

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street, Fifth Floor
Department A, Courtroom 11
Fresno, California

WEDNESDAY

APRIL 29, 2015

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

9:00 a.m.

1. [14-12107](#)-A-7 AMADO GOMEZ
JES-3
JAMES SALVEN/MV

OSCAR SWINTON/Atty. for dbt.
ORDER 3/6/15, RESPONSIVE
PLEADING

No tentative ruling.

2. [14-12107](#)-A-7 AMADO GOMEZ
JES-4
JAMES SALVEN/MV

OSCAR SWINTON/Atty. for dbt.
ORDER 3/6/15, RESPONSIVE
PLEADING

No tentative ruling.

3. [14-12714](#)-A-7 MARIANA BELTRAN
VVF-1
AMERICAN HONDA FINANCE
CORPORATION/MV
MARK ZIMMERMAN/Atty. for dbt.
VINCENT FROUNJIAN/Atty. for mv.
DISCHARGED

RESCHEDULED HEARING RE:
OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
9-30-14 [[43](#)]

RESCHEDULED HEARING RE: MOTION
TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH AMADO LARA GOMEZ
11-14-14 [[52](#)]

MOTION FOR RELIEF FROM
AUTOMATIC STAY
3-27-15 [[45](#)]

Final Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: 2011 Honda Civic

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such

entity's interest in property." 11 U.S.C. § 361(1).

The debtor has missed 1.82 post-petition payments due on the debt secured by the moving party's lien. This constitutes cause for stay relief. The court does not address grounds for relief under § 362(d)(2) as relief is warranted under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

4. [14-15130](#)-A-7 PAUL ROMERO MOTION TO AVOID LIEN OF
PSJ-2 CALIFORNIA BUSINESS BUREAU,
PAUL ROMERO/MV INC.
3-12-15 [[31](#)]

PAUL JAMES/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of-(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial lien, all other liens, and the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, the responding party's judicial lien will be avoided entirely.

5. [15-10635](#)-A-7 JOHN JANDA
HRH-1
CITIZENS BUSINESS BANK/MV
JERRY LOWE/Atty. for dbt.
RAFFI KHATCHADOURIAN/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-8-15 [[43](#)]

Tentative Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Denied

Order: Civil minute order

Subject: 608 E. Center Street, Visalia, CA

LEGAL STANDARDS

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1). "Where the property is declining in value or accruing interest and taxes eat up the equity cushion to the point where the cushion no longer provides adequate protection, the court may either grant the motion to lift the stay or order the debtor to provide some other form of adequate protection." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1096 (rev. 2011). However, "[a]n undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." See *id.* ¶ 8:1065.1 (rev. 2012) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)). Further, when a creditor is oversecured, an existing equity cushion may adequately protect the creditor's security interest against a decline in the collateral's value while the stay remains in effect. See *id.* ¶ 8:1072 (citing cases). In calculating the amount of the movant creditor's equity cushion, the court ignores the debt secured by junior liens. See *id.* ¶ 8:1076 (citing *In re Mellor*, 734 F.2d 1396, 1400-01 (9th Cir. 1984)).

Subsection (d)(2) of § 362 of Title 11 allows relief from stay as against property of the debtor if the moving party shows that two elements are satisfied: (i) "the debtor does not have an equity in such property," and (ii) "such property is not necessary to an effective reorganization." *Id.* § 362(d)(2). Under the first element of this subsection, the moving party bears the burden of proof to show that the debtor lacks equity in the property. See 11 U.S.C. § 362(g)(1); *In re Bialac*, 712 F.2d 426, 432 (9th Cir. 1983). The responding party has the burden of showing that the property is necessary for an effective reorganization and all other issues. 11 U.S.C. § 362(g)(2); see also *In re Bonner Mall P'ship*, 2 F.3d 899, 902 (9th Cir. 1993).

ANALYSIS

The motion does not offer sufficient factual grounds for stay relief under § 362(d)(1) or (2). The stay relief summary sheet shows that no

post-petition payments are past due and that no prepetition payments are past due either. Although the motion recites that certain fees and costs are included in the total balance due under the loan, the motion does not state that these amounts are past due or continuing to accrue in a way that diminishes the available equity.

The motion also summarily concludes that cause exists for stay relief given that the movant's interest in the subject property is not adequately protected. But no factual ground supports this conclusory assertion.

The movant also admits that the debtor has equity totaling \$25,378.09 but notes that the equity is \$0.00 after accounting for costs of sale (see Relief from Stay Summary Sheet, item no. 5). This court does not include costs of sale in an equity analysis under § 362(d)(2).

Further, the motion does present with particularity grounds that would allow the court to infer that the debtor has no equity. See Fed. R. Bankr. P. 9013. Rule 9013 provides in pertinent part: "The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Bankr. P. 9013. Under this rule, a motion lacking proper grounds for relief does not comply with this rule even though the declaration, exhibits or other papers in support together can be read as containing the required grounds.

Lastly, the Relief from Stay Summary Sheet can be construed as asserting as an additional ground for stay relief the debtor's failure to indicate his intention concerning the property and the debtor's failure to list the property appropriately in his schedules. Section 362(h) only provides that the stay is lifted when a debtor fails to take appropriate action with respect to a statement of intention concerning *personal property* securing a claim or subject to an unexpired lease. But the property at issue is not personal property. Further, without more, the failure to properly schedule a claim is not sufficient for a finding of cause for stay relief—no authority supporting such a conclusion has been cited in the motion or memorandum in support. In summary, the factual grounds offered do not provide a basis for granting the relief requested.

6. [14-15837](#)-A-7 CRAIG KANOUSE MOTION TO SELL
TMT-1 3-26-15 [[22](#)]
TRUDI MANFREDO/MV
MARK ZIMMERMAN/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

Tentative Ruling

Motion: Sell Property

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Property: real property located at 3014 West Evergreen Ave., Visalia, CA ("Evergreen property"), 2005 Toyota Camry, and a Glock 21 pistol

Buyer: Debtor

Sale Price:

-Evergreen property:	\$144,841.67 (\$23,856.10 cash plus \$100,000 exemption credit plus a \$20,985.57 lien to which the sale is made subject)
-2005 Toyota Camry:	\$4431.00 (\$1531.00 cash plus \$2900.00 exemption credit)
-Glock 21 pistol:	\$300.00

Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

7.	15-10840 -A-7	HILARIO/MARIA CANO	MOTION TO AVOID LIEN OF CACH, LLC
	ALG-2		
	HILARIO CANO/MV		3-26-15 [20]
	JANINE ESQUIVEL/Atty. for dbt.		

Final Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

2283 N. HANOVER AVE., FRESNO, CA

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been

9. [15-10450](#)-A-7 ANTONIO GASCA AND FABIOLA MOTION TO COMPEL ABANDONMENT
ALG-1 ALVAREZ 3-20-15 [9]
ANTONIO GASCA/MV
JANINE ESQUIVEL/Atty. for dbt.

Final Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: Two businesses: Antonio Gasca Flooring / AMWAY independent contractor business

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

10. [13-17453](#)-A-7 DANIEL/IVY ROCHA
TMT-3

CONTINUED MOTION FOR
COMPENSATION FOR KENNETH C.
ABSALOM, SPECIAL COUNSEL(S)
2-9-15 [[63](#)]

SCOTT MITCHELL/Atty. for dbt.

Final Ruling

Application: Allowance of Final Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

In this Chapter 7 case, Kenneth C. Absalom, special counsel for chapter 7 trustee Trudi Manfredo, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$27,572.24 and reimbursement of expenses in the amount of \$6,332.63.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by a trustee, examiner or professional person employed under § 327, § 328 or § 1103 and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis, provided the chapter 7 trustee lodges the order approving the motion to correct employment order. See Motion to Correct, filed Marc 25, 2015, ECF # 77.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Kenneth C. Absalom's application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$27,572.24 and reimbursement of expenses in the amount of \$6,332.63.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

11. [13-17453](#)-A-7 DANIEL/IVY ROCHA MOTION TO CORRECT ORDER
TMT-4 AUTHORIZING TRUSTEE TO EMPLOY
TRUDI MANFREDO/MV SPECIAL COUNSEL
3-25-15 [[77](#)]
SCOTT MITCHELL/Atty. for dbt.

Final Ruling

Motion: Correct Order Employing Special Counsel
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Federal Rule of Civil Procedure 60(b), incorporated by Fed. R. Bankr. P. 9024, authorizes the correction of pleadings. In this case, the trustee prays correction of her order employing special counsel Kenneth C. Absalom. No opposition has been filed. The motion will be granted.

12. [15-10256](#)-A-7 GLADIS ALANIZ AMENDED MOTION FOR RELIEF FROM
APN-1 AUTOMATIC STAY
BMW BANK OF NORTH AMERICA/MV 3-24-15 [[30](#)]
MARK ZIMMERMAN/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.
NON-OPPOSITION

Final Ruling

Motion: Stay Relief
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Prepared by moving party

Subject: 2012 Nissan Altima

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court

considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 362(d)(2) authorizes stay relief if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2). Chapter 7 is a mechanism for liquidation, not reorganization, and, therefore, property of the estate is never necessary for reorganization. *In re Casgul of Nevada, Inc.*, 22 B.R. 65, 66 (B.A.P. 9th Cir. 1982). In this case, the aggregate amount due all liens exceeds the value of the collateral and the debtor has no equity in the property. The motion will be granted, and Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

13. [08-17157](#)-A-7 PHILIP/SOLA OGBEIDE CONTINUED MOTION TO AVOID LIEN
DRJ-2 OF DAN GABRIELSON
PHILIP OGBEIDE/MV 3-8-15 [[32](#)]
IRMA EDMONDS/Atty. for dbt.

Tentative Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, incorporated by Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

BACKGROUND FACTS

The motion seeks to avoid the judicial lien of Dan Gabrielson on two parcels of real property in which the debtor has a 1/4 interest. The first parcel is located at 1870 Pisa Cir., Stockton, CA ("Pisa Property"). The second parcel is located at 727 Astor Street, Stockton, CA ("Astor Property"). The judicial lien sought to be avoided is Gabrielson's lien totaling \$32,408.23 plus interest from February 19, 2008 at 10% per year (motion at p. 1).

PISA PROPERTY

Liens Plus Exemption: \$33,408.23

Property Value: \$0.00

Judicial Lien Avoided: \$32,408.23 plus 10% interest per annum running from February 19, 2008 until the date of issuance of the order avoiding the judicial lien

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3)

the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

If a debtor who co-owns a fractional interest in property moves to avoid the judicial lien on the property under § 522(f), then the court applies a common sense approach that varies somewhat from a strict mechanical application of the formula under § 522(f)(2)(A). "Under this approach, one nets out consensual liens against the entire fee in co-owned property before determining the value of a debtor's fractional interest and excludes those liens from the calculation of 'all other liens on the property' under § 522(f)(2)(A)(ii)." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 90 (B.A.P. 9th Cir. 2007).

Applying the *Meyer* rule as to co-owned property, as well as § 522(f)(2)(A), the court finds that the moving party's interest in the absence of liens is \$0.00. The consensual lien exceeds the value of the property by a substantial amount.

Accordingly, the respondent's judicial lien, regardless of its accrued amount after adding interest at 10% per annum, plus the amount of the \$1000.00 exemption, exceeds the value of the movant's 1/4 interest in the Pisa Property by an amount greater than the judicial lien. Relief is warranted.

ASTOR PROPERTY

Liens Plus Exemption: \$33,408.23

Property Value: \$0.00

Judicial Lien Avoided: \$32,408.23 plus 10% interest per annum running from February 19, 2008 until the date of issuance of the order avoiding the judicial lien

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

If a debtor who co-owns a fractional interest in property moves to avoid the judicial lien on the property under § 522(f), then the court

applies a common sense approach that varies somewhat from a strict mechanical application of the formula under § 522(f)(2)(A). "Under this approach, one nets out consensual liens against the entire fee in co-owned property before determining the value of a debtor's fractional interest and excludes those liens from the calculation of 'all other liens on the property' under § 522(f)(2)(A)(ii)." *All Points Capital Corp. v. Meyer (In re Meyer)*, 373 B.R. 84, 90 (B.A.P. 9th Cir. 2007).

Applying the *Meyer* rule as to co-owned property, as well as § 522(f)(2)(A), the court finds that the moving party's interest in the absence of liens is \$0.00. The consensual lien exceeds the value of the property by a substantial amount.

Accordingly, the respondent's judicial lien, regardless of its accrued amount after adding interest at 10% per annum, plus the amount of the \$1000.00 exemption, exceeds the value of the movant's 1/4 interest in the Pisa Property by an amount greater than the judicial lien. Relief is warranted.

14. [15-10057](#)-A-7 ALEJANDRO/MARIA PEREZ MOTION TO AVOID LIEN OF KINGS
PBB-1 CREDIT SERVICES
ALEJANDRO PEREZ/MV 3-23-15 [[13](#)]
PETER BUNTING/Atty. for dbt.

Final Ruling

Motion: Avoid Lien that Impairs Exemption

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 522(f) of the Bankruptcy Code authorizes the court to avoid a lien "on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. § 522(f)(1). There are four elements to avoidance of a lien that impairs an exemption: (1) there must be an exemption to which the debtor would have been entitled; (2) the property must be listed on the schedules and claimed as exempt; (3) the lien must impair the exemption claimed; and (4) the lien must be a judicial lien or nonpossessory, nonpurchase-money security interest in property described in § 522(f)(1)(B). *Goswami v. MTC Distrib. (In re Goswami)*, 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003). Impairment is statutorily defined: a lien impairs an exemption "to the extent that the sum of—(i) the lien; (ii) all other liens on the property; and (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A).

The responding party's judicial liens (in the amounts of \$633.46 and \$11,734.36), plus all other liens, plus the exemption amount together exceed the property's value by an amount greater than or equal to the debt secured by the responding party's lien. As a result, both of responding party's judicial liens will be avoided entirely.

15. [13-16758](#)-A-7 DONNA BURKETT MOTION FOR COMPENSATION FOR
SAS-2 SHERYL A. STRAIN, CHAPTER 7
SHERYL STRAIN/MV TRUSTEE(S)
3-24-15 [[31](#)]
- GEORGE LOGAN/Atty. for dbt.
SHERYL STRAIN/Atty. for mv.

No tentative ruling.

16. [14-15762](#)-A-7 JENNIFER SCHWARTZ MOTION TO SELL
RHT-1 3-31-15 [[18](#)]
ROBERT HAWKINS/MV
JOEL WINTER/Atty. for dbt.
ROBERT HAWKINS/Atty. for mv.

Tentative Ruling

Motion: Sell Property

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Property: 2009 Acura TSX

Buyer: Debtor

Sale Price: \$9307.54 (\$4207.54 cash plus \$5100.00 exemption credit)

Sale Type: Private sale subject to overbid opportunity

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 363(b)(1) of Title 11 authorizes sales of property of the estate "other than in the ordinary course of business." 11 U.S.C. § 363(b)(1); *see also In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring business justification). The moving party is the Chapter 7 trustee and liquidation of property of the estate is a proper purpose. *See* 11 U.S.C. § 704(a)(1). As a result, the court will grant the motion. The stay of the order provided by Federal Rule of Bankruptcy Procedure 6004(h) will be waived.

PETER BUNTING/Atty. for dbt.
PETER FEAR/Atty. for mv.

Final Ruling

Application: Allowance of Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this application was required not less than 14 days before the hearing on the application. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

In this Chapter 7 case, the trustee has applied for an allowance of compensation and reimbursement of expenses. The court finds (1) that the compensation requested by the trustee is consistent with 11 U.S.C. § 326(a); (2) that no extraordinary circumstances are present in this case, *see In re Salgado-Nava*, 473 B.R. 911 (B.A.P. 9th Cir. 2012); and (3) that expenses for which reimbursement is sought are actual and necessary. The court approves the application and allows compensation in the amount of \$12,170.85 and reimbursement of expenses in the amount of \$402.10.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

James E. Salven's application for allowance of compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows to the trustee compensation in the amount of \$12,170.85 and reimbursement of expenses in the amount of \$402.10.

IT IS FURTHER ORDERED that the trustee is authorized without further order of this court to pay from the estate the aggregate amount allowed by this order in accordance with the Bankruptcy Code and the distribution priorities of § 726.

18. [15-10469](#)-A-7 TOM/MICHELE MCGEE
KMM-1
TOM MCGEE/MV
KARNEY MEKHITARIAN/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
3-24-15 [[12](#)]

Final Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: A home-inspection business, a sole proprietorship

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

19. [15-11283](#)-A-7 GLORIA ESTILLORE
LHL-1
LEHMAN XS TRUST MORTGAGE
PASS-THROUGH CERTIFICATES,
LAURIE HOWELL/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-16-15 [[17](#)]

Tentative Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: (1) 1172 East Newhall Drive, Fresno, CA, and (2) unlawful detainer proceedings to recover possession of such property

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1).

Movant is the owner of the subject property as a result of a foreclosure sale conducted on August 24, 2014. The trustee's deed was recorded on September 4, 2014. The petition in this case was filed April 1, 2015. Unlawful detainer proceedings have been filed but the trial has not been held. The debtor is not a former trustor of the property. And the movant has not alleged the existence of a residential lease or movant's status as a lessor.

Given the apparent lack of any ownership or lease interest in the property by the debtor, the court finds cause to grant stay relief. The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

20. [15-11390](#)-A-7 RICHARD CABELLO AND MOTION TO COMPEL ABANDONMENT
JDR-1 KRISTI ROZA-CABELLO 4-15-15 [7]
RICHARD CABELLO/MV
JEFFREY ROWE/Atty. for dbt.

Tentative Ruling

Motion: Compel Abandonment of Property of the Estate

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted only as to the business and such business assets described in the motion

Order: Prepared by moving party pursuant to the instructions below

Business Description: a photography sole proprietorship f/d/b/a Roza Bella Photography

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Property of the estate may be abandoned under § 554 of the Bankruptcy Code if property of the estate is "burdensome to the estate or of inconsequential value and benefit to the estate." See 11 U.S.C. § 554(a)-(b); Fed. R. Bankr. P. 6007(b). Upon request of a party in interest, the court may issue an order that the trustee abandon property of the estate if the statutory standards for abandonment are fulfilled.

The business described above is either burdensome to the estate or of inconsequential value to the estate. An order compelling abandonment of such business is warranted.

The order will compel abandonment of the business and the assets of such business only to the extent described in the motion. The order shall state that any exemptions claimed in the abandoned business or the assets of such business may not be amended without leave of court given upon request made by motion noticed under Local Bankruptcy Rule 9014-1(f)(1).

21. [13-16195](#)-A-7 AVELINO/MARIBEL ORMONDE MOTION FOR RELIEF FROM
CJO-1 AUTOMATIC STAY
JPMORGAN CHASE BANK, N.A./MV 4-2-15 [[84](#)]
GEOFFREY ADALIAN/Atty. for dbt.
CHRISTINA O/Atty. for mv.
DISCHARGED
NON-OPPOSITION

Tentative Ruling

Motion: Stay Relief

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Granted

Order: Prepared by moving party

Subject: 2444 N. Clark St., Visalia, CA

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The debtor has filed a non-opposition and has not opposed or otherwise defended the matter. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Subsection (d)(1) of § 362 of Title 11 provides for relief from stay for "cause, including the lack of adequate protection of an interest in property of such party." 11 U.S.C. § 362(d)(1). Adequate protection may consist of a lump sum cash payment or periodic cash payments to the entity entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in property." 11 U.S.C. § 361(1).

"Where the property is declining in value or accruing interest and taxes eat up the equity cushion to the point where the cushion no longer provides adequate protection, the court may either grant the motion to lift the stay or order the debtor to provide some other form of adequate protection." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 8:1096 (rev. 2011). However, "[a]n undersecured creditor is entitled to adequate protection only for the decline in the [collateral's] value *after* the bankruptcy filing." See *id.* ¶ 8:1065.1 (rev. 2012) (citing *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370-73 (1988)). Further, when a creditor is oversecured, an existing equity cushion may adequately protect the creditor's security interest against a decline in the collateral's value while the stay remains in effect. See *id.* ¶ 8:1072 (citing cases). In calculating the amount

of the movant creditor's equity cushion, the court ignores the debt secured by junior liens. See *id.* ¶ 8:1076 (citing *In re Mellor*, 734 F.2d 1396, 1400-01 (9th Cir. 1984)).

The debtor has missed 18 post-petition payments due on the debt secured by the moving party's lien. This constitutes cause for stay relief. The court does not address grounds for relief under § 362(d)(2) as relief is warranted under § 362(d)(1). The motion will be granted, and the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be waived. No other relief will be awarded.

22. [15-10398](#)-A-7 MICHAEL CARNER ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
4-8-15 [[18](#)]
\$30 FILING FEE PAID 4/15/15

Final Ruling

The fee paid in full, the order to show cause is discharged.

10:00 a.m.

1. [14-12200](#)-A-7 ALVIN SOUZA, JR. AND STIPULATION TO DISMISS SECOND
[14-1082](#) ROBYN SOUZA THROUGH FIFTH CLAIMS FOR RELIEF
MILLER HAY AND TRUCKING, INC. 3-19-15 [[38](#)]
V. SOUZA, JR. ET AL
ORDER DENYING

Final Ruling

The motion denied without prejudice by Civil Minute Order, filed April 20, 2015, ECF # 46, the matter is dropped as moot.

2. [14-13625](#)-A-7 CHARLES DAILEY CONTINUED STATUS CONFERENCE RE:
[14-1127](#) COMPLAINT
UNITED STATES V. DAILEY 10-27-14 [[1](#)]

Final Ruling

The status conference is concluded.

3. [14-13625](#)-A-7 CHARLES DAILEY
[14-1127](#) USA-1
UNITED STATES V. DAILEY
JEFFREY LODGE/Atty. for mv.

CONTINUED MOTION FOR ENTRY OF
DEFAULT JUDGMENT
1-22-15 [[18](#)]

Final Ruling

Motion: Entry of Default Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Prepared by moving party consistent with this ruling

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

LEGAL STANDARDS FOR NONDISCHARGEABILITY UNDER § 523(a)(2)(A)

To succeed on a nondischargeability claim under § 523(a)(2)(A), a creditor must establish five elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

DISCUSSION

The court accepts the authority, presented by the plaintiff United States in its supplemental brief, indicating that silence can be a false representation. *United States v. Hall*, 515 B.R. 515, 520 (Bankr. S.D.W. Va. 2014) (citing Third Circuit and Eighth Circuit cases). Based on the pleadings, arguments and supplemental papers filed by Plaintiff, the court finds that the overpayment is nondischargeable.

In addition to the arguments asserted by plaintiff on the § 523(a)(2)(A) claim, the court also notes another basis on which the overpayment is nondischargeable. Defendant's application summary—containing a summary of defendant's statements made to the SSA in his application over the phone and attached as exhibit 1 to the Supplemental Declaration of Adriana Lomeli—contains what appears to be a false representation in light of all other facts provided. The summary of defendant's application states: "I became unable to work because of my disabling condition on October 25, 2006. I am still disabled." The application summary shows that defendant's statements were made on March 5, 2007 for purposes of an application for Social Security disability benefits (and/or all insurance benefits for which defendant was eligible under certain titles of the Social Security Act). These statements imply that defendant was unable to work at the time of the application. The Lomeli declaration (ECF No. 29) indicates that in April 2007, defendant returned to work and worked continuously through at least 2011 (the brief at p. 1 indicates

defendant's return to work was May 2007). Defendant's return to work was about 1-2 months after his representation that he was unable to work, which supports an inference that such representation was false at the time it was made—or an inference that at least defendant had created a false impression, in representing he was unable to work and then shortly thereafter returning to work, that should have been corrected and was not through defendant's omission in failing to correct the representation.

Because defendant knew he was working as of April or May 2007, and knew that he made the representation on March 5, 2007 that he was unable to work, the court infers that defendant knew his representation (or omission) was false (or created a false impression based on original statements in his application). The court further infers that his representation (and failure to correct the false statement if it had been true) was intended to deceive the Plaintiff (specifically, the SSA) to obtain continued benefits based on the application's assertion of defendant's inability to work.

Plaintiff justifiably relied on these statements in paying benefits over a period of years. Plaintiff was damaged by this reliance because Plaintiff paid benefits to defendant based on his false representation of inability to work.

The court infers from the record that the damages equal the amount of the overpayment. In the Supplemental Declaration of Adriana Lomeli, evidence is offered to show that, after a random audit by Plaintiff (through SSA) of defendant's income, defendant returned to work in April 2007 and worked continuously through at least 2011. His return to work was *before* SSA awarded him SSDI benefits in May 2007. The Plaintiff's brief (p.1) indicates that "As a result [of defendant's failure to tell SSA that he went back to work at his previous employer and his continuing to collect disability benefits], SSA continued to pay [defendant] benefits *until 2011 when SSA discovered his return to work in a random audit.*" Thus, accepting this fact as true by default, it appears that SSA stopped benefits *when* it discovered the true facts. Accordingly, the damages resulted from the false representation or omission to correct a false impression.

CONCLUSION

Because the court finds that judgment should be entered on the § 523(a)(2)(A) claim, the court will not decide whether relief is warranted based on the § 523(a)(6) claim. Judgment shall be entered consistent with this ruling.

4. [12-16876](#)-A-7 WILLIAM VANDER POEL
WW-11
WILLIAM VANDER POEL/MV

CONTINUED PRE-TRIAL CONFERENCE
RE: MOTION FOR SANCTIONS FOR
VIOLATION OF THE DISCHARGE
INJUNCTION
8-19-14 [[231](#)]

RILEY WALTER/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

5. [12-16876](#)-A-7 WILLIAM VANDER POEL CONTINUED MOTION TO SET MATTER
[14-1007](#) MM-1 FOR FURTHER PROCEEDINGS
VANDER POEL, SR. V. MEDINA 2-3-15 [[131](#)]
STAN MALLISON/Atty. for mv.
RESPONSIVE PLEADING

No tentative ruling.

6. [12-16876](#)-A-7 WILLIAM VANDER POEL CONTINUED PRE-TRIAL CONFERENCE
[14-1033](#) RE: AMENDED COMPLAINT
VANDER POEL, SR. V. MEDINA ET 9-12-14 [[89](#)]
AL
MICHAEL FLETCHER/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

7. [14-15699](#)-A-7 JASPAL/DALJEET DHESI STATUS CONFERENCE RE: COMPLAINT
[15-1020](#) 2-26-15 [[1](#)]
JOSHI V. DHESI ET AL
TANVIR JOSHI/Atty. for pl.

No tentative ruling.

8. [14-15699](#)-A-7 JASPAL/DALJEET DHESI MOTION TO DISMISS ADVERSARY
[15-1020](#) JRL-1 PROCEEDING/NOTICE OF REMOVAL
JOSHI V. DHESI ET AL 3-30-15 [[6](#)]
JERRY LOWE/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding Pursuant to Rule 12(b)(6)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted in part, denied in part: the first claim is dismissed without prejudice only as against Mr. Dhesi but remains viable against Mrs. Dhesi; the second claim is dismissed without prejudice only as against Mrs. Dhesi but remains viable against Mr. Dhesi

Order: Civil minute order

Defendants Jaspal Dhesi and Daljeet Dhesi move to dismiss the complaint in this action on two separate grounds. First, they argue that res judicata bars this action because the same parties litigated this matter in a prior action in state court but defendants never raised a fraud claim in the state court action. Second they move to dismiss both claims for failure to state a claim. The motion will be granted in part and denied in part for the reasons discussed.

STANDARDS FOR A RULE 12(b)(6) MOTION

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

Res Judicata

The doctrine of res judicata does not apply in nondischargeability proceedings to preclude creditors from inquiring into the true nature of a debt that had previously been reduced to judgment in state court. The Supreme Court held that this principle applied under bankruptcy law prior to 1978. The Court said: "In sum, we reject respondent's contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of respondent's debt. Adopting the rule respondent urges would take § 17 issues out of bankruptcy courts well suited to adjudicate them, and force those issues onto state courts concerned

with other matters, all for the sake of a repose the bankrupt has long since abandoned." *Brown v. Felsen*, 442 U.S. 127, 138-39 (1979) (superseded by statute [1978 Bankruptcy Code] on other grounds).

Furthermore, looking at the legislative history of § 17 of the 1898 Bankruptcy Act, the Supreme Court found that "[the] broad language suggests that all debts arising out of conduct specified in § 17 should be excepted from discharge and the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt." *Id.* at 138.

To apply *res judicata* to bar an creditor's inquiry into the true nature of a judgment debt in bankruptcy would unfairly disadvantage creditors in their ability to respond to debtors who "ha[ve] upset the repose that would justify treating the prior state-court proceeding as final" by attempting to discharge the judgment debt in bankruptcy. *Id.* at 133-34.

In 2003, the Supreme Court recognized the continued validity of its holding in *Brown v. Felsen*. See *Archer v. Warner*, 538 U.S. 314, 319-322 (2003). The Court applied the holding and logic in *Felsen* to decide the question whether a settlement and release precluded a creditor from showing that a debtor's liquidated settlement debt arose out of "false pretenses, a false representation, or actual fraud," and was thus nondischargeable, even though the settlement agreement and release did not resolve the issue of fraud but merely reduced the creditor's claim to a fixed amount. *Id.* at 319-323.

In short, defendants cannot use *res judicata* to preclude plaintiff from raising a claim for false representations or fraud in this adversary proceeding based on the reduction of plaintiff's claim to judgment in state court. By attempting to discharge the plaintiff's judgment in bankruptcy, defendants "ha[ve] upset the repose that would justify treating the prior state-court proceeding as final." *Felsen*, 442 U.S. at 133-34. In turn, the plaintiff is permitted to respond to this attempt to discharge the judgment debt by offering proof that the judgment debt satisfies the requirements for nondischargeability under § 523(a)(2).

Claim under § 523(a)(2)(A)

To succeed on a nondischargeability claim under § 523(a)(2)(A), a creditor must establish five elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

In this case, defendants assert that the adversary complaint does not plead sufficient facts to satisfy the elements of nondischargeability under § 523(a)(2)(A). The defendants have not given specific details, however, about which elements have not been pleaded or why the elements pleaded are not sufficient.

Defendants' argument that the basis of the allegations is merely a breach of contract claim must be rejected. The allegations do not support a "mere breach of contract." The complaint alleges that Mrs. Dhesi made false representations that, if true along with all other elements, would support a claim of fraud against her. These representations were made in the course of her inducing plaintiff to enter into the transaction alleged in which plaintiff purchased or issued tickets for defendants. The problem raised by the complaint is not merely the breach of a contract, or a failure to pay an amount owed. The complaint goes much further and alleges that Mrs. Dhesi induced plaintiff by her misrepresentations to take actions leading to plaintiff's loss.

After review of the complaint, the court finds that the elements of § 523(a)(2)(A) have been sufficiently pleaded as to Mrs. Dhesi. The heading of the First Claim for Relief, however, indicates that the claim is both against Mrs. Dhesi and Mr. Dhesi. Although the complaint's facts, taken as true, might support a claim against Mr. Dhesi based on a fraudulent omission (assuming he knew about and acquiesced in the card charges as to his own ticket, knew that the charges were unauthorized but failed to tell Plaintiff that it was unauthorized before he accepted the benefits of such charges by traveling), further allegations would need to be added to the section of the complaint titled "First Claim for Relief" for the claim to be viable against Mr. Dhesi as well. Accordingly, to the extent that the complaint alleges its First Claim for Relief against Mr. Dhesi, the complaint fails to state a claim upon which relief can be granted.

Accordingly, the motion will be granted in part as to the § 523(a)(2)(A) claim against Mr. Dhesi, and such claim will be dismissed without prejudice as against him. But the motion will be denied in part to the extent it requests dismissal of the § 523(a)(2)(A) claim against Mrs. Dhesi.

Claim under § 523(a)(6)

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The "malicious" injury requirement is separate from the "willful" injury requirement. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008).

A "malicious" injury involves "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997)).

A "willful" injury is a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphases in original). This willful injury requirement is satisfied "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142, 1144-45 (9th Cir. 2002). By contrast, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64.

Thus, the standard is a subjective one, where the debtor must have "either a *subjective intent* to harm, or a *subjective belief* [or actual

knowledge] that harm is substantially certain." *Su*, 290 F.3d at 1444 (emphases added). In determining whether the debtor has actual knowledge, the court can infer that the debtor is usually "charged with the knowledge of the natural consequences of his actions." *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). "In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6.

In this case, the defendants argue that the complaint is devoid of allegations required for a claim under § 523(a)(6). The defendants are not correct. Moreover, the defendants have not specifically explained which allegations are insufficient and how they are insufficient. Instead their argument asserts a general lack of any allegations relating to the legal elements of a § 523(a)(6) claim.

The court has reviewed plaintiff's § 523(a)(6) claim including factual allegations pleaded in paragraphs 1 through 17 incorporated by reference into this claim at paragraph 25. The court's construes the factual allegations, taken as true, along with all reasonable inferences drawn from them, in the light most favorable to the plaintiff. These facts and reasonable inferences drawn therefrom support each element required for a § 523(a)(6) claim against Mr. Dhesi.

A sufficient number of the elements of the malicious-injury prong have been addressed by the complaint to put defendant on fair notice of the wrongful conduct alleged and to allow him to defend. While the allegations might be somewhat tenuous regarding how the wrongful act would "necessarily cause injury" to plaintiff, the court finds that overall, the elements of the malicious injury prong have been pleaded sufficiently to place defendant Mr. Dhesi on fair notice of the factual basis for the claim to allow him to adequately defend against it.

Regarding whether Mr. Dhesi was substantially certain his chargeback would cause injury (under the willful injury prong of the standard under § 523(a)(6)), the allegations state that he knew that "it" (the authorization of a chargeback) would cause injury to plaintiff. If this fact is disputed by the defendant Mr. Dhesi, then the appropriate forum to do so is through the evidence on a motion for summary judgment or at trial.

Lastly, the allegations do not support a § 523(a)(6) claim against Mrs. Dhesi. If such a claim was intended, as indicated by the text beneath the heading for the § 523(a)(6) claim, such claim must fail. Accordingly, the motion will be granted in part to dismiss without prejudice a claim against Mrs. Dhesi under § 523(a)(6). It will be denied in part to the extent it brings a § 523(a)(6) claim against Mr. Dhesi.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Defendants Jaspal Dhesi and Daljeet Dhesi's motion to dismiss the

complaint in this adversary proceeding has been presented to the court. Having considered the motion, and the opposition, and having heard oral argument presented at the hearing, if any,

IT IS ORDERED that the motion is granted in part and denied in part. The complaint's first claim is dismissed without prejudice only as against Mr. Dhesi, but it remains viable against Mrs. Dhesi. The complaint's second claim is dismissed without prejudice only as against Mrs. Dhesi, but it remains viable against Mr. Dhesi.

IT IS FURTHER ORDERED that, if the plaintiff, Buta Ram Joshi, chooses to amend the complaint, any amended complaint must be filed no later than 14 days after service of the order on this motion. Any subsequent answer to the amended complaint must be filed in accordance with the Federal Rules of Bankruptcy Procedure.

11:00 a.m.

1. [14-12107](#)-A-7 AMADO GOMEZ

CONTINUED ORDER TO SHOW CAUSE
FOR DISGORGEMENT
1-13-15 [[73](#)]

OSCAR SWINTON/Atty. for dbt.

Final Ruling

The matter is continued to June 17, 2015, at 9:00 a.m. pending resolution of the Objection to Exemption, filed September 30, 2014, ECF #43, and Motion to Approve Compromise, filed November 14, 2014, ECF # 52.

1:30 p.m.

1. [13-17744](#)-A-11 SREP V, LLC
PLF-4
PETER FEAR/Atty. for dbt.

MOTION FOR COMPENSATION
4-8-15 [[262](#)]

Tentative Ruling

Application: Allowance of First and Final Compensation and Expense Reimbursement

Notice: LBR 9014-1(f)(2); no written opposition required

Disposition: Approved

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

COMPENSATION AND EXPENSES

In this Chapter 11 case, Fear Law Group, P.C., counsel for the debtor in possession, has applied for an allowance of final compensation and reimbursement of expenses. The applicant requests that the court allow compensation in the amount of \$19,803.50 and reimbursement of expenses in the amount of \$523.18.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services" rendered by counsel for the debtor in possession in a Chapter 11 case and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1). Reasonable compensation is determined by considering all relevant factors. See *id.* § 330(a)(3).

The court finds that the compensation and expenses sought are reasonable, and the court will approve the application on a final basis.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Fear Law Group, P.C.'s application for allowance of final compensation and reimbursement of expenses has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the application,

IT IS ORDERED that the application is approved on a final basis. The court allows final compensation in the amount of \$19,803.50 and reimbursement of expenses in the amount of \$523.18. The applicant is authorized to draw on any retainer held.

IT IS FURTHER ORDERED that the debtor in possession is authorized to

pay the fees allowed by this order from available funds only if the estate is administratively solvent and such payment will be consistent with the priorities of the Bankruptcy Code.

2. [15-10366](#)-A-11 ELLIOTT MANUFACTURING CONTINUED MOTION FOR INTERIM
FLG-4 COMPANY, INC. CHANGES TO COLLECTIVE
ELLIOTT MANUFACTURING COMPANY, BARGAINING AGREEMENT PURSUANT
INC./MV TO 11 U.S.C 1113(E)
3-6-15 [[51](#)]
- PETER FEAR/Atty. for dbt.
RESPONSIVE PLEADING

Final Ruling

The motion withdrawn, the matter is dropped as moot.

3. [15-10366](#)-A-11 ELLIOTT MANUFACTURING MOTION FOR ADMINISTRATIVE
SJL-1 COMPANY, INC. EXPENSES
AUTOMOTIVE INDUSTRIES WELFARE 3-9-15 [[55](#)]
TRUST FUND/MV
PETER FEAR/Atty. for dbt.
ANNE BEVINGTON/Atty. for mv.
RESPONSIVE PLEADING

Final Ruling

By stipulation of the parties, the matter is dropped from calendar

2:15 p.m.

1. [13-17744](#)-A-11 SREP V, LLC MOTION FOR COMPENSATION FOR
BJ-2 THOMAS H. ARMSTRONG, OTHER
PROFESSIONAL(S)
3-4-15 [[242](#)]
- PETER FEAR/Atty. for dbt.
RESPONSIVE PLEADING

No tentative ruling.

2. [13-17744](#)-A-11 SREP V, LLC
UST-1
TRACY DAVIS/MV
PETER FEAR/Atty. for dbt.
GREGORY POWELL/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED MOTION FOR REVIEW OF
FEES
1-14-15 [[195](#)]

No tentative ruling.