UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Thursday, March 2, 2017
Place: Department B – Courtroom #13
Fresno, California
INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. The following rulings are tentative. The tentative ruling will not become the final ruling until the matter is called at the scheduled hearing. **Pre-disposed matters will generally be called, and the rulings placed on the record at the end of the calendar.** Any party who desires to be heard with regard to a pre-disposed matter may appear at the hearing. If the party wishes to contest the tentative ruling, he/she shall notify the opposing party/counsel of his/her intention to appear. **If no disposition is set forth below, the hearing will take place as scheduled.**

2. Submission of Orders:

   Unless the tentative ruling expressly states that the court will prepare an order, then the tentative ruling will only appear in the minutes. If any party desires an order, then the appropriate form of order, which conforms to the tentative ruling, must be submitted to the court. When the debtor(s) discharge has been entered, proposed orders for relief from stay must reflect that the motion is denied as to the debtor(s) and granted only as to the trustee. Entry of discharge normally is indicated on the calendar.

3. Matters Resolved Without Opposition:

   If the tentative ruling states that no opposition was filed, and the moving party is aware of any reason, such as a settlement, why a response may not have been filed, the moving party must advise Vicky McKinney, the Calendar Clerk, at (559) 499-5825 by 4:00 p.m. the day before the scheduled hearing.

4. Matters Resolved by Stipulation:

   If the parties resolve a matter by stipulation after the tentative ruling has been posted, but **before the formal order is entered on the docket**, the **moving party** may appear at the hearing and advise the court of the settlement or withdraw the motion. Alternatively, the parties may submit a stipulation and order to modify the tentative ruling together with the proposed order resolving the matter.

5. Resubmittal of Denied Matters:

   If the moving party decides to re-file a matter that is denied without prejudice for any reason set forth below, the moving party must file and serve a new set of pleadings with a new docket control number. It may not simply re-notice the original motion.

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

9:30 A.M.

1.	16-13345-B-11 JONATHAN/PATRICIA MAYER FW-12 JONATHAN MAYER/MV PETER FEAR/Atty. for dbt.	MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH AFFILIATED PHYSICIAN PRACTICE, INC. 2-2-17 [91]

The hearing will proceed as scheduled.

Tentative Ruling: The motion will be GRANTED. Movant shall prepare the order.

The debtor in possession ("Debtor" or "Dr. Mayer") asks the court to approve a settlement agreement between Dr. Mayer and his current employer, Affiliated Physician Practice, Inc. ("APP"). Under the settlement, APP will enter into a new employment agreement with Dr. Mayer. The gross compensation under the employment agreement will be reduced by approximately $1,476.80 per period. The new salary also reflects a reduction of salary under Dr. Mayer's previous employment agreement of $1,574. In return, APP will return all Dr. Mayer's loan payments received within 90 days of the date of the filing of the bankruptcy and any payments received since the bankruptcy was filed. The loans were extended by APP prior to and contemporaneously with Dr. Mayer entering into his initial employment agreement on or about December 1, 2015. After the settlement is approved, APP will not require the repayment of any loans that it extended to Dr. Mayer. This results in payments to the estate of approximately $30,000. The new employment contract will terminate when Dr. Mayer's initial contract was scheduled to terminate, November 30, 2017.

No creditor has filed an opposition to the settlement, however the United States Trustee ("UST") objects to the settlement. UST contends that the salary reduction which Dr. Mayer agreed to is equivalent to proposed loan payments under the old employment agreement essentially "charging" Dr. Mayer for the payments APP has agreed to return to the estate. UST argues that the motion provides "no clear and detailed explanation" for the reduction in salary and the approval of the settlement will result in a "windfall" to general unsecured creditors since the court rejected the Debtor's previous motion to approve the assumption of the executory contract on January 12, 2017. (Doc. No. 84.) UST urges APP to not reduce any wages payable to Dr. Mayer and return to the estate all postpetition payments received.

Federal Rule of Bankruptcy Procedure 9019(a) provides that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." FRBP 9019(a). "The bankruptcy court has great latitude in approving compromises and settlements." *Woodson v. Fireman's Fund Insurance (In re Woodson)*, 839 F.2d 610, 620 (9th Cir., 1988). Nevertheless, the court may only approve a compromise if it is satisfied that the terms are "fair, reasonable and equitable." *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1381 (9th Cir., 1986). The trustee [or in this case, a debtor in possession] has the burden of demonstrating the settlement is fair, reasonable and equitable. *Id.* The court must consider: (a) a probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collections; (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. "When assessing a compromise, courts need not rule upon disputed facts and questions of law, but only canvass the issues." If the court is required to do more than canvass the issues, there would be no point in compromising; the parties might as well go ahead and try the case." *Suter v. Goedert*, 396 B.R. 535, 548 (D. Nevada, 2008) (citations omitted).

<u>Probability of Success in Litigation.</u> There are two potential claims the estate may have against APP. First, payments on the unsecured loans within 90 days of the bankruptcy case may be preferential under 11 U.S.C. § 547. Second, postpetition payments on prepetition loans are unauthorized transactions under 11 U.S.C. § 549 and are recoverable by the bankruptcy estate. 11 U.S.C. § 550. The Debtor claims it is likely the estate would prevail in litigation against APP for recovery of the transfers. (Doc. No. 91) The court agrees. The Debtor contends, however, that the compromise places the estate in the same position as if litigation was pursued. That is, the estate would obtain a judgment in the sum of approximately $30,000. Further, the practical result of that litigation for Dr. Mayer would be the termination of his employment contract.

UST admits that the estate's case against APP is a "simple case of avoidable transfer." (Doc. No. 105.) UST contends, however, that there is no real "controversy," or, if one exists, it has been exacerbated by the Debtor's failure to deal with this issue promptly. That argument goes to the extent of the estate's alleged loss, not to the probability the estate would succeed in litigation.

Nevertheless, there is some risk in this case. APP could argue that the payments were part of the ordinary course of business in defense of the preference case. While the argument may not be the strongest, it would nevertheless affect the "value" of the litigation. This factor favors settlement.

Collection Difficulty. **There is no evidence that APP is judgment proof. No evidence has been presented either supporting or opposing this factor. Accordingly, this factor is neutral.**

Complexity, Expense, Inconvenience and Delay. **The Debtor contends, and UST impliedly concedes, that the litigation is not complex. However, that is not the only element of this factor. Expense and delay both favor settlement. Under the proposed compromise, further expense by the estate to pursue a lawsuit against APP is avoided. Delay is also avoided. While the proposed settlement does involve payment by APP over a period time, the payments for the unauthorized transactions will be completed before the end of 2017. In addition, the settlement agreement does provide that no further deductions of Dr. Mayer's salary will be made to repay loans. Thus, no further loss to the estate will occur. In any event, given the time necessary to prepare for and schedule a trial, it is unlikely that trial of this matter would occur much before November 2017. This factor militates in favor of settlement.**

Interest of Creditors and Deference to Their Views. **No creditor has objected to this motion. UST, as a party in interest, has objected and primarily rests the objection on this factor.**

The primary premise of UST's objection is that the reduction of Dr. Mayer's salary under the new employment agreement (which is part of the settlement) places APP in a preferential position compared to other unsecured creditors because APP, UST argues, is still collecting its ongoing loan payments and repaying the avoidable pre- and postpetition transfers by "reducing" Dr. Mayer's salary. This assumes that Dr. Mayer's former employment agreement could be assumed.

The court has already ruled (see doc. no. 84) that the contract could not be assumed without APP's consent under Ninth Circuit authority. That left the Debtor with four options. First, allowing the contract to "ride through" until plan confirmation. 11 U.S.C. § 365(d)(2). This option would surely result in either dismissal or conversion of the case as the Debtor would continue to make unauthorized postpetition payments. Second, rejecting the contract. This would likely result in the Debtor losing his job and the case would be converted to chapter 7. UST has not provided any evidence as to why that would be a better option. Third, voluntarily seeking to dismiss the case. Of course, the court may not approve dismissal, and if it did, the Debtor would lose the protection of the Bankruptcy Code. Fourth, negotiation of a new contract, which is what occurred here. As the court has previously ruled, under Ninth Circuit law, APP's insistence that the contract be assumed *in toto* limited the Debtor's flexibility.

The Debtor has yet to propose a plan in this case which is now close to six months old. Presumably, the Debtor could not propose a plan unless and until the Debtor knew that the estate would have a source of income.

Further, the court does not know at this moment how the plan will treat unsecured creditors. The estate's "loss" is recovered assuming APP complies with the settlement and with the new employment agreements. Should that not occur, there would be additional ground for dismissal or conversion of the case. APP is in a slightly different position than unsecured creditors in this case since it is the source of income for this estate. That does not change the priority scheme of 11 U.S.C. § 507, certainty, but it does provide a means for repayment to the estate of the estate's loss. The alternative, an unemployed medical professional, is not in the best interests of the creditors in this case who, in the end, are going to rely on the continued employment of Dr. Mayer. This factor militates in favor of settlement. Accordingly, the court finds that the proposed settlement is "fair and equitable."

Independently, though neither party raised the issue, the court finds that the proposed settlement is the proper exercise of the Debtor in possession's business judgment. 11 U.S.C. § 363(b) permits the trustee (or debtor in possession) to use, other than in the ordinary course of business, property of the estate after notice and a hearing. In this chapter 11 case, property of the estate includes property the debtor acquires after the commencement of the case and earnings from services performed by the Debtor after commencement of the case. 11 U.S.C. § 1115(a)(1) and (2). Ordinarily, the position of the trustee is afforded deference, particularly where a business judgment is entailed in the analysis or where there is no objection. Nevertheless, particularly in the face of opposition by creditors, the requirement of court approval means that the responsibility ultimately is the court's. *Simantob v. Claims Prosecutor, LLC (In re Lahijani)*, 325 B.R. 282, 289 (9th Cir. BAP 2005). The bankruptcy court has considerable discretion in deciding whether to approve or disapprove the use of estate property by a debtor in possession, in light of sound business justification. *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14, 17 (9th Cir. BAP 1988) [citations omitted]. "For the debtor-in-possession . . . to satisfy its fiduciary duty to . . . creditors there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business. . . . Whether the proffered justification is sufficient depends on the case." *In re Walter*, 83 B.R. at 19-20 quoting *In re Continental Airlines, Inc.*, 780 F.2d 1223, 1226 (5th Cir., 1986) citing *In re Lionel Corporation*, 722 F.2d 1063, 1071 (2nd Cir. 1983). Factors cited by the *Lionel* court which may be applicable here is the proportionate value of the asset to the estate as a whole, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed [use of property] on future plans of reorganization. Without the Debtor's continued employment, this estate's value diminishes greatly. Accordingly, the value of the use of this employment and the proceeds therefrom by this Debtor are substantial. Without the employment, the reorganization of debts in this chapter 11 is very unlikely.

No fraud or collusion has been evidenced to the court regarding this use of property. While UST contends that the Debtor is favoring APP over other creditors, the fact remains that APP was under no legal obligation to continue to employ the Debtor after this bankruptcy was filed unless it consented to do so. It did not consent. The Debtor and APP negotiated a new contract which is not unreasonable. Presumably, Dr. Mayer's salary will increase after November 2017 based upon the employment contract. At any rate, it is a reasonable exercise of the debtor in possession's business judgment to be preserve employment and settle on a means of simultaneously restoring to the estate any loss in value.

The motion will be GRANTED.

2.	16-13345-B-11 JONATHAN/PATRICIA MAYER UST-1 TRACY DAVIS/MV PETER FEAR/Atty. for dbt. ROBIN TUBESING/Atty. for mv.	CONTINUED MOTION TO DISMISS CASE 12-8-16 [44]

The hearing will proceed as scheduled.

Tentative Ruling: The motion will be DENIED without prejudice. The court will issue an order. The UST may prosecute another motion to dismiss should circumstances warrant.

The United States Trustee ("UST") asks the court to dismiss this chapter 11 case on the grounds that the debtors in possession ("DIP") have "grossly mismanaged the estate." See 11 U.S.C. § 1112(b)(4)(B). UST filed this motion on December 8, 2016. (Doc. No. 47.) UST agreed to continue the motion to March 2, 2017, to permit the DIP to resolve two significant issues. First, repayment to the estate for preferential loan payments made by the debtor ("Dr. Mayer") to his employer Affiliated Physicians Practice, Inc. ("APP") within 90 days before the filing of the petition. Second, to return to the estate unauthorized postpetition loan payments made by Dr. Mayer through payroll deductions to his employer. Originally, UST also raised two other grounds. First, the failure of the DIP to add UST as a party to be notified in the event of insurance cancellation, and, second, the DIP's failure to close certain prepetition bank accounts. The second ground (closure of prepetition bank accounts) was resolved at a hearing on January 12, 2017. (Doc. No. 83 and 116.) The insurance issue has presumably also been resolved in that UST filed a status report and supplement to its motion on February 10, 2017 (Doc. no. 99) and the only issue noted remaining in dispute relates to the prepetition loan payments made by Dr. Mayer through payroll deductions.

11 U.S.C. § 1112(b)(1) provides that a party in interest may ask the court whether to convert or dismiss a case whichever is in the best interest of creditors and the estate "for cause." "Cause" includes gross mismanagement

of the estate. 11 U.S.C. § 1112(b)(4)(D). The first step in the analysis is whether there is "cause" for purposes of § 1112(b). UST contends that the DIP's continuing failure to address the allegedly pre- and improper post filing loan repayments to APP exacerbated the loss to the estate and demonstrates the DIP's inability to manage the property of the estate in accordance with the DIP's fiduciary responsibilities. UST notes that, as early as the initial debtor interview in October 2016, these issues were brought to the debtors' attention as well as at the first meeting of creditors on October 20, 2016. (Doc. No. 101.) Less than two weeks later, Ms. Tubesing (a trial attorney for UST) sent an email to debtors' counsel concerning that same issue. (Doc. No. 101.) After UST filed the motion on December 8, 2016 , to dismiss the case (doc. No. 44), the DIP filed a motion to assume Dr. Mayer's existing employment agreement and amendments thereto as an executory contract. (Doc. No. 54.) The court denied the motion to assume on January 12, 2017. (Doc. No. 84).

The unsuccessful motion to assume the executory contract was filed less than two months after the meeting of creditors. After the court denied that motion, the DIP filed a motion, which this court has tentatively granted on this calendar, to approve a compromise (See item no. 1). The motion to compromise was filed approximately three weeks after the motion to assume executory contract was denied. Given the amount of time this case has been pending without a resolution of these payment issues, UST's concerns are understandable. However, they do not amount to gross mismanagement. This is a chapter 11 case involving an individual debtor. This debtor's earnings will be the source of funding for any chapter 11 plan proposed in this case. The DIP has attempted to satisfy the fiduciary obligations to the estate and creditors. The fact that the legal path taken to achieve that has been challenging is not indicative of gross mismanagement in this case.

The movant here bears the burden of showing cause by a preponderance of the evidence. *In re Wahlie*, 417 B.R. 8, 11 (Bankr. N.D. Ohio 2009) citing *In re Woodbrook Associates*, 19 F.3d 312, 317 (7th Cir., 1994). UST has not met the burden. The evidence is clear that both the DIP and counsel were aware of the issues surrounding these loan payments as early as October 2016. This case was filed September 13, 2016. (Doc. No. 1.) There was delay until the DIP filed the unsuccessful motion to assume the executory contract. However, the DIP did not conceal the information regarding the pre- and postpetition loan payments from UST; the issue was discussed in the Initial Debtor Interview. (Doc. No. 100.) Dr. Mayer has attempted to resolve the matter by entering into a settlement with APP and a new employment agreement which the court has tentatively approved. Under that settlement, both the pre- and postpetition loan payments which are recoverable will be returned to the estate and no further postpetition loan payments will be made.

The cases cited by the UST are not persuasive. *In re Visicon Shareholders Trust*, 478 B.R. 292 (Bankr. S.D. Ohio 2012) involved the owners of the hotel and conference center. In *Visicon*, there were unauthorized payments to trade creditors and other facts showing gross mismanagement, including not designating a debtor in possession bank account, retention and payment of professionals without court authorization, failure to file accurate monthly operating reports, payment of personal expenses with estate revenue, use of cash for hotel improvements without creditor consent or court authority, and failures to disclose. The *Visicon* court noted the lack of transparency and the debtor's failure to cooperate in discovery was evidence of "gross mismanagement." Here, no lack of candor has been evidenced to the court nor any failure to comprehend the significance of continuing to make payments for prepetition debts of postpetition assets. Any losses now have been addressed and it is up to the DIP to exercise the required fiduciary obligations and ensure that the necessary payments are made to the estate.

In re B & L Oil Co.*, 782 F.2d 155 (10th Cir., 1986) is not germane. In *B & L Oil Co.*, one of the two parties to an oil division order filed a bankruptcy petition after the other party made overpayments to the debtor. The issue before the Court of Appeals was whether the party that had overpaid could recoup the overpayments by withholding post bankruptcy payments permitted under the oil division order. The Court of Appeals reversed the bankruptcy and district court holdings, refusing to allow the recoupment. Interestingly, in *B & L*, the Court of Appeals reasoned that the executory contract represented by the oil division order supported recoupment. The Court of Appeals questioned, "[W]hy should [the debtor] not take the unfavorable aspects of [the contract] as well– the obligation to repay earlier overpayments [the other party] made?" *B & L Co.*, 782 F.2d at 159. The Court of Appeals went on to say, "The general principle is that a petition for bankruptcy operates as a 'cleavage' in time; but the recoupment doctrine is traditionally operated as an exception to the rule that applies to other debts." *Id.

Finally, *In re Lively*, 266 B.R. 209 (Bankr. N.D. Okla. 1998) is not persuasive. The Livelys were debtors in possession in a chapter 11 proceeding. After reviewing the monthly operating reports, the court, on its own motion, compelled the debtors and the United States Trustee (and counsel) to explain postpetition payments on prepetition debts owed to a dentist, an accountant, and two creditors whose debts were secured by automobiles. There was no dispute in *Lively* that the payments were made. The court, however, did not dismiss the case but rather compelled the debtors to recover the unauthorized payments. The *Lively* case does not compel dismissal of this case but rather requires the debtors to recover the unauthorized payments or risk dismissal. The debtors have established a means to do that in this case. Should the debtors or APP fail to perform their fiduciary or contractual obligations, respectively, the court may revisit the issue in a proper procedural context. That is exactly what the bankruptcy court in *Lively* did. The court finds that in this case "cause"

for dismissal has not been established.
Even if "cause" was established, the result would be no different. 11 U.S.C. § 1112(b)(2) provides:

> **The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or another party in interest establishes that–**
>
> **(A) there is a reasonable likelihood that a plan will be confirmed . . . within a reasonable period of time; and**
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> **(B) the grounds for converting or dismissing the case including an act or omission of the debtor . . .**
>
> **(i) for which there exists a reasonable justification for the act or omission; and**
> **(ii) that will be cured within a reasonable period of time fixed by the court.**

Courts do have significant discretion in determining whether there are unusual circumstances that weigh against conversion or dismissal. *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 93 (Bankr. S.D.N.Y. 2007) quoted in *In re Products International Co.*, 395 B.R. 101, 109 (Bankr. D.Ariz. 2008). While § 1112(b) does not define "unusual circumstances," "[T]he phrase contemplates conditions that are not common in chapter 11 cases." *In re Products International Co.* at 109.

Unusual circumstances exist in this case because this is a chapter 11 proceeding involving individuals. Without the ability to make full payment of the allowed amount of all claims, the only practical way these debtors can repay allowed claims is to commit five years of future earnings to a plan. 11 U.S.C. § 1129(a)(15). At this moment in the reorganization, the court has not been provided any evidence that the debtors have assets which can be quickly liquidated to pay all allowed claims in full. It is therefore fundamentally necessary that Dr. Mayer remain employed for a chapter 11 plan to be feasible.

Conversion or dismissal of the case at this time is not in the best interest of creditors or the estate for at least two reasons. First, the approval of the settlement agreement provides Dr. Mayer with employment and a potential increase in salary after November 2017. Second, the approval of the settlement agreement provides a mechanism for APP to repay the unauthorized transfers leaving creditors in a better position than if litigation or conversion of this case resulted in Dr. Mayer's termination. Litigation instead of settlement would result in a net recovery by the estate which will necessarily be reduced by attorney's fees and costs

There is a reasonable likelihood that a plan will be confirmed within a reasonable time. At this moment, Dr. Mayer's employment prospects are known as well as his expected salary for now and into the near future. The claims period has expired and it has not been brought to the court's attention that there is any administrative lack of compliance by the DIP, with the exception of the unauthorized payments which has now been remedied. The court intends to set a deadline for the debtor's filing of a plan and disclosure statement at the status conference.

The justification for the DIP's actions in permitting the loan payments to continue is problematic. However, no one has provided any evidence of bad faith on the part of APP or the debtors. The delays in addressing the situation can be explained, in part, by the necessarily vulnerable relationship between a professional and the employer in this context. While there was an approximate two-month delay between UST bringing these issues to the debtors' attention and the debtors' first motion addressing this situation, some delay is understandable. The debtors have swiftly moved to change the situation.

Finally, the real issue, preferential and unauthorized postpetition payments, will be cured by the parties performing the settlement agreement that has been tentatively approved. The estate is to be "made whole" before the end of this year.

The motion will be DENIED without prejudice.

3. 16-13849-B-12 DON FALLERT — CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 10-24-16 [1]

D. GARDNER/Atty. for dbt.

This status conference will be continued to April 27, 2017, at 9:30 a.m., to be heard with the debtor's motion to confirm a chapter 12 plan. No appearance is necessary. The court will enter an order.

4. 16-13849-B-12 DON FALLERT — MOTION TO CONFIRM CHAPTER 12 PLAN 1-23-17 [61]

DMG-4
DON FALLERT/MV
D. GARDNER/Atty. for dbt.

A hearing on this motion was continued to April 27, 2017, at 9:30 a.m., by prior order of the court entered February 16, 2017. No appearance is necessary.

5. 16-13345-B-11 JONATHAN/PATRICIA MAYER — CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
9-13-16 [1]

PETER FEAR/Atty. for dbt.

This matter will be called with the related motions on this calendar at numbers 1 and 2.

1:30 P.M.

1. 16-14301-B-13 JOSE GONZALES — MOTION TO DISMISS CASE
MHM-1 — 1-30-17 [18]
MICHAEL MEYER/MV
JOEL WINTER/Atty. for dbt.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Accordingly, the case will be dismissed. Although the debtor filed and served a modified plan on February 24, 2017, the trustee's motion is based on unreasonable delay by the debtor that is prejudicial to creditors, namely failing to provide the trustee with the following required documentation: 2015 State Tax Return; Authorization to Release Information Form and Security Agreement with Balboa Thrift and Loan.

2. 16-10003-B-7 MELLANIE RAPOZO — STATUS CONFERENCE RE: AMENDED
16-1050 — COMPLAINT
SELLERS V. RAPOZO — 8-17-16 [36]
KLAUS KOLB/Atty. for pl.
DISMISSED

This adversary proceeding has already been dismissed by stipulation of the parties. No appearance is necessary.

3. 16-14603-B-13 ISRAEL REYES — MOTION TO DISMISS CASE
MHM-1 — 1-31-17 [17]
MICHAEL MEYER/MV
TIMOTHY SPRINGER/Atty. for dbt.
RESPONSIVE PLEADING

The trustee's motion has been withdrawn. No appearance is necessary.

4. 16-14310-B-13 AMELIA RODRIGUEZ CARRILLO
MHM-1
MICHAEL MEYER/MV
RICHARD STURDEVANT/Atty. for dbt.

MOTION TO DISMISS CASE
1-30-17 [23]

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Accordingly, the case will be dismissed. The record shows there has been unreasonable delay by the debtor that is prejudicial to creditors, namely the failure to provide the trustee with the following required documentation: Class 1 Mortgage Checklist with payment coupon or last statement; 2015 State Tax Return; proof of all income, i.e., pay advices; profit and loss statements; rental income; unemployment compensation; social security income; disability; and retirement for the six months prior to filing; deed of trust and promissory note for real property, and failure to provide Credit Counseling Certificates.

5. 16-14414-B-13 GERARDO REYES
TOG-1
GERARDO REYES/MV
THOMAS GILLIS/Atty. for dbt.
WITHDRAWN

MOTION TO VALUE COLLATERAL OF FCI LENDER SERVICES, INC.
1-23-17 [15]

This motion has been withdrawn. No appearance is necessary.

6. 14-14016-B-13 ISMAEL GONZALEZ — MOTION TO DISMISS CASE
MHM-1 — 2-1-17 [80]
MICHAEL MEYER/MV
VINCENT GORSKI/Atty. for dbt.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Accordingly, the case will be dismissed on the grounds listed in the trustee's motion.

7. 14-10121-B-13 GREGORY/ERIKA IRELAND
FW-4
GREGORY IRELAND/MV

MOTION FOR DETERMINATION THAT SPECIFIC INSURANCE PROCEEDS ARE NOT PROPERTY OF THE BANKRUPTCY ESTATE AND/OR MOTION FOR AUTHORIZATION TO USE PROCEEDS
2-1-17 [113]

PETER FEAR/Atty. for dbt.

The hearing on this motion will be continued to March 29, 2017 at 1:30 pm. Further briefing as set forth below shall be submitted by the debtors on or before March 9, 2017; the trustee's response, if any, is due March 16, 2017, and debtors' reply is due March 22, 2017. Alternatively, the debtor and the trustee may agree on the terms of an order to be submitted to the court and the continued hearing will be dropped from calendar. The court will issue an order. No appearance is necessary.

The debtors ask the court for an order allowing the debtors to use $120, 350.10 of insurance proceeds (the "Proceeds") that are available due to a catastrophic fire which destroyed the debtors' residence and personal property. The debtors claim they will use the Proceeds to replace furnishings destroyed by the fire and "upgrade" their residence. The fire occurred after confirmation of the debtors' Chapter 13 Plan. The trustee has filed responsive "comments" to the motion stating that the trustee has no objection to whatever "approach" the court wishes to take on the question of whether property of this bankruptcy estate includes the Proceeds (referencing the various circuit interpretations of "property of the estate" in Chapter 13 cases, post confirmation).

First, an adversary proceeding may be necessary. The debtors are asking the court to make a determination as to ownership of the Proceeds. That relief is a declaratory judgment as to the debtors' claimed interest in property which requires an adversary proceeding. FRBP 7001(2); (9). An adversary proceeding is the context in which most relevant decisions address this issue. *See*, *In re Thiel,* 2015 WL 2398555 (Bankr. D.Idaho, 2015) (J. Pappas); *In re Matthews*, 2017 WL 149939 (Bankr. D.ID, 2017) (J. Pappas). Even *In re Jones,* 657 F. 3d 921(9th Cir. 2011), relied on by both parties here, involved a motion based on stipulated facts. *See, In re Jones*, 420 BR 506 (9th Cir. BAP, 2009) *aff'd In re Jones, supra*. Those cases where the issue arose outside of an adversary proceeding do not involve the same procedure the debtors use here. *In re Clark,* 2015 WL 6164003 (Bankr. E.D. Cal. 2015) (J. Jaime) [determination of proper procedure for sale of corporate stock]; *In re Porras,* 2015 WL 23577723 (Bankr. N.D.Cal. 2015) [Chapter 13 Trustee requested instructions on how to disperse held funds]. The debtors also contend this motion is necessary due to LBR 3015-1(b), (i). That does not change the issue of whether the Proceeds are estate property even though the debtors contend the funds are not.

Second, the trustee's position is vague. Does the trustee object to the proposed disposition or not? If the trustee objects, the positions of the debtors and the trustee regarding the state of the law in this circuit cannot be reconciled without full development of the law and the facts of this case. If the trustee does not object, there remains the undecided issue of the extent of post-confirmation property of the estate. No other party in interest has objected.

Third, is there any basis on which these debtors should be estopped or otherwise legally precluded from using the Proceeds traceable to exempt property or otherwise? The First Modified Plan confirmed December 4, 2014 (Doc. # 42) provides in pertinent part that property of the estate vested in the Debtors on confirmation. (Doc. #36). The debtors' amended Schedule C (Doc. #29) includes exemptions for the single family residence and various personal property interests See, CCP § 703.080(a). There was no objection. The debtors' conduct may be relevant based on at least one case cited by the Trustee, *In re Rankin,* 546 B.R. 861 (Bankr. D.Mont. 2016) [failure to disclose inheritance]. The court has no facts on these issues.

Fourth, which "approach" controls in this circuit? The Court of Appeals' decision in *Jones* did not adopt or reject "the estate termination approach." It was unnecessary for that court to embrace that approach to decide the case since the court found the "plain language" of 11 U.S.C. §1327(b) dictated the result. The California Franchise Tax Board did not violate the automatic stay by enforcing its claim post-confirmation in a Chapter 13. The BAP decision, *In re Jones*, 420 BR 506 (9th Cir. BAP, 2009) has not been reversed. The BAP adopted the "estate termination approach." The Ninth Circuit Court of Appeals' holding in *Jones* affirming the BAP's decision does not necessarily leave the BAP's adoption of "the estate termination approach" in question. "Under the doctrine of *stare decisis* a case is important only for what it decides-for the 'what,' not for the 'why,' and not for the 'how.' " *In re Osborne*, 76 F 3d 396, 309 (9th Cir., 1996) ["the doctrine of *stare decisis* concerns the *holdings* of previous cases not the rationales[.]"] *quoted* in *S & H Packing & Sales Co. v. Tanimura Distributing*, (Nos. 14-56059, 14-56078) 2017 U.S. App. LEXIS 3483* at *7, *8 (9th Cir. Feb. 27, 2017).

The parties need to brief these and other issues they wish the court to consider.

8. 15-12222-B-13 NORMAN/DOLORES PHILLIPS
SL-1
NORMAN PHILLIPS/MV
STEPHEN LABIAK/Atty. for dbt.
WITHDRAWN

MOTION TO INCUR DEBT
1-19-17 [34]

This motion has been withdrawn. No appearance is necessary.

9. 16-12626-B-13 DONALD CUMPTON
JRL-3
DONALD CUMPTON/MV
JERRY LOWE/Atty. for dbt.

MOTION TO MODIFY PLAN
1-12-17 [74]

This motion will proceed as scheduled. If the debtor is not current under the proposed plan then the motion will be denied and the case will be dismissed pursuant to the trustee's Notice of Default and Application to Dismiss Case for Failure to Make Plan Payments filed December 6, 2016, Doc. # 70 on the court's docket.

10. 16-13228-B-13 BRIAN FREELAND
MHM-2
MICHAEL MEYER/MV
PHILLIP GILLET/Atty. for dbt.

CONTINUED MOTION TO DISMISS CASE
1-12-17 [33]

The trustee's motion has been withdrawn. No appearance is necessary.

11. 16-14032-B-13 REBA JOYNER
MHM-2
MICHAEL MEYER/MV
PETER BUNTING/Atty. for dbt.

MOTION TO DISMISS CASE
1-26-17 [27]

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Accordingly, the case will be dismissed. The record shows there is a material default in the chapter 13 plan.

12. 13-14140-B-13 JIM/PAMILA HESTILY
TGM-1
TOYOTA MOTOR CREDIT CORPORATION/MV
STEPHEN LABIAK/Atty. for dbt.
TYNEIA MERRITT/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-19-17 [89]

The motion will be granted in part and denied in part without oral argument for cause shown. Movant shall submit a proposed order as specified below. No appearance is necessary.

This motion for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtors and the trustee's defaults will be entered. The automatic stay is terminated, as to the debtors, as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. Although movant requested relief from the co-debtor stay under §1301(a), the record does not show that the co-debtor, Branae W. Hestily, was served with notice of this motion and therefore that relief will not be granted.

The record shows that cause exists to terminate the automatic stay as to the debtors.

The proposed order shall specifically describe the property or action to which the order relates. If the motion involves a foreclosure of real property in California, then the order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code § 2923.5 to the extent that it applies. If the notice and motion requested a waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

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

13.	16-14365-B-13 MHM-1	ESTEBAN ARIAS AND SOFIA HERNANDEZ MICHAEL MEYER/MV THOMAS GILLIS/Atty. for dbt.	MOTION TO DISMISS CASE 1-31-17 [27]

The trustee's motion has been withdrawn. No appearance is necessary.

14. 16-10169-B-13 FRANK/MARY ANNE DORES — MOTION TO SELL AND/OR MOTION TO PAY
FW-5
FRANK DORES/MV
PETER FEAR/Atty. for dbt.
2-9-17 [315]

This motion will be continued to March 29, 2017, at 1:30 p.m., for submission of appropriate evidence and proof of service. The debtors shall serve the motion and file proof of service by March 8, 2017. Additional evidence shall be submitted by March 8, 2017. The court will enter an order. No appearance is necessary.

The motion was fully noticed and the defaults of the respondents that were properly served will be entered.

The motion was filed without admissible supporting evidence as required by LBR 9014-1(d)(7). The motion is not supported by competent evidence that the lien holders consent to this sale of their collateral. Additionally, the record does not show that those parties were served with the notice of this motion.

In lieu of filing the additional evidence movant may submit a proposed order granting the motion which has been approved and signed by both lien holders and the matter will proceed on the continued date for higher and better bids only.

15. 16-13874-B-13 RICHARD DOMENICI — MOTION TO DISMISS CASE
MHM-1
MICHAEL MEYER/MV
DAVID JENKINS/Atty. for dbt.
1-30-17 [29]

The trustee's motion has been withdrawn. No appearance is necessary.

16. 16-14574-B-13 TIMOTHY/VICKIE WEATHERLY — MOTION TO DISMISS CASE
MHM-1 — 1-31-17 [23]
MICHAEL MEYER/MV
SCOTT LYONS/Atty. for dbt.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The record shows that the debtors have failed to provide the trustee with the required documentation, namely, their Deed of Trust and Promissory note.

17. 16-13979-B-13 JOSE NUNEZ — MOTION TO DISMISS CASE
MHM-2 — 1-26-17 [31]
MICHAEL MEYER/MV
RICHARD STURDEVANT/Atty. for dbt.

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The record shows that there is a material default in the chapter 13 plan payments.

18. 17-10183-B-13 JOHNNY GARCIA
ADR-1
ALVERNAZ INVESTMENTS LLC/MV

ANTHONY ROWE/Atty. for mv.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
2-2-17 [12]

This matter will be denied as moot. The case has already been dismissed. No appearance is necessary.

19. 16-13692-B-13 DAVID COVARRUBIAS
MHM-1
MICHAEL MEYER/MV
PETER BUNTING/Atty. for dbt.

MOTION TO DISMISS CASE
1-31-17 [21]

Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown. The court will issue an order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The record shows that there is a material default in the chapter 13 plan payments.

20. 16-13491-B-13 CURTIS ALLEN AND CHARLOTTE JACKSON
EPE-6
CURTIS ALLEN/MV
ERIC ESCAMILLA/Atty. for dbt.
DEBTOR DISMISSED:
02/01/2017
JOINT DEBTOR DISMISSED:
02/01/2017

MOTION TO VACATE DISMISSAL OF CASE
2-14-17 [86]

This matter will proceed as scheduled.

21. 17-10032-B-13 MARTIN/MARIA LOZANO
SL-1
MARTIN LOZANO/MV
SCOTT LYONS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF ALLY FINANCIAL
2-14-17 [13]

This matter will proceed as scheduled.

22. 17-10022-B-13 VIRGINIA QUEVEDO
MHM-1
MICHAEL MEYER/MV

MOTION TO DISMISS CASE
2-16-17 [21]

This matter will proceed as scheduled.