



**UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable Jennifer E. Niemann  
Hearing Date: Wednesday, May 31, 2023  
Department A – Courtroom #11  
Fresno, California**

Unless otherwise ordered, all hearings before Judge Niemann are simultaneously: (1) **IN PERSON** in Courtroom #11 (Fresno hearings only), (2) via **ZOOMGOV VIDEO**, (3) via **ZOOMGOV TELEPHONE**, and (4) via **COURTCALL**. You may choose any of these options unless otherwise ordered.

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1. Review the [Pre-Hearing Dispositions](#) prior to appearing at the hearing.
2. Review the court's [Zoom Policies and Procedures](#) for these and additional instructions.
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## 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, and all parties will need to appear at the hearing unless otherwise ordered. 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.**

1. [23-10516](#)-A-7      **IN RE: LILIANA FABIAN**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES  
5-10-2023    [\[15\]](#)

KARNEY MEKHITARIAN/ATTY. FOR DBT.  
\$32.00 FILING FEE PAID 5/16/23

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

DISPOSITION:      The order to show cause will be vacated.

ORDER:              The court will issue an order.

The record shows that the amendment filing fee has been paid.

2. [23-10963](#)-A-7      **IN RE: JESUS GUERRA**  
[HDN-1](#)

MOTION TO EXTEND AUTOMATIC STAY  
5-17-2023    [\[12\]](#)

JESUS GUERRA/MV  
HENRY NUNEZ/ATTY. FOR DBT.

TENTATIVE RULING:      This matter will proceed as scheduled.

DISPOSITION:      Granted.

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

This motion was filed and served on at least 14 days' notice prior to the hearing date pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Though not required, state court receiver Mark S. Adams ("Receiver") filed written opposition on May 26, 2023. Doc. #20. Further opposition may be presented at the hearing.

Debtor Jesus Guerra ("Debtor") moves the court for an order extending the automatic stay pursuant to 11 U.S.C. § 362(c)(3)(B). Doc. #12.

Debtor requests the court take judicial notice of Debtor's adversary proceeding complaint seeking to determine the nature, extent, and validity of lien; for disallowance of claim; and declaratory relief. Doc. #16. This court may take judicial notice of and consider the records in this bankruptcy case, filings in other court proceedings, and public records. Fed. R. Evid. 201; Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015). The court takes judicial notice of the existence of a filed document but does not take judicial notice of the truth or falsity of the contents of any such document for the purpose of making a finding of fact. In re Harmony Holdings, LLC, 393 B.R. 409, 412-15 (Bankr. D.S.C. 2008) (collecting cases).

Debtor commenced this chapter 7 bankruptcy case on May 4, 2023. Doc. #1. Debtor had a chapter 13 case pending within the preceding one-year period that was dismissed, Case No. 22-10699 (Bankr. E.D. Cal.) (the "Prior Case"). The Prior Case was filed on April 25, 2022 and dismissed on January 27, 2023 for Debtor's failure to make all payments due under the proposed plan. Case No. 22-10699, Doc. #237. Under 11 U.S.C. § 362(c)(3)(A), if a debtor had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the current case. Debtor filed this case on May 4, 2023. The automatic stay will terminate in the present case on June 3, 2023.

Section 362(c)(3)(B) allows the court to extend the stay "to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed[.]" 11 U.S.C. § 362(c)(3)(B).

Section 362(c)(3)(C)(i) creates a presumption that the case was filed not in good faith if (1) the debtor filed more than one prior case in the preceding year; (2) the debtor failed to file or amend the petition or other documents without substantial excuse, provide adequate protection as ordered by the court, or perform the terms of a confirmed plan; or (3) the debtor has not had a substantial change in his or her financial or personal affairs since the dismissal, or there is no other reason to believe that the current case will result in a discharge or fully performed plan. 11 U.S.C. § 362(c)(3)(C)(i).

In this case, the presumption that this bankruptcy case was filed not in good faith arises under 11 U.S.C. § 362(c)(3)(C)(i)(I). The presumption that this bankruptcy case was filed not in good faith may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition." Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citations omitted) vacated and remanded on other grounds by Taggart v. Lorenzen, 139 S. Ct. 1795 (2019).

In support of this motion to extend the automatic stay, Debtor declares that the Prior Case was not dismissed based on any of the following: failure to comply with any court order to file or amend his petition and/or documents; failure to provide adequate protection as ordered by the court; or failure to perform the terms of a confirmed chapter 13 plan. Decl. of Jesus Guerra, Doc. #14. There is a pending foreclosure sale of Debtor's residence by a creditor who holds a super priority lien. Id. Debtor disputes the excessive attorneys' fees being claimed by the creditor. Id. Debtor has filed an adversary complaint to determine the amount of the creditor's lien and will pay the claim in full once a corrected amount is determined. Id.

Based on the adversary complaint, Debtor disputes a super priority deed of trust placed on Debtor's residence by Community Improvement Capital that was approved by the state court in connection with an order granting a motion to appoint a receiver to remediate health code violations on Debtor's property. Debtor's RJN, Ex. 1, Doc. #16. Receiver opposes this court extending the automatic stay on the basis that Debtor has not proved that this chapter 7 case

was filed in good faith by a preponderance of the evidence. Opp., Doc. #20. Receiver asserts, quoting In re Elliott-Cook, 357 B.R. 811, 814-15 (Bankr. N.D. Cal. 2006), that the court must consider the following factors when determining good faith under 11 U.S.C. § 362(c)(3): (1) the timing of the second petition; (2) how the debt(s) arose; (3) the debtor's motive in filing the second petition; (4) how the debtor's actions affected creditors; (5) why the debtor's prior case was dismissed; (6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; and (7) whether the trustee or creditors object to the motion to continue the stay. Opp. at pp. 3-4, Doc. #20.

Turning to the various factors cited by Receiver, Receiver's claim arises from fees and costs associated with Receiver, the City of Madera and Receiver's secured lender. Decl. of Byron Z. Moldo, Doc. #21. Debtor filed this chapter 7 bankruptcy case to prevent a foreclosure sale of Debtor's residence pending resolution of Debtor's dispute over the amount of attorneys' fees related to the receivership action, the subject of Debtor's adversary proceeding. Guerra Decl., Doc. #14. Debtor's Prior Case, a chapter 13 case, was dismissed on January 27, 2023 for Debtor's failure to make payment under a proposed plan. Case No. 22-10699, Doc. #237, #240. On April 17, 2023, there was a court-supervised settlement conference in the receivership action pending in state court that did not result in a settlement. Moldo Decl., Doc. #21. This chapter 7 bankruptcy case was filed on May 4, 2023, and the adversary complaint was filed on May 17, 2023. Doc. #1, 18. An initial status conference in the adversary proceeding is scheduled for July 20, 2023. Adv. Proc. 23-1026, Doc. #3. While no responsive pleadings have been filed in the adversary proceeding, Receiver clearly opposes Debtor's motion to extend the automatic stay. Because Debtor's current case is a chapter 7, whether Debtor will have a steady income throughout the bankruptcy case to fund a plan is an irrelevant factor in this case.

Because this bankruptcy case was filed by Debtor to address a dispute over the amount of attorneys' fees that provides the grounds for a foreclosure sale of Debtor's residence, the court is inclined to find that Debtor has rebutted by clear and convincing evidence the presumption that this bankruptcy case was filed not in good faith.

Accordingly, this court is inclined to GRANT the motion.

3. [23-10272](#)-A-7     **IN RE: HELEN WINK**  
[BLF-2](#)

MOTION TO EMPLOY BERKSHIRE HATHAWAY HOMESERVICES AS REALTOR(S)  
4-13-2023     [\[25\]](#)

IRMA EDMONDS/MV  
SUSAN HEMB/ATTY. FOR DBT.  
LORIS BAKKEN/ATTY. FOR MV.  
WITHDRAWN

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

DISPOSITION:                    Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on May 15, 2023. Doc. #54.

MOTION TO AVOID LIEN OF AMERICAN EXPRESS BANK, FSB  
4-14-2023    [\[26\]](#)

PAMELA MOTTON/MV  
MARK ZIMMERMAN/ATTY. FOR DBT.

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 at least 28 days' notice pursuant to Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of creditors, 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 Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

As an informative matter, the movant did not attach a copy of the Clerk of the Court's matrix of creditors who have filed a Request for Special Notice applicable to this case with the court's mandatory Certificate of Service forms filed in connection with the motion (Doc. #30) and the amended notice of hearing (Doc. #39). Instead of using the Clerk of the Court's matrix that can be generated from the court's website, the movant attached a Pacer generated list of names and addresses served. In the future, the movant should attach a copy of the Clerk of the Court's matrix of creditors who have filed a Request for Special Notice applicable to this case that can be generated from this court's website.

Pamela M. Motton ("Debtor"), the debtor in this chapter 7 case, moves pursuant to 11 U.S.C. § 522(f) and Federal Rules of Bankruptcy Procedure 4003(d) and 9014 to avoid the judicial lien of American Express Bank, FSB ("Creditor") on the residential real property commonly referred to as 677 Vista Ct., Lemoore, California 93425 (the "Property"). Doc. #26; Schedule C, Doc. #1; Am. Schedule D, Doc. #33.

In order to avoid a lien under 11 U.S.C. § 522(f)(1), the movant must establish four elements: (1) there must be an exemption to which the debtor would be entitled under § 522(b); (2) the property must be listed on the debtor's schedules as exempt; (3) the lien must impair the exemption; and (4) the lien must be either a judicial lien or a non-possessory, non-purchase money security interest in personal property listed in § 522(f)(1)(B). 11 U.S.C. § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (B.A.P. 9th Cir. 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)).

Debtor filed the bankruptcy petition on July 20, 2017. Doc. #1. A judgment was entered against Debtor in the amount of \$37,784.30 in favor of Creditor on April 26, 2016. Ex. D, Doc. #29. The abstract judgment was recorded pre-petition in Kings County on November 3, 2016, as document number 1620113. Ex. D, Doc. #29. The lien attached to Debtor's interest in the Property located in Kings County. Doc. #33. The Property also is encumbered by a mortgage in favor of Ditech in the amount \$187,620.00 and second mortgage in favor of SLS in the amount \$9,583.00. Am. Schedule D, Doc. #33. Debtor claimed an exemption of \$75,000.00 in the Property under California Code of Civil Procedure § 704.730. Schedule C, Doc. #1. Debtor asserts a market value for the Property as of the petition date at \$237,000.00. Schedule A/B, Doc. #1.

Applying the statutory formula:

Amount of Creditor's judicial lien		\$37,784.30
Total amount of all other liens on the Property (excluding junior judicial liens)	+	\$197,203.00
Amount of Debtor's claim of exemption in the Property	+	\$75,000.00
		\$309,987.30
Value of Debtor's interest in the Property absent liens	-	\$237,000.00
Amount Creditor's lien impairs Debtor's exemption		\$72,987.30

After application of the arithmetical formula required by § 522(f)(2)(A), the court finds there is insufficient equity to support Creditor's judicial lien. Therefore, the fixing of this judicial lien impairs Debtor's exemption in the Property and its fixing will be avoided.

Debtor has established the four elements necessary to avoid a lien under 11 U.S.C. § 522(f)(1). Accordingly, this motion is GRANTED.

5. [23-10598](#)-A-7      **IN RE: JAZMINE HERNANDEZ**  
[DWE-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
5-8-2023    [\[15\]](#)

LIBERTY FEDERAL CREDIT  
UNION/MV  
T. O'TOOLE/ATTY. FOR DBT.  
DANE EXNOWSKI/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 matter is DENIED WITHOUT PREJUDICE for improper notice.

The certificate of service filed with this motion does not state the date on which service of the motion and related pleadings were made. Doc. #20. The corrected certificate of service states that service of the motion and related pleadings were made on May 8, 2023. Doc. #22. Since notice of hearing was served by mail on May 8, 2023 with a hearing date set for May 31, 2023, the motion was set for hearing on less than 28 days' notice and is governed by Local Rule of Practice ("LBR") 9014-1(f)(2). Pursuant to LBR 9014-1(f)(2), written opposition was not required, and any opposition may be raised at the

hearing. However, the notice of hearing filed with the motion stated that opposition must be filed and served no later than fourteen days before the hearing and that failure to file written response may result in the court granting the motion prior to the hearing. Accordingly, the notice of hearing does not comply with LBR 9014-1(f)(2), and the motion is denied without prejudice for improper notice.