

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Thursday, November 3, 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. [16-11900](#)-B-13 EMANUEL/KAREN DOZIER CONTINUED OBJECTION TO
PPR-1 CONFIRMATION OF PLAN BY BANK OF
BANK OF AMERICA, N.A./MV AMERICA, N.A.
8-3-16 [[29](#)]

ROBERT WILLIAMS/Atty. for dbt.
BONNI MANTOVANI/Atty. for mv.
WITHDRAWN

The objection has been withdrawn. No appearance is necessary.

2. [16-11900](#)-B-13 EMANUEL/KAREN DOZIER MOTION TO VALUE COLLATERAL OF
RSW-3 WELLS FARGO HOME MORTGAGE/WELLS
EMANUEL DOZIER/MV FARGO BANK
10-12-16 [[68](#)]

ROBERT WILLIAMS/Atty. for dbt.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondent's 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 LBR 9014-1(f)(2). The court will issue a civil minute order.

3. [16-13604](#)-B-13 RAMI NESHEIWAT MOTION FOR RELIEF FROM
PK-1 AUTOMATIC STAY
TWINWOOD, INC./MV 10-20-16 [[17](#)]
ROBERT WILLIAMS/Atty. for dbt.
PATRICK KAVANAGH/Atty. for mv.

The motion will be denied without prejudice. No appearance is necessary.

The moving papers were not served on the debtor at the address of record in effect at the time of service. In addition, the motion was not served on the debtor's bankruptcy attorney.

4. [16-13307](#)-B-13 JENNIFER NERNEY

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
10-14-16 [[18](#)]

PATRICK KAVANAGH/Atty. for dbt.

The OSC will be vacated. No appearance is necessary.

The OSC was issued for the debtor's failure to make the payment due October 11, 2016. The delinquent payment was made on or about October 24, 2016. The OSC will be vacated and the case will remain pending because the payment was made. However as a sanction, the court will modify the order permitting the payment of filing fees in installments to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

5. [16-13209](#)-B-13 WILLIAM/CAMILLA GARCIA
MHM-1
MICHAEL MEYER/MV
WILLIAM OLCOTT/Atty. for dbt.

OBJECTION TO CONFIRMATION OF
PLAN BY MICHAEL H. MEYER
10-11-16 [[16](#)]

The trustee's objection to confirmation will be continued and set for a final hearing on December 1, 2016, at 9:00 a.m. The court will issue a civil minute order. No appearance is necessary.

This objection to confirmation was noticed as a preliminary hearing. Unless this case is voluntarily converted to chapter 7 or dismissed or the objection has been withdrawn, the debtors shall file and serve a written response not later than November 17, 2016. The response shall specifically address each issue raised in the objection, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. If the debtors elect to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than November 24, 2016. If the debtors do not timely file a modified plan or a written response, the objection will be sustained on the grounds stated and confirmation will be denied without a further hearing.

In lieu of a response the debtors may submit a proposed order confirming the plan that incorporates the language, suggested by the trustee in the opposition, that resolves the issue.

10. [15-11859](#)-B-13 ARTURO/BERENICE FLORES CONTINUED MOTION TO MODIFY PLAN
RSW-2 8-23-16 [[71](#)]
ARTURO FLORES/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

This matter will proceed as scheduled.

11. [14-13862](#)-B-13 MARK JOSEPH MOTION FOR RELIEF FROM
NLG-1 AUTOMATIC STAY
SETERUS, INC./MV 9-28-16 [[54](#)]
ROBERT WILLIAMS/Atty. for dbt.
NICHOLE GLOWIN/Atty. for mv.
RESPONSIVE PLEADING

This motion for relief from the automatic stay will be denied as moot. No appearance is necessary.

The secured claim relating to this collateral is provided for in Class 4 of the debtor' confirmed chapter 13 plan. Upon confirmation of the chapter 13 plan, the automatic stay was modified for this claim to permit enforcement of the creditor's remedies with regard to the collateral in the event of a default under applicable law. No attorney's fees will be awarded in relation to this motion.

12. [16-10168](#)-B-13 MOISES TURCIOS CONTINUED MOTION FOR RELIEF
PPR-1 FROM AUTOMATIC STAY AND/OR
BRUCE WARREN/MV MOTION FOR ADEQUATE PROTECTION
9-1-16 [[72](#)]
PATRICK KAVANAGH/Atty. for dbt.
CASSANDRA RICHEY/Atty. for mv.

This motion has been withdrawn. No appearance is necessary.

13. [16-12580](#)-B-13 EDWARD PADILLA MOTION TO VALUE COLLATERAL OF
RSW-1 ACCEPTANCE NOW
EDWARD PADILLA/MV 10-19-16 [[14](#)]
ROBERT WILLIAMS/Atty. for dbt.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If 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 a civil minute order.

14. [11-18681](#)-B-13 ELIAS/YVONNE SALCIDO MOTION TO DISMISS CASE
MHM-1 9-22-16 [[74](#)]
MICHAEL MEYER/MV
PHILLIP GILLET/Atty. for dbt.

This matter will proceed as scheduled. The court will inquire as to whether this 63 month-old case should be dismissed for the apparent want of a payment in the amount of \$1,180.23, and by debtors' counsel's alleged failure to file the July 7, 2016, order granting his fee application.

15. [15-10184](#)-B-13 PIERRE ROSADO CONTINUED MOTION TO DISMISS
MHM-3 CASE
MICHAEL MEYER/MV 6-16-16 [[44](#)]
STEVEN ALPERT/Atty. for dbt.
RESPONSIVE PLEADING

This motion will be denied without prejudice. The court intends to grant the debtor's motion, to confirm a modified plan which is intended to cure the default, below at calendar number 16 (DC# PLG-2). No appearance is necessary.

16. [15-10184](#)-B-13 PIERRE ROSADO MOTION TO MODIFY PLAN
PLG-2 9-7-16 [[70](#)]
PIERRE ROSADO/MV
STEVEN ALPERT/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 of Practice; there is no opposition and the respondents' default will be entered. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

17. [16-11686](#)-B-13 BERTHA SANCHEZ
MHM-1
MICHAEL MEYER/MV
ROBERT WILLIAMS/Atty. for dbt.
RESPONSIVE PLEADING

CONTINUED MOTION TO DISMISS
CASE
7-15-16 [[18](#)]

This motion was continued at the debtor's request to provide her with an opportunity to attend her continued \$341 meeting of creditors and provide the trustee with the required documents. The debtor did not appear at that continued meeting. Unless the trustee's motion is withdrawn before the hearing, the motion will be granted without oral argument for cause shown including the grounds set forth in the trustee's motion to dismiss the case. The court will issue a civil minute order. No appearance is necessary.

18. [16-10288](#)-B-13 CLINT/JUDITH HARRISON
RSW-7
CLINT HARRISON/MV
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF
CALIFORNIA TAX BOARD
9-27-16 [[88](#)]

The motion will be granted without oral argument based upon well-pled facts. The debtors shall submit a proposed order consistent with this ruling as set forth below. No appearance is necessary.

This motion to value the collateral for a consensual lien against real property was fully noticed in compliance with the Local Rules of Practice and 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 Federal Rule of Bankruptcy Procedure 9014(c). Upon default, factual allegations will be taken as true (except those relating to amount of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915, 917 (9th Cir., 1987)). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

Based on the evidence offered in support of the motion, the respondent's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. The debtors may proceed under state law to obtain a reconveyance of respondent's trust deed upon completion of the chapter 13 plan and entry of the discharge. If the chapter 13 plan has not been confirmed, then the order shall specifically state that it is not effective until confirmation of the plan.

This ruling is only binding on the named respondent in the moving papers and any successor who takes an interest in the property after service of the motion.

19. [16-13489](#)-B-13 JIMMY CANNON

ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
10-7-16 [[13](#)]

PHILLIP GILLET/Atty. for dbt.
\$310.00 FILING FEE PAID
10/13/16

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

9:30 A.M.

1. [16-13002](#)-B-12 WILLIAM/TRACY GREENLEE STATUS CONFERENCE RE: CHAPTER
12 VOLUNTARY PETITION
8-17-16 [[1](#)]

LEONARD WELSH/Atty. for dbt.

This matter will proceed as scheduled. The court has reviewed the debtors' status conference statement, the trustee's status conference statement, and the debtors' response to the trustee's status conference statement. The court will consider the chapter 12 trustee's response to the debtors' rebuttal concerning eligibility to file as a family farmer under chapter 12 of the bankruptcy code.

2. [15-14685](#)-B-11 B&L EQUIPMENT RENTALS, CONTINUED MOTION TO EMPLOY
DHR-6 INC. TIGER VALUATION SERVICES, LLC
OFFICIAL COMMITTEE OF AS APPRAISER(S) AND/OR MOTION
UNSECURED CREDITORS/MV FOR COMPENSATION FOR TIGER
VALUATION SERVICES, LLC,
APPRAISER(S)
9-14-16 [[509](#)]

LEONARD WELSH/Atty. for dbt.
DANIEL REISS/Atty. for mv.
RESPONSIVE PLEADING

This matter will proceed as scheduled.

10:00 A.M.

1. [15-12211](#)-B-7 BONIFACIO VEGA CONTINUED MOTION TO AVOID LIEN
PWG-2 OF CALIFORNIA SERVICE BUREAU,
BONIFACIO VEGA/MV INC.
9-7-16 [[19](#)]
PHILLIP GILLET/Atty. for dbt.

This matter was originally fully noticed and there was no objection. The respondent's default being entered, the motion was continued to provide the debtor with an opportunity to submit additional evidence. The debtor having filed sufficient evidence to show ownership of the exempt property at the time the lien attached, and therefore that he is entitled to avoid the subject lien on that property, the motion will be granted. The movant shall submit a proposed order. No appearance is necessary.

2. [10-62319](#)-B-7 ERICA MARTINEZ MOTION TO AVOID LIEN OF
PK-14 CITIBANK, NATIONAL ASSOCIATION
ERICA MARTINEZ/MV 9-29-16 [[202](#)]
PATRICK KAVANAGH/Atty. for dbt.

This motion to avoid a lien of Citibank, N.A., is the second to be brought by the debtor. The court denied the first motion, PK-13, on September 28, 2016, on the grounds that the property sought to be protected was not listed as exempt in the debtor's schedules. It does not appear that an amended schedule C, exempting the homestead, has been filed. Accordingly, the motion will be denied without prejudice. No appearance is necessary.

3. [16-13225](#)-B-7 BAKERSFIELD MOVING & MOTION FOR RELIEF FROM
SW-1 STORAGE DBA RELIABLE AUTOMATIC STAY
ALLY BANK/MV 10-17-16 [[37](#)]
NEIL SCHWARTZ/Atty. for dbt.
ADAM BARASCH/Atty. for mv.

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondent's 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 LBR 9014-1(f)(2). The court will issue a civil minute order.

4. [16-13133](#)-B-7 JOYCELYN MAMAUAG
RDN-1
U.S. BANK TRUST, N.A./MV
VINCENT GORSKI/Atty. for dbt.
RANDALL NAIMAN/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-5-16 [[15](#)]

The motion will be denied without prejudice. No appearance is necessary.

The moving papers were not served on the debtor's bankruptcy attorney.

5. [16-12335](#)-B-7 FRIEDA FINNEY
RSW-1
FRIEDA FINNEY/MV
ROBERT WILLIAMS/Atty. for dbt.

CONTINUED MOTION TO REDEEM
9-19-16 [[13](#)]

This matter was originally noticed as a preliminary motion and was continued to permit the respondent to file a written opposition and for the debtor to provide evidence of compliance with the requirements of redemption under the bankruptcy code. The court has reviewed the respondent's opposition, and the debtor has not filed any additional supporting evidence. Accordingly, the motion will be denied. The court will issue a civil minute order. No appearance is necessary.

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). The debtor filed this motion in an attempt to redeem, for a payment of \$8,100, her 2010 Toyota Camry, for which the record shows she owes C.A.H.P. Credit Union \$15,170. Neither the debtor's motion nor the record shows that she has complied with all the requirements necessary to redeem personal property. Although her Statement of Intent, filed within 30 days after the petition or meeting of creditors, listed "redemption" as her intent regarding this property, there is nothing that shows that the Statement of Intent was served on C.A.H.P. Credit Union, on or before filing of the Statement, in compliance with FRBP 1007(b) (2). The record also shows that the motion was not filed within 30 days after date first set for meeting of creditors, which was July 26, 2016, pursuant to § 521(a) (2) (B).

6. [16-13355](#)-B-7 DARLENE ALLEN
APN-1
SANTANDER CONSUMER USA INC./MV
ROBERT WILLIAMS/Atty. for dbt.
AUSTIN NAGEL/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-7-16 [[10](#)]

This matter will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If 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 a civil minute order.

7. [16-12584](#)-B-7 BRIAN/DIANA POOLE
KEH-1
BALBOA THRIFT & LOAN/MV
ROBERT WILLIAMS/Atty. for dbt.
KEITH HERRON/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-5-16 [[13](#)]

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

This motion for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtors' 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 Rule 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. [16-12746](#)-B-7 STEPHANIE VASQUEZ
PFT-1

OPPOSITION RE: TRUSTEE'S MOTION
TO DISMISS FOR FAILURE TO
APPEAR AT SEC. 341(A) MEETING
9-7-16 [[11](#)]

TIMOTHY SPRINGER/Atty. for dbt.
PETER FEAR/Atty. for mv.

Debtor's counsel shall notify his client that no appearance is necessary at this hearing. The court will issue a civil minute order.

The debtor shall attend the meeting of creditors rescheduled for November 28, 2016, at 11:00 a.m. If the debtor fails to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtor's discharge or to move for dismissal of the case under section 707(b) is extended to 60 days after the conclusion of the meeting of creditors.

11:00 A.M.

1. [16-12726](#)-B-7 JUAN/GLORIA JARAMILLO PRO SE REAFFIRMATION AGREEMENT
WITH TD AUTO FINANCE LLC
9-28-16 [[18](#)]

This matter will proceed as scheduled.

2. [16-12871](#)-B-7 BRIAN/BROOKE HUGHES REAFFIRMATION AGREEMENT WITH
CAB WEST, LLC
9-15-16 [[15](#)]

R. BELL/Atty. for dbt.

This reaffirmation agreement will be dropped from calendar without a disposition. Debtors' counsel will inform debtors 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 August 7, 2016, and the lease was not assumed by the chapter 7 trustee within 60 days, 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.

3. [16-12172](#)-B-7 STEPHANIE BROWN REAFFIRMATION AGREEMENT WITH
WELLS FARGO BANK N.A.
10-4-16 [[13](#)]

WILLIAM OLCOTT/Atty. for dbt.

Approval of the Reaffirmation Agreement will be denied. 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.

4. [16-12787](#)-B-7 HOWARD/LALITA YOUNG

REAFFIRMATION AGREEMENT WITH
NISSAN-INFINITI LT
10-4-16 [[15](#)]

R. BELL/Atty. for dbt.

This reaffirmation agreement will be dropped from calendar without a disposition. Debtors' counsel will inform debtors 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 July 31, 2016, and the lease was not assumed by the chapter 7 trustee within 60 days, 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. [16-11205](#)-B-7 TINA SANCHEZ STATUS CONFERENCE RE: AMENDED
[16-1042](#) COMPLAINT
SANCHEZ V. DEPT OF ED./NEL NET 10-3-16 [[30](#)]
TINA SANCHEZ/Atty. for pl.
RESPONSIVE PLEADING

This status conference will be dropped from calendar. The court will enter a civil minute order. No appearance is required.

The summons and complaint were not served within 7 days of issuance of the summons as required by FRBP 7004(e). In addition, the respondent was not served at all of the addresses required by FRBP 7004.

First, the summons and complaint was not mailed addressed to the Civil Process Clerk at the Office of the U.S. Attorney for the Fresno District. FRCP 7004(b)(4).

Second, a copy of the summons and complaint was not mailed to the Attorney General of the United States in the District of Columbia, which, pursuant to that agency's website, may be sent to, Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001. FRBP 7004(b)(5).

The court notes that a plaintiff is not required to file an amended complaint each time the summons is reissued.

2. [16-11205](#)-B-7 TINA SANCHEZ ORDER TO SHOW CAUSE REGARDING
[16-1042](#) DISMISSAL OF ADVERSARY
SANCHEZ V. DEPT OF ED./NEL NET PROCEEDING
9-9-16 [[22](#)]

This matter will proceed as scheduled. Based on the ruling above, at calendar number 1, the court intends to dismiss this adversary proceeding without prejudice pursuant to the Order to Show Cause.

3. [16-10016](#)-B-13 KEVIN DAVEY STATUS CONFERENCE RE: AMENDED
[16-1074](#) COMPLAINT
DAVEY V. OCWEN LOAN SERVICING, 8-30-16 [[50](#)]
LLC ET AL
VINCENT GORSKI/Atty. for pl.
RESPONSIVE PLEADING

This matter will be continued to January 5, 2017, at 1:30 p.m., on the Bakersfield calendar.

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

CONTINUED MOTION TO DISMISS
CAUSE(S) OF ACTION FROM AMENDED
COMPLAINT AND/OR MOTION FOR A
MORE DEFINITE STATEMENT
9-21-16 [[61](#)]

UNKNOWN TIME OF FILING/Atty. for mv.
RESPONSIVE PLEADING

This matter will proceed as scheduled.

Tentative Ruling: The Motion to Dismiss the Fourth through Sixth Claims for Relief ("Counts") under FRCP 12 (b) (6) is denied. The Motion for a More Definite Statement under FRCP 12(e) as to the Fourth and Fifth Claims for Relief is granted and as to the sixth claim for relief is denied. Plaintiff shall file and serve a second amended complaint on or before November 17, 2016.

Barrett, Daffin, Frappier, Treder and Weiss, the foreclosing trustee on the property at issue in this case ("Trustee"), moves to dismiss the fourth claim for relief (injunction); the fifth claim for relief (injunction); and the sixth claim for relief (declaratory relief). Movant contends that the First Amended Complaint fails to state a claim upon which relief can be granted (FRCP 12 (b) (6) made applicable by FRBP 7012). Movant says claims 4 and 5 do not contain allegations "linking" the Trustee to certain post foreclosure acts alleged in the complaint and claim 6 does not allege an existing controversy with Trustee. Alternatively Trustee seeks an order compelling a more definite statement under FRCP 12(e).

Plaintiff opposes the motions by arguing that the foreclosure sale in question was invalid because it was allegedly conducted in violation of the automatic stay of 11 U.S.C. § 362.

The court has reviewed the motion and the exhibits thereto and has again reviewed the first amended complaint. The Plaintiff's opposition is essentially non-responsive to the issues raised in the motion. Yet, after reviewing the parties' submissions, the court makes the above tentative ruling.

This adversary proceeding filed by the Debtor seeks damages and injunctive and declaratory relief stemming from a non-judicial foreclosure sale of the Debtor's residence which occurred on January 5, 2016. That same day the Debtor filed this chapter 13 bankruptcy case. The Plaintiff alleges that the foreclosure was a willful violation of the automatic stay. The Plaintiff prays for unspecified damages, an injunction stopping eviction proceedings and any acts to obtain possession of the residence, and a declaratory judgment regarding the status of Plaintiff's title.

Motion to Dismiss

Under Civil Rule 12(b) (6) (made applicable by Rule 7012), a court must dismiss a complaint if it fails to "state a claim upon which relief can be granted." In reviewing a Civil Rule 12(b) (6) dismissal, we accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th

Cir.2011); *Newcal Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1043 n. 2 (9th Cir.2008). However, the court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. *Bell 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).

To avoid dismissal under Civil Rule 12(b)(6), a plaintiff must aver in his complaint "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Twombly*, 550 U.S. at 570 (A claim survives Civil Rule 12(b)(6) when it is "plausible.")). 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.*, 534 F.3d 1116, 1121 (9th Cir.2008).

1. The complaint alleges sufficient facts to entitle plaintiff to injunctive relief. A request for injunctive relief must allege an irreparable injury and the inadequacy of legal remedies. *Beacon Theatres v. Westover*, 359 U.S. 500, 507-07 (1959); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Stanley v. Univ. Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). No permanent injunction can issue until after the trial and entry of a final judgment. *Golden Gate Hotel Assn. v. City & County of San Francisco*, 836 F. Supp. 707, 709, vacated on other grounds, 18 F. 3d 1482 (9th Cir. 1994).

The complaint alleges irreparable injury. The Plaintiff lost his residence at a foreclosure sale, held in violation of the automatic stay, on January 5, 2016. Losing property to foreclosure can be an irreparable injury. *Sundance Land Corp. v. Community First Federal Savings & Loan Assn.*, 840 F. 2d 653, 661 (9th Cir. 1988). *But see, Alcaraz v. Wachovia Mortgage, FSB*, 592 F. Supp. 2d 1304, 1306 (E.D. Cal., 2009) [plaintiff may not have been able to afford the property impacting irreparable injury]. The complaint alleges the trustee's sale (¶ 25); the filing and prosecution of unlawful detainer proceedings, "lockout" events (¶'s 28-32) and various automatic stay violations (¶'s 34-43). The court's findings and conclusions noted at the hearing on the preliminary injunction establish the injury and the importance of the policies involved. The requirement of irreparable injury has been plead.

The complaint sufficiently alleges inadequacy of legal remedies. The loss of real property can probably be remedied by payment of damages if irreparable injury is not proven. However, the continued alleged attempts to evict Plaintiff and protection of the possessory interest cannot be remedied by payment of damages. Although the legal remedy need not be wholly ineffectual to justify injunctive relief, it must be seriously deficient as compared to the harm suffered. *Foodcomm International v. Barry*, 328 F. 3d 300,304 (7th Cir. 2003). If Plaintiff can establish the stay violation, which means (in the Ninth Circuit) any post-petition activity enforcing the claim secured by the real property would be void, then the loss of possession would be tied to a void trustee's sale. Compared to the harm suffered by the Plaintiff (losing his residence), a

claim for damages would likely be deficient in compensating for the loss of unique real property.

2. The complaint alleges sufficient facts for declaratory relief. A claim for declaratory relief must contain allegations of an actual controversy between the parties within Federal jurisdiction. 28 U.S.C. § 2201; *Calderon v. Ashmus*, 523 U.S. 740, 745 (1988); *International Harvester Co. v. Deere & Co.*, 623 F. 2d 1207, 1210 (7th Cir. 1980). There is no realistic dispute that the complaint alleges stay violations under the Bankruptcy Code which is under Federal jurisdiction.

The issue raised by the motion is lack of controversy with Trustee. The test is whether there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). There are a few controversies between the plaintiff and movant. Those include, first, was movant aware of the bankruptcy filing before the trustee's sale "was cried?" Second, what is the effect of the trustee's deed? Third, what is movant's legal relationship to the other defendants? Fourth, how does that impact any liability? Fifth, what remedy, if any, does Plaintiff have against movant? The allegations of the complaint incorporated in the sixth claim for relief set out the potential violations and invalidity of the trustee's sale. (¶'s 52-57).

Defendant's reliance on *Swartz v. KPMG LLP*, 476 F. 3d 756, 765-66 (9th Cir. 2007) is misplaced. There the Ninth Circuit affirmed a District Court ruling dismissing federal RICO claims and a state consumer protection claim and the related declaratory relief claim but reversed the District's Court's denial of leave to amend the remaining fraud claims. Here the court is not dismissing the 4th and 5th counts (claims) so the premise of defendant's argument is wrong. A claim for declaratory relief is plead. More to the point is the following language from the *Swartz* opinion: "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that recovery is very remote, but that is not the test." *Swartz*, 476 F. 3d at pg. 763 quoting *Jackson v. Carey*, 353 F. 3d 750, 755 (9th Cir. 2003) quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Motion for a More Definite Statement

If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under FRCP Rule 12(e) before responding. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002). A motion under FRCP 12(e) is proper only if the complaint is so indefinite that the defendant cannot ascertain the nature of the claims being asserted, i.e., the complaint is so vague that the defendant cannot begin to frame a response. *C.B. v. Sonora*, 691 F. Supp. 2d 1170, 1191 (E.D. Cal., 2010).

The motion is likely to be denied where the substance of the claim has been alleged even though some of the details have been omitted. *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1169 (E.D. Cal. 2005). This motion attacks unintelligibility not lack of detail. If the complaint is specific enough

to apprise the defendant of the substance of the claim asserted against him or her the complaint is sufficient. *San Bernardino Public Employees Assn. v. Stout*, 946 F. Supp. 790, 804 (C.D. Cal. 1996). These motions are viewed with disfavor and rarely granted. *C.B.*, *supra* 691 F. Supp. 2d at 1191 quoting Schwartz et al, *Federal Civil Procedure Before Trial* 9:351 (2000).

1. A more definite statement is necessary for claims 4 and 5. Both of these claims are for injunctive relief. The injunctive relief claims are not clear and very vague as to the type of injunction ultimately requested. More to the point, the role, if any, movant would have in any provisional relief is not alleged at all. Thus, movant cannot respond when it is not aware whether injunctive relief will affect its interests or the type of relief sought. Count 4, for example alleges that an order is sought voiding any sale transactions. What sales transactions? What does movant have to do with what sales transactions? The relief requested can be construed as a mandatory injunction which is very rarely granted. It is appropriate to require allegations connecting defendants to certain wrongs alleged and not allow a pleader to rely on generalities. *McHenry v. Renne*, 84 F. 3d 1172, 1174-75, 1179-80 (9th Cir. 1996). Counts 4 and 5 are simply too vague as to claims against this defendant. A more definite, intelligible and clear pleading is needed.

2. The same is not true as to Count 6. As mentioned above, an adequate claim for declaratory relief has been plead. The willful stay violation allegations are included in this claim and this claim requests a declaratory judgment as to the legal effect of the actions taken by movant and others. A more definite statement is not required for this claim.

5. [11-62436](#)-B-7 KEVIN/SUSAN MARTIN PRETRIAL CONFERENCE RE: AMENDED
[12-1131](#) COMPLAINT
MARTIN ET AL V. IRS 1-22-13 [25]
KEVIN MARTIN/Atty. for pl.

This matter will proceed as scheduled. The court notes that the parties in *In re Smith*, 828 F.3d 1094, have filed a Petition for Writ of Certiorari with the U.S. Supreme Court, and will inquire as to whether this affects the parties in this matter.

6. [16-11072](#)-B-13 ELLYN LOPEZ STATUS CONFERENCE RE: AMENDED
[16-1073](#) COMPLAINT
LOANME, INC. V. LOPEZ 9-22-16 [23]
DAVID BRODY/Atty. for pl.

The hearing will proceed as scheduled. The parties shall be prepared to discuss dates for discovery cut off and setting the pre-trial conference in this matter.

7. [16-11072](#)-B-13 ELLYN LOPEZ
[16-1073](#) PK-2
LOANME, INC. V. LOPEZ
PATRICK KAVANAGH/Atty. for mv.

MOTION TO DISMISS ADVERSARY
PROCEEDING/NOTICE OF REMOVAL
10-13-16 [[25](#)]

The Motion to Dismiss will be denied. No appearance is necessary. The defendant shall file and serve an answer to the first amended complaint on or before November 17, 2016. The court will issue a civil minute order.

The defendant filed and noticed this motion to dismiss on October 13, 2016. The hearing is scheduled for November 3, 2016. That is 21 days' notice. No order shortening notice was obtained. While the defendant properly referenced in the notice of this motion that filing opposition was not necessary on a motion that is to be heard on less than 28 days' notice, that procedure is not available under the local rules for motions filed in connection with adversary proceedings. LBR 9014-1 (f) (2) (A).