UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, August 15, 2018
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS 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 AM

1. 14-11619-B-7 **IN RE: DONALD ANGLE AND MARY HOLLAUER**
ICE-3

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH MARY A. HOLLAUER, PERMANENTE MEDICAL GROUP, INC, KAISER FOUNDATION HEALTH PLAN, INC, AND KAISER FOUNDATION HOSPITALS
7-6-2018 [99]

JAMES SALVEN/MV
BENNY BARCO
IRMA EDMONDS/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

It appears from the moving papers that the trustee has considered the standards of In re Woodson, 839 F.2d 610, 620 (9th Cir. 1987) and In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986):

a. the probability of success in the litigation;
b. the difficulties, if any, to be encountered in the matter of collection;

c. the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
d. the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Accordingly, it appears that the compromise pursuant to Federal Rule of Bankruptcy Procedure 9019 is a reasonable exercise of the trustee's business judgment. The order should be limited to the claims compromised as described in the motion.

The trustee requests approval of a settlement agreement between the estate and various defendants. The claims were precipitated while debtor Mary Hollauer was employed with defendants.

While the terms of the compromise, which is under seal, are unavailable to the court to view, the estate will net $198,900.04, in full satisfaction of the claims.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is: the probability of success in front of a jury is not assured, though the counsel that represented debtor in the state court litigation has extensive experience in pursuing the types of claims plaintiff had; collection will be easy as the defendants are large hospitals and medical companies and likely have the funds or insurance coverage to pay the settlement; the litigation is complex and moving forward to a jury trial would decrease the net to the estate due to the legal fees; and the creditors will greatly benefit from the net to the estate, that would otherwise not exist; the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

This ruling is not authorizing the payment of any fees or costs associated with the litigation.

2. 14-11619-B-7 **IN RE: DONALD ANGLE AND MARY HOLLAUER**
ICE-4

MOTION FOR COMPENSATION FOR GEOFFREY C. LYON, SPECIAL COUNSEL(S)
7-17-2018 [106]

BENNY BARCO

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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 motion will be GRANTED. Trustee's special counsel, Geoffrey C. Lyon, requests fees of $160,000.00 and costs of $32,000.00 for a total of $192,000.00 for services rendered as trustee's special counsel from December 15, 2015 through February 4, 2018.

11 U.S.C. § 328(a) permits the employment of a professional person "on a contingent fee basis."

This court approved trustee's ex parte application of employment of attorney Geoffrey Lyon as special counsel on December 15, 2015. Doc. #72. Included with trustee's ex parte application was the fee agreement contract showing that the attorney is entitled to receive 40% of the total gross dollar amount of any recovery. *Id.*

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses."

Movant's services included recuperating for the estate over $200,000.00. Doc. #108. Movant took depositions, subpoenaed records and reviewed them, and entered into mediation. *Id.* The court finds

the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $160,000.00 in fees and $32,000.00 in costs.

3. 18-12036-B-7 **IN RE: GUADALUPE/MARIA CERON**
TMT-1

MOTION TO EMPLOY GOULD AUCTION & APPRAISAL COMPANY AS AUCTIONEER, AUTHORIZING SALE OF PROPERTY AT PUBLIC AUCTION AND AUTHORIZING PAYMENT OF AUCTIONEER FEES AND EXPENSES
7-18-2018 [18]

TRUDI MANFREDO/MV
MARK ZIMMERMAN
TRUDI MANFREDO/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

On motions filed on at least 28 days' notice, LBR 9014-1(f)(1)(B) requires the movant to notify the respondent or respondents that any opposition to motions filed on at least 28 days' notice must be in writing and must be filed with the court at least fourteen (14) days preceding the date or continued date of the hearing.

This motion was filed and served on July 18, 2018 and set for hearing on August 15, 2018. Doc. #19, 22. August 15, 2018 is 28 days after July 18, 2018, and therefore this hearing was set on 28 days' notice under LBR 9014-1(f)(1). The notice stated that written opposition was not required and could be made orally at the hearing. Doc. #19. That is incorrect. Because the hearing was set on 28 days' notice, the notice should have stated that written opposition, if any, must be filed and served at least 14 days prior to the hearing. Because this motion was filed, served, and noticed on 28 days' notice, the language of LBR 9014-1(f)(1)(B) needed to have been included in the notice.

4. 18-12337-B-7 **IN RE: GENESIS POOLS, INC.**
SW-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-1-2018 [27]

ALLY BANK/MV
RILEY WALTER
ADAM BARASCH/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted unless opposed at the hearing.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2). Debtor filed a non-opposition on August 7, 2018. Doc. #40. Unless the trustee presents opposition at the hearing, the court intends to enter the trustee's default and enter the following ruling granting the motion for relief from stay. 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.

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 collateral is a 2016 Chevrolet Silverado. Doc. #29. The collateral has a value of $23,300.00 and debtor owes $26,552.50. *Id.*

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

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral has been surrendered and is in movant's possession.

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. 17-10838-B-7 **IN RE: CHARLES/KAREN WILKINS**
RTW-2

MOTION FOR COMPENSATION FOR JANZEN, TAMBERI & WONG, ACCOUNTANT(S)
7-17-2018 [78]

JANZEN, TAMBERI & WONG/MV
JAMES MILLER

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

This motion is GRANTED. The accountancy firm Janzen, Tamberi & Wong are awarded fees and expenses totaling $2,193.00.

6. 18-11539-B-7 **IN RE: HANUEL LEE**
PFR-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-23-2018 [16]

ROBERT VILLEGAS/MV
PAUL READY/ATTY. FOR MV.
DISCHARGED

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

The motion was not filed in compliance with Local Rule of Practice ("LBR") 9014-1(f)(2), the rule describing requirements for motions filed and served on less than 28 days' notice. The motion was filed and served on July 23, 2018 and set for hearing on August 15, 2018 which less than 28 days. Doc. #16, 23. The language in the notice stated that the respondent must file and serve written opposition within 14 days of the hearing or the motion may be granted without a hearing. This language is incorrect however, because the motion was filed on less than 28 days' notice. Therefore, no written opposition was required. *See* LBR 9014-1(f)(2). Accordingly, the motion is DENIED WITHOUT PREJUDICE.

7. 12-13649-B-7 **IN RE: ESTANISLAO GARCIA**
TOG-2

MOTION TO AVOID LIEN OF CITIBANK (SOUTH DAKOTA) N.A.
7-11-2018 [32]

ESTANISLAO GARCIA/MV
THOMAS GILLIS

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below. The order shall have a copy of the affected abstract of judgment attached and referenced in the order.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

A judgment was entered against the debtor in favor of Citibank (South Dakota) N.A. in the sum of $9,419.80 on February 3, 2011. Doc. #35. That lien attached to the debtor's interest in a residential real property in Los Banos, CA. The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property had an approximate value of $95,340.00 as of the petition date. Doc. #1. The unavoidable liens totaled $110,000.00 on that

same date, consisting of a first deed of trust in favor Citibank (South Dakota) N.A. (doc. #1, Schedule D). The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(5) in the amount of $9,419.80. Doc. #38.

The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

8. 13-16155-B-7 **IN RE: MICHAEL WEILERT AND GENEVIEVE DE MONTREMARE**
FW-24

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, P.C. FOR PETER L. FEAR, TRUSTEES ATTORNEY(S)
7-18-2018 [654]

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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 motion will be GRANTED. Trustee's counsel, Fear Waddell, P.C., requests fees of $15,189.00 and costs of $523.28 for a total of $15,712.28 for services rendered as trustee's counsel from November 18, 2017 through June 18, 2018.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1)

Filing a motion to dismiss an appeal of the debtor, (2) Preparing and finalizing fee applications, and (3) Attending to bankruptcy issues regarding a malpractice action handled by outside counsel. The court finds the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $15,189.00 in fees and $523.28 in costs.

9. 18-11559-B-7 **IN RE: AUSTIN DEVINE**
RLM-2

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-17-2018 [22]

STATE FARM MUTUAL AUTOMOTIVE
INSURANCE COMPANY/MV
R. BELL
RICHARD MAHFOUZ/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below. The order shall be limited to liquidation of the claim and relief granted is limited to insurance proceeds, only.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

This motion is GRANTED. Movant asks this court to modify the automatic stay in order to proceed with their subrogation lawsuit against debtor in Kern County Superior Court. Doc. #24.

When a motion for relief from the automatic prays for relief from the stay so that the creditor can proceed or initiate non-bankruptcy court proceedings, a bankruptcy court must consider the "Curtis factors" in making its decision. In re Kronemyer, 405 B.R. 915, 921 (9th Cir. BAP 2009). The factors a court must consider are:

(1) whether the relief will result in a partial or complete resolution of the issues;
(2) the lack of any connection with or interference with the bankruptcy case;
(3) whether the foreign proceeding involves the debtor as a fiduciary;
(4) whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
(5) whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
(6) whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
(7) whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;
(8) whether the judgment claim arising from the foreign action is subject to equitable subordination under section 510(c);
(9) whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under section 522(f);
(10) the interests of judicial economy and the expeditious and economical determination of litigation for the parties;
(11) whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and
(12) the impact of the stay on the parties and the "balance of hurt"

Relief from the stay may result in complete resolution of the issues and the matter in the state courts is unrelated to this bankruptcy. Movant has stated that they will only be looking to available insurance proceeds and NOT property of the debtor, so the interests of other creditors will not be prejudiced. And the interests of judicial economy and the expeditious and economical determination of litigation for the parties weighs in favor of movant, as does the "balance of hurt."

This motion will be granted only for the limited purpose of continuing with the state court action to liquidate the claim and to seek relief against the insurance policy, only.

The court notes that the memorandum of points and authorities failed to comply with the Local Rules of Practice.

LBR 9004-2(c)(1) requires that motions, exhibits, *inter alia*, to be filed as separate documents. Here, the memorandum of points and authorities and exhibits were combined into one document and not filed separately.

10. 18-11968-B-7 **IN RE: WILLIAM BARBOSA**
TMT-1

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
7-17-2018 [24]

TRUDI MANFREDO/MV
TRUDI MANFREDO/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Sustained.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This objection was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

This objection is SUSTAINED.

Federal Rule of Bankruptcy Procedure 4003(b) allows a party in interest to file an objection to a claim of exemption within 30 days after the § 341 meeting of creditors is held or within 30 days after any amendment to Schedule C is filed, whichever is later.

In this case, the § 341 meeting was concluded on June 19, 2018 and this objection was filed on July 17, 2018, which is within the 30 day timeframe.

The Eastern District of California Bankruptcy Court in In re Pashenee, 531 B.R. 834, 837 (Bankr. E.D. Cal. 2015) held that "the debtor, as the exemption claimant, bears the burden of proof which requires her to establish by a preponderance of the evidence that [the property] claimed as exempt in Schedule C is exempt under [relevant California law] and the extent to which that exemption applies."

Trustee makes three objections: (1) the $20 in a Union Bank checking account claimed exempt under California Code of Civil Procedure ("CCP") § 704.070; (2) $3,400.00 in a Union Bank savings account

claimed exempt under CCP § 704.070; and (3) a 2017 income tax refund of $4,100.00 claimed exempt under CCP § 704.070. Trustee objects to (1) and (2) because only 75% of those funds are exempt, and objects to (3) because tax refunds are not "paid earnings" as defined under CCP § 706.011(b).

The court finds that the trustee is correct, and in the absence of any opposing evidence, SUSTAINS the trustee's objection.

11. 17-13275-B-7 **IN RE: PHOENIX COATINGS, INC.**
RH-3

MOTION TO SELL
7-6-2018 [52]

JAMES SALVEN/MV
JOEL WINTER
ROBERT HAWKINS/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted. The court authorizes the public auction of items listed on August 18, 2018.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. 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.

This motion is GRANTED.

The auction will be held on August 15, 2018 at 9:00 a.m. at 6200 Price Way in Bakersfield, California 93308. Among the items to be sold include two Ford 7000 diesel trucks with enclosed boxes, two spray pumps, one sand blaster pot, one pallet hydraulic hose, two camper shells, one heater shop blower, one pallet jack, and three Deutschland powered generators. A complete list can be viewed at doc. #54.

The motion is ambiguous. The date for the auction that is listed in the motion is August 15, 2018 , the same date as this hearing. The date in the prayer for relief is August 18, 2018. The declaration of

James Salven is silent on the date of the auction. And the notice states the day is August 18, 2018. Therefore, unless movant states otherwise, the court finds that the auction will be held on August 18, 2018.

It appears that the sale of "miscellaneous vehicles, machinery, equipment, and supplies" at a public auction is a reasonable exercise of the trustee's business judgment. The auctioneer's employment was approved by the court on June 26, 2018. Doc. #51. The trustee shall submit a proposed order after the hearing.

12. 17-14786-B-7 **IN RE: TODD/PAMELA REINBOLD**
JDR-2

MOTION TO AVOID LIEN OF LIBERTY MUTUAL INSURANCE COMPANY
7-10-2018 [42]

TODD REINBOLD/MV
JEFFREY ROWE

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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.

A judgment was entered against the debtor in favor of Liberty Mutual Insurance Company in the sum of $27,020.82 on October 18, 2016. Doc. #45. The abstract of judgment was recorded with Merced County on January 24, 2017. *Id.* That lien attached to the debtor's interest in a residential real property in Los Banos, CA. The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property had an approximate value of $239,000.00 as of the petition date. Doc. #1. The unavoidable liens totaled $102,587.84 on that same date, consisting of a first deed of trust in favor of Quicken Loans (doc. #1, Schedule D). The debtor claimed an exemption

pursuant to Cal. Civ. Proc. Code § 704.730(a)(3)(B) in the amount of $136,412.16. Doc. #1, Schedule C.

The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

13. 18-11787-B-7 **IN RE: FRANCISCA SOLIS**
VVF-1

MOTION FOR RELIEF FROM AUTOMATIC STAY
7-31-2018 [14]

AMERICAN HONDA FINANCE
CORPORATION/MV
VINCENT GORSKI
VINCENT FROUNJIAN/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted unless opposed at the hearing.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling granting the motion for relief from stay. 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.

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 collateral is a 2017 Honda Civic. Doc. #18. The collateral has a value of $19,175.00 and debtor owes $26,753.20. *Id.*

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

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral has been surrendered on July 10, 2018 and is in movant's possession. Doc. #16.

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).

14. 17-13296-B-7 **IN RE: LARRY CHAMPAGNE**
FW-3

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL, PC FOR PETER A. SAUER, TRUSTEES ATTORNEY(S)
7-18-2018 [67]

DAVID JENKINS

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. 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 motion will be GRANTED. Trustee's counsel, Fear Waddell, P.C., requests fees of $12,538.00 and costs of $138.87 for a total of $12,676.87 for services rendered as trustee's counsel from December 12, 2017 through July 16, 2018.

11 U.S.C. § 330(a)(1)(A) & (B) permits approval of "reasonable compensation for actual necessary services rendered by . . .[a] professional person" and "reimbursement for actual, necessary expenses." Movant's services included, without limitation: (1) Monitoring debtor's involvement in an adversary proceeding and evaluating whether trustee would be required to engage in the proceeding, (2) Preparing and finalizing fee applications, and (3) Analyzing debtor's prepetition real property transfers, conducted an information mediation regarding the transfers, and prepared a motion to approve the settlement of the transfer dispute. The court finds

the services reasonable and necessary and the expenses requested actual and necessary.

Movant shall be awarded $12,538.00 in fees and $138.87 in costs.

15. 18-12202-B-7 **IN RE: ALBERTA MALONE**
TMT-1

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
7-12-2018 [12]

JOEL WINTER

NO RULING.

11:00 AM

1. 18-11853-B-7 **IN RE: JON/JESSICA HEVIA**

REAFFIRMATION AGREEMENT WITH TOYOTA MOTOR CREDIT CORPORATION
7-16-2018 [18]

DAVID JENKINS

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtors' counsel will inform debtors that no appearance is necessary.

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. Although the debtors' attorney executed the agreement, the attorney could not affirm that, (a) the agreement was not a hardship and, (b) the debtor would be able to make the payments.

2. 18-11354-B-7 **IN RE: RODGER STOUT**

REAFFIRMATION AGREEMENT WITH YAMAHA MOTOR FINANCE CORP.
7-9-2018 [15]

TIMOTHY SPRINGER

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied.

ORDER: The court will issue an order.

Debtor's counsel will inform debtor that no appearance is necessary.

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. Although the debtor's attorney executed the agreement, the attorney could not affirm that, (a) the agreement was not a hardship and, (b) the debtor would be able to make the payments.

3. 18-12474-B-7 **IN RE: AURELIA ROCHA**

PRO SE REAFFIRMATION AGREEMENT WITH BANK OF THE WEST
7-20-2018 [9]

NO RULING.

1:30 PM

1. 18-10973-B-13 **IN RE: GLENN BEVER**
   18-1034

   STATUS CONFERENCE RE: COMPLAINT
   6-7-2018 [1]

   BEVER ET AL V. CITIMORTGAGE, INC.
   GLENN BEVER/ATTY. FOR PL.

NO RULING.

2. 18-10973-B-13 **IN RE: GLENN BEVER**
   18-1034 LL-1

   MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
   7-6-2018 [7]

   BEVER ET AL V. CITIMORTGAGE, INC.
   REGINA MCCLENDON/ATTY. FOR MV.
   RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted in part and denied in part. If plaintiffs choose to file an amended complaint, the amended complaint must be filed with the court and served on defendant on or before August 29, 2018.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled.

This motion to dismiss brought by defendant CitiMortgage ("Defendant") argues that plaintiffs Glen and Karen Bever ("Plaintiffs"), and Steven Lucore ("Lucore") (because of the similarity of their objections and contentions, unless stated otherwise, references to Plaintiffs will include Lucore), are essentially precluded from raising their claims for relief because the claims are barred under the principle of *res judicata* or they have failed to state a claim upon which relief can be granted. Only Glen Bever is a debtor in this bankruptcy case. Plaintiffs Karen L. Bever and Steven H. Lucore, Sr. are not debtors.

Plaintiffs filed the complaint in pro se. The Bevers are named as borrowers in a note and deed of trust securing the note dated June

4, 2003 in the amount of $211,850.00 in favor of First Pacific Financial, Inc., acting in the role of "Lender." Doc. #10. Lucore has a fee simple 50% interest in the property securing the note, commonly known as 466 West Tenaya Avenue, Clovis, CA 93612 ("Property"). On May 27, 2011, Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First Pacific Financial, Inc., assigned the deed of trust to Defendant. Doc. #10, p.32. On June 28, 2011, Cal-Western Reconveyance Corporation was substituted as the trustee for Carriage Escrow Inc. *Id.* at 36. A Notice of Default was recorded with the Fresno County Recorder on June 3, 2011. *Id.* at 39-40. A Notice of Trustee's Sale was recorded with the Fresno County Recorder on September 6, 2011. *Id.* at 42-43. On September 23, 2011, Defendant assigned the deed of trust to FANNIE MAE a/k/a/ Federal National Mortgage Association organized and existing under the laws of the United States of America ("FANNIE MAE"). *Id.* at 45. Not even a month later, FANNIE MAE assigned the deed of trust back to Defendant. *Id.* at 47. On December 16, 2015 Quality Loan Service Corporation was designated as the new trustee under the deed of trust. *Id.* at 49. Another Notice of Trustee's Sale was recorded with the Fresno County Recorder on December 22, 2015 (*id.* at 52) and another on February 9, 2018 (*id*. at 55). On March 2, 2018, a Quitclaim deed was recorded in which the Plaintiffs deeded a 50% interest in the Property to Lucore. *Id.* at 81.

Plaintiffs state four causes of action in their complaint.

First, Plaintiffs request that the court determine the extent and validity of the lien on the Property. Doc. #1. Plaintiffs claim that Defendant does not have a secured interest in the Property because Plaintiffs rescinded the loan transaction pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635(f) on May 6, 2004. Plaintiffs stated that because Defendant never contested the recission notice, the note and deed became void by operation of law on that same day.

Second, Plaintiffs request "money for recording false documents." *Id.* Plaintiffs claim that they are entitled to "treble actual or mandatory or exemplary and equitable damages, along with fees and costs...pursuant to 11 U.S.C. §§ 105 and 362(a)." Plaintiffs claim that Defendant recorded or caused to be recorded false documents against the Property. Plaintiffs argue that any documents recorded after May 6, 2004 are void and must be cancelled pursuant to California Civil Code § 3412 because the note and deed of trust became void on May 6, 2004. Plaintiffs do not allege a specific damage amount, only that it will be determined at trial.

Third, Plaintiffs claim that Defendant violated the Fair Debt Collection Practices Act ("FDCPA"). Plaintiffs essentially claim that because the deed of trust is void, Defendant cannot exercise the power of sale clause in the deed and foreclosure actions taken by Defendant "constitute debt collection activities beyond the scope of the ordinary foreclosure process" under Cal. Civ. Code. § 2924, inter alia.

Fourth, Plaintiffs seek declaratory relief that (1) is necessary to provide the same relief available pursuant to Federal Rule of Bankruptcy Procedure 7001(2) and (7); (2) is necessary to carry out

the purposes and intents of the relief requested in this Complaint; (3) pertain to the documents recorded that constitute a cloud upon Plaintiff's title, especially that all documents recorded after May 6, 2004 are void; (5) Defendant is not the lawful beneficiary of the note and deed of trust; and (6) that Defendant has no right to enforce the note and deed of trust.

Prior to this lawsuit against Defendant, Plaintiffs sued defendant twice.

Plaintiffs first sued Defendant on September 20, 2011, one week prior to the first scheduled foreclosure sale ("First Lawsuit"). Plaintiffs sued Defendant in the District Court for the Eastern District of California. After four years of litigation, judgment was entered in favor of Defendant and MERS (doc. #10) and affirmed by the Ninth Circuit Court of Appeals (*id.)*.

Plaintiffs again sued Defendants on January 19, 2016 ("Second Lawsuit"). *Id.* That complaint asserted three causes of action: violation of the FDCPA, 15 U.S.C. § 1629(e)(5) (against Quality Loan Service Corporation only), violation of the Rosenthal Fair Debt Collection Practices Act (against Defendant only), and declaratory relief (against Defendant only). The complaint, like this one, was reliant upon the allegation that Defendant sent a notice of recission to the original lender on May 6, 2004. *Id*. The court granted Defendant's motion to dismiss, concluding that the Defendants' claims were precluded by res judicata, stating that

> [P]laintiffs could have raised this claim in the prior action. The prior action dealt with the same loan and addressed the lender's authority to foreclose on the Tenaya Property. Whether the loan had been rescinded prior to [Defendant's] attempted foreclosure upon the property would naturally have fallen within the scope of that action. *Id*.

Plaintiffs appealed, and the Ninth Circuit again affirmed.

The court dismisses Lucore's claims because the court has no jurisdiction over him in this bankruptcy case. *See* In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988). The Ninth Circuit adopted the "Pacor" definition of "related to jurisdiction," which is that "an action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action. . . and which in any way impacts upon the handling and administration of the bankruptcy estate." *Id*. There is no "related to" jurisdiction here because adjudication of Lucore's rights would not have any conceivable effect on this estate. He is a 50% fee owner according to the complaint.

His rights are separate from the extent of this bankruptcy estate. Also, he is unprotected by the automatic stay under 11 U.S.C. § 1301. Foreclosure by power of sale is not an action to collect the debt. *See*, Walker v. Cmty. Bank, 10 Cal. 3d 729, 111 Cal. Rptr. 897, 518 P.2d 329 (1974); Cal. Civ. Proc. Code § 22. Also, there is no

allegation that lucore is personally obligated on the Bever's debt. *See*, In re Fadel, 492 B.R. 1, 15-17 (9th Cir. BAP 2013).

Karen Bever has a different status but it does not change the result. There is nothing alleged that she has anything other than a community property interest. That interest is part of the bankruptcy case under 11 U.S.C. § 541(a)(2). No independent adjudication possibly from debtors. Therefore, Lucore's claims are dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(h)(3). Lucore is also an unnecessary party. Karen Bever may also be an unnecessary party, and even if she were a necessary party, she is not making an independent claim.

The remaining part of this ruling deals with the Bevers' claims only.

To survive a motion to dismiss, a claim must have sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The factual allegations must be enough to raise a right to relief above the speculative level.

Federal Rule of Civil Procedure 8(c)(1) (made applicable to adversary proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7008) states that one affirmative defense is *res judicata*. "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any claims that were raised or *could* have been raised in the prior action." W. Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (emphasis added). Res judicata applies whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *Id*. at 1192.

Judgment in the First Lawsuit was entered in favor of Defendants with regard to Plaintiffs' claims based on the loan's origination and Defendant's authority to enforce the deed of trust and initiate foreclosure. Judgment in the Second Lawsuit was entered in favor of Defendants with regard to Plaintiffs' claims based on their alleged recission of the loan were barred by res judicata and in any event, failed as a matter of law. Doc. #10.

In this case, all the elements of res judicata as to the First claim for Relief and to the extent the remaining claims are based on alleged voidness of the deed of trust are satisfied.

First, there is an identity of claims. Plaintiffs' assert the exact same theory that was rejected in their second lawsuit, namely, that Plaintiff's notice of recission essentially withdrew the authority of Defendant to act on the note or deed of trust.

Second, the claims were finally adjudicated on their merits. The District Court for the Eastern District of California entered judgment in favor of Defendant in both lawsuits. The Ninth Circuit Court of Appeals also affirmed the District Court's rulings.

Third, there is identity and privity between the parties. “The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property.” Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 474-78 (1918). The Ninth Circuit has held that “a non-party who has succeeded to a party’s interest in property is bound by any prior judgment against the party.” United States v. Schimmels (In re Schimmels), 127 F.3d 875, 881 (9th Cir. 1997). Karen Bever is in privity with her husband Glenn Bever with regard to the first lawsuit. *See* Sharp v. Deutsche Bank Nat’l Tr. Co., 623 Fed.App’x. 425, 426 (9th Cir. 2015).

Even if the claims are not precluded by res judicata, the claims must still be dismissed.

Under Fed. R. Civ. P. 12(b)(6) (made applicable to adversary proceedings by Fed. R. Bankr. P. 7012), a court must dismiss a complaint if it fails to "state a claim upon which relief can be granted." In reviewing a Rule 12(b)(6) dismissal, a court must 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). However, a court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007); Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). While the court generally must not consider materials outside the complaint, the court may consider exhibits submitted with the complaint. Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

To avoid dismissal under Fed. R. Civ. P. 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, 678 (2009) quoting Twombly, 550 U.S. at 570 (A claim survives Civil Rule 12(b)(6) when it is "plausible."). It is self-evident that a claim cannot be plausible when it has no legal basis. A dismissal under Civil Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008).

First, Plaintiffs’ claim for relief under Fed. R. Bankr. P. 7001(2) fails because any action to enforce the recission or seek damages for failure to accept recission must be filed within one year of the creditor’s refusal to accept recission. Gilbert v. Residential Funding LLC, 678 F.3d 271, 278-79 (4th Cir. 2012). If the creditor does not respond to the borrower’s notice of recission, the one-year statute of limitations begins to run 20 days after the request for recission, when creditor’s response was due. *Id.*; 15 U.S.C. § 1635(f). Here, Plaintiffs allegedly provided notice on May 6, 2004, so the time to enforce the recission is untimely, and their claim under TILA has expired. The plaintiff cannot amend the complaint to prevent dismissal. The date the Plaintiffs allegedly provided notice

was May 6, 2004. The one year statute of limitations expired near the end of May 2005. It is implausible the dates can be considered incorrect by thirteen (13) years. Because this claim has no legal basis, it is not plausible and additionally barred under the principle of res judicata and is therefore DISMISSED WITHOUT LEAVE TO AMEND.

Second, 11 U.S.C. §§ 105 and 362 do not establish a claim in Plaintiffs' complaint. § 105 simply states that the bankruptcy court has the authority to issue any order that is "necessary and appropriate" to enforce the provisions of the Bankruptcy Code. Section 105, however, does not provide any basis for a right of action outside the provisions of the bankruptcy code.

Not only have Plaintiffs been unable to allege a violation of the automatic stay by Defendant, but § 362 does not provide a right of action for damages based on a time-barred TILA claim. 11 U.S.C. § 362(k) requires the person allegedly damaged by the violation of the automatic stay to show that it was willful. The only action Plaintiffs claim violated the stay was the filing of "false documents." As has been and will be explained, Plaintiffs' claim is not plausible because the documents cannot shown to be false. No automatic stay arises until the petition is filed. 11 U.S.C. § 362(a). The actions that are the subject of the complaint all arose before the petition was filed.

No conceivable amendment of the complaint can change those facts. The Plaintiffs have not asserted any facts providing a plausible basis to amend this claim. Because this claim has no legal basis, it is not plausible and therefore DISMISSED WITHOUT LEAVE TO AMEND.

Third, Plaintiffs allegations against Defendant not enough to support a TILA violation; and the TILA claim has expired anyway. Additionally, Plaintiffs have not alleged when the FDCPA violation occurred, and the FDCPA has a one-year statute of limitations. *See* 15 U.S.C. § 1692k. As pled, this claim has no legal basis and is not plausible. That said, Plaintiffs claim there are recurring violations though there is no factual basis alleged in the complaint in support. So, this claim will be DISMISSED WITH LEAVE TO AMEND.

Fourth, Plaintiff's request for declaratory relief is not an independent cause of action, and therefore need not be reviewed to determine if it has been pled sufficiently in accordance with the Fed. R. Civ. P. *See* Del Monte Int'l GmbH v. Del Monte Corp., 995 F.Supp.2d 1107, 1124 (C.D. Cal. 2014). Because this claim has no legal basis independent of the other claims, it is not plausible as pled. For the above reasons relating to the Third Claim for Relief, this claim will be DISMISSED WITH LEAVE TO AMEND.

The Plaintiffs oppose on several grounds.

First, they argue that "the first case did not adjudicate the validity of the lien against the property, and concluded only that plaintiffs failed to state a plausible claim for relief on their theories" and that the second case was "barred by res judicata," but still may bring an action for quiet title. Doc. #18. Plaintiffs

state that their prior claims included were for violations of Real Estate Settlement and Procedures Act ("RESPA"), Cal. Civ. Code § 2923.5, unjust enrichment, and violation of the Rosenthal Act, which are "completely distinct from the claims here." *Id.* Plaintiff argues that at the very least, they should be able to amend the complaint to add quiet title. *Id.*

Next, Plaintiffs cite to Carpenter v. Longan, 83 U.S. 271 (1872) in support of their argument that Defendant could not have received a valid assignment of the debt as it claims because the assignment of the deed of trust did not assign the note. Carpenter stated that "assignment of the [mortgage] alone is a nullity." *Id.* at 274. However, at least two District Courts have distinguished Carpenter in cases where the mortgage was in default. *See* Calvino v. Conseco Fin. Servicing Corp., 2013 U.S. Dist. LEXIS 124343 at 20 (W.D. Tex. 2013).

Then, Plaintiffs also argue that their claim under 15 U.S.C. § 1692f(6) is not barred by res judicata because of Defendant's continuing violations.

Last, Plaintiffs argue that collateral estoppel permits their claims. Collateral estopped bars the relitigation of issues actually adjudicated in previous litigation between the same parties. "Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters of points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended." In re Westgate-California Corp, 642 F.2d 1174 (9th Cir. 1981) (citing 1B J. Moore, Federal Practice, P0.441[2] (2d ed. 1974). Plaintiffs argue that because Defendant did not hold itself out as the creditor-beneficiary under a proof of claim in the prior lawsuits, "the primary issues presented in the adversary complaint were not in issue to be litigated when the prior actions were litigated." Doc. #18.

However, Plaintiffs' oppositions fall short because "res judicata . . . bars litigation in a subsequent action of any claims that were raised *could have been raised* in the prior action." W. Radio Servs. Co. v. Flickman, 123 F.3d 1189, 1192 (9th Cir. 1997) (emphasis added). Plaintiffs had all the information available at the time of the original lawsuit to bring any claim they allege is not barred by res judicata now, then. Plaintiffs arguments fall flat; the arguments have been decided by two district courts and affirmed both times by the 9th Circuit Court of Appeals. As explained above, the claims fail on res judicata grounds.

Therefore, this motion is GRANTED IN PART and DENIED IN PART. If plaintiffs choose to file an amended complaint, the amended complaint must be filed with the court and served on the defendant on or before August 29, 2018.

3. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
17-1095

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
12-28-2017 [1]

HEALTHCARE CONGLOMERATE
ASSOCIATES, LLC V. TULARE
HAGOP BEDOYAN/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to September 26, 2018 at 1:30 p.m.

ORDER: The court will issue an order.

Because the motions for remand, to dismiss counterclaim, and to strike have been continued to September 26, 2018 (doc. ## 132-34), this matter is also continued to September 26, 2018 at 1:30 p.m.

4. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**

CONTINUED STATUS CONFERENCE RE: CHAPTER 9 VOLUNTARY PETITION
9-30-2017 [1]

RILEY WALTER
RESPONSIVE PLEADING

NO RULING.

5. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
WW-32

CONTINUED MOTION FOR EXAMINATION AND FOR PRODUCTION OF DOCUMENTS
5-30-2018 [539]

TULARE LOCAL HEALTHCARE
DISTRICT/MV
RILEY WALTER

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to September 26, 2018 at 1:30 p.m.

NO ORDER REQUIRED: The parties filed a stipulation. Doc. #686.

6. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1005

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
5-8-2018 [27]

TULARE LOCAL HEALTHCARE
DISTRICT V. HEALTHCARE
RILEY WALTER/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to September 26, 2018 at 1:30 p.m.

ORDER: The court will issue an order.

At the request of the parties, this matter is continued to September 26, 2018 at 1:30 p.m.

7. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1014

CONTINUED STATUS CONFERENCE RE: NOTICE OF REMOVAL
4-10-2018 [1]

SPECIALTY LABORATORIES, INC.
V. HCCA TULARE REGIONAL
UNKNOWN TIME OF FILING/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to September 26, 2018 at 1:30 p.m.

ORDER: The court will issue an order.

All parties except the plaintiff request the matter be continued, as the District and HCCA are finalizing a global settlement which includes assigning responsibility for the claims, plaintiff requests a scheduling order.

Because it is unclear which party may ultimately be responsible for the claim plaintiff alleges, the court will defer issuing a scheduling order at the time. But the court ORDERS that all parties provide Federal Rule of Civil Procedure 26 disclosures to the other parties on or before September 19, 2018.

This matter is continued to September 26, 2018 at 1:30 p.m. Fed. R. Civ. P. 26(a) disclosures to be exchanged on or before September 19, 2018 and joint or unilateral status reports are to be filed on September 19, 2018.

8. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1020

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-30-2018 [1]

TULARE LOCAL HEALTHCARE
DISTRICT V. JOHNSON ET AL
MATTHEW BUNTING/ATTY. FOR PL.

NO RULING.

9. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1021

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-30-2018 [1]

TULARE LOCAL HEALTHCARE
DISTRICT V. BRAVIN ET AL
MATTHEW BUNTING/ATTY. FOR PL.
DISMISSED, CLOSED

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED: An order dismissing the case has already been entered. Doc. #14.

10. 17-13797-B-9 **IN RE: TULARE LOCAL HEALTHCARE DISTRICT**
18-1022

CONTINUED STATUS CONFERENCE RE: COMPLAINT
4-30-2018 [1]

TULARE LOCAL HEALTHCARE
DISTRICT V. LAVERS ET AL
MATTHEW BUNTING/ATTY. FOR PL.

NO RULING.