on the foregoing, the objection is overruled as moot because the claim to which the objection is directed was withdrawn.

The court will issue a minute order.

48. [06-20251](#)-B-7 GEORGE'S EQUIPMENT
MPD #21 COMPANY, INC.

HEARING - OBJECTION
TO PROOF OF CLAIM NO. 45 BY
DEBRA GEORGE AND STEVEN JOHNSON
FILED SEPTEMBER 27, 2007 IN THE
AMOUNT OF \$7,439.30
7-17-08 [[182](#)]

Tentative Ruling: This objection has been filed pursuant to LBR 3007-1(d)(1). In this instance, the objection to claim No. 45 on the court's claims register ("Claim"), filed by Debra George and Steven Johnson as an amendment to claim no. 22 on the court's claims registry, is resolved through the following tentative ruling.

The objection is sustained and the Claim is disallowed, except to the extent already paid by the trustee.

The chapter 7 trustee questions the validity and nature of the Claim. A properly completed and filed proof of claim is prima facie evidence of the validity and amount of a claim. Fed. R. Bankr. P. 3001(f). However, when an objection is made and that objection is supported by evidence sufficient to rebut the prima facie evidence of the proof of claim, then the burden is on the creditor to prove the claim.

Here, the trustee provides evidence that the Claim represents personal obligations of Debra George and Steven Johnson (collectively "Claimants") for legal fees and costs incurred in a state court action brought by Thomas and Liesette George against the debtor and Claimants, among others ("State Court Action"). Trustee argues that such fees and costs do not constitute corporate obligations of the debtor. To this end, the trustee notes that the Claim's supporting documentation includes billing records

which are directed to Claimants, individually, and not to the debtor. The court finds that the trustee has rebutted the prima facie evidence of the Claim.

The court notes that Claimants' filed a response on August 25, 2008. (Dkt. 191). Through the response, Claimants argue that the Claim constitutes a corporate obligation of the debtor because Claimants have a right of indemnification from the corporate debtor pursuant to California Corporations Code § 317. In particular, Claimants argue that they are entitled to mandatory indemnification pursuant to Cal. Corp. Code § 317(d) for the fees and expenses Claimants' incurred in defending the State Court Action. The court finds Claimants' argument unpersuasive. Pursuant to the relevant provisions of Cal. Corp. Code § 317(d), a corporation shall indemnify an officer, director, and/or employee who has been "successful on the merits in defense of any proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue, or matter therein." In this case, Claimants have not shown "success on the merits." Under California law, the success on the merits requirement precludes mandatory indemnification in the event of a successful technical defense or a voluntary dismissal. American Nat. Bank & Trust Co. v. Schigur, 83 Cal. App. 3d 790 (1st Dist. 1978). Here, Claimants were dismissed without prejudice from the State Court Action pursuant to a stipulation for entry of judgment. (Dkt. 192 at 23-25). That stipulation contained no determination that Claimants' defense was meritorious. Accordingly, Claimants have not shown a basis for mandatory abstention under Cal. Corp. Code § 317(d). Based on the foregoing, the court finds that Claimants have failed to prove the Claim. The objection is therefore sustained, and the Claim is disallowed, except to the extent already paid by the trustee.

The court will issue a minute order.

49. [06-22976](#)-B-7 KEVIN ARCHBOLD CONT. HEARING - AMENDED
[07-2372](#) CBS #20 DEFENDANT'S MOTION FOR
JOHN REGER, VS. SUMMARY JUDGMENT
6-13-08 [[43](#)]
KEVIN ARCHBOLD, ET AL.

DISCHARGED 10-18-07
CONT. FROM 8-5-08

Tentative Ruling: None.

50. [06-22976](#)-B-7 KEVIN ARCHBOLD CONT. HEARING - MOTION
[07-2372](#) BLL #26 FOR SUMMARY JUDGMENT
JOHN REGER, VS. 6-13-08 [[36](#)]
KEVIN ACHARBOLD, ET AL.

DISCHARGED 10-18-07
CONT. FROM 8-5-08

Tentative Ruling: None.

51. [07-31187](#)-B-7 SANDRA KING HEARING - MOTION TO
[08-2171](#) DISMISS ADVERSARY PROCEEDING
BURNEL MURRAY, ET AL., VS. 7-23-08 [[17](#)]

SANDRA KING

DISCHARGED 5-13-08

Tentative Ruling: None.

52. [08-20569](#)-B-11 DUNMORE HOMES, INC. HEARING - MOTION
PM #1 BY JMP REALTY TRUST, INC. FOR
LEAVE TO FILE LATE CLAIM
8-12-08 [[819](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

The motion is continued to the omnibus hearing date to be set in October, 2008. Within three court days after the omnibus hearing date for October, 2008 is set, movant JMP Realty Trust shall serve a notice of continued hearing on the appropriate parties in interest in accordance with the amended and restated interim order (Dkt. 321), which establishes notice, case management, and administrative procedures in this case, and the Local Bankruptcy Rules to the extent applicable. Movant shall also file the notice of continued hearing with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the movant fails to do any of the foregoing, the motion will be denied without prejudice.

The court will issue a minute order.

53. [08-23636](#)-B-7 JAMES/MARCELLA BARNHART HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
LASALLE BANK NA AS 7-30-08 [[98](#)]
TRUSTEE, VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 105 Balcaro Way, Sacramento, CA 95834 (APN 225-0890-034-0007) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period

specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$64,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$127,785.25. Considering the junior lien of \$34,519.03, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make ten (10) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

54. [08-28042](#)-B-7 STEVEN CUTRUFELLI HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
WASHINGTON MUTUAL BANK, VS. 7-30-08 [[13](#)]

Disposition Without Oral Argument: This matter was withdrawn by the moving party on August 25, 2008 (Dkt. 25) and is removed from the calendar.

55. [08-28342](#)-B-7 DALE COPE HEARING - MOTION FOR
MBB #1 RELIEF FROM AUTOMATIC STAY
MORTGAGE ELECTRONIC REGISTRATION 7-25-08 [[10](#)]
SYSTEMS, INC., VS.

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 22915 Montclair Court, Grass Valley, CA 95949 (APN 11-710-26-000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$1,150,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$1,102,797.76. Considering the senior lien of \$6,396.00 and the junior lien of \$118,859.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has

failed to make nine (9) mortgage payments. Debtor has filed a statement of intent to surrender the Property. Debtor has also filed a notice of non-opposition to the motion. The lack of written opposition by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property, less the amount of the senior lien, exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

56. 08-20543-B-7 LOUIE HERAS HEARING - MOTION FOR
JHW #1 RELIEF FROM AUTOMATIC STAY
LONG BEACH ACCEPTANCE CORP., VS. 7-29-08 [43]

DISCHARGED 4-30-08

Tentative Ruling: This motion has been filed pursuant to LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). In this instance, the court issues the following tentative ruling.

The motion is denied as moot. The automatic stay terminated with respect to the collateral, a 2003 Ford F-350 (VIN 1FTWW33F43EA94367) (the "Collateral") at 12:01 a.m. on Saturday, February 16, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Collateral. The debtor did not file a statement of intention with respect to the Collateral within the time allowed by 11 U.S.C. § 521(a)(2) and Federal Rule of Bankruptcy Procedure 1019(1)(B). No statement of intention was filed in this case. The debtor had until February 15, 2008, 30 days after the filing of the petition, to file a statement of intention that addressed the Collateral. Because he did not file such a statement of intention timely and because the Collateral is personal property, the automatic stay terminated with respect to the Collateral at 12:01 a.m. on Saturday, February 16, 2008, by operation of 11 U.S.C. § 362(h), and the Collateral has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

57. 08-28749-B-7 MICHAEL/MICHELLE ELVIR HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
WASHINGTON MUTUAL BANK, VS. 8-4-08 [10]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be

presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. As to the debtors and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d) (1) and (d) (2) in order to permit movant to foreclose on the real property located at 8170 Auberry Drive, Sacramento, California 95826 (APN 115-0860-106-0000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day stay of Fed.R.Bankr.P. 4001(a) (3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$250,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$281,120.04. There is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make seven (7) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition and filing of a report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

58. 08-25954-B-7 MARCUS ROMAN HEARING - MOTION FOR
MDE #1 RELIEF FROM AUTOMATIC STAY
LITTON LOAN SERVICING, LP, VS. 7-25-08 [15]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f) (1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. As to the debtor, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362(d) (1) and (d) (2) in order to permit movant to foreclose on the real property located at 662 Woodlake Drive, Sacramento, California 95815 (APN 275-0193-002) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day period specified in Fed.R.Bankr.P. 4001(a) (3) is not waived. Except as so ordered, the motion is denied.

The debtor received his discharge on August 20, 2008. The automatic stay as to the debtor ended on that date. 11 U.S.C. § 362(c) (2) (C).

Movant alleges without dispute that the Property has a value of \$402,500.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$492,674.13. Without considering the junior liens of \$50,000.00 and \$16,348.00, there

is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make sixteen (16) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

59. [08-28054](#)-B-7 STEVEN/CAROL GRAVATT HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
THE BANK OF NEW YORK, ET AL., VS. 8-4-08 [[16](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. As to the debtors and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 706 Clifton Way, Vacaville, California 95688 (APN 0133-396-020) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$350,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$397,923.14. Without considering the junior liens of 443,791.00 and \$5,420.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make six (6) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition and filing of a report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

60. [08-28155](#)-B-7 SEAN LANEY
MBB #2
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., VS.

HEARING - MOTION FOR
RELIEF FROM AUTOMATIC STAY
8-4-08 [[21](#)]

Disposition Without Oral Argument: This motion for relief from the automatic stay has been filed pursuant to LBR 4001-1 and LBR 9014-1(f)(1). The failure of the debtor, the trustee, and all other parties in interest to file timely written opposition as required by this local rule is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtor pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 10517 Mills Acre Circle, Rancho Cordova, California 95670 (APN 072-0192-026-0000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$150,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$240,327.85. Without considering the junior lien of \$28,000.00 and the senior tax lien of \$4,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtor has failed to make ten (10) mortgage payments. The debtor has filed a statement of intent to surrender the Property. The lack of written opposition and report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

61. [08-25558](#)-B-7 OFELIA/GEORGE GARNACE
KAT #1
DEUTSCHE BANK NATIONAL
TRUST COMPANY, VS.

CONT. HEARING - MOTION FOR
RELIEF FROM AUTOMATIC STAY
7-9-08 [[31](#)]

CONT. FROM 8-5-08

Disposition Without Oral Argument: This matter continued from August 5, 2008. The court established a briefing schedule. The failure of the debtors, the trustee, and all other parties in interest to file timely written opposition is considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the matter is now resolved without oral argument.

The motion is granted in part. The automatic stay is modified as against the estate and the debtors pursuant to 11 U.S.C. § 362(d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at

5401 Rowser Way, Elk Grove, California 95757 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day period specified in Fed.R.Bankr.P. 4001(a)(3) is not waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$699,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$648,958.12. Considering the junior lien of \$112,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this chapter 7 case. Movant also alleges without dispute that the debtors have failed to make ten (10) mortgage payments. The lack of written opposition and report of no distribution by the trustee show that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Counsel for the movant shall submit an order consistent with the foregoing ruling.

62. [08-25342](#)-B-11 DIAMOND CREEK PARTNERS HEARING - MOTION
[08-2333](#) RHB #2 FOR SUMMARY JUDGMENT OR,
UMPQUA BANK, VS. ALTERNATIVELY, FOR SUMMARY
ADJUDICATION
DIAMOND CREEK PARTNERS, LTD. 8-5-08 [[16](#)]

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is granted in part and denied in part. As between Umpqua and debtor ("Debtor"), the request for a determination that the lien ("Umpqua Lien") against Debtor's real property commonly known as 110, 120 and 130 Diamond Creek Place, Roseville, CA 95747, Placer County APNs 017-115-032-000, 017-115-033-000 and 017-115-070-000 (the "Real Property") created by the documents described in paragraphs 13 through 22 of Statement of Undisputed Facts In Support Of Motion For Summary Judgment Or, Alternatively, For Summary Adjudication (Dkt. 28) (the "Movant Statement of Undisputed Facts") is valid is granted. The request for a determination that the Umpqua Lien extends to "all of Umpqua's collateral," is denied. The request for a determination that the Umpqua Lien is prior to "all other non-assessment secured and unsecured liens" is denied. The request for an order that all rents heretofore and hereafter "generated by" Debtor be turned over to Umpqua is denied. The request for a determination that Umpqua is entitled to attorney's fees and post-petition interest is denied. Summary adjudication is granted to the following extent: As between Umpqua and Debtor, the facts alleged in the Movant Statement of Undisputed Facts and listed as undisputed, without qualification, by Debtor in Debtor's Reply To Plaintiff's Separate Statement Of Undisputed Fact (Dkt. 36) ("Debtor Response to Movant Statement of Undisputed Facts") are deemed established for

purposes of this adversary proceeding. Except as so ordered, the motion is denied.

Plaintiff Umpqua Bank ("Umpqua") seeks summary judgment in its favor, including (1) a determination that Umpqua's lien against the defendant debtor's real property is valid, prior to all "other non-assessment secured and unsecured liens," and extends to "all of Umpqua's collateral," (2) an order that all rents heretofore and hereafter "generated by" Debtor be turned over to Umpqua, and (3) a determination that Umpqua is entitled to attorney's fees and post-petition interest.

Umpqua is not entitled to the first requested determination - that its lien against Debtor's real property is prior to all other non-assessment secured and unsecured liens. This is not an in rem proceeding. The only defendant named in the complaint is Debtor. Umpqua cannot obtain a determination of the rights of persons or entities who are not parties to this adversary proceeding. Mullane v. Central Hanover Bank & Trust Co. et al., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Umpqua's motion seeks a declaration of the superiority of its rights over the rights of all others. It identifies only one other non-assessment lien holder with a lien against the real property, Ascent Builders, Inc ("Ascent"). Umpqua asserts that Ascent has a judgment lien that is inferior in priority to Umpqua's lien, and seeks a determination to that extent, but has not named Ascent as a party to this adversary proceeding or given Ascent notice or an opportunity to respond to this motion seeking a judgment from this court that Ascent's lien is inferior to Umpqua's lien.

Partial summary adjudication on the issues of fact identified in the Movant Statement of Undisputed Facts is appropriate. Debtor's statement that certain facts are undisputed, without qualification, is a stipulation to those facts.

Umpqua's entitlement to immediate turnover of cash collateral is not governed solely by the issue of whether it holds a perfected security interest in the cash collateral. Whether Umpqua is entitled to possession of its cash collateral depends, inter alia, on whether Umpqua's interest is adequately protected. The court recently considered that very question in ruling on Umpqua's motion for relief from the automatic stay and for turnover of the cash collateral in the parent bankruptcy case. In its ruling issued on August 21, 2008, (Main Dkt. 177), the court found as of the date of that ruling that Umpqua was adequately protected by a cushion of equity in Debtor's real property and that it was not entitled to adequate protection payments. The court also pointed out that even though Debtor was prohibited from using the rents to fund its post-petition operations, the denial of a motion to use cash collateral under 11 U.S.C. § 363 does not require the court to order turnover of the cash collateral to a secured creditor. Umpqua has neither cited any authority nor submitted any evidence to establish that it is entitled to immediate turnover of cash collateral.

Umpqua's entitlement to attorneys' fees and post-petition interest depends on a number of factors, including the value of Umpqua's collateral and the reasonableness of requested fees. 11 U.S.C. § 506(b). Those determinations may change over time. Furthermore, as Debtor points out, Debtor's plan of reorganization filed on July 24, 2008 proposes to pay interest on Umpqua's secured claim at the fixed rate of six percent

(6%) per annum. Whether that plan can be confirmed under 11 U.S.C. § 1129(a) and (b) is a matter that will be taken up in the confirmation process. Finally, Debtor argues that it has not had an opportunity to engage in discovery regarding Umpqua's claimed entitlement to pre-petition legal fees in the amount of \$72,782.42. Debtor's argument is persuasive. Although Umpqua's motion for summary judgment is not technically premature, as it was filed more than twenty days after the commencement of the adversary proceeding, see Fed. R. Civ. P. 56(a), "summary judgment is disfavored where relevant evidence remains to be discovered." Mann v. Beatty, 874 F.2d 816 (9th Cir. 1989) (citing Klinge v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988)). Here, Umpqua's evidence of pre-petition attorneys' fees and costs is contained in the declaration of Theresa Erisey, a Vice President at Umpqua, who states that as of April 25, 2008 Umpqua had incurred legal fees in the amount of \$72,782.42. (Dkt. 19 at 5). Umpqua has submitted no documentary evidence, such as billing statements, to support Umpqua's claimed attorneys' fees. By the terms of the court's own June 30, 2008 Order to Confer on Initial Disclosures and Setting Deadlines, Debtor was not permitted to initiate or conduct discovery prior to the discovery conference, which was held on August 18, 2008, the day before Debtor was required to file its written opposition to the motion. Given the sizable amount of pre-petition attorney's fees claimed by Umpqua, the fact that the sole evidence to support the fees is an undocumented assertion contained a supporting declaration, and the fact that Debtor had little or no time to conduct discovery on the issue prior to filing its opposition, the court finds that denial of the request in the interest of allowing Debtor the opportunity to conduct further discovery is appropriate.

The court will issue a minute order on the motion. Umpqua shall prepare, serve on counsel for Debtor and submit proposed findings of fact consistent with the court's grant of partial summary adjudication.

63. 06-23451-B-7 SERGIO/SANDRA RODAS HEARING - APPLICATION FOR
 BCC #1 ORDER AUTHORIZING EMPLOYMENT
 OF ACCOUNTANT, BACHECKI, CROM &
 CO., LLP, BY TRUSTEE, PREM N.
 DHAWAN FOR A FLAT RATE OF
 COMPENSATION (\$1,000.00)
 7-18-08 [[184](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

64. 07-21553-B-11 RICHARD YOUNIE HEARING - MOTION
 FHS #6 FOR TURNOVER OF PROPERTY
 OF THE ESTATE
 7-18-08 [[167](#)]

Tentative Ruling: The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52,

53 (9th Cir. 1995); LBR 9014-1(f)(1). In this instance the court issues the following tentative ruling.

The motion is denied without prejudice.

The debtor seeks an order pursuant to 11 U.S.C. § 542 compelling the debtor's ex-spouse, Tanya Younie, aka Tanya Raco, ("Tanya") to turn over personal property consisting of a 2003 Chevrolet Corvette to the debtor. Pursuant to the debtor's confirmed plan, the debtor is to obtain possession of the Corvette and surrender it to secured creditor General Motors Acceptance Corporation.

The motion suffers from two defects. First, the motion was served on Tanya at an address that the debtor is informed and believes is her current address. However, for service to be effective, mailing must be to Tanya's dwelling house or usual place of abode or to the place where Tanya regularly conducts a business or profession. Bankruptcy Rules 9014(b) and 7004(b)(1). If service is not made to an appropriate place, it is ineffective, regardless of the debtor's information and belief. Second, even if Tanya was properly served and has failed to oppose debtor's request for turnover, the debtor has not shown that he is legally entitled to the relief he seeks. All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007) ("...default does not entitle a plaintiff to judgment as a matter of right or as a matter of law."). The debtor has not shown that the Tanya is actually in possession of the Corvette. "The [language of Section 542] requires actual or constructive possession by a defendant as a fundamental predicate to a trustee's turnover rights." In re De Berry, 59 B.R. 891, 895 (Bankr. E.D.N.Y. 1986). The debtor bears the burden of proof of showing that Tanya is in possession of the specific property the trustee seeks by way of turnover order. Id. at 896. The debtor has not carried his burden here.

The court will issue a minute order.

65. 07-21553-B-11 RICHARD YOUNIE
FHS #7

HEARING - OBJECTION
TO CLAIM NO. 1 OF
CHAD AND KIMBERLY ALLREAD
7-18-08 [[171](#)]

Tentative Ruling: This matter cannot be resolved on the pleadings before the court. The debtor objects to claim no. 1 of Chad and Kimberly Allread, filed on April 9, 2007 in the unsecured amount of \$45,000.00 (the "Claim"). The debtor's argument that the Claim should be disallowed based on the running of the statute of limitations for the claim prior to the petition date is dependent upon the debtor's assertion that the debt underlying the claim became due and payable on the date that the debtor executed a bill of sale for the purchase of goods from the claimants, and that the debtor and claimants did not discuss any terms for payment of the purchase price or the timing of payment. Interested party Mohammed Poonja, chapter 7 trustee of the bankruptcy estate of claimant Chad Allread, opposes the objection and asserts that the debtor and claimants did agree that payment would be due and owing upon sale of the debtor's residence, an event which recently occurred. To determine the factual issue necessary to resolve this objection, i.e. the date on which a cause

of action for nonpayment of the debt accrued to the claimants, this matter is continued to a final evidentiary hearing on October 3, 2008 at 10:00 a.m. before the Honorable David E. Russell in courtroom 32.

On or before September 26, 2008, each party shall serve on the other party all documentary evidence the party intends to present at the hearing and a witness list (which includes a general summary of the testimony of each designated witness). The parties shall also lodge on September 26, 2008, two additional copies of all materials, one for the judge and one for the courtroom deputy. The parties shall lodge and serve these documents regardless of whether they have filed them in the past with this court, and shall designate the documents as "Exhibits for Evidentiary Hearing on Richard Younie's Objection to Claim no. 1 of Chad and Kimberly Allread, D.C. No. FHS-7." The judge's and courtroom deputy's copies shall be submitted in three-ring binders, tabbed as necessary. The hearing exhibits shall be pre-marked, with the trustee enumerating his exhibits as "1, 2, 3..." and debtor enumerating his exhibits "A, B, C...."

The court will issue a minute order.

66. 07-21553-B-11 RICHARD YOUNIE HEARING - OBJECTION
FHS #8 TO CLAIM NO. 2 OF
CHAD AND KIMBERLY ALLREAD
7-18-08 [[177](#)]

Tentative Ruling: This matter cannot be resolved on the pleadings before the court. The debtor objects to claim no. 2 of Chad and Kimberly Allread, filed on April 9, 2007 in the unsecured amount of \$145,000.00 (the "Claim"). The debtor's argument that the Claim should be disallowed based on the running of the statute of limitations for the claim prior to the petition date is dependent upon the debtor's assertion that the debt underlying the claim was due and payable on the demand of the claimants no later than the date on which the money forming the debt underlying the claim was loaned to the debtor, and that the debtor and the claimants did not discuss the terms for repayment of the money loaned, including a date for repayment. Interested party Mohammed Poonja, chapter 7 trustee of the bankruptcy estate of claimant Chad Allread, opposes the objection and asserts that the debtor and claimants did agree that payment would be due owing upon sale of the debtor's residence, an event which recently occurred. To determine the factual issue necessary to resolve this objection, i.e. the date on which a cause of action for nonpayment of the debt accrued to the claimants, this matter is continued to a final evidentiary hearing on October 3, 2008 at 10:00 a.m. before the Honorable David E. Russell in courtroom 32.

On or before September 26, 2008, each party shall serve on the other party all documentary evidence the party intends to present at the hearing and a witness list (which includes a general summary of the testimony of each designated witness). The parties shall also lodge on September 26, 2008, two additional copies of all materials, one for the judge and one for the courtroom deputy. The parties shall lodge and serve these documents regardless of whether they have filed them in the past with this court, and shall designate the documents as "Exhibits for Evidentiary Hearing on Richard Younie's Objection to Claim no. 2 of Chad

and Kimberly Allread, D.C. No. FHS-8." The judge's and courtroom deputy's copies shall be submitted in three-ring binders, tabbed as necessary. The hearing exhibits shall be pre-marked, with the trustee enumerating his exhibits as "1, 2, 3..." and debtor enumerating his exhibits "A, B, C...."

The court will issue a minute order.

67. [07-21553](#)-B-11 RICHARD YOUNIE HEARING - MOTION
FHS #9 FOR APPROVAL OF FIRST INTERIM
COMPENSATION TO DEBTOR'S COUNSEL
(\$46,942.50 FEES; \$1,799.43
COSTS)
7-18-08 [[182](#)]

Tentative Ruling: The failure of any party in interest to file timely written opposition as required by this local rule may be considered consent to the granting of the motion. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); LBR 9014-1(f)(1). In this instance the court issues the following tentative ruling.

The application is granted in part and denied in part to the extent set forth herein. The application is approved for a total of \$46,247.43 in fees and costs.

This court authorized the employment of counsel for the debtor in possession on March 29, 2007. The order does not indicate that the employment was effective as of an earlier date, and no evidence of extraordinary circumstances has been presented to warrant compensation prior to the court's authorization. Applicant now seeks compensation for the period of March 8, 2007 to July 15, 2008 in the amount of \$46,942.50 in fees and \$1,799.43 in costs. Compensation for services prior to March 29, 2007 (\$2,282.50 in fees and \$32.00 in costs) is denied without prejudice, and has been deducted from the application accordingly. In re Shirley, 134 B.R. 940 (9th Cir. BAP 1992).

As set forth in the attorney's application, the allowed fees and costs are reasonable compensation for actual, necessary and beneficial services. 11 U.S.C. § 330(a)(1).

The court will issue a minute order.

68. [04-26255](#)-B-7 PONCE-NICASIO BROADCASTING HEARING - MOTION
[06-2227](#) TAM #1 TO AMEND PRE-TRIAL ORDER TO
BRUCE FOX, ET AL., VS. AVOID MANIFEST INJUSTICE
8-4-08 [[195](#)]
PONCE NICASIO BROADCASTING, ET AL.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter has been continued to September 16, 2008 at 9:30 a.m. pursuant to a stipulated order signed August 29, 2008. This matter is therefore removed from this calendar.

69. [04-26255](#)-B-7 PONCE-NICASIO BROADCASTING HEARING - MOTION
[06-2228](#) TAM #1 TO AMEND PRE-TRIAL ORDER TO
BRUCE FOX, ET AL., VS. AVOID MANIFEST INJUSTICE
8-4-08 [[192](#)]
PONCE NICASIO BRODCASTING, ET AL.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This matter has been continued to September 16, 2008 at 9:30 a.m. pursuant to a stipulated order signed August 29, 2008. This matter is therefore removed from this calendar.

70. [04-26357](#)-B-13J LARRY/NANCY TEVIS CONT. HEARING - MOTION TO
[08-2004](#) DISMISS AND/OR QUASH SERVICE,
LARRY/NANCY TEVIS, VS. INCLUDING FOR FAILURE TO TIMELY
SERVE, OR, ALTERNATIVELY, TO
DISMISS FOR FAILURE TO OTHER
WISE STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED, OR,
MOTION FOR A MORE DEFINITE
STATEMENT
6-26-08 [[88](#)]
CAL VET, ET AL.
CONT. FROM 8-5-08

Tentative Ruling: This matter continued from August 5, 2008 to allow Plaintiffs to file written opposition. Plaintiffs timely filed written opposition. Moving Defendants filed a reply.

Neither the respondents within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is granted. Defendants Randy Andrus and Andrus and Associates ("Moving Defendants") are dismissed from this adversary proceeding without prejudice.

Moving Defendants seek an order dismissing them from this adversary proceeding, arguing that plaintiff debtors ("Plaintiffs") failed to serve Moving Defendants properly and timely. The court construes the motion as a request for dismissal under Federal Rule of Civil Procedure 12(b)(4), for insufficient process, and 12(b)(5), for insufficient service of process, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. Alternatively, Moving Defendants seek dismissal from the adversary proceeding under Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

Moving Defendants were not properly served with the summons and complaint in this proceeding. Federal Rule of Civil Procedure 4(a)(1)(A), made applicable to this proceeding by Bankruptcy Rule 7004, requires that the summons served on a defendant in an adversary proceeding name the court

and the parties. Rule 4(a)(1)(B) requires that the summons also be directed to the defendant. The summons served on Moving Defendants does not satisfy either of the foregoing requirements. Moving Defendants have submitted a copy of the documents received in the mail from Plaintiffs. The copy of the summons received by Moving Defendants (Dkt. 90 at 5) does not name Moving Defendants or all parties. The summons states that a complete list of defendants is attached, but no such list was received by Moving Defendants. The summons received by Moving Defendants was also not directed to either Moving Defendant. These defects constitute insufficient process pursuant to Rule 12(b)(4) and are grounds for dismissal of Moving Defendants from the adversary proceeding.

Furthermore, as of the date of this hearing, Plaintiffs have failed to effect proper service of the summons and complaint on Moving Defendants within the time limit established by Federal Rule of Civil Procedure 4(m), made applicable here pursuant to Federal Rule of Bankruptcy Procedure 7004(a)(1). In pertinent part, Rule 4(m) provides a 120-day time limit for service of process. Fed. R. Civ. P. 4(m). Plaintiffs filed their initial complaint on January 2, 2008. They later filed a first amended complaint on May 13, 2008. Moving Defendants are named in both the initial complaint and the first amended complaint. The 120-day time limit of Fed. R. Civ. P. 4(m) refers to the filing of the first version of the complaint naming the particular defendant to be served. Bolden v. City of Topeka, 441 F.3d 1129, 1149 (10th Cir. 2006); First Horizon Home Loan Corp. v. Phillips, 2008 U.S. Dist. LEXIS 26964 (D. Ariz. Mar. 31, 2008); see also McGuckin v. United States, 918 F.2d 811 (9th Cir. 1990). Because the initial complaint was filed on January 2, 2008, the 120-day period expired on May 1, 2008. Plaintiffs did not effect proper service on Moving Defendants by that date.

The court warned plaintiffs, on numerous occasions, about dismissal of improperly served defendants. Such occasions include the continued status conference, held May 14, 2008 (Dkt. 40), and the continued status conference, held June 25, 2008 (Dkt. 93), where the court ordered numerous other parties dismissed without prejudice pursuant to Federal Rule of Bankruptcy Procedure 7004(a) (Dkt. 95). Based on the foregoing, the court orders dismissal of Moving Defendants from the adversary proceeding without prejudice.

Plaintiffs' written opposition (Dkt. 183) is not persuasive. Despite their belief that they properly served Moving Defendants, the evidence submitted shows that they did not. Neither the receipt of the complaint nor the filing of the instant motion constitutes a waiver by Moving Defendants of the defects in process. If they did constitute a waiver, no party would ever be able to prevail on a Rule 12(b)(4) or 12(b)(5) motion. Rule 12(b) allows a party to file a motion asserting one or more of the defenses under Rule 12(b) before pleading if a responsive pleading is allowed. Moving Defendants here did not file any responsive pleading before filing this motion. Furthermore, the Ninth Circuit has pointed out that "Federal Rule of Civil Procedure 12 abolished the distinction between general and special appearances when the Federal Rules were adopted in 1938." SEC v. Wencke, 783 F.2d 829, 832 n.3 (9th Cir. 1986), citing Republic International Corp. v. Amco Engineers, Inc., 516 F.2d 161, 165 (9th Cir. 1975) ("Special appearances to challenge jurisdiction are no longer required in federal courts."); Hays v. United Fireworks Manufacturing Co., 420 F.2d 836, 844 n.10 (9th Cir. 1969); Dragor Shipping Corp. v. Union Tank Car. Co., 378 F.2d 241, 243 n.2 (9th Cir. 1967); Martens v. Winder, 341 F.2d 197, 200 (9th Cir) cert denied 382 U.S. 937

(1965); 5 Wright and Miller, Federal Practice and Procedure, § 1344, at 522 (1969). Moving Defendants were not required to make any special appearance in order to file the instant motion challenging the court's jurisdiction over them.

The court declines to reach the merits of Defendants' request for dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

The court will issue a minute order.

71. [04-26357](#)-B-13J LARRY/NANCY TEVIS
[08-2004](#)
LARRY/NANCY TEVIS, VS.

CAL VET, ET AL.

CONT. FROM 8-5-08

CONT. HEARING - MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN
BE GRANTED AND IN THE ALTERNA-
TIVE, MOTION FOR A MORE
DEFINITIVE STATEMENT RULE
6-24-08 [58]

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written opposition. Moving Defendants filed a reply.

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is granted to the extent set forth herein. Judgment shall be entered in favor of Defendants Peter Galgani and the Law Offices of Peter Galgani ("Moving Defendants"), which judgment shall state that plaintiff debtors ("Plaintiffs") shall take nothing by their claims for relief against Moving Defendants. Except as so ordered, the motion is denied.

Moving Defendants ask the court to dismiss this case Federal Rule of Civil Procedure 12(b)(6). Moving Defendants asserts that a settlement agreement between the chapter 7 trustee, Max Hoseit, Herman Koelewyn, Moving Defendants, and Paul Cass (the "Settlement Agreement"), approved by the bankruptcy court in the parent case, provides a bar to the claims for relief raised by Plaintiffs.

Because the motion references a court-approved settlement agreement extrinsic to the pleadings in this adversary proceeding, however, the court may convert the motion to a motion for summary judgment under Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See Fed. R. Civ. P. 12(d). "Courts tend to use the conversion option only in situations in which the materials extrinsic to the pleadings are incontrovertible and pose discrete and dispositive issues. Examples of such extrinsic material include . . . a stipulation, incorporated into a court order in previous litigation, that operated to bar the instant action." James Wm. Moore, et. al., Moore's Federal Practice § 12.34[3][a] (2008). Under some limited circumstances a Rule 12(b)(6)

motion need not be converted to a summary judgment motion in order to consider extrinsic evidence, but in the Ninth Circuit such evidence is limited to documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." In re Silicon Graphics Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (quoting Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)). This "incorporation by reference" doctrine has been extended to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. See Knieval v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)). Here, Plaintiffs' first amended complaint (the "FAC") does not explicitly reference the Settlement Agreement nor its contents, nor does it appear from the allegations set forth in the FAC that Plaintiffs' claims for relief depend on the contents of the Settlement Agreement. Therefore, the court converts the motion to a summary judgment motion under Federal Rule of Civil Procedure 56.

When a motion to dismiss is converted to a summary judgment motion, questions of adequate notice arise, as the court must be sure that all parties had notice and reasonable opportunity to present all material made pertinent by Rule 56. See Fed. R. Civ. P. 56(c) (requiring ten days' advance notice to the adverse party of a motion for summary judgment). In the Ninth Circuit, the standard for determining the adequacy of such notice is "whether the party against whom summary judgment was entered was fairly apprised that the court would look beyond the pleadings and thereby transform the 12(b) motion to dismiss into one for summary judgment." Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981). Here, Plaintiffs received adequate notice of the Moving Defendants' intention to rely on the Settlement Agreement, as both the motion and the memorandum of points and authorities make specific reference to the Settlement Agreement. Plaintiffs' written opposition also does not take issue with Moving Defendants' intention to rely on the Settlement Agreement in connection with the motion.

Pursuant to Federal Rule of Civil Procedure 56(c), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, the moving party on a motion for summary judgment must demonstrate that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c).

Moving Defendants have satisfied both prongs of the standard. Moving Defendants were associated with another attorney formerly employed by Plaintiffs, Paul Cass. Debtors commenced a legal malpractice suit against Paul Cass and Moving Defendants in January 2004, prior to commencing their bankruptcy case. Upon the commencement of the bankruptcy case, Plaintiffs' malpractice claim became property of the bankruptcy estate. During pendency of the parent bankruptcy case under chapter 7, the chapter 7 trustee settled the malpractice action and other state court litigation involving Plaintiffs by entering into the Settlement Agreement (Main Dkt. 29 at 45) with Moving Defendants, Paul Cass, Max Hoseit, Herman Koelewyn and Hoseit & Koelewyn. The bankruptcy court approved the Settlement Agreement by order entered November 12, 2004. The Settlement Agreement included a general release of all claims against Moving Defendants and a waiver of unknown claims. (Main Dkt. 29

at 46-47).

Plaintiffs have responded to the motion, but they have failed to submit evidence to the court showing a material dispute as to the provisions of the Settlement Agreement, including the release of claims and waiver of unknown claims. The FAC sets forth no allegation of a claim based upon a post-petition transaction or occurrence giving rise to a claim against Moving Defendant, and there is no evidence before the court of any such claim. Plaintiffs' written opposition (Dkt. 182) contains only conclusory and unsupported allegations that Moving Defendants "committed fraud by being a party to the Fraudulent Settlement Agreement and Release Submitted fraudulent claims in the plaintiffs bankruptcy case. Misrepresented the facts. Defamed plaintiffs with untruths. Breached written and oral contracts. Breach fiduciary duties, committed Negligence, and caused emotional injury and damage." (Dkt. 182 at 3). These unsupported allegations are insufficient to satisfy Plaintiffs' burden of showing a genuine issue for trial, nor do they show that Moving Defendant is not entitled to judgment as a matter of law. There is no genuine dispute of material fact as to the content of the Settlement Agreement, and Moving Defendants have shown as a matter of law that the Settlement Agreement bars Plaintiffs' claims against them. Therefore, summary judgment that Plaintiffs shall take nothing by their claims against Moving Defendants is appropriate.

The court will enter a minute order granting the motion. Moving Defendants shall submit a proposed judgment stating that Plaintiffs shall take nothing by their claims for relief set forth in the FAC against Moving Defendants.

72. [04-26357](#)-B-13J LARRY/NANCY TEVIS
[08-2004](#) PLC #1
LARRY/NANCY TEVEIS

CAL VET, ET AL.

CONT. FROM 8-5-08

CONT. HEARING - MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN
BE GRANTED AND IN THE ALTERNA-
TIVE, MOTION FOR A MORE
DEFINITIVE STATEMENT
6-25-08 [[66](#)]

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written opposition. Moving Defendants did not file a reply.

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f) (1) (ii) and (iii).

The motion is granted to the extent set forth herein. Judgment shall be entered in favor of Defendants Paul Cass and the Law Offices of Paul Cass ("Moving Defendants"), which judgment shall state that plaintiff debtors ("Plaintiffs") shall take nothing by their claims for relief against Moving Defendants. Except as so ordered, the motion is denied.

Moving Defendants asks the court to dismiss this case Federal Rule of Civil Procedure 12(b)(6). Moving Defendants assert that a settlement agreement between the chapter 7 trustee, Max Hoseit, Herman Koelewyn, Peter Galgani, and Moving Defendants (the "Settlement Agreement"), approved by the bankruptcy court in the parent case, provides a bar to the claims for relief raised by Plaintiffs.

Because the motion references a court-approved settlement agreement extrinsic to the pleadings in this adversary proceeding, however, the court may convert the motion to a motion for summary judgment under Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See Fed. R. Civ. P. 12(d). "Courts tend to use the conversion option only in situations in which the materials extrinsic to the pleadings are incontrovertible and pose discrete and dispositive issues. Examples of such extrinsic material include . . . a stipulation, incorporated into a court order in previous litigation, that operated to bar the instant action." James Wm. Moore, et. al., *Moore's Federal Practice* § 12.34[3][a] (2008). Under some limited circumstances a Rule 12(b)(6) motion need not be converted to a summary judgment motion in order to consider extrinsic evidence, but in the Ninth Circuit such evidence is limited to documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." In re Silicon Graphics Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (quoting Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)). This "incorporation by reference" doctrine has been extended to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)). Here, Plaintiffs' first amended complaint (the "FAC") does not explicitly reference the Settlement Agreement nor its contents, nor does it appear from the allegations set forth in the FAC that Plaintiffs' claims for relief depend on the contents of the Settlement Agreement. Therefore, the court converts the motion to a summary judgment motion under Federal Rule of Civil Procedure 56.

When a motion to dismiss is converted to a summary judgment motion, questions of adequate notice arise, as the court must be sure that all parties had notice and reasonable opportunity to present all material made pertinent by Rule 56. See Fed. R. Civ. P. 56(c) (requiring ten days' advance notice to the adverse party of a motion for summary judgment). In the Ninth Circuit, the standard for determining the adequacy of such notice is "whether the party against whom summary judgment was entered was fairly apprised that the court would look beyond the pleadings and thereby transform the 12(b) motion to dismiss into one for summary judgment." Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981). Here, Plaintiffs received adequate notice of the Moving Defendants' intention to rely on the Settlement Agreement, as both the motion and the memorandum of points and authorities make specific reference to the Settlement Agreement. Plaintiffs' written opposition also does not take issue with Moving Defendants' intention to rely on the Settlement Agreement in connection with the motion.

Pursuant to Federal Rule of Civil Procedure 56(c), made applicable to

this proceeding by Federal Rule of Bankruptcy Procedure 7056, the moving party on a motion for summary judgment must demonstrate that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c).

Moving Defendants have satisfied both prongs of the standard. Debtors commenced a legal malpractice suit against Moving Defendants in January 2004, prior to commencing their bankruptcy case. Upon the commencement of the bankruptcy case, Plaintiffs' malpractice claim became property of the bankruptcy estate. During pendency of the parent bankruptcy case under chapter 7, the chapter 7 trustee settled the malpractice action and other state court litigation involving Plaintiffs by entering into the Settlement Agreement (Main Dkt. 29 at 45) with Moving Defendants, Peter Galgani, Max Hoseit, Herman Koelewyn and Hoseit & Koelewyn. The bankruptcy court approved the Settlement Agreement by order entered November 12, 2004. The Settlement Agreement included a general release of all claims against Moving Defendants and a waiver of unknown claims. (Main Dkt. 29 at 46-47).

Plaintiffs have responded to the motion, but they have failed to submit evidence to the court showing a material dispute as to the provisions of the Settlement Agreement, including the release of claims and waiver of unknown claims. The FAC sets forth no allegation of a claim based upon a post-petition transaction or occurrence giving rise to a claim against Moving Defendants, and there is no evidence before the court of any such claim. Plaintiffs' written opposition (Dkt. 182) contains only conclusory and unsupported allegations that Moving Defendants "committed fraud by being a party to the Fraudulent Settlement Agreement and Release that included Misrepresentations of the facts, Defamed plaintiffs with untruths, Breached fiduciary duties, committed Negligence, and caused emotional injury and damage." (Dkt. 182 at 3). These unsupported allegations are insufficient to satisfy Plaintiffs' burden of showing a genuine issue for trial, nor do they show that Moving Defendants are not entitled to judgment as a matter of law. There is no genuine dispute of material fact as to the content of the Settlement Agreement, and Moving Defendants have shown as a matter of law that the Settlement Agreement bars Plaintiffs' claims against them. Therefore, summary judgment that Plaintiffs shall take nothing by their claims against Moving Defendants is appropriate.

The court will enter a minute order granting the motion. Moving Defendants shall submit a proposed judgment stating that Plaintiffs shall take nothing by their claims for relief set forth in the FAC against Moving Defendants.

73. [04-26357](#)-B-13J LARRY/NANCY TEVIS
[08-2004](#) HCK #1
LARRY/NANCY TEVIS

CAL VET, ET AL.

CONT. HEARING - SPECIAL MOTION
TO STRIKE OF DEFANDANTS HANSEN,
CULHANE, KOHLS, JONES & SOMMER,
LLP AND JAMIE ERRECART, ESQ.
6-26-08 [[73](#)]

CONT. FROM 8-5-08

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written

opposition. Moving Defendants filed a reply.

Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is granted to the extent set forth herein. Judgment shall be entered in favor of Defendants Hansen, Culhane, Kolhs, Jones & Sommer LLP ("Hansen Culhane") and Jamie Errecart (collectively, "Moving Defendants"), which judgment shall state that plaintiff debtors ("Plaintiffs") shall take nothing by their claims for relief against Moving Defendants. Except as so ordered, the motion is denied.

Moving Defendants ask the court to "strike" the complaint in this adversary proceeding, citing California Code of Civil Procedure § 425.16 and Federal Rule of Civil Procedure 12(b)(6). Given Moving Defendants' assertion that a settlement agreement between the chapter 7 trustee, Max Hoseit, Herman Koelewyn, Peter Galgani, and Paul Cass (the "Settlement Agreement") provides a bar to the claims for relief raised by the debtors, the court declines to reach Moving Defendants' arguments raised under Code of Civil Procedure § 425.16 and instead reaches the merits of the request for dismissal under Rule 12(b)(6).

Because the motion references a court-approved settlement agreement extrinsic to the pleadings in this adversary proceeding, however, the court may convert the motion to a motion for summary judgment under Federal Rule of Civil Procedure 56, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See Fed. R. Civ. P. 12(d). "Courts tend to use the conversion option only in situations in which the materials extrinsic to the pleadings are incontrovertible and pose discrete and dispositive issues. Examples of such extrinsic material include . . . a stipulation, incorporated into a court order in previous litigation, that operated to bar the instant action." James Wm. Moore, et. al., Moore's Federal Practice § 12.34[3][a](2008). Under some limited circumstances a Rule 12(b)(6) motion need not be converted to a summary judgment motion in order to consider extrinsic evidence, but in the Ninth Circuit such evidence is limited to documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." In re Silicon Graphics Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999) (quoting Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994)). This "incorporation by reference" doctrine has been extended to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint. See Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)). Here, Plaintiffs' first amended complaint (the "FAC") does not explicitly reference the Settlement Agreement nor its contents, nor does it appear from the allegations set forth in the FAC that Plaintiffs' claims for relief depend on the contents of the Settlement Agreement. Therefore, the court converts the motion to a summary judgment motion under Federal Rule of Civil Procedure 56.

When a motion to dismiss is converted to a summary judgment motion, questions of adequate notice arise, as the court must be sure that all parties had notice and reasonable opportunity to present all material made pertinent by Rule 56. See Fed. R. Civ. P. 56(c) (requiring ten days' advance notice to the adverse party of a motion for summary judgment). In the Ninth Circuit, the standard for determining the adequacy of such notice is "whether the party against whom summary judgment was entered was fairly apprised that the court would look beyond the pleadings and thereby transform the 12(b) motion to dismiss into one for summary judgment." Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir. 1981). Here, Plaintiffs received adequate notice of the Moving Defendants' request that the court take notice of the Settlement Agreement, as the notice of hearing filed with the motion stated that the motion would be based upon the motion, supporting points and authorities, declarations, and a request for judicial notice and separate exhibits filed concurrently with the motion. Moving Defendants' request for judicial notice also identifies the Settlement Agreement (Dkt. 77 at 2-3), and the motion makes specific reference to the Settlement Agreement in the context of Moving Defendants' assertion that the Settlement Agreement barred Plaintiffs' claims. Furthermore, Plaintiffs have filed no opposition in response to the motion, as required by the notice of hearing and LBR 9014-1(f)(1). Plaintiffs also were made aware of the court's intent to convert this motion to a summary judgment motion when this matter previously came on for hearing on August 5, 2008.

Pursuant to Federal Rule of Civil Procedure 56(c), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, the moving party on a motion for summary judgment must demonstrate that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c).

Moving Defendants have satisfied both prongs of the standard. Moving Defendants allege without dispute that their contact with Plaintiffs arose out of Moving Defendants' representation of the law firm of Hoseit & Koelewyn as defense counsel in a state malpractice action commenced by Plaintiffs prior to the filing of the petition commencing the parent bankruptcy case. Upon the commencement of the bankruptcy case, Plaintiffs' malpractice claim became property of the bankruptcy estate. During pendency of the parent bankruptcy case under chapter 7, the chapter 7 trustee settled the malpractice action and other state court litigation involving Plaintiffs by entering into the Settlement Agreement (Main Dkt. 29 at 45) with Paul Cass, the Law Offices of Paul Cass, Peter Galgani, Max Hoseit, Herman Koelewyn and Hoseit & Koelewyn. The bankruptcy court approved the Settlement Agreement by order entered November 12, 2004. The Settlement Agreement included a general release of all claims against Hoseit, Koelewyn, and their law practice and a waiver of all unknown claims (Main Dkt. 29 at 46-47). In addition to Hoseit and Koelewyn, the chapter 7 trustee also released their attorneys (Main Dkt. 29 at 46).

Plaintiffs have responded to the motion, but they have failed to submit evidence to the court showing a material dispute as to the provisions of the Settlement Agreement, including the release of claims and waiver of unknown claims. The FAC sets forth no allegation of a claim based upon a post-petition transaction or occurrence giving rise to a claim against Moving Defendants, and there is no evidence before the court of any such claim. There is no genuine dispute of material fact as to the content of

the Settlement Agreement, and Moving Defendants have shown as a matter of law that the Settlement Agreement bars Plaintiffs' claims against them. Therefore, summary judgment that Plaintiffs shall take nothing by their claims against Moving Defendants is appropriate.

The arguments that Plaintiffs do raise in their written opposition (Dkt. 179) are not persuasive. First, the court finds no misrepresentation in the motion regarding the employment of Jamie Errecart by Hansen Culhane. The motion is clear that Errecart was employed by Hansen Culhane at the time that Hansen Culhane represent Hoseit & Koelewyn. Although the motion does not expressly point out that Errecart is no longer employed by Hansen Culhane, the court does not find that this is a basis for striking the motion, and Plaintiffs have cited no authority supporting that request.

Second, to the extent that the debtors address Moving Defendants' request to strike the FAC pursuant to California Code of Civil Procedure § 425.16, the court declines to reach the arguments.

Third, as to Plaintiffs' argument that Moving Defendants violated the automatic stay by sending a "threat letter" to them while they were in bankruptcy and represented by counsel, the court notes that the "threat letter" to (Dkt. 179 at 15) was sent to Plaintiffs after the bankruptcy court approved the compromise and release of claims between the chapter 7 trustee and Hoseit and Koelewyn. Moving Defendants sent the debtors a letter with a joint request for dismissal of the state court litigation commenced pre-petition, pursuant to the terms of the Settlement Agreement, asking the debtors to sign and return it to Moving Defendants. The "threat" was that if the debtors would not sign the request, Moving Defendants would be forced to file a motion to dismiss the state court litigation and would seek sanctions if forced to do so. There are two reasons why this argument fails. First, the FAC contains a reference to a claim for violation of the automatic stay in its caption and in the prayer, but sets forth no actual claim in the body of the FAC itself or any allegations supporting such a claim. Second, even if such allegations were contained in the FAC, the debtors fail to cite any authority supporting their argument that the "threat letter" constitutes a violation of the automatic stay where Moving Defendants sought to resolve state court litigation commenced by Plaintiffs. See In re Way, 229 B.R. 11, 13 (9th Cir. BAP 1998) (primary purposes of 11 U.S.C. § 362(a) do not apply to offensive actions by a debtor); In re White, 186 B.R. 700, 703 (9th Cir. BAP 1995); In re Merrick, 175 B.R. 333, 336 (9th Cir BAP 1994). The remainder of Plaintiffs' arguments are nothing more than conclusory statements that Moving Defendants committed fraud, defamation, and wrongful conduct under "all other cause of actions" and are unsupported by any evidence showing a genuine dispute for trial.

The court will enter a minute order granting the motion. Moving Defendants shall submit a proposed judgment stating that Plaintiffs shall take nothing by their claims for relief set forth in the FAC against Moving Defendants.

74. [04-26357](#)-B-13J LARRY/NANCY TEVIS
[08-2004](#) WFH #1
LARRY/NANCY TEVEIS

CONT. HEARING - MOTION
BY DANIEL L. EGAN TO DISMISS
OR FOR MORE DEFINITE STATEMENT
6-26-08 [[80](#)]

CAL VET, ET AL.

CONT. FROM 8-5-08

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written opposition. Moving Defendant filed a reply.

Neither the respondent within the time for opposition nor the movants within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is granted. Defendant Daniel Egan ("Defendant") is dismissed from the adversary proceeding.

Defendant seeks dismissal from the adversary proceeding. Defendant alleges without dispute that his contact with the plaintiff debtors ("Plaintiffs") arises out of his representation of the chapter 7 trustee during the time that Plaintiffs' parent bankruptcy case was pending under chapter 7. The first amended complaint (the "FAC") mentions Defendant in four places. First, the FAC identifies Defendant as an individual named defendant to the adversary proceeding in ¶ 11. Second, the FAC mentions Defendant in connection with factual allegations in paragraphs 60 and 61:

61. CAL VET makes Agreement with Bankruptcy Chapter 7 Trustee to sell our property.

62. Chapter 7 Trustee's Attorney Daniel L. Egan LIES to the Bankruptcy Court and states NO Agreement has been reached with Cal Vet.

(Dkt. 35 at 10) (emphasis in original). Third, paragraph 64 states "Plaintiffs Appeal of Trustee's Attorney's Fees on the grounds of FRAUD." (Dkt. 35 at 11) (emphasis in original). Paragraphs 61, 62, and 64 are incorporated into each of Plaintiffs' ten claims for relief for fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, and negligent infliction of emotional distress. Fourth, the FAC mentions Defendant, along with all of the other named defendants, in the prayer.

Defendant's argument for his dismissal is based on the "litigation privilege" set forth under California Civil Code § 47(b), which section makes privileged communications made in any judicial proceeding or other official proceeding authorized by law. Cal. Civ. Code § 47(b). "The

usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. Silberg v. Anderson, 50 Cal.3d 205, 212-213 (1990) (collecting cases). There are a few highly specific statutory exceptions to the privilege, such as gratuitous libel of a nonparty in a marital dissolution action, acts in furtherance of destruction of evidence, concealment of the existence of an insurance policy, and an improper *lis pendens*. Cal. Civ. Code § 47(b)(1)-(4). The purpose of the litigation privilege is to give litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. Silber, 50 Cal. 3d at 213. California courts have extended the privilege to attorneys as well as parties "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with libel or slander actions while acting for his client." Thornton v. Rhoden, 245 Cal. 2d 80, 99 (1966). California courts have also applied the litigation privilege regardless of malice. Silber, 50 Cal. 3d at 215-16.

[I]n immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than the occasional unfair result.

Silber, 50 Cal. 3d at 214. When applicable, the litigation privilege serves as an absolute bar against all tort claims based on the challenged communication, except malicious prosecution actions. See Silberg, 50 Cal. 3d at 215-16. The litigation privilege has been explicitly held by California courts to bar several of the claims for relief raised by Plaintiffs in the FAC, including fraud, negligence, intentional infliction of emotional distress. See Silber, 50 Cal. 3d at 215-16 (collecting cases). Federal courts have also applied the California litigation privilege to bar state law tort claims brought in federal proceedings where the litigation privilege is applicable. See, e.g., Sengchangthalangsy v. Accelerated Recovery Specialists, Inc., 473 F.Supp.2d 1083 (S.D. Cal. 2007).

Here, the conduct ascribed to Defendant in the FAC is conduct that falls squarely under the protection of the litigation privilege, as Defendant's assistance of the chapter 7 trustee in reaching a settlement agreement with Cal Vet and Defendant's alleged misrepresentation to the court that no settlement agreement had been reached constitute communications made in a judicial proceeding, by an attorney for a litigant, made to achieve the an object of litigation, that had a connection or logical relation to the litigation. None of the exceptions under Civil Code § 47(b)(1)-(4) is applicable here. The FAC also does not allege a malicious prosecution action against Defendant.

Plaintiffs' written opposition to the motion is not persuasive. Plaintiffs completely ignore Defendant's argument that the litigation privilege bars their claims, choosing instead to repeat the allegations set forth in the FAC and to argue that the motion to dismiss should not be granted unless it appears certain that Plaintiffs can "prove no set of facts which would support [P]laintiffs [sic] claim and would entitle it [sic] to relief." (Dkt. 177 at 3). However, the "no set of facts"

language is no longer favored by the United States Supreme Court. Under the Supreme Court's most recent formulation of the standard for a motion to dismiss under Rule 12(b)(6), a defendant need not demonstrate that a plaintiff can prove "no set of facts" in support of his claim. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1968-70 ("The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.") Rather, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. Twombly, 127 S.Ct. at 1964-66 ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

The FAC alleges no factual matter other than that protected by the litigation privilege that gives a plausible basis for the claims raised by Plaintiffs. Nor have Plaintiffs presented any additional factual matter in their written opposition that does not fall under the litigation privilege. In an attempt to clarify their allegations regard "false and defamatory statements" Defendant allegedly made to the court, Plaintiffs set forth seven alleged misrepresentations, a statement that "Settlement Agreements and Releases are Fraudulent" and a statement that Defendant engaged in "Misconduct to portray the plaintiffs in a false light." (Dkt. 177 at 4-5). However, all of the alleged misrepresentations and misconduct fall under the category of communications made in judicial proceedings, by an attorney for a litigant, made to achieve the an object of litigation, that had a connection or logical relation to the litigation, and Plaintiffs have set forth no plausible factual matter to the contrary. Furthermore, their assertion that certain settlement agreement and releases are "fraudulent" is conclusory and sets forth no plausible factual matter to support a claim of fraud. Their opposition fails.

The court will issue a minute order.

75. 04-26357 -B-13J LARRY/NANCY TEVIS 08-2004 MHA #1 LARRY/NANCY TEVIS, VS. CAL VET, ET AL., VS.	CONT. HEARING - MOTION OF DEFENDANT FIRST AMERICAN TITLE COMPANY FOR A MORE DEFINITE STATEMENT 7-9-08 [111]
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CONT. FROM 8-5-08

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written opposition. Moving Defendant filed a reply.

Neither the respondent within the time for opposition nor the movants within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The request for a more definite statement is granted. The debtors shall

file an amended complaint that specifies which claims for relief set forth in the complaint are asserted against defendant First American Title Company ("First American"), and, if fraud is averred against First American, shall plead any claim for fraud with the particularity required by Federal Rule of Civil Procedure 9(b). The debtors shall file and serve the amended complaint on or before September 22, 2008. If the debtors do not file an amended complaint by the foregoing date, First American may submit an order that dismisses First American from the adversary proceeding without prejudice.

First American seeks an order requiring the debtors to file a more definite statement as to First American in this adversary proceeding pursuant to Federal Rule of Civil Procedure 12(e), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. Rule 12(e) allows a party to move for a more definite statement "of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

In this case, the first amended complaint (the "FAC") filed by the plaintiff debtors ("Plaintiffs") names thirty separate defendants and sets forth ten separate claims for relief, including fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, and negligent infliction of emotional distress. First American is specifically mentioned in three places in the FAC. First American is introduced as a party to the action in paragraph 30 of the FAC and is described as a business entity. The FAC also mentions First American in paragraph 42: "On July 22, 1998 CAL VET fraudulently RECORDED our CAL VET LOAN CONTRACT through First American Title without the 433 RECORDED and WITHOUT the close of ESCROW. This is in violation of the California Health and Safety Codes." (Dkt. 35 at 8-9). The FAC also specifically mentions First American, along with all other named defendants, in the prayer.

In addition, as a defendant to this proceeding First American is also mentioned in each of the ten claims for relief under the undefined term "Defendants." Plaintiffs have asserted each of the ten claims for relief against "Defendants" generally without specifying which of the thirty named defendants are implicated in each claim.

Motions for a more definite statement are generally not favored, because a party's pleadings are to be construed liberally to do substantial justice. "Rule 12(e)'s standard is plainly designed to strike at unintelligibility rather than lack of detail In the presence of proper, although general, allegations, the motion will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining the detailed information." James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008). Despite a general disfavor of the motion, Professor Moore goes on to describe the utility of a Rule 12(e) motion in two types of situations:

First, proper pleading under Rule 8 requires a pleading to contain allegations of each element of the claim. If it does not, and if the deficiency is not so material that the pleading should be dismissed under Rule 12(b)(6), a more definite statement is

appropriate. Second, if a complaint approaches the other extreme of being overly prolix or complex, the motion for more definite statement can assist the court in "the cumbersome task of sifting through myriad claims, many of which may be foreclosed by various defenses." Because of its potential usefulness in that respect, courts will occasionally order a more definite statement sua sponte, which they have the freedom to do.

James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008) (citations omitted). In particular, Professor Moore cites Anderson v. District Board of Trustees of Central Florida Community College, 77 F.3d 364, 366 (11th Cir. 1996) for the proposition that a court has a supervisory obligation to order a more definite statement where the complaint incorporates every antecedent allegation by reference into each subsequent claim and fails to adequately link a claim for relief to its factual predicates.

Here, each of the ten claims for relief asserted by Plaintiffs incorporates by reference each of the "general statements and allegations" set forth in paragraphs 35 through 71 of the FAC. However, Plaintiffs fail to adequately link each claim for relief to the facts alleged in paragraphs 35 through 71. The ten claims for relief set forth in the FAC contain only general allegations that do not connect the alleged facts or conduct to the relief sought, making it difficult for First American to evaluate whether Plaintiffs assert that any of First American's conduct with respect to Plaintiffs constitutes fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, or negligent infliction of emotional distress. The FAC is also ambiguous as to which of the thirty named "Defendants," including First American, are implicated in each claim for relief. Given the large number of defendants against whom Plaintiffs seek relief, and given the large number of claims asserted in the FAC, a more definite statement is required to apprise the defendants of the conduct that Plaintiffs assert to be actionable pursuant to each claim for relief, and which defendants are implicated by each claim. A more definite statement will also assist the court in sifting through the numerous claims asserted by Plaintiffs with respect to each defendant.

Furthermore, with respect to first and second claims for relief for fraud/deceit/misrepresentation/constructive fraud against a fiduciary, and fraudulent inducement/recission, the complaint fails to plead those claims for relief with the particularity required by Federal Rule of Civil Procedure 9(b). The Ninth Circuit Court of Appeals has interpreted Federal Rule of Civil Procedure 9(b) to require that the complaint (1) specify the averred fraudulent representations; (2) aver the representations were false when made; (3) identify the speaker; (4) state when and where the statements were made; and (5) state the manner in which the representations were false and misleading. Decker v. GlenFed Inc., (In re Glenfed, Inc. Sec. Litig.), 42 F.3d 1541, 1547, fn. 7 (9th Cir. 1994) (en banc), superseded by statute on other grounds as stated in In re Silicon Graphics, Inc., 970 F. Supp. 746, 754 (N.D. Cal. 1997); Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991); Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003). After examining the first and second causes of actions, particularly paragraphs 73-82 and 84-85, the court finds that Plaintiffs

have failed to specify the averred fraudulent representations, identify the speaker, state when and where the statements were made, and state the manner in which the representations were false and misleading.

Plaintiffs' argument in their written opposition fails. Considering the heightened pleading standard for allegations of fraud set forth in Rule 9(b), fraud is not sufficiently alleged where the only conduct specifically ascribed to First American is that "CAL VET fraudulently RECORDED our CAL VET LOAN CONTRACT through First American Title without the 433 RECORDED and WITHOUT the close of ESCROW." (Dkt. 35 at 8-9). Plaintiffs' supplemental opposition (Dkt. 178) fares no better, as it completely ignores the heightened requirement for pleading fraud. Plaintiffs simply argue that "American Title Company committed Fraud intentionally and knowingly with malice against the plaintiffs." (Dkt. 178 at 2). That does not set forth any actual statements, the time the statements were made, to whom the statements were made, who made the statements, or the manner in which the statements were false and misleading. Plaintiffs merely use "fraud" as a catch-all term to describe any conduct that they feel is wrongful, and completely ignore the technical requirements for pleading fraud.

Furthermore, to the extent that Plaintiffs attempt to clarify their allegations with respect to First American as to their claims for breach of fiduciary duties, gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of the duty of good faith and fair dealing, and violation of California Health and Safety Code § 18000, Plaintiffs still fail to connect any specific conduct by First American to the elements of these claims and the allegations do not rise above being merely conclusory. Moreover, regardless of how much additional detail is asserted in Plaintiffs' opposition, their opposition is not the complaint. It is the complaint that must be amended to provide a more definite statement. Plaintiffs' opposition fails.

The court will issue a minute order.

76. [04-26357](#)-B-13J LARRY/NANCY TEVIS
[08-2004](#) HLK #1
LARRY/NANCY TEVIS, VS.

CAL VET, ET AL.

CONT. FORM 8-5-08

CONT. HEARING - MOTION OF
DEFENDANTS MAX H. HOSEIT AND
H.L. KOELEWYN, IND. AND DBA
HOSEIT & KOELEWYN FOR A MORE
DEFINITE STATEMENT
6-25-08 [[61](#)]

Tentative Ruling: This matter continued from August 5, 2008. The court established a briefing schedule. Plaintiffs filed timely written opposition. Moving Defendants filed a reply.

Neither the respondent within the time for opposition nor the movants within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f) (1) (ii) and (iii).

The motion is granted to the extent set forth herein. The motion of defendants Max Hoseit ("Hoseit") and Herman Koelewyn ("Koelewyn") (collectively, "Moving Defendants") for a more definite statement is granted. The plaintiff debtors ("Plaintiffs") shall file an amended complaint that specifies which claims for relief set forth in the complaint are asserted against Moving Defendants, and, if fraud is averred against Moving Defendants, shall plead any claim for fraud with the particularity required by Federal Rule of Civil Procedure 9(b). Plaintiffs shall file and serve the amended complaint on or before September 22, 2008. If Plaintiffs do not file an amended complaint by the foregoing date, Moving Defendants may submit an order dismissing Moving Defendants, as individuals, from the adversary proceeding without prejudice.

Moving Defendants seek an order requiring the debtors to file a more definite statement as to them in this adversary proceeding pursuant to Federal Rule of Civil Procedure 12(e), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012. Rule 12(e) allows a party to move for a more definite statement "of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). On July 9, 2008, named defendant the law firm of Hoseit & Koelewyn withdrew its motion for a more definite statement. This motion is therefore brought solely by defendants Hoseit and Koelewyn in their individual capacities.

In this case, the first amended complaint (the "FAC") filed by Plaintiffs names thirty separate defendants and sets forth ten separate claims for relief, including fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, and negligent infliction of emotional distress. Moving Defendants are specifically mentioned in three places in the FAC. Hoseit is mentioned in paragraph 21 of the FAC for the purpose of introducing him as a named individual defendant in the proceeding. Koelewyn is mentioned in paragraph 22 of the FAC, also for the purpose of introducing him as a named individual defendant in the proceeding. (Dkt. 35 at 6). Moving Defendants are also specifically mentioned, along with every other named defendant, in the prayer of the FAC. Neither Hoseit nor Koelewyn is specifically mentioned in any other paragraph of the FAC.

In addition, as defendants to this proceeding Moving Defendants are also mentioned in each of the ten claims for relief under the undefined term "Defendants." Plaintiffs have asserted each of the ten claims for relief against "Defendants" generally without specifying which of the thirty named defendants are implicated in each claim.

Motions for a more definite statement are generally not favored, because a party's pleadings are to be construed liberally to do substantial justice. "Rule 12(e)'s standard is plainly designed to strike at unintelligibility rather than lack of detail In the presence of proper, although general, allegations, the motion will usually be denied on the grounds that discovery is the more appropriate vehicle for obtaining the detailed information." James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008). Despite a general disfavor of the

motion, Professor Moore goes on to describe the utility of a Rule 12(e) motion in two types of situations:

First, proper pleading under Rule 8 requires a pleading to contain allegations of each element of the claim. If it does not, and if the deficiency is not so material that the pleading should be dismissed under Rule 12(b)(6), a more definite statement is appropriate. Second, if a complaint approaches the other extreme of being overly prolix or complex, the motion for more definite statement can assist the court in "the cumbersome task of sifting through myriad claims, many of which may be foreclosed by various defenses." Because of its potential usefulness in that respect, courts will occasionally order a more definite statement sua sponte, which they have the freedom to do.

James Wm. Moore, et. al., Moore's Federal Practice § 12.36[1] (2008) (citations omitted). In particular, Professor Moore cites Anderson v. District Board of Trustees of Central Florida Community College, 77 F.3d 364, 366 (11th Cir. 1996) for the proposition that a court has a supervisory obligation to order a more definite statement where the complaint incorporates every antecedent allegation by reference into each subsequent claim and fails to adequately link a claim for relief to its factual predicates.

Here, each of the ten claims for relief asserted by Plaintiffs incorporates by reference each of the "general statements and allegations" set forth in paragraphs 35 through 71 of the FAC. However, Plaintiffs fail to adequately link each claim for relief to the facts alleged in paragraphs 35 through 71. The first through sixth and eighth through tenth claims for relief set forth in the FAC contain only general allegations that do not connect the alleged facts or conduct to the relief sought, making it difficult for Moving Defendants to evaluate whether Plaintiffs assert that any of Moving Defendants' conduct with respect to Plaintiffs constitutes fraud/deceit/misrepresentation/constructive fraud against a fiduciary, fraudulent inducement/recission, defamation/libel/slander, breach of written contract, breach of oral/IMPLIED contract, breach of fiduciary duties, negligence, equitable/declaratory/injunctive relief/accounting, intentional infliction of emotional distress, or negligent infliction of emotional distress. The FAC is also ambiguous as to which of the thirty named "Defendants," including Moving Defendants, are implicated in each claim for relief. Given the large number of defendants against whom Plaintiffs seek relief, and given the large number of claims asserted in the FAC, a more definite statement is required to apprise the defendants of the conduct that Plaintiffs assert to be actionable pursuant to each claim for relief, and which defendants are implicated by each claim. A more definite statement will also assist the court in sifting through the numerous claims asserted by Plaintiffs with respect to each defendant.

Furthermore, with respect to first and second claims for relief for fraud/deceit/misrepresentation/constructive fraud against a fiduciary, and fraudulent inducement/recission, the complaint fails to plead those claims for relief with the particularity required by Federal Rule of Civil Procedure 9(b). The Ninth Circuit Court of Appeals has interpreted Federal Rule of Civil Procedure 9(b) to require that the complaint (1) specify the averred fraudulent representations; (2) aver the representations were false when made; (3) identify the speaker; (4) state when and where the statements were made; and (5) state the manner in

which the representations were false and misleading. Decker v. GlenFed Inc., (In re Glenfed, Inc. Sec. Litig.), 42 F.3d 1541, 1547, fn. 7 (9th Cir. 1994) (en banc), superseded by statute on other grounds as stated in In re Silicon Graphics, Inc., 970 F. Supp. 746, 754 (N.D. Cal. 1997); Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 405 (9th Cir. 1991); Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1103-04 (9th Cir. 2003). After examining the first and second causes of actions, particularly paragraphs 73-82 and 84-85, the court finds that Plaintiffs have failed to specify the averred fraudulent representations, identify the speaker, state when and where the statements were made, and state the manner in which the representations were false and misleading.

Plaintiffs' opposition is not persuasive. Plaintiffs' argument regarding the standard for a motion to dismiss under Rule 12(b)(6) is irrelevant, as the motion does not request dismissal. Plaintiffs' argument that motions for a more definite statement are generally not favored is acknowledged by the court, but, as described above, the court has determined that a more definite statement is needed in this case, and any delay in the adversary that will result while Plaintiffs formulate a more definite statement will be beneficial to the ultimate outcome of this adversary proceeding. Finally, Plaintiffs' attempt to clarify the conduct that they complain of as to Moving Defendants, consisting of a statement that "Defendants committed Fraud by being a party to the Fraudulent Settlement Agreement and Release that included Misrepresentations of the facts, Defamed plaintiffs with untruths. Breached fiduciary duties, committed negligence, and caused emotional injury and damage" (Dkt. 181 at 3) still does not arise above the level of general and conclusory allegations that plague the FAC. Furthermore, Plaintiffs' opposition is not the complaint; to the extent that Plaintiffs feel a need to clarify their allegations with respect to Moving Defendants in their opposition, they simply underscore the need for a more definite statement in the complaint. Plaintiffs' opposition fails.

Moving Defendants' request for dismissal set forth in their written reply (Dkt. 201) is denied. This motion did not request dismissal. Defendants cannot assert a new request for relief and new grounds for relief in their reply after Plaintiffs have already responded to the motion.

The court will issue a minute order.

77. 07-21245-B-7 LAWRENCE FEDERICO
HM #1

CONT. HEARING - MOTION
TO SET ASIDE ORDER AND
JUDGMENT AS VOID
6-30-08 [[257](#)]

DISCHARGED 6-25-07
CONT. FROM 8-5-08

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied.

Creditors Brian Federico, Paul Federico, Douglas Brown, and Terry Brown ("Creditors") seek to set aside the court's November 21, 2007 order authorizing the chapter 7 trustee to conduct a sale by auction of personal property (the "Property") consisting of vehicles and equipment used in construction located at a storage yard on Welty Road in Vernalis, California (the "Sale Order"). Creditors argue that the Sale Order is void because they were denied due process when the court approved the sale of the Property without first requiring an adversary proceeding to quiet title to the Property after Brian Federico asserted a claim to ownership in the Property in his opposition to the sale motion.

Pursuant to Federal Rule of Civil Procedure 60(b)(4), made applicable here by Federal Rule of Bankruptcy Procedure 9024, a court may set aside a final order if the order is void.

As the trustee argues in his opposition, the Ninth Circuit has stated the standard for determining whether a final order is void:

A final judgment is "void" for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law. See In re Ctr. Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir.1985); Jones v. Giles, 741 F.2d 245, 248 (9th Cir.1984). "A judgment is not void merely because it is erroneous." In re Ctr. Wholesale, Inc., 759 F.2d at 1448.

United States v. Berke, 170 F.3d 882, 883 (9th Cir. 1999).

The manner in which the trustee's motion to sell the Property came before the court and the manner in which it was ultimately resolved are informative. The chapter 7 trustee filed his motion to sell the Property on October 1, 2007 (Dkt. 66). The trustee set the motion for hearing on October 30, 2007 at 9:30 a.m. under Local Bankruptcy Rule 9014-1(f)(1), which procedure required any party opposing the motion to file written opposition no later than fourteen days before the date of the hearing. The notice of hearing summarizing the motion and the relief sought was served on Brian Federico. (Dkt. 72). With the motion the trustee filed an inventory of the property he proposed to sell. (Dkt. 70).

On October 16, 2007, creditor Brian Federico filed written opposition to the motion. (Dkt. 82). He argued that the bankruptcy court could not sell the Property without first determining the threshold issue of whether the Property was property of the estate. He further argued that an adversary proceeding was required to determine that issue. He argued that he owned "much of the personal property which the trustee seeks to sell" (Dkt. 82 at 1) and that the motion sought to "sell personal property belonging to third parties without their consent." (Dkt. 82 at 2). Brian Federico's supporting declaration (Dkt. 85) stated "I am the owner of most of the personal property which is the subject of the [motion] . . . I have certificates of ownership ("pink slips") for most of the vehicles which are the subject of the Motion and many of the certificates show me as the registered owner." (Dkt. 85 at 2). He stated that in 2002 the debtor owed him more than \$200,000 and gave him "most of" the Property in satisfaction of the antecedent debt. "He gave me the certificates of ownership for the vehicles which are required to

be registered and he no longer had any interest in the vehicles." (Dkt. 85 at 2). He also stated that "some of" the items the trustee sought to sell belonged to unidentified third parties and that the items were stored in a large yard used by several people. He also stated that the debtor did not own "any of the items of personal property which are sought to be sold." (Dkt. 85 at 2). Aside from the Federico declaration, no other evidence supporting the opposition was filed.

On October 29, 2007, the day before the first hearing on the motion, the court issued a tentative ruling denying the motion. The tentative ruling denied the motion without prejudice because the trustee had not satisfied the court that the Property was property of the estate. Later in the day on October 29, 2008, the trustee and Brian Federico filed a stipulation to continue the motion to November 14, 2007 at 9:30 a.m. (Dkt. 107).

At the first hearing on the motion on October 30, 2007, counsel for both Brian Federico and the trustee appeared. The trustee's attorney stated on the record that she believed that she could clarify a number of the issues raised by the court. Also appearing at the hearing in pro per was Rosalio Arcos, owner of the storage yard on which the Property was located. Mr. Arcos stated that he had rented the storage yard out to the debtor. Mr. Arcos complained that his attempts to take possession of the storage yard back from the debtor had been going on for a number of years and had most recently been frustrated by the debtor's bankruptcy filing. Mr. Arcos expressed his desire to take possession of his real property so that he could find new tenants to whom he could lease the real property. At the conclusion of the hearing the court ordered the motion continued to November 14, 2007, with supplemental evidence supporting the motion to be filed no later than November 7, 2007.

On November 7, 2007, the trustee filed supplemental papers supporting the motion. (Dkt. 125-133). Included in the supplemental papers were 106 pages of vehicle registration inquiry reports related to the vehicles that the trustee proposed to sell. (Dkt. 130, 131). Brian Federico did not file any further supplemental papers or evidence. On November 14, 2007 the matter came on for a final hearing. The trustee and Brian Federico appeared at the hearing. After the hearing, the court issued a disposition after oral argument granting the motion and permitting the trustee to sell the Property, with the exception of three vehicles that the trustee had determined did not belong to the debtor. The court allowed the trustee to sell the Property free and clear of the interest, if any, of Brian Federico in the Property under 11 U.S.C. § 363(f)(4), with his interest to attach to the proceeds of the sale. The court based its finding that Brian Federico's claim was in bona fide dispute on his assertion that he claimed to have certificates of ownership for most of the vehicles without submitting any evidence of the alleged certificates of ownership. The court's ruling also noted that the trustee's title search had not shown Brian Federico to be the registered owner of any of the vehicles, but that he appeared as the legal owner, or lien holder, on one of the vehicles. (Dkt. 146 at 2). The court did not waive the ten-day stay of Federal Rule of Bankruptcy Procedure 6004(g).

The court's order approving the sale motion was entered on November 26, 2007. It was not appealed and became final on December 6, 2007. The court's record on this motion indicates that a sale of some or all of the Property occurred on or around January 19, 2008, forty-four (44) days later. Over three months later creditors sought to challenge the propriety of the Sale Order in opposition to the trustee's motions for

compensation for the trustee, his attorney, and the auctioneer who conducted the sale, arguing that it was inappropriate to award compensation where the Sale Order was erroneous. Creditors filed the instant motion on June 30, 2008, seeking a determination that the Sale Order is void.

The issue now before the court is whether the Sale Order is void, i.e., whether the circumstances described above constitute a denial of Creditors' due process rights. The issue of whether the Sale Order is erroneous is not before the court, and the court will not revisit the merits of Creditors' claims to ownership of the Property at this time. Thus, the arguments made by Creditors relating to allegations that the chapter 7 trustee ignored repeated requests by Creditors to halt the sale, that the trustee ignored Creditors' assertions that most of the personal property belonged to persons other than the debtor or the estate, or that the court erred in determining that the personal property could be sold free and clear of the interest, if any, of Brian Federico without first making a threshold determination that the personal property was property of the estate fail because they are essentially arguments that the Sale Order is erroneous. That is not a valid basis for vacating the Sale Order as void. Such arguments, if successful, might constitute grounds for reversing the Sale Order on appeal, but Creditors did not appeal the Sale Order and the opportunity to do so has expired.

Creditors do not dispute that the court had subject matter jurisdiction over the trustee's motion to sell estate property. Creditors also do not dispute that they received notice of the trustee's motion or that they had an opportunity to oppose the motion. Creditors argue that notwithstanding their participation in the proceedings on the trustee's motion, they were not afforded due process of law because the trustee did not commence an adversary proceeding to determine the extent and nature of the estate's and Creditors' respective interests in the Property, and the court granted the trustee's motion in the absence of such an adversary proceeding.

Determining whether Creditors were afforded due process is not solely a matter of determining whether the type of ownership dispute that has arisen here is one that is described in Federal Rule of Bankruptcy Procedure 7001. As a general rule, a motion procedure cannot be used to circumvent the requirement of an adversary proceeding. In re Loloe, 241 B.R. 655, 660 (9th Cir. BAP 1999). "Merely erroneous procedure and notice, however, will not suffice for Rule 60(b)(4) relief unless the circumstances cross over the line from mere error to error that violates the due process clause of the Fifth Amendment Thus, while [an] order may have been vulnerable to reversal for a variety of reasons, voidness requires a greater degree of error." Loloe, 241 B.R. at 660 (citing Owens-Corning Fiberglass, Inc. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985); Citicorp Mortgage Inc. V. Brooks (In re Ex-Cel Concrete Co.), 178 B.R. 198, 203 (9th Cir. BAP 1995)).

The United States Supreme Court has held that the due process clause of the Fifth Amendment is satisfied as follows:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).

The court concedes that the procedure that is regularly prescribed is one of the "circumstances" to be taken into account under the Mullane "all of the circumstances" test. Mullane, 339 U.S. at 314. But it is only one circumstance. Here, the court finds that other circumstances were present that justified the resolution of the sale motion as a contested matter under Bankruptcy Rule 9014 rather than after an adversary proceeding under Bankruptcy Rule 7001.

First, the notice of hearing served on Brian Federico adequately apprised him of the relief sought by the trustee. Mr. Federico was allowed to present written opposition, and did so timely. The hearing on the matter was also continued an additional two weeks to allow for the filing of supplemental evidence, allowing for a period of time for Mr. Federico to prepare for the final hearing on the matter that was longer than the minimum twenty-eight days required by LBR 9014-1(f)(1). In connection with the continuance, both Mr. Federico and the trustee had been apprised of the court's specific concern that the property to be sold by the trustee be property of the bankruptcy estate.

Second, contrary to Creditors' assertions, Mr. Federico failed to come forward with sufficient evidence supporting his claim to ownership of the Property that would persuade the court that an adversary proceeding was necessary to resolve the claim. Mr. Federico filed a declaration that contained the somewhat vague and self-serving statements that he owned "most of" the Property and that he had certificates of title for "most of the vehicles" and that "many of" the certificates showed him as the registered owner. Equally vague were his assertions that "some of the items" belonged to unidentified third persons other than the debtor or Mr. Federico and that the debtor did not own "any of" the Personal Property. Mr. Federico made no attempt, even after the continuance of the motion pursuant to his stipulation with the trustee, to provide any corroborating evidence for these assertions, such as copies of the certificates of title themselves, supporting declarations from the unidentified third persons or the debtor, or any other evidence that would identify the property of which he asserted ownership. Mr. Federico also did not give any indication in his supporting declaration, as he does now in connection with the instant motion, that he did not have access to the certificates of title or other information. The fact that he may have informed the trustee that he needed access to the information did not suffice to relay that information to the court.

In addition to the foregoing considerations, the court was confronted with the circumstances of the sale itself. The Property was personal property that was declining in value. It was located on a storage yard and was accruing potential carrying costs from a landlord who was seeking and had sought for a number of years to regain possession of the storage lot.

Although the due process issue described above is the sole issue relevant to the voidness of the Sale Order in this case, the court will address some of the other authorities cited by Creditors in their memorandum of

points and authorities.

Creditors rely on In re Colortran, Inc., 218 B.R. 507, 510-11 (9th Cir. BAP 1997). In Colortran, the debtor filed a motion for approval of a compromise whereby the debtor would pay a past-due bill and a creditor would release a shipment of equipment to the debtor, which shipment the creditor was holding and on which it asserted a lien. The debtor's motion was unopposed, and the creditor did not appear at the hearing on the motion. The bankruptcy court sua sponte denied approval of the compromise, invalidated the creditor's lien, ordered the creditor to turn over the equipment and ordered the debtor to file a motion seeking sanctions against the creditor for violation of the automatic stay. 218 B.R. at 509. On appeal from the order denying the approval of the compromise, the Ninth Circuit Bankruptcy Appellate held that the order determining that the creditor had no lien was void:

Since the motion to compromise was uncontested, [creditor] was not prepared to appear at the hearing on the motion to compromise. [Creditor] did not receive adequate notice that the validity of its lien would be adjudicated nor opportunity to prepare a proper defense of the validity of its lien. The bankruptcy court should not have invalidated the asserted lien without giving [creditor] an opportunity to present a complete argument as to its validity. Furthermore, the bankruptcy court did not follow the procedures necessary to invalidate a lien. No adversary proceeding occurred as required by Rule 7001. Consequently, the bankruptcy court's conclusion invalidating [creditor's] lien is void.

Colortran, 218 B.R. at 511. Creditors argue that where Brian Federico had previously asserted a claim of ownership of the personal property in opposition to the trustee's motion, the court's failure to require an adversary proceeding to resolve the ownership dispute rendered the Sale Order void under Colortran.

The argument is not persuasive. Colortran involved a bankruptcy court's determination that a creditor did not have a valid lien in certain property. The court did not void any lien held by Creditors in this case. The court merely determined that the personal property could be sold free and clear of the interest, if any, of Brian Federico, the only creditor who opposed the trustee's motion. Brian Federico's interest attached to the proceeds of the sale, which proceeds the trustee presently holds pending an agreement on or a determination of the disputed ownership interests. The Ninth Circuit Bankruptcy Appellate Panel has also distinguished a determination that property to be sold is property of the estate in the context of a motion to sell under 11 U.S.C. § 363 from a determination that a lien is invalid. "[W]e have held that the determination of the validity of a lien without an adversary proceeding is 'void.'" In re Colortran, Inc., 218 B.R. 507, 510-11 (9th Cir. BAP 1997). . . . [W]e left open the question of whether property of the estate could be determined in a contested matter in In re Popp, 323 B.R. 260, 269 n.14 (9th Cir. BAP 2005) (§ 363 sale)." Cogliano, 355 B.R. 792, 805 (9th Cir. BAP 2006) (emphasis added).

Furthermore, the authorities cited by Creditors for the proposition that the court must make a threshold determination that the personal property was property of the estate before authorizing the sale are distinguishable from this case. Creditors cite the Ninth Circuit Bankruptcy Appellate Panel decisions in Moldo v. Clark (In re Clark), 266

BR 163 (9th Cir. BAP 2001) and In re Popp, 323 B.R. 260 (9th Cir. BAP 2005).

In Clark, the trustee sought to sell real property that the debtor had claimed as exempt under a California exemption statute permitting exemption of retirement plans. The trustee had not objected to the claim of exemption, but sought to sell the real property free and clear of the debtor's claim of exemption after he found that title to the property was held by a trust, of which the debtor was the trustee. The trustee argued that as trustee of the bankruptcy estate he was also trustee of the debtor's trust, an estate asset, and therefore could sell the property for the benefit of the estate and creditors. The trustee sought to sell the property under 11 U.S.C. § 363(f), free and clear of the debtor's claim of exemption. The bankruptcy court denied the trustee's motion to sell because he had failed to object to the debtor's claim of exemption. The Bankruptcy Appellate Panel reversed the decision of the bankruptcy court, holding that what it found to be an "ambiguous" claim of exemption did not entitle the debtor to an automatic exemption of the real property in the absence of objections. The Bankruptcy Appellate Panel further noted that even though it was reversing the bankruptcy court's decision, it disagreed with the trustee's argument that § 363(f) permitted the trustee to sell the real property free and clear of a claim of exemption. The BAP pointed out that the trustee had cited no authority for that proposition, and that § 363(f) only authorized sale of "property of the estate" as that term was defined under 11 U.S.C. § 541. Because § 522 permitted the debtor to exempt property from "property of the estate," a threshold determination as whether the real property was property of the estate was required.

In Popp, the trustee sought to sell real property that he alleged was property of the estate, although title in the real property was held by a partnership in which the debtor was not a named partner. The trustee alleged that the partnership was an alter ego of the debtor and filed an adversary proceeding seeking a determination of that fact. Before a determination could be made in the adversary proceeding however, the bankruptcy court authorized the trustee to sell the property, finding that the estate had "some interest" in the property. Popp, 323 B.R. at 264. The Bankruptcy Appellate Panel reversed the order authorizing the sale primarily because the bankruptcy court had acted inconsistently by making a finding as to a substantive issue - the nature of the estate's interest in the real property - in connection with the sale motion, and did nothing with respect to the same issue in the parallel and pending adversary proceeding. Popp, 323 B.R. at 269-70.

Clark and Popp are distinguishable from the instant case. Importantly, as was the case in Colortran, the opinions in Clark and Popp arose out of appeals of the bankruptcy court orders that authorized the sales of property. Here, the sale order was not appealed. It is final. In addition the issue of inconsistency in the bankruptcy court's orders in Popp is not present here. Both Clark and Popp also involved far more colorable claims to ownership than the instant case. As described above in this ruling in more detail, Brian Federico's claim to ownership of the Property was supported by only vague and self-serving statements, and was unsupported by corroborating evidence. The Clark and Popp courts were also not confronted with the prospect of continuing a sale of property that was declining in value and accruing carrying costs while vague and ambiguous claims of ownership were resolved through adversary litigation. To the extent that Creditors rely on In re Blum, 202 F. 833 (7th Cir.

1913), the court notes that Blum was decided under the Bankruptcy Act of 1898 and was decided by an out-of-circuit court. To the extent that Blum can be read to stand for the proposition that any sale of property must stop to await the resolution of an adversary proceeding based on any vague, ambiguous, and uncorroborated claim of ownership, the court does not find it persuasive.

Therefore, based on the foregoing, the motion to set aside the Sale Order as void is denied.

The court will issue a minute order.

78. [08-22563](#)-B-7 CHRISTOHPER/SHERRI DOYLE HEARING - MOTION TO REOPEN CASE FOR LIMITED PURPOSE AND FOR ORDER VACATING DISCHARGE AS TO MOVANT ONLY AND EXTENDING TIME TO FILE COMPLAINT FOR NON-DISCHARGEABILITY
DIS. 6-10-08; CLOSED 6-13-08 7-24-08 [[29](#)]

Tentative Ruling: Neither the respondent within the time for opposition nor the movant within the time for reply has filed a separate statement identifying each disputed material factual issue relating to the motion. Accordingly, both movant and respondent have consented to the resolution of the motion and all disputed material factual issues pursuant to FRCivP 43(e). LBR 9014-1(f)(1)(ii) and (iii).

The motion is denied.

The movant's request to reopen the case is denied. Pursuant to LBR 5010-1, a motion to reopen a case shall contain a statement of the grounds for reopening the case, but shall not contain a request for any other relief. Here, the movant also requests that the court revoke the debtors' discharge as to movant and to extend the deadline for filing a complaint seeking a determination of nondischargeability under 11 U.S.C. § 523(c).

The movant's request for an "order vacating the discharge as to Movant only" (Dkt. 29 at 3) is also denied. Both revocation of the debtors' discharge and a determination that a debt is nondischargeable require the filing of an adversary proceeding. See Fed. R. Bankr. P. 7001(4) and (6).

The movant's request for an order enlarging the time for movant to file a nondischargeability complaint is denied. Pursuant to Interim Bankruptcy Rule 4007(c), the time for filing a complaint under § 523(c) in a chapter 7 liquidation case may be extended for cause and after notice and a hearing, but the motion "shall be filed before the time has expired." Fed. R. Bankr. P. 4007(c). Here, the movant filed the instant motion on July 24, 2008, eighteen (18) days after the time expired. Rule 4007(c) does not contain any "excusable neglect" exception for late-filed motions seeking an extension. If the movant relies on Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380 (1993), that reliance is misplaced. Pioneer dealt with the extension of a Chapter 11 claim filing deadline under Fed. R. Bankr. P. 9006(b)(1), which does contain a provision allowing the court to grant a post-expiration request for an

enlargement of time upon a showing of excusable neglect. Fed. R. Bankr. P. 9006(b)(3), entitled "enlargement limited," specifically states that "the court may enlarge the time for taking action under Rules ... 4007(c)...only to the extent and under the conditions stated in those rules." Thus, no enlargement of the time for filing a complaint under 11 U.S.C. § 523(c) may be granted unless the request for enlargement is made before the expiration of the initial period for filing such complaints, and Fed. R. Bankr. P. 9006(b)(1) is of no help to the movant.

Even if the excusable neglect standard were applicable, the movant has not established excusable neglect based only on movant's assertions that its counsel failed to properly calendar the deadline for the filing of a complaint and that no party will be prejudiced by an extension. Determination of whether neglect is excusable takes into account all relevant circumstances surrounding a party's omission, including danger of prejudice to the debtor, length of delay and its potential impact on judicial proceedings, whether the movant acted in good faith, and the reason for the delay including whether it was within the reasonable control of the movant. See Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380 (1993). Movant has not addressed any of the foregoing factors.

The court will issue a minute order.

79. 08-28915-B-7 EUGENE CHAVEZ HEARING - MOTION FOR
ND #1 RELIEF FROM AUTOMATIC STAY
SAXON MORTGAGE SERVICES, ON REAL PROPERTY
INC., VS. 8-13-08 [14]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtor has filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. As to the debtor and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 15150 Torrey Pines Circle, Chowchilla, California 93610 (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The court awards no fees and costs. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$295,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$336,279.18. There is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtor has failed to make nine (9) mortgage payments. The debtor has filed a statement of intent to surrender the Property. The lack of opposition and filing of a report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

Counsel for the movant shall submit an order consistent with the foregoing ruling.

80. [08-29515](#)-B-7 RAND/PAMELA UBRY HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
AMERICAN HOME MORTGAGE 8-13-08 [[10](#)]
SERVICING, INC., VS.

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. As to the debtors and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 2080 South Bar V Road, Auburn, California 95603 (APN 031-080-097) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$600,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$685,367.74. Even without considering the junior liens of \$63,000.00 and \$32,000.00, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make eight (8) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition and filing of a report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

The court will issue a minute order.

81. [08-22426](#)-B-7 JAMES/ANGULA TOLLEY HEARING - MOTION TO
DKC #1 APPROVE ADMINISTRATIVE RENT
CLAIM AND REQUIRE PAYMENT
8-14-08 [[36](#)]

DISCHARGED 6-17-08

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

On August 29, 2008 the movants and the chapter 7 trustee filed a stipulation resolving the movants' request for allowance of an administrative rent claim in this case. This matter is therefore removed from this calendar as resolved by stipulation.

82. [08-27632](#)-B-7 KRIS KRAUSE HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-14-08 [[18](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the debtor paid the delinquent filing fee installment on August 22, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

83. [08-28634](#)-B-7 JACK/KAREN KING HEARING - MOTION
SMR #1 TO COMPEL ABANDONMENT
8-11-08 [[12](#)]

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter. The motion is continued to September 16, 2008 at 9:30 a.m. The debtors did not file a proof of service with the motion. As this is a motion in which the debtors seek relief against the chapter 7 trustee, the debtor must serve him with the motion. Pursuant to Section 1.1 of the Region 17 United States Trustee Guidelines, the debtors must also serve the motion on the United States trustee. As the debtors failed to file a proof of service, there is no presumption of service on either of the foregoing parties.

On or before September 9, 2008, the date of this hearing, the debtors shall serve on the chapter 7 trustee and the United States trustee the motion, its supporting papers, and notice of the continued hearing. The debtors shall also file the notice of continued hearing with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the debtors fail to do any of the foregoing the motion will be denied without prejudice.

The court will issue a minute order.

84. [08-27435](#)-B-7 TIMOTHY MCKENZIE HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-14-08 [[16](#)]

Tentative Ruling: None.

85. [08-30837](#)-B-7 RICHARD/AMANDA PRATT HEARING - MOTION FOR
PJR #1 RELIEF FROM AUTOMATIC STAY
TRI COUNTRIES BANK, VS. 8-19-08 [[7](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

86. [07-30041](#)-B-7 RANDALL/CINDY CHAMBERS HEARING - MOTION FOR
MBJ #1 RELIEF FROM AUTOMATIC STAY
MEMBERS 1ST CREDIT UNION, VS. 8-14-08 [[147](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

87. [07-30041](#)-B-7 RANDALL/CINDY CHAMBERS HEARING - MOTION FOR
MBJ #1 RELIEF FROM AUTOMATIC STAY
MEMBERS 1ST CREDIT UNION, VS. 8-14-08 [[152](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

88. [07-30041](#)-B-7 RANDALL/CINDY CHAMBERS HEARING - MOTION FOR
LAZ #1 RELIEF FROM AUTOMATIC STAY
U.S. BANK, VS. 8-15-08 [[157](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

89. [08-28042](#)-B-7 STEVEN CUTRUFELLI HEARING - MOTION FOR
LDH #1 RELIEF FROM AUTOMATIC STAY
FEDERAL NATIONAL MORTGAGE ASSOCIATION, VS. 8-11-08 [[20](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

90. [08-25247](#)-B-7 GERARD WHITE HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-11-08 [[22](#)]

Disposition Without Oral Argument: The order to show cause is discharged because the debtor paid the delinquent filing fee installment on August 26, 2008. No monetary sanctions are imposed.

The court will issue a minute order.

91. [08-27649](#)-B-7 FREDRICK/GUDRUN CHRISTIAN HEARING - MOTION FOR
ND #1 RELIEF FROM AUTOMATIC STAY
SAXON MORTGAGE SERVICES, INC., VS. ON REAL PROPERTY
8-11-08 [[16](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

92. [08-24850](#)-B-7 ANA AGUILERA HEARING - MOTION TO
MEA #2 RECONSIDER ORDER DENYING
COUNTRYWIDE HOME LOANS, INC., VS. MOTION FOR RELIEF FROM
AUTOMATIC STAY AND REQUEST
TO VACATE ORDER
8-18-08 [[31](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

93. [08-28461](#)-B-7 MILDRED JONES HEARING - MOTION FOR
MBJ #1 RELIEF FROM AUTOMATIC STAY
SIERRA CENTRAL CREDIT 8-18-08 [[15](#)]
UNION, VS.

Tentative Ruling: The motion is denied as moot. The automatic stay terminated with respect to the collateral, a 2006 Mitsubishi Endeavor (the "Vehicle"), at 12:01 a.m. on July 26, 2008, by operation of 11 U.S.C. § 362(h), and the Vehicle has from that date no longer been property of the estate.

The movant has filed a motion seeking relief from the automatic stay as to the Vehicle. The debtor did not file a statement of intention with respect to the Vehicle within the time allowed by law. The debtor had

until July 25, 2008, 30 days after the filing of the petition commencing the case, to file a statement of intention that addressed the Vehicle. Because she did not timely file such a statement of intention, and because the Vehicle is personal property, the automatic stay terminated at 12:01 a.m. on July 26, 2008, by operation of 11 U.S.C. § 362(h), and the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.

94. 08-21665-B-11 PAUL/LESLIE PLATNER HEARING - MOTION FOR
SMR #1 RELIEF FROM AUTOMATIC STAY
FREEDOM FINANCIAL 8-12-08 [[55](#)]
FUNDING, INC., VS.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter. The motion is continued to September 16, 2008 at 9:30 a.m. The movant did not file a proof of service with the motion. There is therefore no presumption of service on any party in interest. At a minimum, this motion must be served on the debtors and the United States trustee. The movant also did not file a relief from stay information sheet with the motion, as required by LBR 4001-1(c).

On or before September 9, 2008, the date of this hearing, the movant shall serve on the debtors and the United States trustee the motion, its supporting papers, a completed relief from stay information sheet and notice of the continued hearing. The movant shall also file the notice of continued hearing and relief from stay information sheet with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the movant fails to do any of the foregoing the motion will be denied without prejudice.

The movant's use of the procedure under LBR 9014-1(f)(2) in setting this matter for hearing constitutes a waiver of the time limitations contained in 11 U.S.C. § 362(e). LBR 9014-1(f)(2)(ii).

The court will issue a minute order.

95. 08-21665-B-11 PAUL/LESLIE PLATNER HEARING - MOTION FOR
SMR #2 RELIEF FROM AUTOMATIC STAY
FREEDOM FINANCIAL 8-12-08 [[58](#)]
FUNDING, INC., VS.

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter. The motion is continued to September 16, 2008 at 9:30 a.m. The movant did not file a proof of service with the motion. There is therefore no presumption of service on any party in interest. At a minimum, this motion must be served on the debtors and the United States trustee. The movant also did not file a relief from stay information sheet with the motion, as required by LBR 4001-1(c).

On or before September 9, 2008, the date of this hearing, the movant shall serve on the debtors and the United States trustee the motion, its supporting papers, a completed relief from stay information sheet and notice of the continued hearing. The movant shall also file the notice of continued hearing and relief from stay information sheet with the court. Proof of service shall be filed within three court days thereafter. LBR 9014-1(e)(2). If the movant fails to do any of the foregoing the motion will be denied without prejudice.

The movant's use of the procedure under LBR 9014-1(f)(2) in setting this matter for hearing constitutes a waiver of the time limitations contained in 11 U.S.C. § 362(e). LBR 9014-1(f)(2)(ii).

The court will issue a minute order.

96. [08-28166](#)-B-7 PROMOJA/ALICIA EARL HEARING - MOTION FOR
ND #1 RELIEF FROM AUTOMATIC STAY
SAXON MORTGAGE SERVICES, ON REAL PROPERTY
INC., ET AL., VS. 8-18-08 [[18](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

97. [08-28766](#)-B-7 MELQUIADES/LOIDA BALLESTEROS HEARING - MOTION FOR
ND #1 RELIEF FROM AUTOMATIC STAY
SAXON MORTGAGE ON REAL PROPERTY
SERVICES, INC., VS. 8-20-08 [[13](#)]

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part. As to the debtors and the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 8954 Generations Court, Elk Grove, California 95768 (APN 116-1190-053) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. No fees or costs are awarded. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

Movant alleges without dispute that the Property has a value of \$244,000.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$318,962.22. Even without considering the junior lien of \$76,515 and the senior tax lien of \$1,262.48, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this

Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make five (5) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition and filing of a report of no distribution by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay.

Because movant has not established that the value of the Property exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

The court will issue a minute order.

98. [08-24769](#)-B-7 CAROL MARLING HEARING - MOTION TO
FF #1 COMPEL TRUSTEE TO ABANDON
PROPERTY OF THE BANKRUPTCY
ESTATE
8-12-08 [[21](#)]
- DISCHARGED 7-22-08

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

99. [08-25169](#)-B-7 ALEJANDRO/NANCY RODRIGUEZ HEARING - MOTION FOR
TJS #1 RELIEF FROM AUTOMATIC STAY
JP MORGAN CHASE BANK, N.A., VS. 8-6-08 [[43](#)]
- DISCHARGED 8-12-08

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

100. [06-24971](#)-B-7 BRUCE SEYMOUR HEARING - MOTION FOR
HSM #12 APPROVAL OF SALE OF REAL
PROPERTY
8-11-08 [[397](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

101. [08-28077](#)-B-7 NICHOLAS/MELINDA GUERRERO HEARING - MOTION FOR
KAT #1 RELIEF FROM AUTOMATIC STAY
MORTGAGE ELECTRONIC REGISTRATION 8-18-08 [[15](#)]
SYSTEMS, INC., VS.

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

102. [08-28079](#)-B-7 GERALD/DONNA STARCHER HEARING - MOTION FOR
WGM #1 RELIEF FROM AUTOMATIC STAY
HSBC MORTGAGE SERVICES, VS. ON REAL PROPERTY
8-14-08 [[15](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

103. [08-30082](#)-B-7 DANIEL PEARSON HEARING - MOTION FOR
WGM #1 RELIEF FROM AUTOMATIC STAY
WASHINGTON MUTUAL BANK, VS. ON REAL PROPERTY
8-11-08 [[16](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

104. [08-22884](#)-B-7 RICHARD/ROBERTA WEST HEARING - MOTION FOR
BSN #1 RELIEF FROM AUTOMATIC STAY
BANK OF AMERICA, N.A., VS. 8-15-08 [[33](#)]

DISCHARGED 7-15-08

Tentative Ruling: This is a properly filed motion for relief from the automatic stay under LBR 4001-1 and LBR 9014-1(f)(2). Opposition may be presented at the hearing. Because the debtors have filed a statement of intent to surrender the Property, the court issues the following tentative ruling.

The motion is granted in part and denied in part. As to the debtors, the motion is denied as moot. As to the estate, the automatic stay is modified pursuant to 11 U.S.C. § 362 (d)(1) and (d)(2) in order to permit movant to foreclose on the real property located at 6897 Scotview Lane,

Anderson, California 96007 (APN 057-380-035-000) (the "Property") and to obtain possession of the Property following the sale, all in accordance with applicable non-bankruptcy law. The 10-day stay of Fed.R.Bankr.P. 4001(a)(3) is waived. Except as so ordered, the motion is denied.

The debtors received their discharge and were discharged from all dischargeable debts on July 15, 2008. The automatic stay ended as to them on that date. 11 U.S.C. § 362(c)(2)(C).

Movant alleges without dispute that the Property has a value of \$457,500.00 and is encumbered by a perfected deed of trust or mortgage in favor of movant. That security interest secures a claim of \$112,033.77. Considering the senior lien of \$425,393.92, there is no equity in the Property, and the Property is not necessary to an effective reorganization or rehabilitation in this Chapter 7 case. Movant also alleges without dispute that the debtors have failed to make thirteen (13) mortgage payments. The debtors have filed a statement of intent to surrender the Property. The lack of opposition by the trustee shows that the trustee cannot administer the Property for the benefit of creditors. These facts constitute cause for relief from the automatic stay as to the estate.

The court will issue a minute order.

105. [08-27086](#)-B-7 RICHARD WISCHHUSEN HEARING - MOTION FOR
WGM #1 RELIEF FROM AUTOMATIC STAY
WASHINGTON MUTUAL BANK, VS. ON REAL PROPERTY
8-13-08 [[20](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

106. [08-28986](#)-B-7 JOHN HERBERT HEARING - MOTION FOR
PD #1 RELIEF FROM AUTOMATIC STAY
HOME LOAN SERVICES, INC., VS. 8-11-08 [[18](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. Therefore, the court issues no tentative ruling on the merits of the motion.

107. [08-28986](#)-B-7 JOHN HERBERT HEARING - MOTION FOR
PD #1 RELIEF FROM AUTOMATIC STAY
HOME LOAN SERVICES, INC., VS. 8-18-08 [[26](#)]

DUPLICATE FILING

Disposition Without Oral Argument: Oral argument will not aid the court in rendering a decision on this matter.

This motion is identical to the motion for relief from the automatic stay filed by the movant at Dkt. 18. The court will address the relief requested by the movant in connection with that motion, which is calendared elsewhere on this calendar. This matter is dropped from the calendar.

108. [08-29090](#)-B-7 MARIEO DAVIS

HEARING - ORDER
TO SHOW CAUSE RE DISMISSAL
OF CASE OR IMPOSITION OF
SANCTIONS
8-11-08 [[14](#)]

Disposition Without Oral Argument: The order to show cause is discharged as moot. By order entered August 22, 2008, this case was dismissed. No monetary sanctions are imposed.

The court will issue a minute order.

109. [07-28994](#)-B-7 DONN/KATHLEEN GILBERT
RSL #1
BANK OF AMERICA, N.A., VS.

HEARING - MOTION FOR
RELIEF FROM AUTOMATIC STAY
ON REAL PROPERTY
8-18-08 [[46](#)]

Tentative Ruling: This is a properly filed motion under LBR 9014-1(f)(2). Opposition may be presented at the hearing. However, in this instance, the court issues the following tentative ruling.

The motion is denied as moot.

Through the motion, movant seeks relief from the automatic stay in connection with a 2004 Ford Flair 33R Motorhome (VIN 1FCNF53S130A07252) (the "Vehicle"). The motion is denied as moot because the debtors' statement of intention provides that will reaffirm the debt secured by the Vehicle. Pursuant to 11 U.S.C. § 521(a)(2)(B), debtors had until January 2, 2008 to perform the stated intention. There is no evidence that they did so. Thus, as the Vehicle is personal property, the automatic stay terminated at 12:01 a.m. on January 3, 2008 by operation of 11 U.S.C. § 362(h)(1), and the Vehicle has from that date no longer been property of the estate. The movant already has the relief it seeks by this motion.

The court will issue a minute order.