

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Thursday, August 4, 2016
Place: U.S. Courthouse, 510 19th Street
Bakersfield, 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 a civil minute 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.

9:00 A.M.

1. [16-11505](#)-B-13 JENNIFER JENKINS MOTION TO DISMISS CASE
MHM-2 6-20-16 [[18](#)]
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

2. [16-11505](#)-B-13 JENNIFER JENKINS OBJECTION TO DEBTOR'S CLAIM OF
MHM-3 EXEMPTIONS
MICHAEL MEYER/MV 6-29-16 [[22](#)]
ROBERT WILLIAMS/Atty. for dbt.

Because the court intends to dismiss this case based on the trustee's fully-noticed and unopposed motion above, calendar number 1 (DC# MHM-2), this motion will be denied as moot. The court will enter a civil minute order. No appearance is necessary.

3. [16-11106](#)-B-13 NICOLE BENTLEY ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
7-5-16 [[36](#)]
SUSAN SALEHI/Atty. for dbt.
FINAL INSTALLMENT PAYMENT
7/18/16

The OSC will be vacated. No appearance is necessary. The record shows that the required fee has been paid.

4. 15-14007-B-13 CARA WEESE
MHM-3
MICHAEL MEYER/MV
WILLIAM OLCOTT/Atty. for dbt.

MOTION TO DISMISS CASE
6-3-16 [45]

Unless the motion is withdrawn prior to the hearing, the motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

5. 16-10508-B-13 EFRAIN HERNANDEZ

PATRICK KAVANAGH/Atty. for dbt.
DISMISSED

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
6-27-16 [25]

This matter will be dropped from calendar. The case has already been dismissed. No appearance is necessary.

6. 16-11209-B-13 MOISES PALMA
BPN-1
EDWARDS FEDERAL CREDIT
UNION/MV
STEVEN ALPERT/Atty. for dbt.
BRUCE NEEDLEMAN/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
6-15-16 [39]

The motion will be granted. No appearance is necessary. Movant shall submit an acceptable order in accordance with the requirements below.

Movant seeks relief from stay to exercise its state law remedies relating to its security interest in a 2015 Seabreeze Trailer. The motion was noticed pursuant to LBR 9014-1(f)(1). There was no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

Movant has established its interest in the trailer, that the debtor is in default and that the amount owed exceeds the value of the trailer. Although movant's evidence on the last point is insufficient as it references a market price without adequate foundation as to the source's reliability. Declarant has not established his expertise in evaluating this equipment. The debtor's proposed Plan, however, classifies this obligation as secured by collateral to be surrendered. Further, debtor's schedules state the debtor's estimated value of the trailer as being less than what is owed. Accordingly cause exists to terminate the stay as to this creditor.

The proposed order shall specifically describe the property or action to which the order relates. If the notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. 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.

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).

7. 15-14716-B-13 GEORGE NUNEZ
MHM-2
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO DISMISS CASE
6-3-16 [[44](#)]

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

8. 16-11118-B-13 KENNETH SPURLOCK
MHM-1
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
6-14-16 [[25](#)]

Unless the motion is withdrawn by the trustee prior to the hearing, the motion will be continued to September 8, 2016, at 9:00 a.m., to be heard with the debtor's motion to confirm a chapter 13 plan. The court will enter a civil minute order. No appearance is necessary.

9. 16-10319-B-13 MONIQUE BOOKOUT
RSW-2
MONIQUE BOOKOUT/MV
ROBERT WILLIAMS/Atty. for dbt.

OBJECTION TO CLAIM OF INTERNAL
REVENUE SERVICE, CLAIM NUMBER 4
6-17-16 [50]

The motion will be continued to September 8, 2016, at 9:00 a.m. Additional evidence supporting the objection as to the priority and general unsecured portions of the claim shall be filed no later than August 25, 2016. The objection to the secured portion of the claim will be denied as moot. The court will enter a civil minute order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

The debtor has filed an objection to claim number 4, the secured, general unsecured, and priority claims of the IRS. The debtor's objection to the secured portion of the claim will be deemed as a motion to value the collateral for that claim, and will be denied as moot. The IRS filed an amended proof of claim on July 8, 2016, in which it agrees with the debtor's valuation of its collateral. Accordingly, there is no case or controversy with regard to the secured portion of the claim.

As to the general unsecured and priority unsecured portions of the claim, the debtor's moving papers do not present "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re Tracht Gut, LLC*, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The proof of claim is entitled to *prima facie* validity and the debtor submitted no evidence to the contrary as is required by LBR 3007-1(a).

10. 16-10319-B-13 MONIQUE BOOKOUT
RSW-2
MONIQUE BOOKOUT/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
6-17-16 [54]

The motion will be denied without prejudice. The court will enter a civil minute order. No appearance is necessary.

The moving papers do not include an appropriate docket control number as required by Local Bankruptcy Rule 9014-1(c). Docket control number RSW-2 has already been used for the debtor's objection to proof of claim at calendar number 9.

11. [16-10522](#)-B-13 ELIZABETH/JULIO CAMACHO MOTION TO DISMISS CASE
MHM-2 6-14-16 [[26](#)]
MICHAEL MEYER/MV
OSCAR SWINTON/Atty. for dbt.

Unless the trustee's motion is withdrawn prior to the hearing, the motion will be denied without prejudice. The basis for the trustee's motion to dismiss is the failure by the debtors to confirm a chapter 13 plan. The court intends to grant the debtors' fully noticed and unopposed motion to confirm a chapter 13 plan below at calendar number 12 (DC# ORS-1). Accordingly, it appears that the motion is no longer justified. The court will enter a civil minute order. No appearance is necessary.

12. [16-10522](#)-B-13 ELIZABETH/JULIO CAMACHO MOTION TO CONFIRM PLAN
ORS-1 6-17-16 [[30](#)]
ELIZABETH CAMACHO/MV
OSCAR SWINTON/Atty. for dbt.

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules, there is no opposition and the respondents' default will be entered. The confirmation order shall be in conformance with LBR 3015-1(e) and shall include the docket control number of the motion and reference the plan by the date it was filed.

13. [15-12826](#)-B-13 JOE/TINA MARIE GRANILLO MOTION TO DISMISS CASE
MHM-1 6-6-16 [[77](#)]
MICHAEL MEYER/MV
SUSAN SALEHI/Atty. for dbt.

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

14. [15-11029](#)-B-13 TERRY WHEELER
PK-6
TERRY WHEELER/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO MODIFY PLAN
5-26-16 [[155](#)]

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules, there is no opposition and the respondents' default will be entered. The confirmation order shall be in conformance with LBR 3015-1(e) and shall include the docket control number of the motion and reference the plan by the date it was filed.

15. [13-18038](#)-B-13 MARK MOORE AND TAMILLEE
MHM-6 DERINGTON-MOORE
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE
6-16-16 [[114](#)]

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

16. [16-11241](#)-B-13 RUTH HERNANDEZ
PK-1
RUTH HERNANDEZ/MV
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF
CAPITAL ONE N.A.
6-27-16 [[18](#)]

This motion to value collateral will be denied as moot. The court will enter a civil minute order. No appearance is necessary.

In the debtor's opinion the fair market value of the 2010 Dodge Avenger is \$6,154. The creditor has filed a proof of claim that lists the value of the property securing its claim as \$5,660 and the amount of its claim that is secured as \$6,154. Accordingly, there is no case or controversy before the court.

The court notes that the creditor, whether as "Capital One, N.A.," or as "Capital One Auto Finance, a Division of Capital One N.A.," was not served pursuant to FRBP 7004.

17. [16-11853](#)-B-13 VICTOR VILLALVAZO
HTP-1
BANK OF THE SIERRA/MV
RICHARD STURDEVANT/Atty. for dbt.
HANNO POWELL/Atty. for mv.

OBJECTION TO CONFIRMATION OF
PLAN BY BANK OF THE SIERRA
6-29-16 [[15](#)]

This matter will be continued to September 8, 2016, at 9:00 a.m. The court will prepare and enter a civil minute order. No appearance is necessary.

The trustee has not yet concluded the meeting of creditors and by prior order of the court, the trustee has another 7 days after completion of the creditors' meeting to file his objection to the plan. If the § 341 has been concluded and this objection has not been withdrawn, the court will call the matter on September 8, 2016, at 9:00 a.m., and set an evidentiary hearing.

18. [15-12954](#)-B-13 MICHAEL HALL
SAW-3
MICHAEL HALL/MV
STEVEN WOLVEK/Atty. for dbt.

AMENDED MOTION TO CONFIRM PLAN
6-23-16 [[93](#)]

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules, there is no opposition and the respondents' default will be entered. The confirmation order shall be in conformance with LBR 3015-1(e) and shall include the docket control number of the motion and reference the plan by the date it was filed.

19. 16-12158-B-13 RICO PIMENTEL
BH-1
SANTIAGO CREEK MOBILE HOME
PARK, L.P./MV
ROBERT BRUMFIELD/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-6-16 [17]

The motion will be denied, without prejudice as to any relief that may be available under §§ 362(d)(1) or (d)(2). The court will enter a civil minute order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondent's default will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

Here, the moving papers do not present "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *In re Tracht Gut, LLC*, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Movant, a mobile home park, has established without dispute that it has proceeded with its unlawful detainer remedies in the Kern County Superior Court for non-payment of rent as to a mobile home located at 3000 S. Chester Ave., #117, Bakersfield, CA. However, movant has not obtained the judgment because of the filing of a bankruptcy case by Guadalupe Miranda (Case number 16-11321-A-13 dismissed on July 12, 2016) the purported owner of the mobile home and now the filing of this chapter 13 case by the debtor, an alleged occupant of the mobile home. Movant seeks relief under 11 U.S.C. § 362(d)(4).

Movant's supporting evidence does not establish grounds for that relief. 11 U.S.C. § 362(d)(4) relief is limited to a creditor "whose claim is secured by an interest in . . . real property if the court finds that the filing of a petition was part of a scheme to delay, hinder, or defraud creditors . . . that involved multiple bankruptcy filings affecting such real property." Neither Mr. Brumfield's declaration, the documents for which movant requests the court take judicial notice, nor the schedules in this or Miranda's case, establish that movant is secured by the real property at issue.

The evidence is that Miranda may own the mobile home (the court does not so find in this motion) and movant has unsecured rental claims against Miranda and perhaps this debtor. Even the Chapter 13 Plan proposed in this case classifies movant's claim as an executory contract that is to be assumed under 11 U.S.C. § 365. No evidence establishes movant's secured interest

in the real property that is the subject of the unlawful detainer proceeding pending in Superior Court. Movant may own the mobile home park but even that is not established by the evidence and, if it was, §362(d) (4) relief would not be appropriate. Accordingly relief under § 362(d) (4) will be denied.

Movant did not move for relief under any of the other subsections of §362.

20. [14-13863](#)-B-13 ARTURO CORONEL
RSW-1
ARTURO CORONEL/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO MODIFY PLAN
6-30-16 [[40](#)]

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules, there is no opposition and the respondents' default will be entered. The confirmation order shall be in conformance with LBR 3015-1(e) and shall include the docket control number of the motion and reference the plan by the date it was filed.

21. [16-11063](#)-B-13 DANIEL PADILLA
SJS-4
DANIEL PADILLA/MV
SUSAN SALEHI/Atty. for dbt.

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA), N.A.
6-20-16 [[51](#)]

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

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

22. [16-11063](#)-B-13 DANIEL PADILLA
SJS-5
DANIEL PADILLA/MV

MOTION TO AVOID LIEN OF
SPRINGLEAF FINANCIAL SERVICES,
INC.
6-20-16 [[58](#)]

SUSAN SALEHI/Atty. for dbt.

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

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

23. [14-15467](#)-B-13 STEVEN WILLIAMS
MHM-3
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE
6-6-16 [[65](#)]

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

24. [16-11072](#)-B-13 ELLYN LOPEZ
MHM-1
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.

OBJECTION TO CONFIRMATION OF
PLAN BY MICHAEL H. MEYER
6-14-16 [[35](#)]

This motion will be set for a final hearing on September 8, 2016, at 9:00 a.m. The court will prepare and enter a civil minute order. No appearance is necessary.

The trustee filed fully noticed objection to confirmation of the debtor's chapter 13 plan, to which the debtor filed an (untimely) opposition.

If the dispute is not resolved before the continued hearing, the trustee shall file a supplemental statement of issues by September 1, 2016. If the matter is resolved then the trustee shall withdraw this objection prior to the continued hearing.

25. [16-11473](#)-B-13 SHELBY/CAROL KING
LKW-1
SHELBY KING/MV
LEONARD WELSH/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
6-16-16 [[23](#)]

This matter will proceed as scheduled.

26. [15-10076](#)-B-13 ESTEBAN ZAVALA
MHM-4
MICHAEL MEYER/MV
PATRICK KAVANAGH/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
6-6-16 [[127](#)]

Unless the trustee has withdrawn his motion prior to the hearing, the motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

The chapter 13 trustee's motion to dismiss was fully noticed in compliance with the Local Rules. On July 21, 2016, the debtor filed an objection to the motion indicating an intention to file a modified amended plan that cures the default, however the record shows that no plan has been filed.

27. [15-10677](#)-B-13 JOHN KING
MHM-4
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE
6-6-16 [[85](#)]

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

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

The record shows that there is a material default in the chapter 13 plan payments that has not been cured. Accordingly, the case will be dismissed.

28. [14-11878](#)-B-13 HOLLY DAVENPORT
RSW-2
HOLLY DAVENPORT/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO SELL
7-14-16 [[43](#)]

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' default and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2). If the motion is granted, the moving party shall submit a proposed order after the hearing. Otherwise, the court will issue a minute order.

29. [15-10184](#)-B-13 PIERRE ROSADO
MHM-3
MICHAEL MEYER/MV
STEVEN ALPERT/Atty. for dbt.

MOTION TO DISMISS CASE
6-16-16 [[44](#)]

This matter will be continued to September 8, 2016, at 9:00 a.m., to be heard with the debtor's motion to confirm a modified chapter 13 plan that addresses the basis of the trustee's motion. The court will enter a civil minute order. No appearance is necessary.

30. [15-13887](#)-B-13 BERNARD NAWORSKI
RSW-1
BERNARD NAWORSKI/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO MODIFY PLAN
6-2-16 [[39](#)]

The motion will be granted without oral argument based on well-pled facts. No appearance is necessary. The movant shall submit a proposed order as specified below.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules, there is no opposition and the respondents' default will be entered. The confirmation order shall be in conformance with LBR 3015-1(e) and shall include the docket control number of the motion and reference the plan by the date it was filed.

31. [16-10288](#)-B-13 CLINT/JUDITH HARRISON
MHM-2
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
6-10-16 [[41](#)]

Unless the trustee has withdrawn his motion prior to the hearing, the motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

The chapter 13 trustee's motion to dismiss was fully noticed in compliance with the Local Rules. On July 21, 2016, the debtors filed an objection to the motion indicating an intention to file the necessary motions to value collateral, however the record shows that motions have yet been filed.

32. 16-11189-B-13 RUBEN BEGA
MHM-1
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO DISMISS CASE
6-14-16 [[17](#)]

Unless the trustee has withdrawn his motion prior to the hearing, the motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

The chapter 13 trustee's motion to dismiss was fully noticed in compliance with the Local Rules. On July 21, 2016, the debtor filed an objection to the motion indicating that the required documentation has been provided to the trustee, however the trustee's motion has not been withdrawn.

33. 16-10391-B-13 MICHAEL PFEIFFER
DMG-1
MICHAEL PFEIFFER/MV
D. GARDNER/Atty. for dbt.
RESPONSIVE PLEADING

MOTION TO CONFIRM PLAN
6-21-16 [[28](#)]

Based on the debtor's response to the trustee's opposition to confirmation, this matter will be continued to September 8, 2016, at 9:00 a.m. At that hearing the court will set an evidentiary hearing. The court will prepare and enter a civil minute order. No appearance is necessary.

If this dispute is not resolved before the continued hearing, the trustee shall file a supplemental statement of issues by September 1, 2016. If the matter is resolved, then the trustee shall withdraw this objection prior to the continued hearing.

34. 16-12440-B-13 JAVIER GARCIA
RJC-1
JAVIER GARCIA/MV
ROBERT CERVANTES/Atty. for dbt.

MOTION TO EXTEND AUTOMATIC STAY
7-28-16 [[10](#)]

This matter will be called as scheduled. Unless opposition is presented at the hearing, the court intends to grant the motion.

The Motion to Extend the Automatic Stay was properly set for hearing on expedited notice pursuant to a request for an order shortening time. Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative

ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Courts consider many factors - including those used to determine good faith under §§ 1307(and 1325(a) - but the two basic issues to determine good faith under 11 U.S.C. § 362(c)(3) are:

1. Why was the previous plan filed?
 2. What has changed so that the present plan is likely to succeed?
- In re Elliot-Cook*, 357 B.R. 811, 814-15 (Bankr. N.D. Cal.2006)

In this case the presumption of bad faith does not arise. "Where there is no presumption of bad faith and no party objects, a request to extend the stay should be liberally granted." *In re Elliott-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006), citing *In re Warneck*, 336 B.R. 181, 182 (Bankr.S.D.N.Y.2006).

Based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the debtor's petition was filed in good faith and intends to grant the motion to extend the automatic stay. The motion will be granted and the automatic stay extended for all purposes, as to all parties who received notice, unless terminated by further order of this court. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2). The court will issue a minute order after the hearing.

9:30 A.M.

1. [15-14685](#)-B-11 B&L EQUIPMENT RENTALS, MOTION FOR COMPENSATION BY THE
DHR-3 INC. LAW OFFICE OF LEVENE, NEALE,
BENDER, YOO & BRILL L.L.P. FOR
DANIEL H. REISS, CREDITOR COMM.
ATY(S)
7-21-16 [[421](#)]

LEONARD WELSH/Atty. for dbt.
AMENDED NOTICE TO CONTINUE
WITHOUT ORDER

The motion will be deemed withdrawn without prejudice. The court will issue a minute order. No appearance is necessary.

The purported re-notice does not comply with Local Bankruptcy Rule 9014-1(j) requiring court approval of a continuance. The re-noticed hearing on August 11, 2016, will be dropped from calendar.

2. [15-14685](#)-B-11 B&L EQUIPMENT RENTALS, MOTION FOR COMPENSATION BY THE
LKW-32 INC. LAW OFFICE OF LEONARD K. WELSH
FOR LEONARD K. WELSH, DEBTORS
ATTORNEY(S)
7-14-16 [[409](#)]

LEONARD WELSH/Atty. for dbt.

This matter will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' default and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f) (2). The court will issue a minute order.

10:00 A.M.

1. [16-12412](#)-B-7 SIREESHA IRUVURI ORDER TO SHOW CAUSE RE: FILING
FEE DUE
7-14-16 [[6](#)]

This matter will proceed as scheduled.

No written opposition was required in response to the OSC, however respondent has filed such opposition. The court has reviewed that opposition and, at the hearing, intends to dismiss the case pursuant to the OSC. The court has considered the respondent's opposition and determined that further hearing pursuant to Local Bankruptcy Rule 9014-1(f)(2), is unnecessary. The court will issue a minute order.

2. [16-12316](#)-B-7 JANINE MCCULLOUGH MOTION FOR RELIEF FROM
PK-1 AUTOMATIC STAY
AARON FABBIAN/MV 7-7-16 [[19](#)]
PATRICK KAVANAGH/Atty. for mv.

The motion will be denied without prejudice. The court will enter a civil minute order. No appearance is necessary.

The motion was not served on the debtor at the address of record in effect at the time of service.

3. [16-12225](#)-B-7 ANDRES GERARDO MOTION FOR RELIEF FROM
PK-1 AUTOMATIC STAY
DVP LP/MV 7-7-16 [[18](#)]
PATRICK KAVANAGH/Atty. for mv.
DISMISSED

This motion will be denied as moot. The case has already been dismissed. The court will enter a civil minute order. No appearance is necessary.

4. 16-12427-B-7 JON BARTON
DMG-1
HERITAGE BANK/MV
ROBERT WILLIAMS/Atty. for dbt.
D. GARDNER/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-7-16 [7]

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 and there was no opposition. The debtor(s) default 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 notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. 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.

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).

5. 16-11832-B-7 RONALD/KIMBERLY WAITLEY
JCW-1
U.S. BANK NATIONAL
ASSOCIATION/MV
JOSEPH PEARL/Atty. for dbt.
JENNIFER WONG/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
6-30-16 [10]

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 and there was no opposition. The debtor(s) default 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 to the extent that it applies. If the notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. 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.

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. 15-14433-B-7 ROBERT/PATRICIA SALAZAR
JMV-1
JEFFREY VETTER/MV
D. GARDNER/Atty. for dbt.

MOTION TO SELL
7-6-16 [35]

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

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

7. 16-12038-B-7 GARY/VALERIE STEVENSON
APN-1
SANTANDER CONSUMER USA INC./MV
ROBERT WILLIAMS/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
6-23-16 [11]

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 and there was no opposition. The debtor(s) default 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 notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. 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.

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).

8. [16-10864](#)-B-7 MARTHA ESPINALES
JSP-2
MARTHA ESPINALES/MV
JOSEPH PEARL/Atty. for dbt.

MOTION TO AVOID LIEN OF WELLS
FARGO BANK, N.A.
6-27-16 [[23](#)]

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

This matter was fully noticed in compliance with the Local Rules and there is no opposition. Accordingly, the respondents' defaults will be entered. Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, governs default matters and is applicable to contested matters under FRBP 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.

9. [16-10267](#)-B-7 MARY KRIST
PK-1
MARY KRIST/MV
PATRICK KAVANAGH/Atty. for dbt.

CONTINUED MOTION FOR
EXAMINATION
6-7-16 [[15](#)]

This matter will proceed as scheduled.

ROBERT WILLIAMS/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.
RESPONSIVE PLEADING

This matter will proceed as scheduled.

The court will consider the objection to the trustee's final report (the "TFR") at the hearing. The court's tentative ruling is to overrule the objection.

The Objectors contend that the trustee's filed and served notice of intent regarding to abandon property did not result in the abandonment of the subject property from the estate, and that more was required to effectuate abandonment. The court does not agree.

On January 18, 2013, the trustee filed a pleading (DC# TGM-2) captioned, "TRUSTEE'S NOTICE OF INTENT TO ABANDON REAL PROPERTIES OF THE BANKRUPTCY ESTATE" (the "Notice"). The notice was served on, *inter alia*, the Objectors c/o their attorney pursuant to their Request for Special Notice, as well as their address of record, informing them of the necessity of filing and serving a written objection and request for a hearing within 14 days of service of the Notice. The Notice specifically stated: "If no written objections are received within the period described above, the abandonment will be effectuated by placing a Notice of Abandonment in the court file. No further notices will be sent."

Following this statement, the property the trustee intended to abandon was listed:

1. 13800 Las Entradas, Bakersfield, California, more particularly described as LOT 30 OF TRACT NO. 5084, PHASE 1, IN THE CITY OF BAKERSFIELD, COUNTY OF KERN, STATE OF CALIFORNIA, AS PER MAP RECORDED MAY 7, 1991 IN BOOK 38, PAGES 131 THRU 133, INCLUSIVE OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY ("Las Entradas").
2. 8904 Gascony Court, Bakersfield, California, more particularly described as LOT 67 OF TRACT 4639, AS PER MAP RECORDED APRIL 24, 1984 IN BOOK 33, PAGE 87 OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF KERN COUNTY "Gascony Court").

The notice also informed the Objectors, "Objections not timely served will be deemed waived."

On February 5, 2013, the trustee filed a pleading captioned "TRUSTEE'S ABANDONMENT OF REAL PROPERTIES," wherein the trustee gave notice that he had not received any objection or request for a hearing in response to his "proposal of abandonment," and stating, "Accordingly, the Trustee herein abandons the following real properties," and listing Las Entradas and Gascony Court, as listed in the Notice. Again, the Objectors were served with the pleadings. The objecting creditors argue that the Notice did not effectuate

abandonment of the real property from the estate and that more was needed.

Abandonment of property from the estate by the trustee is governed by §544(a) and FRBP 6007. The trustee is required to give notice of the proposed abandonment. Parties-in-interest may file an objection within 14 days.

"If the trustee proposes to abandon property under subsection (a) [the trustee's own motion], the property may be abandoned after notice and a hearing, unless a timely objection is made, without a court order." If an objection is made, then a hearing is set on notice to decide the issue and the court issues an order.

* * * * *

"[I]f there is no objection to the proposed abandonment after notice, the court may dispense with a hearing and a court order is not necessary." 5 Alan N. Resnick & Henry J. Sommer, Collier On Bankruptcy ¶554.02[4] & [6] (16th ed. 2015) (citations omitted).

The Objectors apparently now agree that abandonment was effectuated when no objection was filed to the trustee's Notice dated January 18, 2013. See "Notice of Withdrawal" filed July 29, 2016 (docket number 253).

The "PG&E Security Deposit" and the "1988 Honda Quad" will be abandoned when the case is closed. 11 USC § 554(c). The Objectors want the word "administered" in the TFR replaced with the word "abandon." Abandonment is a method of administering an asset. The court will not order "corrected" wording.

Finally, the \$15,000 "Bank Account Withdrawal." The explanation of the "trade" with the debtor involving a partial exemption waiver is explained in Mr. Parker's declaration (docket number 247). The way an asset is described in the TFR is discretionary with the trustee, in large part. The U.S. Trustee has reviewed the report and has not objected. Objectors provide no evidence or analysis of how a different description would somehow change the administration of the case. The court does not perceive any suggested amendment of the TFR that will change the case in any material respect.

11. 16-12092-B-7 RYAN FRITZ
JWC-2
WA FUNDING, INC./MV
JOHN CADWALADER/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-20-16 [21]

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

Tentative Ruling - The automatic stay will be 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 movant shall submit a proposed order after hearing that specifically describes the property or action to which the order relates. If the motion involves a foreclosure of real property in California, then the order shall also provide that the bankruptcy proceeding has been finalized for purposes of California Civil Code 2923.5 to the extent that it applies. If the notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. 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.

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).

11:00 A.M.

1. [16-11325](#)-B-7 GEORGE MINYARD

PRO SE REAFFIRMATION AGREEMENT
WITH KERN SCHOOLS FEDERAL
CREDIT UNION
7-20-16 [[12](#)]

JOSEPH PEARL/Atty. for dbt.

The hearing will be dropped from calendar. Debtor's counsel shall advise his client that no appearance is necessary.

The court is not approving or denying approval of the reaffirmation agreement. Debtor was represented by counsel when he 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). The reaffirmation agreement, in the absence of a declaration by debtor's counsel, does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable.

In addition, both the reaffirmation agreement and the bankruptcy schedules show that reaffirmation of this debt creates a presumption of undue hardship which has not been rebutted in the reaffirmation agreement.

2. [16-12025](#)-B-7 KAREN STILLWELL

PRO SE REAFFIRMATION AGREEMENT
WITH HARLEY-DAVIDSON CREDIT
CORP.
6-30-16 [[15](#)]

This matter will proceed as scheduled.

3. [16-10833](#)-B-7 LINDA MADDOCK

REAFFIRMATION AGREEMENT WITH
ARMY AND AIR FORCE EXCHANGE
SVC-MILITARY STAR
6-23-16 [[12](#)]

DAVID LOZANO/Atty. for dbt.

Approval of the Reaffirmation Agreement, of an unsecured credit card debt, will be denied. Counsel shall notify his client that no appearance is necessary.

The debtor's attorney signed the reaffirmation agreement certifying that he has explained the agreement to the debtor, but did not check the box to state an opinion that the reaffirmed debt will not create an undue hardship. Both the reaffirmation agreement and the bankruptcy schedules show that reaffirmation of this debt creates a presumption of undue hardship which has not been rebutted in the reaffirmation agreement.

4. [16-11235](#)-B-7 CRISTIAN/MELISSA MERCADO PRO SE REAFFIRMATION AGREEMENT
WITH WELLS FARGO BANK N.A.
7-19-16 [[11](#)]

OSCAR SWINTON/Atty. for dbt.

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

Debtors were represented by counsel when they entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), "if the debtor is represented by counsel, the agreement *must* be accompanied by an affidavit of the debtor's attorney' attesting to the referenced items before the agreement will have legal effect." *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). In this case, the debtors' attorney affirmatively represented that 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.

5. [16-12337](#)-B-7 GEOFFERY/THERESA SAWYER PRO SE REAFFIRMATION AGREEMENT
WITH SANTANDER CONSUMER USA
INC.
7-19-16 [[19](#)]

This matter will proceed as scheduled.

6. [16-11986](#)-B-7 HAYDEE MUNOZ REAFFIRMATION AGREEMENT WITH
SANTANDER CONSUMER USA INC.
6-29-16 [[9](#)]

VINCENT GORSKI/Atty. for dbt.

This reaffirmation agreement will be dropped from calendar without a disposition. Debtor's counsel will inform debtor that no appearance is necessary.

The agreement relates to a lease of personal property. The parties are directed to the provisions of 11 U.S.C. § 365(p)(2). This case was filed May 31, 2016, and the lease was not assumed by the chapter 7 trustee within the time prescribed in 11 U.S.C. § 365(d)(1). Pursuant to 365 (p)(1), the leased property is no longer property of the estate.

1:30 P.M.

1. [15-11200](#)-B-7 ROSA BALMORI CONTINUED STATUS CONFERENCE
RE:
[16-1043](#) COMPLAINT
U.S. TRUSTEE V. BALMORI 4-12-16 [[1](#)]
GREGORY POWELL/Atty. for pl.

This matter will be dropped from calendar. The adversary proceeding has already been dismissed. No appearance is necessary.

2. [16-10003](#)-B-7 MELLANIE RAPOZO CONTINUED STATUS CONFERENCE
RE:
[16-1050](#) AMENDED COMPLAINT
SELLERS V. RAPOZO 6-15-16 [[10](#)]
KLAUS KOLB/Atty. for pl.

This matter will proceed as scheduled.

3. [16-10003](#)-B-7 MELLANIE RAPOZO MOTION TO DISMISS ADVERSARY
[16-1050](#) DMG-2 PROCEEDING/NOTICE OF REMOVAL
SELLERS V. RAPOZO AND/OR MOTION TO STRIKE
7-6-16 [[14](#)]
D. GARDNER/Atty. for mv.
RESPONSIVE PLEADING

This matter will proceed as scheduled. Unless opposition to the tentative ruling is presented at the hearing, the court intends to enter civil minute orders as indicated. If opposition is presented at the hearing, the court will consider the opposition and whether further briefing and a hearing is necessary pursuant to Local Bankruptcy Rule 9014-1(f)(2).

The court's Tentative Ruling: The court will issue a Civil Minute Order as follows:

Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (FAC) under FRCP 12(b)(6) made applicable to this Adversary Proceeding by FRBP 7012 will be DENIED as to the First Claim for Relief under 11 U.S.C. § 523(a)(2). The Motion will be GRANTED with leave to amend as to the Second Claim for Relief under 11 U.S.C. § 523(a)(4) and as to the Third Claim for Relief under 11 U.S.C. § 523(a)(6). Plaintiff may file and serve a Second Amended Complaint on or before August 19, 2016. Defendant shall then file and serve a responsive pleading on or before September 2, 2016. The motion to strike is DENIED.

Should Plaintiff elect not to file another amended complaint and proceed only on the First Claim for Relief, then Defendant may submit a signed stipulation by Plaintiff's and Defendants's counsel and a proposed order to

that effect on or before August 19, 2016. Alternatively, if Plaintiff does not file a Second Amended Complaint on or before August 19, 2016, Defendant may submit a proposed order providing that the Motion to Dismiss Plaintiff's Second and Third Claims for Relief is GRANTED without leave to amend. In either case, the Defendant shall file and serve a responsive pleading on or before September 2, 2016.

Discussion-

This is the second time the court has decided an FRCP 12(b)(6) motion in this Adversary Proceeding. The first motion was granted with leave to amend. This motion addresses the FAC.

FAC Allegations

Plaintiff retained Defendant, a lawyer, in 2009 to assist him in deflecting creditor harassment stemming from a business transaction. Defendant sent out letters to several parties which eventually led to the cessation of harassment by a collection agency and restoration of Plaintiff's credit rating. The other parties were not responsive to Defendant's efforts at settlement and she filed a civil complaint on Plaintiff's behalf. Defendant did not vigorously prosecute the claim and was unsuccessful in obtaining a default judgment against the other parties. Two years after being retained by the Plaintiff, the Defendant withdrew as Plaintiff's counsel. Plaintiff paid \$33,500 in fees for Defendant's efforts.

Using other counsel, Plaintiff obtained settlements with the other parties. Plaintiff then demanded a refund of certain fees which he believed Defendant did not earn. Informal overtures being unsuccessful, Plaintiff started a Mandatory Fee Arbitration (MFA) process with the Sacramento County Bar Association. Defendant did not participate in the MFA other than filing a written response and providing documents to the three-person MFA panel. One issue raised by Defendant was the fee contract's requirement for mediation as a pre-requisite to further proceedings. The MFA panel agreed and continued the arbitration so that mediation could proceed, however Defendant declined to participate despite Plaintiff's counsel's "repeated" requests.

On March 10, 2014 the MFA panel issued an award giving Plaintiff a partial victory by finding that \$20,000 of the \$33,500 should be refunded.¹ The MFA panel found it "more probable than not" that Defendant did not spend the time [that Defendant] claimed on her billings." Also, that "the fee collected for the work that had been accomplished 'shocked the conscience' and thus was unconscionable." Neither Defendant or Plaintiff objected to the award which was served on all parties. Plaintiff filed a petition in the Sacramento County Superior Court to confirm the award but this never

¹The award and petition to confirm the award is attached to the FAC and incorporated in the FAC by reference.

occurred. Plaintiff alleges that Defendant avoided service of the notice of the petition.

Plaintiff claims the \$20,000 MFA award against Defendant is non-dischargeable under three theories. First, that the debt arises from Defendant's "actual fraud" under 11 U.S.C. § 523(a)(2). Second, that the debt arises from "fraud or defalcation" by a fiduciary under 11 U.S.C. § 523(a)(4). Third, that the "injury" suffered by Plaintiff in "overpaying" \$20,000 to Defendant was a "willful and malicious" injury under 11 U.S.C. § 523(a)(6).

Standards Applicable

A claim may be dismissed under Civil Rule 12(b)(6) either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F. 3d 780, 783 (9th Cir. 1996). In addressing a Civil Rule 12(b)(6) challenge, the court accepts all factual allegations in the complaint as true (*Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740(1976)), and construes the pleading in the light most favorable to the nonmoving party. *Tanner v. Heise*, 879 F. 2d 572, 576 (9th Cir. 1989). "Dismissal without leave to amend is improper unless it is clear. . . that the complaint could not be saved by any amendment." *Schneider v. Cal. Dep't of Corr.*, 151 F. 3d 1194, 1196 9th Cir., 1998) (quoting *Chang v. Chen*, 80 F. 3d 1293, 1296 (9th Cir., 1996)). To survive a motion to dismiss under Civil Rule 12(b)(6), a complaint need only set forth a short and plain statement of the claim showing the pleader is entitled to relief; it "does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). Nevertheless a plaintiff must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* For purposes of a 12(b)(6) motion attached documents are treated as part of the complaint. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308 (2007).

Neither party has addressed the issue which the court raised in the prior hearing: the binding effect, if any, of the unconfirmed MFA award. While perhaps not directly needed for this FRCP 12(b)(6) motion, it bears consideration. Under California law, an MFA award is presumed non-binding unless no one seeks to vacate within 30 days (see Cal. Bus. & Prof. §6203(b)), the parties agree to be bound by the award or jointly request trial *de novo*. *Giorgianni v. Crowley*, 197 Cal. App. 4th 1462, 1472, 129 Cal. Rptr. 3d 546 (2011). This seems consistent with other arbitration awards under California law. See Cal. Civ. Proc. § 1287.6. It appears that none of these actions were taken here.

One effect of the now-binding MFA award is to liquidate the damage claim. The other findings (e.g., "more probable than not" that time spent was inflated; fees "unconscionable") are more problematic. See, *Liska v. Ans Law Firm*, 117 Cal. App. 4th 275, 285, 12 Cal. Rptr. 3d 21 (2004). Counsel

will need to address this issue eventually. For now, the MFA award is attached and is part of the complaint for the FRCP 12(b)(6) analysis.

Section 523(a)(2) - First Claim for Relief.

Section 523(a)(2)(A) excepts from discharge debts incurred through "false pretenses, a false representation or actual fraud." For this exception to apply, a creditor must allege and prove by a preponderance of the evidence each of the following elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of the statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damages to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19,35 (9th Cir. BAP 2009), quoting *Turtle Rock Meadows Homeowner's Association v. Slyman (In re Slyman)*, 234 F. 3d 1081, 1085 (9th Cir. 2000). All five elements must be asserted in the creditor's complaint for an exception to discharge. *Weinberg*, 410 B.R. at 35. FRCP 9(b)'s pleading particularity requirement means: "the plaintiff must set forth what is misleading about a statement and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading." *Yourish v. California Amplifier*, 191 F. 3d 983, 993 (9th Cir. 1999).

Defendant argues the complaint is not specific enough and "over broad" when it alleges that the inflated bills were fraudulent representations. The court disagrees. While most of the allegations are on information and belief, paragraph 21 of the complaint (the claim incorporates the background allegations including the MFA award) sets forth the representations of the Defendant: billings exceeding the actual time spent on services by \$20,000. Bills that inflated the time spent and charging for such time are "false statements" if proven. The finding of the MFA panel that it was "more probable than not" the bills were inflated certainly at least is an allegation that meets an evidentiary burden of proof. Defendant does not challenge any other aspect of this claim. The first claim for relief in the FAC satisfies FRCP 9(b)'s requirements. This claim has enough particularity to apprise Defendant of what she must defend. Intent is alleged by inference through the volitional act of sending the bills that are false.

Section 523(a)(4) - Second Claim for Relief.

This claim requires fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny. "Fraud" under this subsection has been construed to mean intentional misrepresentation. 4 Alan N. Resnick & Henry J. Sommer, *Collier On Bankruptcy* ¶ 523.10 [1][a] (16th ed. 2015) and cases therein cited. The FAC does not allege why Defendant's capacity as an attorney and admittedly a fiduciary is even relevant to this claim. If fraud is the only claim, then no relief is available unless the Plaintiff pleads and proves all allegations of the First Claim of Relief.

In the Ninth Circuit, state law determines whether the attorney-client relationship creates an express or technical trust within the meaning of 523(a)(4). *In re Bigelow*, 271 BR. 178 (9th Cir. BAP 2001). An attorney-client relationship may rise to a level of a fiduciary relationship for purposes of § 523(a)(4) if there are client trust funds involved. *In re Stokes*, 142 BR. 908, 910 n.3 (Bankr. N.D. Cal., 1992).

The second claim for relief alleges only the fiduciary relationship. No express or technical trust is alleged. There may be facts that bring part of claimant's damages within the § 523(a)(4) exception, however, upon review of the FAC and the attachment, none are plead.

Section 523(a)(6) - Third Claim for Relief.

A simple breach of contract cannot give rise by itself to a nondischargeable debt. *In re Jercich*, 238 F. 3d 1202, 1205 (9th Cir. 2001). But § 523(a)(6) can apply to a breach of contract claim when the breach is accompanied by willful tortious conduct. *Id.* Section 523(a)(6) precludes discharge of a debt incurred by willful and malicious injury to an entity or property of an entity. Both "malice" and "willfulness" must be plead and proved. An act is "willful" when the debtor subjectively intended to injure the creditor or subjectively knew that injury to the creditor was substantially certain to occur. *Su v. Carillo*, 290 F. 3d 1140, 1142-43 (9th Cir. 2002). An injury is malicious if it involves: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury, and (4) is done without just cause or excuse. *Jercich*, 238 F. 3d at 1209.

Defendant argues in the motion that nothing in the complaint "describes or alludes" to the Plaintiff's intent. In construing the FAC in the light most favorable to the Plaintiff, which the court must, the Defendant is incorrect. "Intent" necessarily must be plead either by a conclusory allegation or by allegations that infer intent. The complaint alleges Defendant inflated her bills. The method of doing so can be inferred to be an intentional act (i.e., sending overinflated bills which were paid by Plaintiff). Thus, the court does not agree with Defendant's argument.

Rather, the motion is granted as to this claim because the complaint does not allege a subjective intent to injure or facts from which that could be inferred. A "willful" injury is a "deliberate or intentional act that leads to injury." *In re Barboza*, 545 F. 2d 702, 706 (9th Cir., 2008) quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974 (1988) (emphasis in original). An intent to misrepresent may be accompanied by a subjective intent to injure, but the FAC does not contain any allegation of facts suggesting that Defendant did intend to injure Plaintiff. Also, the FAC does not contain any allegations that there was no excuse for the allegedly inflated bills.

A court may deny leave to amend when granting a Civil Rule 12(b)(6) motion for several reasons, including undue delay, bad faith . . . [and] futility

of amendment. *Manzarek v. St. Paul Fire & Marine Insurance Co.*, 519 F. 3d 1025, 1051 (9th Cir. 2008). The Plaintiff will have one more opportunity to amend the second a third claims for relief.

The Defendant provides no independent basis to strike all or any portion of the FAC other than the arguments supporting the motion to dismiss. For the reasons above, the motion to strike is denied.

4. [15-13444](#)-B-7 TRAVIS/AMBER BREWER RESCHEDULED STATUS CONFERENCE
[15-1151](#) RE: COMPLAINT
BJORNEBOE V. BREWER 12-17-15 [1]
MISTY PERRY-ISAACSON/Atty. for pl.
RESPONSIVE PLEADING

This matter will be continued to February 9, 2017, at 1:30 p.m., without prejudice to further continuance. The court will enter a civil minute order. No appearance is necessary.

The plaintiff shall file a status report on or before February 2, 2017, and serve it on the parties.