

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto
Hearing Date: Wednesday, August 24, 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. [15-13600](#)-B-7 CHRISTOPHER MARSHALL MOTION TO SELL
JES-2 7-27-16 [[29](#)]
JAMES SALVEN/MV
VARDUHI PETROSYAN/Atty. for dbt.

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

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

It appears that the sale is a reasonable exercise of the trustee's business judgment. The trustee proposes to sell to the debtor the estate's interest in 87 shares of Vivent Solar at \$13.16 per share. The net to the estate is \$1,144.92. That amount has been paid to the trustee. The trustee's evidence in support of the motion does not address the tax consequences of the sale. But given the *de minimis* amount involved, the court finds that lack of proof as not critical to the granting of the motion.

2. [16-11201](#)-B-7 JOSE CORTES
JES-1
JAMES SALVEN/MV
MARK ZIMMERMAN/Atty. for dbt.

MOTION TO SELL
7-14-16 [[26](#)]

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

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

It appears that the sale is a reasonable exercise of the trustee's business judgment. The trustee proposes to sell to the debtor the estate's interest in a 2003 Chevrolet Avalanche. The net to the estate is \$1,600 and that amount has been paid to the trustee. The trustee's evidence in support of the motion does not address the tax consequences of the sale. But given the *de minimis* amount involved, the court finds that lack of proof as not critical to the granting of the motion.

3. [16-11804](#)-B-7 EMMA POTTER
GHW-1
FEDERAL NATIONAL MORTGAGE
ASSOCIATION/MV
BRIAN FOLLAND/Atty. for dbt.
GLENN WECHSLER/Atty. for mv.
RESPONSIVE PLEADING

CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY
6-7-16 [[19](#)]

This hearing will proceed as scheduled. The court intends to inquire as to whether the debtor has filed an adversary proceeding in this matter and entertain arguments regarding the propriety of injunctive relief.

This motion, a hearing on a motion for relief from the automatic stay to foreclose in a reverse mortgage, was originally heard July 20, 2016. Movant has waived the requirement of a final order within 30 days of filing the motion under 11 U.S.C. § 362(e). The court gave the parties the opportunity to submit additional evidence and briefing on the issue of the effect of the state court stipulated judgment. The court has carefully reviewed all of the evidence and arguments. Neither party has reserved rights to present live testimony. LBR 9014-1(f)(1)(B), (C).

Movant was the successful bidder at a non-judicial foreclosure sale held February 17, 2016 affecting the property (Doc. # 21 and related exhibits). The deed of trust foreclosed secured a reverse mortgage (Doc. # 39). Debtor and her deceased husband owned the property before the foreclosure sale. Movant started an unlawful detainer proceeding in the Fresno County Superior Court. A stipulated judgment for possession was entered by the Superior Court April 19, 2016 (Doc. # 21 and related exhibits). The debtor and her daughter were present at the trial. (Doc. # 50, 51) Before the Superior Court entered the stipulated judgment, the Superior Court Judge questioned the debtor and was satisfied the debtor understood the nature of the proceedings and the agreement she made (Doc. # 50, 51). That judgment provided that no "lockout" would occur before May 20, 2016 at 6:00 am. (Doc. # 21 and related exhibits). This case was filed May 20, 2016. (Doc. # 1).

The movant's brief alleges the debtor was mentally competent and was assisted by her daughter when she agreed to the stipulation. The debtor's brief includes the contention that the debtor has not been handling her own financial affairs for some time and has been assisted by her daughter. In her declaration, the debtor's daughter states that at the time the stipulation was entered in the state court proceeding she did not explain the consequences of the stipulation to her elderly mother because she was fearful for her mother's mental state and because she did not understand them herself. Fraud in the inception of the contract is also alleged.

Movant contends stay relief should be granted to effectuate the state court judgment because the debtor has no interest in the property other than possession. Movant also claims the debtor is not in good faith since the petition was filed solely to stall eviction. Debtor claims the foreclosure sale was a preference subject to avoidance. Also the debtor claims that she has claims against movant, movant's predecessor Financial Freedom, and others for elder abuse, wrongful foreclosure, unfair business practices and other claims. Debtor also stresses that her failing health and advanced age may result in

substantial harm if she is forced to move.

Stay relief can be granted "for cause." 11 U.S.C. § 362(c)(1). Cause is a "case by case" inquiry. Here there is no dispute that the judgment was entered, the Superior Court questioned the debtor to be certain she understood the agreement, the debtor was given an additional 30 days to vacate the property and that the foreclosure sale terminated the debtor's interest in the property. There appears to be nothing for the estate here except prosecution of claims against the movant and others. Possession of the property by the debtor is not necessary for pursuit of those claims.

Relief from stay hearings are limited in scope to adequacy of protection, equity and necessity for an effective reorganization. Validity of underlying claims is not litigated. *In re Robbins*, 310 B.R. 628, 631 (9th Cir., BAP 2004) citing, *In re Johnson*, 756 F.2d 738, 740 (9th Cir., 1985) cert. denied, 474 U.S. 828 (1985). Stay relief hearings do not involve a full adjudication on the merits of the claims, defenses or counterclaims, but simply a determination as to whether the creditor has a colorable claim. *Robbins*, 310 B.R. at 631; *In re Griffin*, 719 F.2d 1126, 1128 (9th Cir., 2013) ["[P]roceeding . . . for relief from a stay only determines whether a creditor should be released from the stay in order to argue the merits in a separate proceeding.")

Debtor's defenses do not relate to rights to possession of the property without more factual development than is appropriate in this motion. The Superior Court's judgment appears carefully made and the debtor was an active participant in the proceeding. The debtor's (or more precisely the trustee's) pursuit of the estate's claims, if any, against the movant and others can proceed as appropriate. If provisional relief is needed, it can be requested in an adversary proceeding.

Movant has not provided credible evidence of the debtor's bad faith in filing the petition. The debtor is 81 years old and ill with many maladies. There is at least one other creditor according to the schedules. The bankruptcy filing may be a "last ditch" effort, but it was not in bad faith. There is nothing startling about a debtor filing a case to prevent enforcement of a judgment without other facts that are not present here.

4. [16-12005](#)-B-7 CARMEN GRIMSLEY
TCS-1
CARMEN GRIMSLEY/MV
TIMOTHY SPRINGER/Atty. for dbt.

MOTION TO AVOID LIEN OF FORD
MOTOR CREDIT COMPANY
7-28-16 [[13](#)]

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 Local Bankruptcy Rule 9014-1(f)(2). The court will issue a minute order if the matter is continued.

5. [16-10214](#)-B-7 GLENN BEVER
GLENN BEVER/MV

OBJECTION TO CLAIM OF CAVALRY
SPV I, LLC, CLAIM NUMBER 1
7-13-16 [[54](#)]

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

The notice requires a written objection filed before the hearing, however the notice of the claim objection fails to comply with Local Bankruptcy Rule 3007-1(b)(1), which requires the notice to be served 44 days prior to the hearing where written objection is required.

In addition, the pleadings do not comply with the Local Bankruptcy Rules, Appendix II, EDC.002-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (effective August 12, 2015) ("Guidelines"), as follows:

- 1. The proof of service was not filed as a separate document, as required by Guidelines Section V.A.**
- 2. The moving papers did not have a docket control number, as required by Guidelines Section II.E.**

The court notes that it is the duty of the chapter 7 trustee to file claim objections where appropriate.

6. [14-13915](#)-B-7 PAUL FRANKEL AND
PJF-1 ELIZABETH BEALONIS
PAUL FRANKEL/MV
PAUL FRANKEL/Atty. for mv.

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA) N.A.
7-28-16 [[68](#)]

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

The pleadings do not comply with the Local Bankruptcy Rules, Appendix II, EDC.002-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (effective August 12, 2015) ("Guidelines"), as follows:

1. The proof of service was not filed as a separate document, as required by Guidelines Section V.A.
2. The moving papers did not have a docket control number, as required by Guidelines Section II.E.
3. The documents did not comply with Guidelines Section II.D.
4. A copy of the abstract of judgment was not attached as required by LR 9014-1(d) (7).

In addition, the respondent bank was not served pursuant to FRBP 7004. Service on the bank's attorney is not service on the bank.

7. [14-13915](#)-B-7 PAUL FRANKEL AND
PJF-2 ELIZABETH BEALONIS
PAUL FRANKEL/MV
PAUL FRANKEL/Atty. for mv.

MOTION TO AVOID LIEN OF STEVE
TINETTI
7-28-16 [[69](#)]

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

The pleadings do not comply with the Local Bankruptcy Rules, Appendix II, EDC.002-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (effective August 12, 2015) ("Guidelines"), as follows:

1. The proof of service was not filed as a separate document, as required by Guidelines Section V.A.
2. The moving papers did not have a docket control number, as required by Guidelines Section II.E.
3. The documents did not comply with Guidelines Section II.D.
4. A copy of the abstract of judgment was not attached as required by LR 9014-1(d) (7).

In addition, the respondent was not served pursuant to FRBP 7004. Service on the respondent's attorney is not service on the respondent.

8. [16-12126](#)-B-7 SHAWNA REYNA
VVF-1
AMERICAN HONDA FINANCE
CORPORATION/MV
ERIC ESCAMILLA/Atty. for dbt.
VINCENT FROUNJIAN/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
7-21-16 [[17](#)]

This motion for relief from the automatic stay will be denied as moot. The movant shall submit a proposed order as specified below. No appearance is necessary.

The debtor is an individual. The record does not show that the personal property collateral for this secured claim was redeemed or surrendered within the applicable time set by 11 U.S.C. §521(a)(2). Similarly, the record does not reflect that the loan was reaffirmed or that the movant denied a request to reaffirm the loan on the original contract terms. Therefore, pursuant to 11 U.S.C. §362(h), the collateral is no longer property of the estate and the automatic stay has already terminated by operation of law. Movant may submit an order denying the motion, and confirming that the automatic stay has already terminated on the grounds set forth above. No attorney fees will be awarded in relation to this motion.

9. [16-12226](#)-B-7 MICHAEL GRIFFIN AND NANCY MOTION FOR RELIEF FROM
SC-1 PAGE-GRIFFIN AUTOMATIC STAY
RALPH PARTNERS II, LLC/MV 8-3-16 [[25](#)]
JERRY LOWE/Atty. for dbt.
SAM CHANDRA/Atty. for mv.

This matter will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the debtors' defaults and grant the motion for relief from stay. If opposition is presented, the court will determine if further hearing is necessary. LBR 9014-1(f)(2)(C). The tentative ruling is below.

The automatic stay will be annulled retroactive to the time of the filing of the petition 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 annul the automatic stay, including the weight of the equities, *In re Fjeldsted*, 293 B.R. 12, 24-25 (9th BAP 2003). The foreclosure sale occurred pre-petition and the post-petition acts were taken without knowledge of the bankruptcy case. When movant discovered the former owners of the property had filed bankruptcy, they ceased taking action and filed this motion for relief.

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

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

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

10. [16-10631](#)-B-7 MAGGIE HEBIESH-LOBUE
LSY-1
SAN DIEGO COUNTY CREDIT
UNION/MV
SCOTT MCDONALD/Atty. for dbt.
LISA YUN/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
7-25-16 [[32](#)]

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

This motion for relief from stay was fully noticed in compliance with the Local Rules and there was no opposition. The debtor's default will be entered. The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law.

The record shows that cause exists to terminate the automatic stay. The debtor executed a reaffirmation with movant regarding this property, which agreement is still subject to rescission (within 60 days of filing the reaffirmation agreement or entry of the discharge, which ever occurs later). In light of the debtor's non-opposition to this motion, the court will deem that agreement rescinded.

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).

11. [16-10734](#)-B-7 AMADOR/HELEN GONZAGA
PFT-3
PETER FEAR/MV
PATRICIA CARRILLO/Atty. for dbt.
PETER FEAR/Atty. for mv.

MOTION TO SELL
7-27-16 [[32](#)]

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

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

It appears that the sale is a reasonable exercise of the trustee's business judgment. The trustee proposes to sell to the debtor the non-exempt equity in a 2005 Hyundai Tucson for \$500. The debtor has paid the money to the trustee. There is no commission on the sale. The trustee's evidence in support of the motion does not address the tax consequences of the sale. But given the *de minimis* amount involved, the court finds that lack of proof as not critical to the granting of the motion.

DAE PARK/MV
JAENAM COE/Atty. for dbt.

The motion will be denied without prejudice. The court notes that the chapter 7 trustee has filed a notice of conditional non-opposition in which she agrees the business should be abandoned. In lieu of filing a new motion, the debtor may file a stipulation and proposed order that has been approved by the chapter 7 trustee. No appearance is necessary. The court will enter a civil minute order.

The notice was not filed in compliance with LR 9014-1(f)(1), served on 28 days notice with written opposition required to be filed within 14 days of the hearing, or 9014-1(f)(2), served on 14 days notice with opposition presented at the hearing.

Also, the moving papers do not appear to separately list each item of personal property to be abandoned.

In addition, the pleadings do not comply with the Local Bankruptcy Rules, Appendix II, EDC.002-901, Eastern District Bankruptcy Court's Guidelines for the Preparation of Documents (effective August 12, 2015) ("Guidelines"), as follows:

1. The proof of service was not filed as a separate document, as required by Guidelines Section V.A.
2. The moving papers did not have a docket control number, as required by Guidelines Section II.E.
3. The documents did not comply with Guidelines Section II.D.

13. [15-10362](#)-B-7 RDD RACEWAY HOBBIES INC.
RH-2
PETER FEAR/MV

MOTION FOR COMPENSATION FOR
ROBERT HAWKINS, TRUSTEES
ATTORNEY(S)
7-26-16 [[21](#)]

VARDUHI PETROSYAN/Atty. for dbt.
ROBERT HAWKINS/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.

The trustee retained the applicant to file an adversary proceeding to recover a preference. According to the fee application, the defendant agreed to pay the full amount claimed so the action was dismissed before applicant filed a motion for the entry of a default judgment. The period covered by the application includes services rendered within one month of the approval of applicant's employment and those services are thus properly included.

The fees requested are reasonable and for services which benefitted the estate. Accordingly pursuant to 11 U.S.C. § 330, the application will be granted.

The court notes the applicant has not categorized the fees according to tasks. Since the only material services rendered were for one project - the preference action - that deficiency was overlooked in evaluating this application.

14. [16-12562](#)-B-7 PATRICE COOK
JWC-1
WA FUNDING, INC./MV
JOHN CADWALADER/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
8-10-16 [[27](#)]

This matter will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the debtor's default and grant the motion for relief from stay. Movant shall prepare a proposed order. If opposition is presented at the hearing, the court will determine if further hearing is necessary. LBR 9014-1(f)(2)(C). The tentative ruling is below.

The automatic stay will be annulled retroactive to the time of the filing of the petition 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 annul the automatic stay, including the weight of the equities, *In re Fjeldsted*, 293 B.R. 12, 24-25 (9th BAP 2003). The actions that were taken post-petition were taken without knowledge of the bankruptcy case. The record shows that the debtor was aware of the movant's address however listed a different address in her bankruptcy petition. When movant discovered the existence of the bankruptcy case, they ceased taking action and filed this motion for relief.

The movant shall submit a proposed order after hearing that specifically describes 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).

15. [16-12464](#)-B-7 LEONARD/VALEN RAEI
ICE-1
LEONARD RAEI/MV
IRMA EDMONDS/Atty. for dbt.

MOTION TO COMPEL ABANDONMENT
8-9-16 [[14](#)]

This matter was served with 14 days notice and will proceed as scheduled.

Unless opposition is presented at the hearing, the court intends to enter the respondents' default and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2). The movant will submit a proposed order after hearing, if the court enters a final ruling after the hearing, in conformity with the representations made in the motion and with the trustee's conditional non-opposition to the motion filed August 18, 2016 (Doc. # 20).

The debtor, Leonard Rael, has been a cement contractor for 25 years. The debtors have claimed an exemption in certain business assets that are the subject of this motion. The motion was filed promptly and the court is not aware of any objection to the exemption. The exemption will be thus deemed allowed.

16. [16-10771](#)-B-7 CHRIS/KIMBERLY KATELEY
PFT-2
PETER FEAR/MV
MARK ZIMMERMAN/Atty. for dbt.
PETER FEAR/Atty. for mv.

MOTION TO SELL
7-27-16 [[41](#)]

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

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

It appears that the sale is a reasonable exercise of the trustee's business judgment. The trustee proposes to sell the estate's interest in 800 Atkins St., Ridgecrest, CA, to Chris Stovers for \$125,000. The property was inherited by debtor Kimberly Kately and her sister who is not a debtor in these proceedings. The current tenant is the buyer.

After payments of liens and costs, the net recovery for the sellers is \$18,108. One half of that amount, \$9,533.57 is the net to the estate. No party has objected to the sale and the sale was not noticed for higher and better bids.

The court notes that the movant's declaration references payment of a commission, however the motion is silent on that point and no broker has been employed in this case.

17. [13-12474](#)-B-7 MARK/MARIA ESQUEDA
GH-2
MARK ESQUEDA/MV
GARY HUSS/Atty. for dbt.

MOTION TO AVOID LIEN OF AQUA
FINANCE, INC.
6-27-16 [[41](#)]

This motion will be denied. The court will enter a civil minute order. No appearance is necessary.

The motion was filed under § 522(f)(1) to avoid an interest held by Aqua Finance, LLC. Section 522(f)(1) permits a debtor to avoid the fixing of a lien that impairs an exemption if that lien is a "judicial lien." Section 522(f) is inapplicable to the subject lien because it is a voluntarily conveyed security interest and not a judicial lien. The evidence does not establish that it is a lien securing any claim other than a purchase money security interest.

It appears that Aqua Finance, Inc., filed a UCC Financing Statement with regard to a water filtration system. The UCC Financing Statement was filed as an exhibit to the moving papers and, though largely illegible, the document describes the collateral in section 4 as "Water Treatment System." Section 14 of the UCC Financing Statement includes a description of the debtors' real property. Without more, this information merely provides the location of Aqua Finance, Inc.'s collateral and does not constitute a lien on the debtors' real property unless Aqua Finance, Inc., also recorded a deed of trust in addition to the UCC Financing Statement.

18. [16-12081](#)-B-7 DANIEL/SHERRY FRANCO
GMA-1
DANIEL FRANCO/MV
GEOFFREY ADALIAN/Atty. for dbt.

MOTION FOR EXEMPTION FROM
FINANCIAL MANAGEMENT COURSE
7-25-16 [[13](#)]

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. The record shows that the debtor is deceased. The debtor will be excused from the requirement of completing a financial management course.

19. [16-12182](#)-B-7 CHRISTOPHER/ANDREA GOLDEN MOTION FOR RELIEF FROM
MET-1 AUTOMATIC STAY AND/OR MOTION
BANK OF THE WEST/MV FOR ADEQUATE PROTECTION
7-21-16 [[12](#)]

PETER FEAR/Atty. for dbt.
MARY TANG/Atty. for mv.

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

This motion for relief from stay was fully noticed in compliance with the Local Rules and there was no opposition. The debtors' defaults 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 debtors' Statement of Intent is to surrender the subject collateral. There is also no equity in the collateral. The automatic stay will be terminated pursuant to §361(c) (1) & (2).

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).

20. [16-12094](#)-B-7 BRIANA POPPS
DJP-1
EDUCATIONAL EMPLOYEES CREDIT
UNION/MV
MARIO LANGONE/Atty. for dbt.
DON POOL/Atty. for mv.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
7-29-16 [[13](#)]

This matter will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the debtor's default and grant the motion for relief from stay. Movant shall submit a proposed order. If opposition is presented at the hearing, the court will determine if further hearing is necessary. LBR 9014-1(f)(2)(C). The tentative ruling is below.

The automatic stay will be terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law.

The record shows that cause exists to terminate the automatic stay. The collateral, a 2013 Ford Mustang, has no equity and debtor has not made post-petition payments.

The movant shall submit a proposed order after hearing that specifically describes 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).

21. [14-14999](#)-B-7 GISELLE GUTSENS
JES-2
JAMES SALVEN/MV

MOTION TO SELL
7-14-16 [[23](#)]

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

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

The only reason the debtor is required to buy the equity in her car from the bankruptcy estate is because she did not file an amended schedule C using the Florida exemption schedule after the court sustained the trustee's objection to her use of the California exemptions.

11:00 A.M.

1. [16-11602](#)-B-7 DEBORAH SHIPP

REAFFIRMATION AGREEMENT WITH
TOYOTA MOTOR CREDIT CORPORATION
7-25-16 [[17](#)]

JEFFREY ROWE/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.

2. [16-12221](#)-B-7 DONNA OSOMOE

REAFFIRMATION AGREEMENT WITH
FORD MOTOR CREDIT COMPANY
8-2-16 [[14](#)]

PATRICIA CARRILLO/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.

3. [16-12157](#)-B-7 REBECCA GALLAGHER

PRO SE REAFFIRMATION AGREEMENT
WITH FIRST CALIFORNIA FEDERAL
CREDIT UNION
8-1-16 [[19](#)]

This matter will proceed as scheduled.

1:30 P.M.

1. [14-11114](#)-B-7 CHRISTOPHER WEINERT CONTINUED STATUS CONFERENCE RE:
[16-1056](#) COMPLAINT
U.S. TRUSTEE V. WEINERT 5-10-16 [[1](#)]
ROBIN TUBESING/Atty. for pl.

This matter will be dropped from calendar. The record shows that the plaintiff filed a notice of dismissal prior to any responsive pleading by the defendant and the adversary proceeding will be dismissed.

2. [14-11114](#)-B-7 CHRISTOPHER WEINERT CONTINUED MOTION FOR ENTRY OF
[16-1056](#) UST-1 DEFAULT JUDGMENT
U.S. TRUSTEE V. WEINERT 6-22-16 [[11](#)]
ROBIN TUBESING/Atty. for mv.

This matter will be dropped from calendar. The record shows that the plaintiff filed a notice of dismissal prior to any responsive pleading by the defendant and the adversary proceeding will be dismissed.

3. [16-10016](#)-B-13 KEVIN DAVEY CONTINUED ORDER TO SHOW CAUSE
[16-1074](#) VAG-1 REGARDING PRELIMINARY
DAVEY V. OCWEN LOAN SERVICING, INJUNCTION
LLC ET AL 7-6-16 [[14](#)]
RESPONSIVE PLEADING

This matter will proceed as scheduled.

Tentative Ruling: The court will issue an Order to Show Cause as to why the underlying bankruptcy case (16-10016) should not be re-closed.

This adversary proceeding (16-01074) was filed by the debtor (the "Debtor" or the "Plaintiff") to address the alleged willful stay violations by the defendants (the "Adversary Proceeding" or the "Proceeding"). The court will exercise jurisdiction in the Proceeding as a matter "arising under" the Bankruptcy Code. The court will enter a preliminary injunction, subject to further order of the court, staying further eviction proceedings and other efforts to obtain possession of the property commonly known as 28170 Braeburn Place, Tehachapi, California ("the Property") only as to the named defendants and those bound under F.R.C.P. 65(d)(2) (as applicable pursuant to FRBP 7065) who have notice of the injunction. Plaintiff shall prepare the proposed order in conformance with F.R.C.P. 65(d)(1).

At the hearing the court will also consider arguments from counsel addressing issues raised by the court.

Discussion

Introduction.

This adversary proceeding filed by the Debtor seeks damages, injunctive, and declaratory relief stemming from a non-judicial foreclosure sale of the Property which occurred on January 5, 2016. The Plaintiff contends that the post-petition foreclosure sale of the Property by the defendants was a willful violation of the 11 U.S.C. § 362(a) automatic stay. The Plaintiff seeks, unspecified damages for the alleged willful violation of the stay, an injunction stopping eviction proceedings, and a declaratory judgment regarding the status of Plaintiff's title to the Property, which is his residence.

On July 6, 2016, the court issued a Temporary Restraining Order as to the Property pending further order (the "TRO," Doc. #14).¹ The original "return date" was July 20, 2016. At the July 20, 2016 hearing the Plaintiff and Deutsche Bank National Trust Company, as Trustee for the GMACM Mortgage Loan Trust 2005-AR5 ("the Bank") and Ocwen Loan Servicing, LLC ("Ocwen") (collectively the "Foreclosing Creditors") appeared through counsel and stipulated to continuance of the TRO until after this hearing.²

The Foreclosing Creditors filed an opposition to the motion for preliminary injunction. The third named defendant, Barrett Baffin, et al, the foreclosing trustee, did not file opposition but instead filed a motion to dismiss the adversary proceeding under F.R.C.P. 12(b)(6) (made applicable to this adversary proceeding by F.R.C.P. 7012), or alternatively for a more definite statement under F.R.C.P. 12(e), which is scheduled to be heard September 14, 2016.

The Foreclosing Creditors rely primarily on a single proposition, that the foreclosure sale of the Property occurred pre-petition. Their contention rests on the fact that the "Notice of Bankruptcy" issued by the Clerk of the Court listed the day and time the bankruptcy petition was entered as January 5, 2016 at 9:38 am. (Doc. 43), which was two minutes after the actual sale took place (Doc. 43). Accordingly, it is their position that the Property was not property of the estate and thus, no stay existed, at the time the foreclosure sale took place.

The Foreclosing Creditors also argue that, even if the stay had arisen, they did not know about it in time to stop the sale and therefore the stay could be annulled under 11 USC § 362(c). They also argue that any actions they took after the bankruptcy case (the "Bankruptcy Case," or "Case") was

¹Unless otherwise indicated, references to filed documents are to those filed in this adversary proceeding and appearing on the docket in this adversary proceeding.

²The agreed upon expiration of the TRO is now August 25, 2016 at 5:00 PM Pacific Time, subject to further extension.

dismissed were not stayed by the "automatic stay."³ In addition they contend, without reference to a specific factual basis, that the Bankruptcy Case was filed in bad faith because of Debtor's multiple bankruptcy filings and multiple unsuccessful attempts to modify his loan.

In reply, the Debtor argues that his Bankruptcy Case was actually filed at the time the petition was "e-filed" on January 5, 2016 at 8:20:59 am. (Doc. #1 main case; Doc. #47), approximately one hour and 15 minutes prior to the foreclosure sale. Thus the stay arose before the sale and the sale was a violation of the automatic stay and, therefore, void.⁴

Debtor's request to re-open the Bankruptcy Case.

The Debtor filed his Bankruptcy Case on January 5, 2016. The Case was filed without all of the required schedules and documents and, for that reason, was dismissed on January 25, 2016. The Case was subsequently closed on March 9, 2016. On July 5, 2016, the Debtor filed a motion to re-open the Bankruptcy Case, "so that the Clerk can file an adversary complaint and seek emergency relief in the form of a temporary restraining order." The Case was re-opened and the Debtor filed the missing schedules and documents.

Section § 350(b) and FRBP 5010 permit the court to re-open a closed case on motion from a debtor or party-in-interest. The Debtor's Case was not closed pursuant to § 350(a), after being fully administered, but was dismissed by the court for failure to file documents and subsequently closed. As discussed below, reopening the case under these circumstances was unnecessary, however improvident re-opening is "largely victimless error." *In re Menk*, 241 B.R. 896, 914 (9th Cir., B.A.P. 1999).

The court will issue an Order to Show Cause why the order re-opening the Case should not be vacated and the Case closed.

³These creditors also state the Plaintiff will not "prevail" on the injunction claim because it does not amount to separate claim for relief and only a remedy and that declaratory relief is unavailable to Plaintiff because it is prospective only. These arguments will be briefly discussed below.

⁴The Plaintiff states the other opposing arguments are "red herrings" without any explanation or analysis as to why. The Foreclosing Creditors' arguments are not superficial and are directly relevant to whether the stay was knowingly or willfully violated. These are central to Plaintiff's request for monetary relief and permanent prospective relief and will be carefully considered by the court as necessary.

Jurisdiction over the Adversary Proceeding.

The court may exercise "arising under" jurisdiction over this adversary proceeding. As noted by the court *In re Aheong*, 276 B.R. 233, 242 (9th Cir. B.A.P., 2002), "the Ninth Circuit has ruled that after dismissal the bankruptcy court has ancillary jurisdiction to 'interpret' and 'effectuate' its orders." This includes matters 'arising under' the Bankruptcy Code as well as 'arising in' a bankruptcy case, subject to limitations on 'new' relief. *Id.* 'Arising under' Title 11 means the cause of action is created by Title 11. *Menk*, 241 B.R. at 909. The stay violation claim is under § 362(k) of Title 11, the Bankruptcy Code.

"The damages action created by 11 U.S.C. § 362(h) for violation of the automatic stay survives closing or dismissal of the bankruptcy case and can be filed as a count in a civil action in federal court under [11 U.S.C.] § 1334(b) 'arising under' jurisdiction." *Menk*, 241 B.R. at 906. The claims for relief in this adversary proceeding fall under 11 U.S.C. § 362(k). Despite dismissal of the Bankruptcy Case, the stay violation is still subject to the court's ancillary jurisdiction under 28 U.S.C. § 1334(b) and, thus, the court retains jurisdiction both over this Adversary Proceeding and in the Bankruptcy Case.

The Motion for a Preliminary Injunction.

The court now must determine whether to allow the TRO issued earlier to dissolve or to make it permanent pending further order of the court. The court has reviewed the pleadings in the Adversary Proceeding and it does not appear that any fact material to the preliminary injunction itself is in dispute. The parties agree on the following facts:

1. The defendant both caused the Property, the Debtor's home, to be sold on January 5, 2016, at 9:36 a.m., and was the winning bidder at that sale (defendant's exhibit document #43, p. 65).
2. The defendant filed the Bankruptcy Case on January 5, 2016.
3. The date and time stamp on the bankruptcy petition appear as "1/5/2016 8:20:59 AM."
4. The Notice of Bankruptcy Case Filing mailed to creditors states that the case was, "entered on 01/05/2016 at 09:38 AM and filed on 01/05/2016."

Neither party has reserved any material factual issues for evidentiary hearing under LBR 9014-1(f) (1) (B), (C).

F.R.C.P. 65 (made applicable here by F.R.C.P. 7065) governs the issuance of the injunction in this case. The Supreme Court, in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), reaffirmed the four factors used in determining whether to grant injunctive relief: (1)

Likelihood of plaintiff's success on the merits; (2) Likelihood of plaintiff suffering irreparable harm in the absence of affirmative relief; (3) That the balance of equities tips in the plaintiff's favor; (4) That an injunction is in the public's interest.

Likelihood of Success

Foreclosing Creditors rely solely on the contention that the sale occurred two minutes before the filing of the Bankruptcy Case and therefore did not violate the automatic stay. However, the Debtor's position, that the date and time stamp on the petition, one hour and 16 minutes prior to the sale, proves that the sale occurred in violation of the stay, is the correct one. *In re Godfrey*, 102 B.R. 769, 771 (9th Cir. B.A.P. 1989) ("In a case where it is disputed exactly when the petition was placed in the possession of the clerk the file stamp gives rise to the presumption that the petition was filed when it was date and time stamped by the clerk."); *In re Sands*, 328 B.R. 614, (Bankr. N.D. N.Y. 2005) ("The Notice of Electronic Filing [generated for the filing party] provides the time of filing, which is not the time the CM/ECF system generates the Notice, but the time when the filers press the "next" tab on the warning screen and the Court's CM/ECF server receives the transmission.")

Here, the time the Bankruptcy Case was filed was not when the clerk's office entered the case on the docket, apparently at 9:38 a.m., but when the Debtor's attorney pressed the "next" tab, which time is indicated on the petition as 8:20 a.m., and was prior to the sale. Accordingly, the foreclosure sale and all acts following that sale were in violation of the automatic stay.

Foreclosing Creditors' reliance on *Sands* and *In re Looper*, 334 B.R. 596 (Bankr. E.D. Tenn. 2005) are misplaced. In *Sands* the debtor argued the time her attorney signed on to the court's electronic filing system established the time she filed her bankruptcy case. The court disagreed and, lacking any evidence to the contrary, decided that the notice of electronic filing established the time when the court clerk actually "came in possession" of the petition. The absence of evidence was the court's focus in denying the debtor's claim. To the contrary, the Plaintiff has provided competent evidence that establishes the time the Bankruptcy Case was filed. The "file stamp" on the petition shows that the Bankruptcy Case was filed well before the sale was scheduled and when it actually occurred.

Neither does *Looper* assist Foreclosing Creditors. There, the court decided that the time an incarcerated inmate filed his bankruptcy petition was not determined by the actual "file stamp" by the Clerk, but at an earlier time, when he actually delivered the document to prison officials. *Id.* at 599. *Looper*.⁵

⁵Nothing in *In re Brugos*, 263 B.R. 698 (Bankr. D. Conn. 2001) also cited by Foreclosing Creditors helps them here. The Plaintiff

The Foreclosing Creditors do not get the benefit of the sale being statutorily perfected at 8:00 am on January 5, 2016 as provided in Cal. Code Civ. Proc. § 2924h(c). It is undisputed that the trustee's deed here was recorded within 15 days of the actual sale (Doc. #33). However, since the foreclosure sale was itself void, later perfection could not validate it.⁶ *In re Mitchell*, 279 B.R. 839, 844 (9th Cir. B.A.P. 2002). To extent the the statute provides for void foreclosure sale to relate back to before Debtor's bankruptcy petition was filed, it conflicts with and is preempted by federal bankruptcy law. The recordation of the trustee's deed was thus of no effect.

Even if the Notice of Case Filing creates a presumption that the Case was filed after the sale, as urged by the Foreclosing Creditors, the Plaintiff rebutted it here. The presumption, as discussed in *Godfrey*, here is rebutted by the Plaintiff's evidence of when the Case was filed, the date and time stamped petition (Doc. # 1 main case; Doc. # 47) which was long before the foreclosure sale was both scheduled and when it actually occurred.

Whether done knowingly or not, it is well-settled law in the Ninth Circuit that transactions made in violation of the automatic stay are void *ab initio*. See, e.g., *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992). The fact that the Case was later dismissed does not validate the action taken in violation of the stay. See, 40235 *Washington Street Corp. v. Lusardi*, 177 F.Supp.2d 1090, 1104 (S.D.Cal.2001), *aff'd* on other grounds, 329 F.3d 1076 (9th Cir.2003), *cert. denied*, 540 U.S. 983 (2003)("The violations remain ineffective even if the underlying bankruptcy case is dismissed.").

The court agrees that a claim for an injunction is a remedy not a "claim for relief." However, the Foreclosing Creditors' argument, that Debtor will not prevail on that claim, begs the question of whether injunctive relief is appropriate at this time. No motion to strike the claim for relief has been brought by any responding party and, even if such a motion was granted, the Plaintiff would undoubtedly be given leave to amend.

The Foreclosing Creditors' argument that the Plaintiff will not prevail on the Declaratory Relief claim because it is prospective only proves too much. While declaratory relief has prospective effect, a court can declare the rights of the parties based on acts which have occurred before the judgment. A plaintiff has no other basis for saying a justiciable dispute exists for declaratory relief purposes unless earlier acts bring the request in context. At any rate, the existence of a present controversy is fairly evident given the positions of the parties in this case, so far.

has not argued that he receives the benefit of the stay beginning at 12:01 am the day of the petition filing as did the debtor in *Brugos*.

⁶ See discussion below.

Based on the undisputed evidence, the foreclosure sale was void because it occurred post-petition and in violation of the automatic stay which was in effect for 30 days after the Bankruptcy Case was filed. 11 U.S.C. § 362 (c)(3). Therefore, this first factor in determining the propriety of injunctive relief militates in favor of the Plaintiff.

Irreparable Harm

Loss of interest in real property constitutes an irreparable injury. *Park Village Apartments Tenant Assn v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir., 2011). Here, the Plaintiff had an ownership interest in the Property when the Bankruptcy Case was filed. The foreclosure sale occurred after the Case was filed. The actions of the Foreclosing Creditors to obtain possession of the Property interferes with that ownership. While true that Plaintiff's interest in the Property was subject to an encumbrance which (according to foreclosing creditor's unsubstantiated opinion) left very little equity available for the Plaintiff (Doc. # 41), nevertheless Plaintiff was entitled to stay protection subject to further court orders. Losing his residence by actions taken in violation of legal protections is an irreparable injury to the Plaintiff.

The court makes no findings here regarding any damages the Plaintiff claims to have suffered. Indeed, that proof is left to another day. The Foreclosing Creditors have raised issues suggesting the violation may not have been willful. The only issue addressed at this time, however, is the propriety of preliminary injunctive relief. It is clear that the Plaintiff stands to suffer irreparable harm without an order for injunctive relief and so this factor militates in favor of the Plaintiff.

Balance of equities

This factor involves looking at the degree of harm that will be suffered by the Plaintiff or defendant if the injunction is improperly granted or denied. *Winter*, 555 U.S. at 14. The duration of that harm is also relevant. See, *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir., 2014).

Without an injunction the Plaintiff will be evicted from his home where the basis for the Foreclosing Creditor's or their successor's possessory claim to the Property appears at this time to be improper. Title to the Property should not have passed pursuant to the foreclosure sale.⁷ Because the Property is the Plaintiff's residence, Plaintiff will suffer a great degree of harm. On the other hand, the Foreclosing Creditors will suffer no harm and will conclude the eviction proceeding.

⁷There is evidence that a third party, Ditech, purchased the Property from Foreclosing Creditors on June 23, 2016 (Doc. # 41 and referenced exhibits). Plaintiff has not added them as a defendant and the extent the injunction affects their interest is not decided here.

If injunctive relief is granted, the Plaintiff will, for the time being, have preserved the status quo. However, nothing can resurrect the Plaintiff's dismissed chapter 13 bankruptcy case and the Plaintiff does not indicate his plans for dealing with the Foreclosing Creditor's claim secured by the subject Property on which he apparently is in default. Thus, it seems there is a stalemate. The court will leave it to the parties to change this situation. On the other hand, the harm suffered by the Foreclosing Creditors if the injunction is granted would be delay in perfecting its claim. The Foreclosing Creditors may be subject to claims by the purported buyer, but that is speculative at this time. There may be a loss of rental value while the case is pending, but that is not yet before the court.

The duration of harm to the Plaintiff is unknown and perhaps infinite if he loses his home. The duration of harm to the Foreclosing Creditors is dependent solely on the time it takes for them to obtain alternate relief. That is obviously speculative, but during the interim period, the harm suffered strongly militates in favor of the Plaintiff.

The Foreclosing Creditors raise the issue of the Debtor's good faith and cite authority for annulment of the stay, however no motion for relief under § 362 has been filed or is before the court. Likewise, although the Debtor, in Part 4 of his Statement of Financial Affairs, lists "Davey VS Ocwen Loan Servicing, LLC, S1500CV2825519, in the Superior Court of California, County of (blank)," the status of that action is "Concluded." The court is unaware of any pending litigation in state court regarding the merits of the Debtor's underlying claims for unlawful foreclosure.

Giving the Foreclosing Creditors the benefit of the doubt, the "good faith" arguments may be an attempt to raise the Plaintiff's "unclean hands" as a defense to injunctive relief. Traditional equitable considerations such as duress, laches and unclean hands may militate against issuing an injunction that otherwise meets the *Winter* requirements. *Inst. Of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940, 947 (9th Cir., 2013). The unclean hands doctrine requires that the plaintiff have "dirtied [his hands] in acquiring the right he now asserts or that the manner of dirtying renders inequitable the assertion of such rights against the defendant." *Id. quoting Republic Molding Corp. V. B.W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir., 1963). Fundamental to the application of the "unclean hands" doctrine is that the alleged misconduct by a party relate directly to the transaction concerning which the complaint is made. *Seller Agency Council v. Kennedy Ctr. For Real Estate Ed. Inc.*, 621 F.3d 981, 986-7 (9th Cir., 2010).

The Plaintiff certainly did not acquire the rights asserted in this case by engaging in inequitable conduct. The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. *In re Bourke*, 543 B.R. 657, 662 (Bankr. D. Mt., 2015) citing, *The Minoco Group of Companies v. First State Underwriters Agency of New England Reinsurance Corp. (In re the Minoco Group of Companies)*, 799 F.2d 517, 520 (9th Cir., 1986) and

Gruntz v. Angeles (In re Gruntz), 202 F.3d 1074, 1081 (9th Cir., 2000). Section 362(k) is part of that statutory protection and there is nothing inequitable in asserting rights provided by statute without much more evidence than the Foreclosing Creditors have thus far provided.

Foreclosing Creditors have established that the Plaintiff has made numerous attempts to obtain a loan modification and that those were declined primarily because the income the Plaintiff reported was insufficient to sustain the debt service. (Doc. # 41). These creditors have also established that three bankruptcy cases were filed by the Plaintiff in almost 2 years. (Doc. # 41, 42). However, the creditors have not established that the Plaintiff has acted inequitably in asserting his rights here. There is no evidence the Plaintiff withheld information about the filings. There is no evidence the documents presented to the creditors were false. There is no evidence that the Plaintiff has transferred partial interests of the Property to third parties to frustrate the foreclosure process. Nothing establishes that the Plaintiff has acted inequitably relative to the benefit of the automatic stay for 30 days upon the filing of the Bankruptcy Case.

The Plaintiff may not be able to afford the Property. That is not before the court. The Foreclosing Creditors have been stalled from foreclosing numerous times, to be sure, and there is a question about whether the Foreclosing Creditors had notice of the January 5, 2016 bankruptcy filing. (Docs. # 11, 9, 8, 41 and related exhibits). But that does not suggest inequitable conduct by the Plaintiff. The court is mindful that the Plaintiff has not suggested any payment to the Foreclosing Creditors or their successor while the case is pending, which is an issue in the analysis. But inequitable conduct precluding preliminary injunctive relief has not been evidenced by the Foreclosing Creditors. The balance of equities militates in favor of the Plaintiff at this time.

Public Interest

The Ninth Circuit has repeatedly described the broad scope of the automatic stay as "one of the most important protections in bankruptcy law." *In re Bourke*, *supra*, 543 B.R. at 662, quoting *Sternberg v. Johnson*, 595 F.3d 937, 943 (9th Cir., 2010), cert. denied, 562 U.S. 831 (2010); quoting, *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210; 1214-15 (9th Cir., 2002). The stay is effective against the world regardless of notice. *Morris v. Peralta (In re Peralta)*, 317 B.R. 381, 389 (9th Cir., B.A.P. 2004). The protection includes precluding the enforcement of any lien against property of the debtor securing a claim that arose before the petition was filed. § 362(a)(5).

The public has an interest in the sanctity of the automatic stay if the public needs to avail itself of the bankruptcy laws whether as debtor or creditor. In this case, the issuance of a preliminary injunction acknowledges the breadth of the stay and furthers the Ninth Circuit's clear position, that acts taken in violation of the stay are void *ab initio*. The

Debtor may not be able to prove he was damaged. The Debtor may not get to keep his house when this litigation is completed. But the automatic stay cannot be ignored by the court when it is properly invoked.

4. [15-14225](#)-B-7 LETICIA CAMACHO MOTION TO SET ASIDE ENTRY OF
[16-1009](#) WSH-1 DEFAULT
CAMACHO V. GARCIA ET AL 7-18-16 [[49](#)]
SHANNON BENBOW/Atty. for mv.
ADVERSARY DISMISSED

This matter will be dropped from calendar without a disposition. The adversary proceeding has already been dismissed. No appearance is necessary.

5. [15-14228](#)-B-13 OSCAR GUTIERREZ MOTION TO SET ASIDE ENTRY OF
[16-1010](#) WSH-1 DEFAULT
GUTIERREZ V. GARCIA ET AL 7-18-16 [[59](#)]
SHANNON BENBOW/Atty. for mv.
ADVERSARY DISMISSED

This matter will be dropped from calendar without a disposition. The adversary proceeding has already been dismissed. No appearance is necessary.

6. [15-14034](#)-B-13 MICHAEL/LUCIA LOPEZ CONTINUED STATUS CONFERENCE RE:
[15-1133](#) COMPLAINT
U.S. TRUSTEE V. LOPEZ ET AL 10-29-15 [[1](#)]
TERRI DIDION/Atty. for pl.
RESPONSIVE PLEADING

The status conference will be vacated subject to being reset by any party on 10 days' notice. No appearance is necessary. The court will prepare and enter a civil minute order.

The court intends to grant the motion below at calendar number 7 (UST-3) to approve a stipulation by the parties that settles this matter. The clerk of the court may close the adversary proceeding without notice in 60 days unless the adversary proceeding has been set for a further status conference within that time. Either party may request an extension of this time up to 30 days by ex parte application for cause. After the adversary proceeding has been closed, the parties will have to file an application to reopen the adversary proceeding if further action is required.

7. [15-14034](#)-B-13 MICHAEL/LUCIA LOPEZ MOTION TO COMPROMISE
[15-1133](#) UST-3 CONTROVERSY/APPROVE SETTLEMENT
U.S. TRUSTEE V. LOPEZ ET AL AGREEMENT WITH MICHAEL T. LOPEZ
AND LUCIA LOPEZ
7-14-16 [[39](#)]

TERRI DIDION/Atty. for mv.

The motion to approve a settlement of this adversary proceeding will be granted. No appearance is necessary. The U.S. Trustee shall submit a proposed order with the stipulation of the parties attached.

8. [16-10866](#)-B-13 MICHELLE YORK
[16-1071](#)
PEOPLEASE HOLDINGS LLC ET AL
V. YORK
PAUL LAURIN/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: AMENDED
COMPLAINT
7-13-16 [[8](#)]

This matter will proceed as scheduled.