

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Wednesday, May 24, 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. [16-12604](#)-B-7 BENNIE MCLIN AMENDED MOTION TO COMPEL
JES-1 ABANDONMENT
5-8-17 [[58](#)]

BENNIE MCLIN/Atty. for mv.

This motion will be denied without prejudice. The record does not show that this motion was served on anyone. No appearance is necessary. The court will enter an order.

2. [16-10521](#)-B-7 ALAN ENGLE MOTION FOR ADMINISTRATIVE
FW-5 EXPENSES
TRUDI MANFREDO/MV 4-17-17 [[134](#)]
PETER BUNTING/Atty. for dbt.
GABRIEL WADDELL/Atty. for mv.

The motion for payment of administrative expenses pursuant to §330(a)(1)(B) will be denied. The court will enter an order. No appearance is necessary.

This motion was brought by trustee's counsel on behalf of the auctioneer who was employed by the estate to sell estate assets at a public auction. The record shows that the order for employment and the sale specified the compensation for the auctioneer which was limited to a 15% commission and \$2,450 for allowed expenses. After the return of sale was filed it was discovered that a "buyer's premium" was charged on most of the estate's items that were sold. This charge had the effect of increasing the sales price of those items and, after being informed that these funds were property of the estate, the auctioneer turned the funds over to the trustee.

It appears now that the auctioneer's request in this motion for payment of additional expenses, including advertising, security, and hauling, that would not normally be charged to the seller, was brought because the auctioneer had expected to cover those expenses with the amounts charged to buyers in the form of a premium.

Section 330(a)(1)(A) and (B) permit employed professional persons to make an administrative claim for "reasonable compensation for actual, necessary services rendered by [the] . . . professional person . . . and, "reimbursement for actual, necessary expenses." The statute, however, is limited by §330(a)(3)(F), listing the factors to be taken into account by the court including, "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than [bankruptcy cases]."

Evaluation of the debtor's argument in opposition regarding conflict of interest is unnecessary because the auctioneer has returned the "buyers' premium" to the estate in this case.

Except for, perhaps, the additional, security expense, storage, and outside hauling fees, required by the unique situation arising in disposing of the assets in this case (Doc. # 134, p. 708), the expenses sought appear to be advertising costs which would reasonably be included as part of the commission approved by the court when the auctioneer was employed. *In lieu* of noticing and preparing a new application, the auctioneer may elect to be reimbursed those costs only as reasonable and necessary expenses unique to this case in a total amount of \$3,067.50.

3. [16-12226](#)-B-7 MICHAEL GRIFFIN AND NANCY CONTINUED OBJECTION TO DEBTOR'S
JES-1 PAGE-GRIFFIN CLAIM OF EXEMPTIONS
JAMES SALVEN/MV 10-6-16 [[46](#)]
F. GIST/Atty. for dbt.
ROBERT HAWKINS/Atty. for mv.

This matter will proceed as a scheduling conference. The court has reviewed the parties' status reports. The parties should be prepared to set dates for discovery and a pretrial hearing.

4. [17-10129](#)-B-7 IGNACIO/MARIA MORENO MOTION TO AVOID LIEN OF
DMG-1 CALIFORNIA SERVICE BUREAU, INC.
IGNACIO MORENO/MV 4-18-17 [[17](#)]
D. GARDNER/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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 respondents' defaults will be entered. It appears from the evidence submitted and the record that the debtors are entitled to avoid this lien that impairs an exemption to which they would otherwise have been entitled.

5. [12-12133](#)-B-7 ALFONSO/SYLVA OLAGUE
EMM-1
WELLS FARGO BANK, N.A./MV
ROBERT WILLIAMS/Atty. for dbt.
ERIN MCCARTNEY/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-19-17 [[184](#)]

The motion will be granted 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 it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

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.

If adequate protection is requested, it will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein.

If an award of attorney fees has been requested, it will be denied without prejudice. A motion for attorney fees pursuant to 11 U.S.C. §506(b), or applicable nonbankruptcy law, must be separately noticed and separately briefed with appropriate legal authority and supporting documentation. In addition, any future request for an award of attorneys fees will be denied unless the movant can prove there is equity in the collateral. 11 U.S.C.A. §506(b).

A waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will not be granted. The movant has shown no exigency.

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 be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

6. [17-11334](#)-B-7 PATRICIA RUIZ

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
4-24-17 [[12](#)]

The OSC will be vacated. The record shows that an agreement to pay the filing fee in installment payments has been filed. No appearance is necessary.

7. [12-14439](#)-B-7 RAFAEL/ARACELI NEGRETE
TOG-2
RAFAEL NEGRETE/MV
THOMAS GILLIS/Atty. for dbt.

MOTION TO AVOID LIEN OF SEQUOIA
CONCEPTS, INC.
5-8-17 [[26](#)]

This motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

The moving papers and the copy of the abstract of judgment refer to a lien held by "Kings Credit Services, a Corp," which entity was served with the motion. However, the debtors request avoidance of a lien held by "Sequoia Concepts, Inc."

This case was re-opened May 8, 2017, for the filing of a motion to avoid a lien. If a replacement motion is not filed by June 24, 2017, the case will be re-closed and will need to be reopened again if further proceedings are necessary.

8. [17-10942](#)-B-7 ANGELA GORDON
JHW-1
AMERICREDIT FINANCIAL
SERVICES, INC./MV
JENNIFER WANG/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
4-24-17 [[21](#)]

The motion will be granted 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 debtor's and the trustee's defaults will be entered. The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates.

If adequate protection is requested, it will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein.

If an award of attorney fees has been requested, it will be denied without prejudice. A motion for attorney fees pursuant to 11 U.S.C. §506(b), or applicable nonbankruptcy law, must be separately noticed and separately briefed with appropriate legal authority and supporting documentation. In addition, any future request for an award of attorneys fees will be denied unless the movant can prove there is equity in the collateral. 11 U.S.C.A. §506(b).

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

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 be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

9. [16-14043](#)-B-7 MYRNA LOPEZ
TOG-3
MYRNA LOPEZ/MV
THOMAS GILLIS/Atty. for dbt.

MOTION TO AVOID LIEN OF CAVALRY
SPV L, LLC
4-20-17 [[38](#)]

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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 respondents' defaults will be entered. It appears from the evidence submitted and the record that the debtors are entitled to avoid this lien that impairs an exemption to which they would otherwise have been entitled.

10. [16-12646](#)-B-7 PERRY CROUCH
RJP-4
PERRY CROUCH/MV
RABIN POURNAZARIAN/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO COMPEL ABANDONMENT
4-17-17 [[47](#)]

Based on the trustee's opposition, this matter, will be continued to June 28, 2017, at 9:30 a.m. for a scheduling conference. The court will issue an order. No appearance is necessary.

This matter is now deemed to be a contested matter. Pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the federal rules of discovery apply to contested matters. The debtor is reminded of his obligation to cooperate with the trustee. See, 11 U.S.C. §521(a)(3). The debtor shall make the subject property available for inspection on reasonable notice, including inspection requests under FRCP 34. The parties shall immediately commence formal discovery, exchange appraisals, meet and confer, set deposition dates if necessary, and be prepared for the court to set an early evidentiary hearing if the matter is not resolved by the continued hearing date.

The court notes that the debtor submitted as an exhibit a document titled "Comparative Market Analysis" however that document has no evidentiary foundation and accordingly is not admissible as evidence of value except as a statement against the debtor's interest, since it states a value in excess of the debtor's schedules.

11. [17-10046](#)-B-7 BENIGNO PADILLA-MARTINEZ MOTION FOR RELIEF FROM
CJO-1 AND SUSANA PADILLA AUTOMATIC STAY
BANK OF AMERICA, N.A./MV 5-3-17 [[18](#)]
JERRY LOWE/Atty. for dbt.
CHRISTINA O/Atty. for mv.

This matter will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the debtors' and the trustee's defaults and grant the motion for relief from stay as follows:

The motion will be granted 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 it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

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.

If adequate protection is requested, it will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein.

If an award of attorney fees has been requested, it will be denied. The movant has not shown there is equity in its collateral and therefore cannot be awarded attorney fees in this matter. 11 U.S.C.A. §506(b).

A waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will not be granted. The movant has shown no exigency.

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 be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

12. [13-16155](#)-B-7 MICHAEL WEILERT AND
FW-20 GENEVIEVE DE MONTREMARE
JAMES SALVEN/MV
PETER FEAR/Atty. for mv.

MOTION FOR CONTEMPT
4-26-17 [[549](#)]

The trustee's motion for contempt sanctions will be granted in part and denied in part without oral argument based upon well-pled facts. The trustee shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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 respondents' defaults will be entered.

On January 8, 2015, the debtors and the trustee executed a stipulation that resolved in part the trustee's objection to the debtors' exemption in a retirement account. Subsequently, on April 4, 2015, the court entered an order approving the stipulation ("It is hereby ordered, adjudged, and decreed: A. The Motion [approving the stipulation] is Granted. B. Trustee is authorized to compromise a controversy with Debtors on the terms set forth in the stipulation attached hereto as Exhibit A."). That stipulation set forth the specific actions the debtors required by the debtors and dates by which time the debtors "shall turnover to Trustee the amount of \$25,850."

The evidence submitted in support of the motion shows that the debtor withdrew \$25,850 from the retirement account between April 1, and June 30, 2015, the precise amount specified in the court's order incorporating the stipulation. However, despite demands from the trustee, the debtors have yet to turn over these funds.

A court may "exercise[] its enforcement power ... in contempt proceedings for violation of a court order approving [a] settlement." *TNT Mktg., Inc. v. Agresti*, 796 F.2d 276, 278 (9th Cir. 1986); *Seven Arts Pictures PLC v. Jonesfilm*, 311 Fed.Appx. 962, 965 (9th Cir. 2009). "Civil contempt is characterized by the court's desire to compel obedience to a court order, or to compensate the contemnor's adversary for the injuries which result from the noncompliance." *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (citations omitted). The trustee has shown by clear and convincing evidence that the debtors have violated the court's order approving and incorporating the terms of the stipulation, and that this disobedience is not based on a good faith and reasonable interpretation of the order. The debtors had the ability to comply with the court's specific and definite order and failed to take all reasonable steps within their power.

The trustee requests sanctions in the form of attorneys fees, according to proof, for bringing this motion. In addition, the trustee requests a sanction in the form of requiring payment of the taxes on the distribution, which the stipulation allocated to the estate, by the debtors.

Debtors are ordered to turnover the funds specified in the stipulation and order, together with interest at the rate allowed on civil judgments from April 26, 2017, the date of the filing of the motion, to the date of turnover, on or before June 8, 2017, under further contempt. The estate will remain liable for taxes and penalties on those funds as provided for in the stipulation and order.

Compensatory civil contempt, including attorney fees, is appropriate as a sanction to ensure compliance with the court's orders. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 506 (9th Cir., 2002); *F.J. Hanshaw, Inc. V. Emerald River Development, Inc.*, 244 F.3d 1128, 1142 (9th Cir., 2001). Attorneys fees for bringing the contempt motion will be awarded, subject to proof, in a subsequent motion.

Creditor, Pendragon Trust, filed a "joinder" to the trustee's contempt motion. The trustee is the movant and real-party-in-interest. The Pendragon Trust, while a creditor, is not a party that needs to be joined. Permissive joinder is not available in contested matters under FRBP 9014. Accordingly, the joinder is stricken and will not be considered.

13. [11-60165](#)-B-7 ANTONIO/CAROL MARCELINO MOTION TO AVOID LIEN OF A.L.
TPH-2 GILBERT COMPANY
ANTONIO MARCELINO/MV 4-26-17 [45]
THOMAS HOGAN/Atty. for dbt.

The motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

This motion to avoid a judicial lien was noticed pursuant to LR 9014-1(f)(2), however the record does not establish that the motion was served on the named respondent in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(3) (corporation, partnership or unincorporated association). *In re Villar*, 317 B.R. 88 (9th Cir. BAP 2004). Information regarding service on a corporation may be obtained from the California Secretary of State's Internet Website, see <http://kepler.sos.ca.gov/>. Litigants are encouraged to attach a copy of their information source (web page, etc.) to the proof of service to assist the court in evaluating compliance with Rule 7004. Service on the lienholder's attorney is not service on the lienholder.

This case was re-opened April 25, 2017, for the filing of the motions to avoid liens. If a replacement motion is not filed by June 24, 2017, the case will be re-closed and will need to be reopened again if further proceedings are necessary.

14. [11-60165](#)-B-7 ANTONIO/CAROL MARCELINO MOTION TO AVOID LIEN OF
TPH-3 VETERINARY SERVICE, INC.
ANTONIO MARCELINO/MV 4-26-17 [[51](#)]
THOMAS HOGAN/Atty. for dbt.

The motion will be denied without prejudice. The court will enter an order. No appearance is necessary.

This motion to avoid a judicial lien was noticed pursuant to LR 9014-1(f)(2), however the record does not establish that the motion was served on the named respondent in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(3) (corporation, partnership or unincorporated association). *In re Villar*, 317 B.R. 88 (9th Cir. BAP 2004). Information regarding service on a corporation may be obtained from the California Secretary of State's Internet Website, see <http://kepler.sos.ca.gov/>. Litigants are encouraged to attach a copy of their information source (web page, etc.) to the proof of service to assist the court in evaluating compliance with Rule 7004. Service on the lienholder's attorney is not service on the lienholder.

This case was re-opened April 25, 2017, for the filing of the motions to avoid liens. If a replacement motion is not filed by June 24, 2017, the case will be re-closed and will need to be reopened again if further proceedings are necessary.

15. [17-10984](#)-B-7 JUAN/GABRIELA OCEGUEDA MOTION TO COMPEL ABANDONMENT
GT-1 4-13-17 [[19](#)]
JUAN OCEGUEDA/MV
GRISELDA TORRES/Atty. for dbt.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If the motion is granted the movant shall submit a proposed order that identifies separately each item to be abandoned.

If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

16. [13-11489](#)-B-7 FERNANDO/LUCILA
JES-2 BAGUINGUITO
JAMES SALVEN/MV
JAMES MILLER/Atty. for dbt.

MOTION FOR COMPENSATION FOR
JAMES E. SALVEN, ACCOUNTANT(S)
4-20-17 [[62](#)]

The motion will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order in conformance with the ruling. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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 respondents' defaults will be entered.

17. [16-10293](#)-B-7 EDWIN YEE
JES-3
JAMES SALVEN/MV
JAMES SALVEN/Atty. for mv.

MOTION TO SELL
4-25-17 [[45](#)]

This motion will proceed as scheduled only for submission of higher and better bids, if any. The moving party shall submit a proposed order after the hearing.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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 respondents' defaults will be entered.

18. [13-10699](#)-B-7 CHERI BELT
TCS-2
CHERI BELT/MV
TIMOTHY SPRINGER/Atty. for dbt.

MOTION TO AVOID LIEN OF
CITIBANK, N.A.
5-3-17 [[20](#)]

This matter was noticed as a preliminary hearing and will be continued to June 28, 2017, at 9:30 a.m. No appearance is necessary. The movant shall serve the moving papers and notice of continued hearing on the case trustee. After the continued hearing, movant shall submit a proposed order.

If service on the case trustee is properly made under LR 9014-1(f)(1), and no opposition is filed, the matter may be removed from calendar by predisposition.

This motion to avoid a judicial lien was not served on the case trustee, James Salven. The requirements for serving a motion are set forth in Bankruptcy Rule 9013, which states in pertinent part: Every written motion, other than one which may be considered ex parte, shall be served by the moving party The moving party shall serve the motion on: (a) the trustee . . . and on those entities specified by these rules

19. [13-10699](#)-B-7 CHERI BELT
TCS-3
CHERI BELT/MV
TIMOTHY SPRINGER/Atty. for dbt.

MOTION TO AVOID LIEN OF
CITIBANK, N.A.
5-3-17 [[24](#)]

This matter was noticed as a preliminary hearing and will be continued to June 28, 2017, at 9:30 a.m. No appearance is necessary. The movant shall serve the moving papers and notice of continued hearing on the case trustee. After the continued hearing, movant shall submit a proposed order.

If service on the case trustee is properly made under LR 9014-1(f)(1), and no opposition is filed, the matter may be removed from calendar by predisposition.

This motion to avoid a judicial lien was not served on the case trustee, James Salven. The requirements for serving a motion are set forth in Bankruptcy Rule 9013, which states in pertinent part: Every written motion, other than one which may be considered ex parte, shall be served by the moving party The moving party shall serve the motion on: (a) the trustee . . . and on those entities specified by these rules

20. 14-14991-B-7 KEVIN/DEBORAH KOKER
JES-1
JAMES SALVEN/MV
JEFFREY ROWE/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

CONTINUED OBJECTION TO DEBTOR'S
CLAIM OF EXEMPTIONS
2-8-17 [29]

This motion shall proceed as scheduled.

21. 14-14991-B-7 KEVIN/DEBORAH KOKER
JES-2
JAMES SALVEN/MV
JEFFREY ROWE/Atty. for dbt.
JAMES SALVEN/Atty. for mv.

CONTINUED MOTION TO COMPEL
2-8-17 [34]

This motion shall proceed as scheduled.

11:00 A.M.

1. [17-10141](#)-B-7 MARGARITA ESPINOZA

REAFFIRMATION AGREEMENT WITH TD
AUTO FINANCE LLC
4-24-17 [[21](#)]

THOMAS GILLIS/Atty. for dbt.

The hearing will be dropped from calendar. Counsel shall inform his clients that no appearance is necessary at this hearing.

Debtor was represented by counsel when she entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), "if the debtor is represented by counsel, the agreement *must* be accompanied by an affidavit of the debtor's attorney' attesting to the referenced items before the agreement will have legal effect." *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). In this case, the debtor's attorney affirmatively represented that he could not recommend the reaffirmation agreement. Therefore, the agreement does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable.

1:30 P.M.

1. [16-10016](#)-B-13 KEVIN DAVEY
[16-1074](#) EAT-4
DAVEY V. OCWEN LOAN SERVICING,
LLC ET AL
DARLENE VIGIL/Atty. for mv.

MOTION TO DISMISS CROSSCLAIM
4-26-17 [[154](#)]

This matter will proceed as scheduled. The court has considered the motion and opposition and intends to enter the tentative ruling below.

Tentative Ruling. This motion will be DENIED in part and GRANTED in part. DHINTEC shall file and serve an amended cross claim by June 7, 2017.

First, DHINTEC's argument, that the motion is late, is disingenuous. The law is clear that a motion based on the failure to state a claim for relief may be raised at any time before entry of judgment, although it may not technically be a FRCP 12(b)(6) motion at that time. *Russell v. Choicepoint Servs., Inc.*, 302 F. Supp. 2d 654, 659 (E.D. La. 2004). The authority cited by DHINTEC, *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 12 (8th Cir. 1965), actually relates to a motion "raising objections to venue." Other waivable (12)(b) motions include objections to personal jurisdiction. The failure to state a claim objection, however, is "preserved by Rule 12(g) from the waiver mechanism in Rule 12(h)(2)." *Farmers Elevator Mut. Ins. Co. v. Carl J. Austad & Sons, Inc.*, 343 F.2d 7, 12 (8th Cir. 1965).

The standards to be applied in a ruling on a motion to dismiss under Civil Rule 12(b)(6) (made applicable by rule 7012), are well known. The court must dismiss a complaint if it fails to "state a claim upon which relief can be granted." In reviewing a 12(b)(6) dismissal, we accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011); *Newcal Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1043 n. 2 (9th Cir. 2008). However, the court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. *Bell At. Cor. V. Twombly*, 550 U.S. 544, 555-56 (2007); *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

To avoid dismissal under civil rule 12 (b)(6), a plaintiff must aver in his complaint "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 (2009) A dismissal under civil rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence or sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116,1121 (9th Cir. 2008). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that recovery is very remote, but that is not the test.

Second, DHINTEC's fourth claim for relief for equitable indemnity is adequately plead. FRCP 13 (g) (made applicable to bankruptcy adversary proceedings by FRBP 7013) provides:

A pleading may state as a cross claim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject of the original action . . . or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

Here, DHINTEC's cross claim alleges that it purchased the property at issue five months after the foreclosure sale (¶'s 2, 19); Barrett was the foreclosing trustee (¶ 14), that the plaintiff filed a chapter 13 and the foreclosure sale occurred after the filing (¶'s 15 and 16). Also, DHINTEC incorporates (without admitting liability) the allegations of the second amended complaint setting forth potential violation of the automatic stay and the result therefrom. (¶ 27). Finally DHINTEC admits the claims for indemnity are contingent (¶'s 4 and 40)

Barrett makes essentially two arguments. First, Barrett states that there is no basis for liability against DHINTEC plead in plaintiff's complaint thus there is no basis in law for a claim for indemnity. Second, that as a matter of law, Barrett has no liability to third party purchasers of property after the foreclosure sale under *Heritage Oaks Partners v. First American Title Insurance*, 155 Cal.App.4th 339 (2007). Therefore there is no basis for DHINTEC to assert an indemnity claim even if DHINTEC is found liable.

Barrett's first argument is simply a repeat of its arguments attacking the sufficiency of the second amended complaint. The court has already ruled on that issue denying Barrett's Second Motion to Dismiss (Doc.# 114). It seems the plaintiff may have a difficult time proving a claim against DHINTEC and may have difficulty proving a claim against Barrett. That is not the test. After discovery, and perhaps a round of dispositive motions, this may come to pass. However, now the court cannot say that the claim for equitable indemnity asserted by DHINTEC is insufficient as a matter of law given the allegations in the second amended complaint incorporated by DHINTEC.

Equitable indemnity is only available among tortfeasors who are jointly and severally liable for plaintiff's injury. *In re Parker*, 471 BR 570, 576 (9th Cir. BAP 2012) [indemnitor's conditional default judgment against another party is not a judicial admission that the indemnitor is jointly liable with the other party who defaulted]. In order to state a claim for equitable indemnity, the indemnitee (here DHINTEC) must plead that the indemnitor (here Barrett) is jointly at fault for plaintiff's injury and the indemnitee has or will incur damages for which the indemnitor is responsible. *Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.*, 86 Cal.App.4th 1135, 1139 (2001). "If the evidence establishes that

a defendant is not a concurrent tortfeasor responsible in any way for the plaintiff's injuries, another defendant may not pursue a claim for indemnity against that defendant." *Children's Hospital v. Sedgwick*, 45 Cal.App.4th 1780, 1787 (1996), *emphasis original*. This proposition is the basis for the argument by Barrett but is not a basis to dismiss the cross claim. DHINTEC has plead what is necessary for the claim.

Barrett's second argument fails because *Heritage Oaks* cannot be stretched as far as Barrett argues. In *Heritage Oaks*, previous litigation involving the parties was tried and the trial court's judgment, that the trustee sale there was void because it was not conducted by the foreclosure trustee of record, was reversed by the California court of appeal which also reformed the deed of trust to validate the sale. *Heritage Oaks*, 155 Cal.App.4th, 511. The court of appeal in *Heritage Oaks* held, a foreclosing trustee's negligence in believing it was the foreclosing trustee of record who conveys title to a successful bidder owes no duty to subsequent purchasers. *Id.*

The underlying validity of the trustee's sale was determined in previous litigation in *Heritage Oaks*. That was a controlling factor for the *Heritage Oaks* court. *Id.* at 517. In this case, validity of the sale has not been determined. Indeed, in the Ninth Circuit, sales conducted in violation of the automatic stay are void. See, *In re Schwartz*, 954 F. 2d 569 (9th Cir. 1992). In addition, the manner in which the plaintiff pleads the case against the defendants does not control rights to indemnity. So long as the indemnitee pleads and proves that the indemnitor breached a duty to the plaintiff for which the indemnitee is liable, the indemnity action is viable. *GEM Developers v. Hallcraft Homes of San Diego, Inc.*, 213 Cal. App. 3d 419, 428-29 (1989), *emphasis added*. Here, DHINTEC has conditionally plead the basis for liability asserted by the plaintiff. For reasons alleged by DHINTEC, even though proving those may be remote, an indemnity claim has been asserted.

Arguably, even under the *Heritage Oaks* rationale, DHINTEC's indemnity claim is viable. In discussing the limited duties a foreclosing trustee owes to the trustor and beneficiary, one of those is, "upon default to undertake the steps necessary to foreclose the deed of trust." *Heritage Oaks*, 155 Cal.App.4th, 514 quoting *Vournas v. Fidelity National Title Ins. Co.*, 73 Cal.App.4th 668, 677 (1999). Do those steps include determining if a bankruptcy was filed when provided with that information before the foreclosure sale? Barrett does not address this issue and neither does *Heritage Oaks*.

In addition to the foregoing, Barrett's argument fails because Barrett has offered no compelling reason why an alleged violation of the automatic stay should not be the subject of an equitable indemnity claim. The policy of indemnity claims being prosecuted is favored. See, *Platt v. Coldwell Banker Residential Real Estate Services*, 217 Cal.App.3d 1439, 1449 (1990). The policy of protecting the automatic stay is favored as well. *Sternberg v. Johnson*, 595 F. 3d 937, 943 (9th Cir. 2010) cert. den. 562 U.S. 831 (2010) quoting *Eskanos & Adler P.C. v. Leetien*, 309 F. 3d 1210, 1214-15

(9th Cir. 2002). The indemnity claim is premised on the alleged stay violation which has not been proven though it has been plead. That is sufficient to survive the motion to dismiss.

Third, DHINTEC's seventh claim (negligent misrepresentation) is not adequately plead against Barrett. DHINTEC incorporates all allegations of the cross claim into this claim for relief and additionally alleges that the Trustee's Deed upon sale executed by Barrett affirmatively represented that all of the requirements of law with regard to the January 5, 2016 foreclosure were complied with. (¶ 52) Also, DHINTEC alleges that if plaintiff's allegations are true and the sale is void due to improper foreclosure, those representations were false and that Barrett and the other cross-defendants had no grounds for believing they were true. (¶ 53). The cross claim also alleges the representations were made to induce the reliance of future purchasers of the property like DHINTEC and that DHINTEC relied on those representations. *Id.*

The elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal.App.4th 226, 243 (2007) citing *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 983 (2003) see also Cal.Civ.Code §1710(2). "Claims of fraud and negligent misrepresentation must meet the heightened pleading requirements of [FRCP] 9(b)." *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D.Cal., 1999). FRCP 9 is applicable to bankruptcy adversary proceedings under FRBP 7009.

DHINTEC's cross claim must allege the circumstances surrounding the fraud with particularity including time, place, specific content of the false representations and the identities of the parties to the misrepresentation. *Odom v. Microsoft Corp.*, 486 F. 3d 541, 553-54 (9th Cir. 2007). The problem here is that the specific content of the misrepresentation is not alleged except by reference to the Trustee's Deed (Doc. 84). The representation cited by DHINTEC in the Trustee's Deed references Barrett's alleged compliance with noticing requirements, not other provisions of law. DHINTEC tries to change that in its opposition to the motion when it referenced Barrett's, "exercise of its powers under said Deed of Trust" This was not alleged in the cross claim.

In fact, there is no allegation supporting an inference that something in the "powers under said Deed of Trust" would be justifiably relied upon by DHINTEC as a basis for the negligent misrepresentation claim against Barrett. Thus there is no basis plead in the cross claim to support any allegation of an affirmative misrepresentation by Barrett. However, when read as a whole there are allegations in the cross claim which may form that basis and thus amendment of the cross-claim will be permitted.

DHINTEC is reminded that the generic allegations of, "no reasonable ground for belief," and justifiable reliance, may not be within FRCP 9(b)'s requirements.

Barrett's other argument regarding its alleged lack of duty has been discussed above and need not be dealt with here.

Finally, the court has reviewed DHINTEC's objection to consideration by the court of any argument that mentions possible insurance coverage for DHINTEC's claim. That objection deals with an evidentiary exclusion and no evidence has been reviewed here except the Trustee's Deed which is part of the pleadings. Also, the court's rulings as set forth above are not in any manner based on insurance coverage or the lack thereof. The objection is overruled.

The motion to dismiss is DENIED in part and GRANTED in part. DHINTEC shall file and serve an amended cross-claim on or before June 7, 2017.

2. [16-14572](#)-B-7 NAVTEJ SINGH AND VEERPAL STATUS CONFERENCE RE: COMPLAINT
[17-1037](#) KAUR 3-24-17 [[1](#)]
VOHRA V. SINGH
THORNTON DAVIDSON/Atty. for pl.
REISSUED SUMMONS SETTING
STATUS CONFERENCE FOR
6/28/17

This status conference will be dropped from calendar. No appearance is necessary.

The summons has been reissued and a new status conference has been set in the reissued summons.

3. [16-12687](#)-B-7 LORAINÉ GOODWIN MILLER STATUS CONFERENCE RE: COMPLAINT
[17-1039](#) 3-29-17 [[1](#)]
SALVEN V. GOODWIN MILLER ET AL
TRUDI MANFREDO/Atty. for pl.
RESPONSIVE PLEADING

This status conference shall proceed as a scheduling conference. The court has reviewed the trustee's status report. Parties shall be prepared to set dates for discovery cut-off and a pre-trial hearing.