

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Wednesday, July 27, 2016
Place: Department B – Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. The following rulings are tentative. The tentative ruling will not become the final ruling until the matter is called at the scheduled hearing. **Pre-disposed matters will generally be called, and the rulings placed on the record at the end of the calendar.** Any party who desires to be heard with regard to a pre-disposed matter may appear at the hearing. If the party wishes to contest the tentative ruling, he/she shall notify the opposing party/counsel of his/her intention to appear. **If no disposition is set forth below, the hearing will take place as scheduled.**

2. Submission of Orders:

Unless the tentative ruling expressly states that the court will prepare 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.

9:30 A.M.

1. [15-13503](#)-B-7 JANA RIPIPORTELLA CONTINUED OBJECTION TO DEBTOR'S
TGM-2 CLAIM OF EXEMPTIONS
PETER FEAR/MV 5-24-16 [[38](#)]
EDWARD KERNS/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

This matter was continued to be heard with the motion to compromise below. Because the court intends to grant that motion, TGM-3, this objection will be overruled as moot. No appearance is necessary.

2. [15-13503](#)-B-7 JANA RIPIPORTELLA MOTION TO COMPROMISE
TGM-3 CONTROVERSY/APPROVE SETTLEMENT
PETER FEAR/MV AGREEMENT WITH JANA
RIPIPORTELLA
6-29-16 [[50](#)]

EDWARD KERNS/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

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

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

Based on the evidence, before entering into this settlement the trustee considered the impact on creditors of this estate by evaluating each of the factors enumerated by the Ninth Circuit Court of Appeals in the case of *A & C Properties*, 784 F.2d 1377 (9th Cir. 1986), including the potential litigation in the case and the difficulties in collection. The evidence supports the trustee's conclusion that the compromise is in the best interests of creditors and the bankruptcy estate and it should result in payment in full of allowed claims.

3. [16-10631](#)-B-7 MAGGIE HEBIESH-LOBUE
TMT-2
TRUDI MANFREDO/MV
SCOTT MCDONALD/Atty. for dbt.
TRUDI MANFREDO/Atty. for mv.

MOTION FOR TURNOVER OF PROPERTY
6-29-16 [[24](#)]

The default of responding parties will be entered. The court will grant the motion as provided below without oral argument based upon well-pled facts. The moving party shall submit a proposed order. No appearance is necessary.

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

In order to prevail on a motion for turnover, the trustee must prove: (1) The refunds are or were in debtor's possession, custody or control during the pendency of the bankruptcy case; (2) The refunds could be used by the trustee or exempted by the debtor; (3) The refunds have more than inconsequential benefit to the estate. *Bailey v. Sunhar (In re Bailey)*, 380 B.R. 486, 490 (6th Cir., BAP, 2008). The well pled facts establish that 2015 federal and state tax refunds totaling \$9,638 were either received by or are due to the debtor. The refunds are community property of the debtor and her non-filing spouse. The cash can be used by the trustee. The trustee has demanded turnover of those funds and the funds have not been turned over.

Tax refunds are property of the estate under 11 U.S.C. § 541. *Nichols v. Birdsell*, 491 F. 3d 987, 990 (9th Cir., 2007). The debtor must turn over that property. 11 U.S.C. § 542(a). The uncontroverted declaration of the trustee establishes that the debtor admitted receipt of the federal refund but that it was expended by the debtor's non-filing spouse. The state tax refund could not be paid, according to the declaration, because the account to which it was to be deposited had been closed. That refund is still payable according to the evidence.

The expenditure of the funds does not prevent the relief requested. *Newman v. Schwartzer (In re: Newman)*, 487 B.R. 193 (9th Cir., BAP 2013). The fact the debtor's spouse may have expended the funds does not prevent the granting of the order requested here. The trustee and the bankruptcy estate are entitled to the full amount of the refunds less any amount properly exempt. The order will be without prejudice to the Trustee's potential action against the non-filing spouse. See, FRBP 7001 (1).

4. [11-60233](#)-B-7 MICHAEL NORMAN
JTW-2
JANZEN, TAMBERI AND WONG/MV

OVIDIO OVIEDO/Atty. for dbt.

MOTION FOR COMPENSATION FOR
JANZEN, TAMBERI AND WONG,
ACCOUNTANT(S)
5-26-16 [[41](#)]

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

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

5. [16-10841](#)-B-7 NOE AGUILAR AND LUCRECIA
JES-1 GUILLEN
JAMES SALVEN/MV

CHARLES STONER/Atty. for dbt.
ORDER #23

MOTION TO EMPLOY COLDWELL
BANKER GONELLA REALTY AS
BROKER(S)
6-21-16 [[20](#)]

If this motion is not withdrawn before the hearing then it will proceed as scheduled for the trustee to explain how, after the debtors' amendment of exemptions, the sale of the debtors' residence would be in the best interest of creditors.

If the motion is withdrawn prior to the hearing, then the matter will be dropped from calendar and no appearance will be necessary.

6. [16-11464](#)-B-7 CLIFFORD/JODIE MCDONALD
PK-2
FRONTIER REAL ESTATE SERVICE,
INC./MV
PATRICK KAVANAGH/Atty. for mv.

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
6-23-16 [[45](#)]

This matter was filed as a preliminary motion and was continued from July 7, 2016, where the debtors appeared in opposition. A written opposition was to be filed and served by July 13, 2016. No such written opposition having been filed, the debtors' defaults will be entered and the motion will be granted without oral argument for cause shown. Movant shall submit a proposed order as specified below. No appearance 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 proposed order shall specifically describe the property or action to which the order relates. If the notice and motion requested a waiver of Federal Rules of Bankruptcy Procedure 4001(a)(3), that relief will be granted.

If the prayer for relief includes a request for adequate protection, and/or a request for an award of attorney fees, those requests will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein. A motion for attorney fees pursuant to 11 U.S.C. §506(b), or applicable nonbankruptcy law, must be separately noticed and separately briefed with appropriate legal authority and supporting documentation.

Unless the court expressly orders otherwise, the proposed order shall not include any other relief. If the proposed order includes extraneous or procedurally incorrect relief that is only available in an adversary proceeding then the order will be rejected. See *In re Van Ness*, 399 B.R. 897 (Bankr. E.D. Cal. 2009).

7. [13-17082](#)-B-7 RONALD RUSHING
FW-12
TRUDI MANFREDO/MV

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH BERKSHIRE
HATHAWAY HOMESERVICES
CALIFORNIA REALTY AND/OR MOTION
FOR COMPENSATION FOR BERKSHIRE
HATHAWAY HOMESERVICES
CALIFORNIA REALTY, BROKER(S)
6-23-16 [[246](#)]

SCOTT LYONS/Atty. for dbt.
PETER FEAR/Atty. for mv.

The motion will be denied without prejudice to the filing of an application for fees by Berkshire Hathaway Homeservices/California Realty. The court will enter a civil minute order. No appearance is necessary.

Based on the court's review of the record, there is no evidence here of a controversy to compromise. It does not appear that the trustee's agreement with the debtors, for their retention of the real property in exchange for their payment of the settlement amount, constitutes a breach of her agreement with Berkshire Hathaway Homeservices/California Realty.

The motion to employ Berkshire Hathaway Homeservices/California Realty, document #211, filed August 18, 2015 and granted September 25, 2015, provides, at paragraph 11: "If Broker has rendered services and the Property is disposed of by the Trustee other than by sale through Broker, but Broker's services substantially benefitted the estate, Broker shall be entitled to submit a fee application for compensation for the services rendered and costs."

8. [16-11884](#)-B-7 GRIFFITH TRUCKING
HAR-1 SERVICE, INC.
LEE FINANCIAL SERVICES/MV

MOTION TO APPROVE STIPULATION
FOR RELIEF FROM THE AUTOMATIC
STAY
6-27-16 [[6](#)]

NEIL SCHWARTZ/Atty. for dbt.
HILTON RYDER/Atty. for mv.

The motion to approve a stipulation for relief from stay regarding a 2012 Freightliner Tractor will be granted without oral argument based upon well-pled facts. The moving party shall submit a proposed order. No appearance is necessary.

The evidence presented in movant's uncontroverted declaration shows that the subject property is overencumbered by approximately \$2,600. 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.

9. [15-12689](#)-B-7 MARK HANSEN
MRH-3
MARK HANSEN/MV

MOTION TO AVOID LIEN OF
AMERICAN EXPRESS BANK, FSB,
FEDERAL SAVINGS BANK
6-9-16 [[89](#)]

MARK HANSEN/Atty. for mv.

This motion to avoid the judicial lien of American Express Bank, FSB, Federal Savings Bank, will be denied without prejudice. The court will enter a civil minute order. No appearance is necessary.

The respondent is a federally insured depository institution and therefore must be served through an officer such as president or CEO by certified mail at the address of the institution.

In addition, the proof of service does not comply with the Local Bankruptcy Rules, Appendix II, EDC 2-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (revised August 12, 2015). The form of the proof of service must be formatted in the same way that the first page of the motion is prepared.

10. [15-12689](#)-B-7 MARK HANSEN
MRH-4
MARK HANSEN/MV
MARK HANSEN/Atty. for mv.

MOTION TO AVOID LIEN OF CMRE
FINANCIAL SERVICES, INC
6-9-16 [[85](#)]

This motion to avoid the judicial lien of CMRE Financial Services, Inc., will be denied without prejudice. The court will enter a civil minute order. No appearance is necessary.

The respondent must be served either through its Agent for Service of Process, listed on the Secretary of State's internet website, or through an officer such as a president or CEO. Service on the respondent's attorney is not service on the respondent.

In addition, the proof of service does not comply with the Local Bankruptcy Rules, Appendix II, EDC 2-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (revised August 12, 2015). The form of the proof of service must be formatted in the same way that the first page of the motion is prepared.

11:00 A.M.

1. [16-11005](#)-B-7 FRANCISCO/CINDY SUAREZ REAFFIRMATION AGREEMENT WITH
WELLS FARGO BANK, N.A.
7-1-16 [[25](#)]

TIMOTHY SPRINGER/Atty. for dbt.

Approval of the Reaffirmation Agreement will be denied. Debtors' attorney shall notify his clients 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 debtors would be able to make the payments.

2. [16-10819](#)-B-7 JESSE/AMALIA ORTIZ REAFFIRMATION AGREEMENT WITH
TOYOTA MOTOR CREDIT CORPORATION
6-23-16 [[17](#)]

MARK ZIMMERMAN/Atty. for dbt.

Approval of the Reaffirmation Agreement will be denied. Debtors' attorney shall notify his clients that no appearance is necessary.

Although the debtors' attorney executed the agreement, 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.

3. [16-10969](#)-B-7 MARTIN ESPINOSA REAFFIRMATION AGREEMENT WITH
TOYOTA MOTOR CREDIT CORPORATION
6-30-16 [[15](#)]

MARK ZIMMERMAN/Atty. for dbt.

Approval of the Reaffirmation Agreement will be denied. Debtor's attorney shall notify his clients that no appearance is necessary.

Although the debtor's attorney executed the agreement, 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.

1:30 P.M.

1. [15-14288](#)-B-13 GEORGE/JULIETTE ROBERTS CONTINUED STATUS CONFERENCE RE:
[16-1030](#) COMPLAINT
 ROBERTS ET AL V. MORENO 3-13-16 [[1](#)]
 ENTERPRISES, INC.
 DAVID JENKINS/Atty. for pl.
 RESPONSIVE PLEADING

This matter will proceed as scheduled unless a joint status conference statement is filed as ordered in the civil minute order entered at the prior hearing. The parties should check for an updated pre-disposition in this matter.

2. 14-14593-B-7 WAYNE HEAD CONTINUED STATUS CONFERENCE RE:
16-1040 COMPLAINT
 FEAR V. HEAD 4-7-16 [1]
 TRUDI MANFREDO/Atty. for pl.

Based on the stipulation filed extending the time to answer this matter will be continued to September 14, 2016, at 1:30 p.m. The record shows that the defendant has filed an answer. The court will issue a scheduling order. No appearance is necessary.