

UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable René Lastreto II  
Hearing Date: Wednesday, September 11, 2019  
Place: Department B – Courtroom #13  
Fresno, California

**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

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

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

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

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

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

**THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.**

**9:30 AM**

1. [19-12707](#)-B-7      **IN RE: PAULO/MELODIE FURTADO**  
[PFT-1](#)

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR  
AT SEC. 341(A) MEETING OF CREDITORS  
7-30-2019    [\[29\]](#)

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

DISPOSITION:      Conditionally denied.

ORDER:              The court will issue the order.

The chapter 7 trustee's motion to dismiss is CONDITIONALLY DENIED.

The debtors shall attend the meeting of creditors rescheduled for October 7, 2019 at 11:00 a.m. If the debtors fail to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtors' discharge or file motions for abuse, other than presumed abuse, under § 707, is extended to 60 days after the conclusion of the meeting of creditors.

2. [19-12807](#)-B-7     **IN RE: MATIAS/JANELY VERDUZCO**  
[BPC-1](#)

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY  
7-23-2019    [\[10\]](#)

THE GOLDEN 1 CREDIT UNION/MV  
NEIL SCHWARTZ  
MICRO HAAG/ATTY. FOR MV.

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

DISPOSITION:     Dropped from calendar as moot.

ORDER:             The court will issue an order.

This motion is DROPPED FROM CALENDAR. Movant filed an amended motion for relief (matter #3 below) that appears to be identical to this motion.

3. [19-12807](#)-B-7     **IN RE: MATIAS/JANELY VERDUZCO**  
[BPC-1](#)

AMENDED MOTION FOR RELIEF FROM AUTOMATIC STAY (FILING FEE NOT  
APPLICABLE)  
8-1-2019    [\[16\]](#)

THE GOLDEN 1 CREDIT UNION/MV  
NEIL SCHWARTZ  
MICRO HAAG/ATTY. FOR MV.

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

DISPOSITION:     Granted under § 362(d)(1) only.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The movant, The Golden 1 Credit Union, seeks relief from the automatic stay under 11 U.S.C. § 362(d) (1) and (d) (2) with respect to a 2015 Dodge Grand Caravan.

11 U.S.C. § 362(d) (1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

11 U.S.C. § 362(d) (2) allows the court to grant relief from the stay if the debtor does not have an equity in such property and such property is not necessary to an effective reorganization. Mr. Vasquez' declaration quotes the Kelly Blue Book value (at auction) for the collateral. Based on his experience in consumer lending, he says, that is the fair market value of the collateral. But the declaration does not include any statement about his expertise in valuing vehicles or how long he has been in the consumer lending business. So, movant has not met its burden of proof under § 362(d) (2) on the issue of equity.

After review of the included evidence, the court finds that "cause" exists to lift the stay because debtor has failed to make payments to movant since May 2019. The movant has produced evidence that debtor owes at least \$10,382.30 and has not made payments for about four months. Doc. #12, 14.

This is a chapter 7 case and the trustee does not oppose the motion.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d) (1) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a) (3) will be ordered waived because the collateral is a depreciating vehicle.

4. [19-13115](#)-B-7     **IN RE: ANA ORTUNO**  
[AMO-1](#)

MOTION TO AVOID LIEN OF PACIFIC CREDIT EXCHANGE  
8-16-2019     [\[12\]](#)

ANA ORTUNO/MV  
ANA ORTUNO/ATTY. FOR MV.

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

DISPOSITION:     Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f) (1). The failure of the

creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. 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). § 522(f)(1); Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th Cir. BAP 2003), quoting In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992), aff'd 24 F.3d 247 (9th Cir. 1994).

A judgment was entered against the debtor in favor of Pacific Credit Exchange in the sum of \$6,075.64 on December 14, 2005. Doc. #12. The judgment was renewed on November 13, 2015. Id. The abstract of judgment was recorded with Tulare County on May 10, 2018. Id. That lien attached to the debtor's interest in a residential real property in Dinuba, CA. The motion will be granted pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property had an approximate value of \$208,249.00 as of the petition date. Doc. #1. The unavoidable liens totaled \$178,150.00 on that same date, consisting of a first deed of trust in favor of Cross Country. Doc. #1, schedule D. The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730(a)(1) in the amount of \$75,000.00. Doc. #1, schedule C.

Movant has established the four elements necessary to avoid a lien under § 522(f)(1). After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the debtor's exemption of the real property and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B).

5. [19-13315](#)-B-7     **IN RE: GAYLE ROYAL**  
[APN-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-8-2019    [\[9\]](#)

NISSAN MOTOR ACCEPTANCE  
CORPORATION/MV  
AUSTIN NAGEL/ATTY. FOR MV.

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

DISPOSITION:     Granted.

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

This motion for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. The debtor's and the trustee's 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 proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2015 Nissan Altima. Doc. #13. The collateral has a value of \$11,125.00 and debtor owes \$14,796.79 *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

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).

6. [19-13335](#)-B-7     **IN RE: BHUPINDER SINGH**  
[HRH-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-20-2019    [\[10\]](#)

BMO HARRIS BANK N.A./MV  
LAYNE HAYDEN  
RAFFI KHATCHADOURIAN/ATTY. FOR MV.

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Granted unless opposed at the hearing.

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

This motion for relief from stay was noticed pursuant to LBR 9014-1(f)(2) and written opposition was not required. Unless opposition is presented at the hearing, the court intends to enter the debtor's and the trustee's defaults and enter the following ruling granting the motion for relief from stay. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The automatic stay is terminated as it applies to the movant's right to enforce its remedies against the subject property under applicable nonbankruptcy law. The record shows that cause exists to terminate the automatic stay.

The proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2018 Wabash 53' Dry Van Trailer. Doc. #12. The collateral has a value of \$24,250.00 and debtor owes \$26,140.39. *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

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. [19-12839](#)-B-7     **IN RE: ERIN BRYANT**  
[PFT-1](#)

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO  
APPEAR AT SEC. 341(A) MEETING OF CREDITORS  
8-6-2019    [\[10\]](#)

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

DISPOSITION:     Conditionally denied.

ORDER:             The court will issue the order.

The chapter 7 trustee's motion to dismiss is CONDITIONALLY DENIED.

The debtors shall attend the meeting of creditors rescheduled for October 7, 2019 at 1:00 p.m. If the debtor fails to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtors' discharge or file motions for abuse, other than presumed abuse, under § 707, is extended to 60 days after the conclusion of the meeting of creditors.

8. [18-14740](#)-B-7     **IN RE: LORI ANNA WRIGHT**  
[JCW-1](#)

MOTION TO COMPEL ABANDONMENT  
8-9-2019    [\[26\]](#)

WELLS FARGO BANK, N.A./MV  
SCOTT LYONS  
JENNIFER WONG/ATTY. FOR MV.

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

DISPOSITION:     Granted.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved



without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

11 U.S.C. § 554(b) provides that "on request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." In order to grant a motion to abandon property, the bankruptcy court must find either that: (1) the property is burdensome to the estate or (2) of inconsequential value and inconsequential benefit to the estate. In re Vu, 245 B.R. 644, 647 (9th Cir. B.A.P. 2000). As one court noted, "an order compelling abandonment is the exception, not the rule. Abandonment should only be compelled in order to help the creditors by assuring some benefit in the administration of each asset . . . Absent an attempt by the trustee to churn property worthless to the estate just to increase fees, abandonment should rarely be ordered." In re K.C. Mach. & Tool Co., 816 F.2d 238, 246 (6th Cir. 1987). And in evaluating a proposal to abandon property, it is the interests of the estate and the creditors that have primary consideration, not the interests of the debtor. In re Johnson, 49 F.3d 538, 541 (9th Cir. 1995) (noting that the debtor is not mentioned in § 554). In re Galloway, No. AZ-13-1085-PaKiTa, 2014 Bankr. LEXIS 3626, at 16-17 (B.A.P. 9th Cir. 2014).

Creditor Wells Fargo Bank, N.A. ("Creditor") asks this court to compel the chapter 7 trustee to abandon the estate's interest in the property located at 1156 East Malone Street in Hanford, CA ("Subject Property"). Creditor is the beneficiary under a deed of trust on the Subject Property. Doc. #29.

The court finds that the Subject Property is of inconsequential value and benefit to the estate. The chapter 7 trustee signed a stipulation indicating the Subject Property is of inconsequential value to the estate (doc. #29, exh. 8) and the debtor intends to surrender the Subject Property (doc. #29, exh. 7). The Subject Property is accurately scheduled, and the debtor's interest is exempted. Therefore, this motion is GRANTED.

The order shall include the address of the Subject Property.

9. [19-12245](#)-B-7      **IN RE: SALVADOR CHAVEZ RAMIREZ AND SANDRA JUAREZ  
DE CHAVEZ**  
[EPE-1](#)

MOTION TO EXTEND TIME AND/OR MOTION TO DELAY DISCHARGE  
8-13-2019    [\[16\]](#)

SALVADOR CHAVEZ RAMIREZ/MV  
ERIC ESCAMILLA

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

DISPOSITION:      Granted in part and denied in part.

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

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED IN PART and DENIED IN PART. Federal Rule of Bankruptcy Procedure 4008 requires reaffirmation agreements to be filed not later than 60 days after the first § 341 meeting of creditors. The rule also states: "at any time and in [the court's discretion]" the court may enlarge the time to file a reaffirmation agreement.

The § 341 meeting was held on June 20, 2019, and no reaffirmation agreement was filed with the court within the 60 day deadline, which expired on August 19, 2019. Debtors have not received their discharge.

Debtors were unable to file a signed reaffirmation agreement by the deadline. They request that the deadline to file a reaffirmation agreement be extended up to and including October 18, 2019. Doc. #16. Likewise, debtors request that their discharge be delayed until after October 18, 2019.

The court, in its discretion, GRANTS the motion in part. The court finds that no prejudice shall occur to any party by granting this

motion. The order does not approve the reaffirmation agreement. That must be the subject of a separate hearing.

The court DENIES the request to delay the discharge to October 18, 2019. Fed. R. Bankr. P. 4004(c)(2) authorizes the court to defer the entry of discharge for 30 days and, on motion made within that time, to a date certain. This is the debtors' first request and the court cannot defer the discharge more than 30 days.

10. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[JHK-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
7-22-2019    [\[14\]](#)

MERCEDES-BENZ FINANCIAL SERVICES USA, LLC/MV  
THOMAS HOGAN  
JOHN KIM/ATTY. FOR MV.  
AMENDED NTC OF HRG

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Denied without prejudice unless the moving party appears and orally requests a continuance to October 9, 2019 at 9:30 a.m.

ORDER:                        The court will issue an order.

The movant's notice of hearing on the motion for relief from the automatic stay was filed on July 22, 2019 (doc. #15), in compliance with Local Rule of Practice ("LBR") 9014-1(f)(1), setting the matter for hearing on September 11, 2019 at 9:30 a.m. On August 30, 2019, the movant filed an amended notice of hearing, continuing the matter to October 9, 2019 at 9:30 a.m. Doc. #110.

As required by LBR 9014-1(j), continuances of hearings must be approved by the Court. Upon review of the docket prior to the hearing, the court made note that no written application to continue the matter had been filed. A request for continuance may be made orally at the hearing. If the movant fails to appear at the scheduled hearing on September 11, 2019 at 9:30 a.m., the motion will be DENIED WITHOUT PREJUDICE.

11. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[JHK-2](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
7-22-2019    [\[21\]](#)

MERCEDES-BENZ FINANCIAL SERVICES USA, LLC/MV  
THOMAS HOGAN  
JOHN KIM/ATTY. FOR MV.  
AMENDED NTC OF HRG

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Denied without prejudice unless the moving  
party appears and orally requests a  
continuance to October 9, 2019 at 9:30 a.m.

ORDER:                        The court will issue an order.

The movant's notice of hearing on the motion for relief from the automatic stay was filed on July 22, 2019 (doc. #22), in compliance with Local Rule of Practice ("LBR") 9014-1(f)(1), setting the matter for hearing on September 11, 2019 at 9:30 a.m. On August 30, 2019, the movant filed an amended notice of hearing, continuing the matter to October 9, 2019 at 9:30 a.m. Doc. #112.

As required by LBR 9014-1(j), continuances of hearings must be approved by the Court. Upon review of the docket prior to the hearing, the court made note that no written application to continue the matter had been filed. A request for continuance may be made orally at the hearing. If the movant fails to appear at the scheduled hearing on September 11, 2019 at 9:30 a.m., the motion will be DENIED WITHOUT PREJUDICE.

12. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[JHK-3](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-6-2019    [\[59\]](#)

MERCEDES-BENZ FINANCIAL SERVICES USA, LLC/MV  
THOMAS HOGAN  
JOHN KIM/ATTY. FOR MV.  
AMENDED NTC OF HRG

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Denied without prejudice unless the moving  
party appears and orally requests a  
continuance to October 9, 2019 at 9:30 a.m.

ORDER:                        The court will issue an order.

The movant's notice of hearing on the motion for relief from the automatic stay was filed on August 6, 2019 (doc. #60), in compliance

with Local Rule of Practice ("LBR") 9014-1(f)(1), setting the matter for hearing on September 11, 2019 at 9:30 a.m. On August 30, 2019, the movant filed an amended notice of hearing, continuing the matter to October 9, 2019 at 9:30 a.m. Doc. #116.

As required by LBR 9014-1(j), continuances of hearings must be approved by the Court. Upon review of the docket prior to the hearing, the court made note that no written application to continue the matter had been filed. A request for continuance may be made orally at the hearing. If the movant fails to appear at the scheduled hearing on September 11, 2019 at 9:30 a.m., the motion will be DENIED WITHOUT PREJUDICE.

13. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[JHK-4](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-6-2019    [\[66\]](#)

MERCEDES-BENZ FINANCIAL SERVICES USA, LLC/MV  
THOMAS HOGAN  
JOHN KIM/ATTY. FOR MV.  
AMENDED NTC OF HRG

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Denied without prejudice unless the moving party appears and orally requests a continuance to October 9, 2019 at 9:30 a.m.

ORDER:                        The court will issue an order.

The movant's notice of hearing on the motion for relief from the automatic stay was filed on August 6, 2019 (doc. #67), in compliance with Local Rule of Practice ("LBR") 9014-1(f)(1), setting the matter for hearing on September 11, 2019 at 9:30 a.m. On August 30, 2019, the movant filed an amended notice of hearing, continuing the matter to October 9, 2019 at 9:30 a.m. Doc. #118.

As required by LBR 9014-1(j), continuances of hearings must be approved by the Court. Upon review of the docket prior to the hearing, the court made note that no written application to continue the matter had been filed. A request for continuance may be made orally at the hearing. If the movant fails to appear at the scheduled hearing on September 11, 2019 at 9:30 a.m., the motion will be DENIED WITHOUT PREJUDICE.

14. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[RAS-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-1-2019    [\[46\]](#)

HITACHI CAPITAL AMERICA CORP./MV  
THOMAS HOGAN  
RICHARD SOLOMON/ATTY. FOR MV.  
RESPONSIVE PLEADING

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 for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. Debtor filed Non-Opposition on August 6, 2019. Doc. #75. The trustee'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 proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2016 Utility Reefer Trailer and Reefer Unit. Doc. #50. The collateral has a value of \$36,250.00 and debtor owes \$27,047.00. *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

The request for an award of attorney fees and costs is denied without prejudice. 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).

The court notes that the movant's notice of hearing failed to comply with LBR 9014-1(d)(3)(B)(iii), but the court took into consideration the debtor's filing of Non-Opposition and granted this motion. If any future motions are filed without the required language, the court will deny the motion without prejudice. The court urges counsel to review the Eastern District of California's Local Bankruptcy Rules on the court's website at <http://www.caeb.circ9.dcn/LocalRules.aspx>.

15. [19-12754](#)-B-7     **IN RE: SUPER TRUCK LINES INC.**  
[RAS-2](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-1-2019    [\[52\]](#)

HITACHI CAPITAL AMERICA CORP./MV  
THOMAS HOGAN  
RICHARD SOLOMON/ATTY. FOR MV.  
RESPONSIVE PLEADING

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 for relief from stay was fully noticed in compliance with the Local Rules of Practice and there was no opposition. Debtor filed Non-Opposition on August 6, 2019 (Doc. #77). The trustee'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 proposed order shall specifically describe the property or action to which the order relates. The collateral is a 2016 Utility Reefer Trailer and Reefer Unit. Doc. #56. The collateral has a value of \$36,250.00 and debtor owes \$26,937.00. *Id.*

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The moving papers show the collateral is a depreciating asset.

The request for an award of attorney fees and costs is denied without prejudice. 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).

The court notes that the movant's notice of hearing failed to comply with LBR 9014-1(d)(3)(B)(iii), but the court took into consideration the debtor's filing of Non-Opposition and granted this motion. If any future motions are filed without the required language, the court will deny the motion without prejudice. The court urges counsel to review the Eastern District of California's Local Bankruptcy Rules on the court's website at <http://www.caeb.circ9.dcn/LocalRules.aspx>.

16. [19-11167](#)-B-7     **IN RE: ROSA RODRIGUEZ**  
[RLF-2](#)

MOTION TO AVOID LIEN OF DISCOVER BANK  
8-1-2019    [\[26\]](#)

ROSA RODRIGUEZ/MV  
SHANE REICH

FINAL RULING:        This matter will proceed as scheduled.

DISPOSITION:        Denied without prejudice.

ORDER:                The court will issue the order.

This motion is DENIED WITHOUT PREJUDICE. Constitutional due process requires that the movant make a *prima facie* showing that they are entitled to the relief sought. Here, the moving papers do not present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" In re Tracht Gut, LLC, 503 B.R. 804, 811 (9th Cir. BAP, 2014), citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

A judgment was entered against the debtor in favor of Discover Bank for the sum of \$4,942.48 on March 6, 2017. Doc. #29, exh. A. The abstract of judgment was recorded with Madera County on June 1, 2017. Id. That lien attached to the debtor's interest in a residential real property in Madera, CA. The subject real property had an approximate value of \$192,888.00 as of the petition date. Doc. #1, Schedule A/B.

The debtor claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of \$160,000.00 in Schedule C. Doc. #1. The petition and schedules do not identify the subsection under which the exemption is claimed. Since the claimed exemption is \$160,000.00, the claim must be under subsection (a)(3). Cal. Civ. P. § 704.730(a)(3) requires one of three elements in order for the exemption to apply - the person must be 65 years of age or older; physically or mentally disabled, and as a result of that disability, is unable to engage in substantial gainful employment; and a person 55 years of age or older with a gross annual income of not more than \$25,000 if unmarried, or a joint gross annual income of not more than \$35,000.

No evidence was filed with the motion supporting the allowance of this exemption. Debtor's declaration, erroneously filed as an exhibit in violation of the Local Rules of Practice, does not explain why she is entitled to the \$160,000.00 exemption. Debtors have that burden on these motions. Morgan v. FDIC (In re Morgan), 149 B.R. 147, 152 (9th Cir. B.A.P. 1993). This is true even in the absence of an objection to the exemption. Id. The motion and debtor's declaration also list the incorrect statute. The motion and declaration list Cal. Civ. P. § 704.140(b)(5), which does not exist.



Cal. Civ. P. § 704.140 deals with exemption for personal injury awards, not the homestead exemption.

17. [19-12997](#)-B-7     **IN RE: VIRGINIA REYES**  
[CAS-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
8-5-2019    [\[11\]](#)

FINANCIAL SERVICES VEHICLE TRUST/MV  
JANINE ESQUIVEL OJI  
CHERYL SKIGIN/ATTY. FOR MV.

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

DISPOSITION:     Granted.

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

This motion for relief from the automatic stay will be granted  
without oral argument based upon well-pled facts.

This motion relates to an executory contract or lease of personal  
property. The time prescribed in 11 U.S.C. § 365(d)(1) for the lease  
to be assumed by the chapter 7 trustee has not yet run and, pursuant  
to § 365(p)(1), the leased property is still property of the estate  
and protected by the automatic stay under § 362(a).

This matter was fully noticed in compliance with the Local Rules of  
Practice 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 Federal  
Rule of Bankruptcy Procedure 9014(c). Upon default, factual  
allegations will be taken as true (except those relating to amount  
of damages). *Televideo Systems, Inc. v. Heidenthal* (826 F.2d 915,  
917 (9th Cir., 1987)). Constitutional due process requires that a  
plaintiff make a *prima facie* showing that they are entitled to the  
relief sought, which the movant has done here. The trustee has not  
moved to assume the subject lease and the lease was not listed in  
the debtor's Statement of Intention.

The request for attorney's fees will be denied pursuant to 11 U.S.C.  
§506(b). Debtors have no equity in the property.

18. [19-12825](#)-B-7     **IN RE: GERARDO LUPERCIO**  
[PFT-1](#)

OPPOSITION RE: TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO  
APPEAR AT SEC. 341(A) MEETING OF CREDITORS  
8-6-2019    [\[17\]](#)

MARK ZIMMERMAN

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

DISPOSITION:     Conditionally denied.

ORDER:             The court will issue the order.

The chapter 7 trustee's motion to dismiss is CONDITIONALLY DENIED.

The debtors shall attend the meeting of creditors rescheduled for October 7, 2019 at 1:00 p.m. If the debtor fails to do so, the chapter 7 trustee may file a declaration with a proposed order and the case may be dismissed without a further hearing.

The time prescribed in Rules 1017(e)(1) and 4004(a) for the chapter 7 trustee and the U.S. Trustee to object to the debtors' discharge or file motions for abuse, other than presumed abuse, under § 707, is extended to 60 days after the conclusion of the meeting of creditors.

11:00 AM

1. [19-13104](#)-B-7     **IN RE: ERNESTO/LISA GARCIA**

PRO SE REAFFIRMATION AGREEMENT WITH FORD MOTOR CREDIT COMPANY  
8-20-2019     [[15](#)]

NO RULING.

2. [19-12520](#)-B-7     **IN RE: JOSEF/DEBORAH OLSON**

PRO SE REAFFIRMATION AGREEMENT WITH AMERICAN HONDA FINANCE  
CORPORATION  
8-14-2019     [[16](#)]

NO RULING.

3. [19-12238](#)-B-7     **IN RE: VICTOR GUTIERREZ**

REAFFIRMATION AGREEMENT WITH AMERICAN HONDA FINANCE CORP.  
8-19-2019     [[18](#)]

MARK ZIMMERMAN

NO RULING.

4. [19-12550](#)-B-7     **IN RE: IGNACIO GARIBAY**

PRO SE REAFFIRMATION AGREEMENT WITH ALLY FINANCIAL  
8-19-2019     [[15](#)]

NO RULING.

5. [19-12451](#)-B-7     **IN RE: LORENA AVALOS SILVA**

REAFFIRMATION AGREEMENT WITH WELLS FARGO BANK N.A.  
8-15-2019     [[19](#)]

MARK ZIMMERMAN

NO RULING.

6. [19-12672](#)-B-7     **IN RE: JOANN GOFF**

PRO SE REAFFIRMATION AGREEMENT WITH ACAR LEASING LTD  
8-26-2019    [\[13\]](#)

TENTATIVE RULING:            This matter will proceed as scheduled.

DISPOSITION:                Denied.

ORDER:                        The court will issue an order.

This agreement relates to a lease of personal property. The parties are directed to the provisions of 11 U.S.C. § 365(p)(2). This case was filed June 21, 2019 and the lease was not assumed by the chapter 7 trustee within 60 days, the time prescribed in 11 U.S.C. § 365(d)(1). Pursuant to 365(p)(1), the leased property is no longer property of the estate. Therefore, the court will issue an order denying the Reaffirmation Agreement.

7. [19-12479](#)-B-7     **IN RE: KENDRA NORTHEY**

REAFFIRMATION AGREEMENT WITH JPMORGAN CHASE BANK, N.A.  
8-15-2019    [\[20\]](#)

MARK ZIMMERMAN

NO RULING.

1:30 PM

1. [19-11115](#)-B-7     **IN RE: ROMAN NORIEGA**  
[19-1053](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT  
5-31-2019    [\[1\]](#)

OSUNA V. NORIEGA  
JEFF REICH/ATTY. FOR PL.  
RESPONSIVE PLEADING

NO RULING.

2. [17-14619](#)-B-7     **IN RE: AMANDA/CALVIN HAMM**  
[19-1056](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT  
6-6-2019    [\[1\]](#)

U.S. TRUSTEE V. HAMM ET AL  
ROBIN TUBESING/ATTY. FOR PL.

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

DISPOSITION:     The status conference will be continued to October  
9, 2019 at 1:30 pm.

ORDER:             The court will issue the order.

On August 21, 2019 the defaults of Calvin Hamm (Doc. 14) and Amanda Hamm (Doc. 15) were entered. Plaintiff has through September 20, 2019 to set a default "prove up" hearing on the appropriate calendar. If a hearing is set by the date of the continued status conference, the status conference will be continued to the hearing date. If not, the court will issue an Order to Show Cause why the adversary proceeding should not be dismissed for lack of prosecution.

3. [18-14160](#)-B-7     **IN RE: BRYAN ROCHE**  
[19-1013](#)     [DMS-1](#)

COUNTER MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS  
(SUBPOENA TO MICHAEL J. SEMAS)  
8-28-2019     [\[31\]](#)

VANDENBERGHE V. ROCHE  
DAREN SCHLECTER/ATTY. FOR MV.

TENTATIVE RULING:             This matter will proceed as scheduled.

DISPOSITION:                     Granted in part and denied in part.

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

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and 9014-1(i) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The court notes Plaintiff's failure to comply with LBR 9014-1(d)(3)(B)(iii). The notice did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at [www.caeb.uscourts.gov](http://www.caeb.uscourts.gov) after 4:00 p.m. the day before the hearing.

This motion is GRANTED. Plaintiff Kathy Vandenberghe ("Plaintiff") asks this court for an order compelling the production of documents held by Michael J. Semas ("Semas"), defendant Bryan Roche's ("Defendant") CPA. Plaintiff alleges that after several unproductive meet-and-confer attempts, Plaintiff has not received documents ostensibly in Semas' possession, custody, or control that Plaintiff believes is entitled to. Doc. #31. Specifically, Plaintiff is requesting production for requests nos. 3 - 6, 8, 12 - 16, and 18. Id.

Federal Rule of Civil Procedure 34(a) (made applicable to bankruptcy adversary proceedings under Federal Rule of Bankruptcy Procedure 7034)<sup>1</sup> may be used to inspect documents, tangible things, or land in the possession, custody, or control of another party. A party responding to requests for production has an independent duty to obtain documents from a third party as falling within the custody or control definition. Property is deemed within a party's "possession,

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<sup>1</sup> Future references to the Federal Rules of Civil Procedure will be noted as "Civil Rule." Future references to the Federal Rules of Bankruptcy Procedure will be noted as "Rule."

custody or control" "for purposes of [Civil] Rule 34 if the party has *actual* possession, custody or control, or has the legal right to obtain the documents on demand." In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995) (citations omitted).

"'[C]ontrol' comprehends not only possession but also the right, authority, or ability to obtain the documents." Comeau v. Rupp, 810 F.Supp. 1127, 1166 (D. Kan. 1992). Plaintiff claims that Defendant "has an independent duty to verify that all documents within [Semas]'s possession/custody/control that fall within the enumerated categories . . . have been identified and produced." Doc. #31. Plaintiff claims to have evidence showing that there are documents within Defendant's control that have not been identified and produced. See doc. ##33, 34, and #35, exh. I,K,L,M, and N.

It makes sense that Defendant, a client of Semas, would have the right and/or authority to obtain the documents. Defendant's counsel would also seemingly have that right, as Defendant's representative. Exhibit K, a letter from Semas to Plaintiff's counsel, states that Semas is unable to provide tax returns or tax return-related documents to anyone but the taxpayer or their agent without a court order. Doc. #35. The court finds that the tax returns and tax return-related documents are at a minimum in the control of Defendant and must therefore be produced. The court will enter an order preventing the dissemination of tax returns to anyone except the parties, their counsel and any expert witness provided all those individuals are identified. The court may also consider other terms proposed by the parties in a stipulation.

Unless opposition is presented at the hearing, the court intends to GRANT this motion.

As to the award of fees and costs on this motion, it will be DENIED. The correspondence attached to Plaintiff's counter motion shows that there was a good faith dispute between counsel as to what particular telephone conversations were and what Defendant's counsel would be willing to do about the subpoena directed to Semas. The court notes no motion for a protective order specifically dealing with this witness has been filed.

4. [18-14160](#)-B-7     **IN RE: BRYAN ROCHE**  
[19-1013](#)     [SAH-1](#)

MOTION FOR PROTECTIVE ORDER  
8-3-2019     [\[21\]](#)

VANDENBERGHE V. ROCHE  
SUSAN HEMB/ATTY. FOR MV.  
RESPONSIVE PLEADING

TENTATIVE RULING:             This matter will proceed as scheduled.

DISPOSITION:                     Denied.

ORDER:                             The minutes of the hearing will be the court's findings and conclusions. The court will issue the order.

Rulings on Vandenberghe's Objections to Declaration of Attorney Hemb

All objections are OVERRULED except the following: 3. Hearsay - SUSTAINED. 7. Hearsay - SUSTAINED. 8. Relevance - SUSTAINED

Relevant Background

Kathy Vandenberghe ("Plaintiff") filed this adversary proceeding asking the court to enter judgment that her approximately \$96,000 state court judgment against debtor Bryan Roche ("Defendant") is non-dischargeable and that Defendant should be denied a discharge. She alleges she was defrauded by Defendant into loaning \$150,000 about five years before this bankruptcy case was filed. Plaintiff claims she was led to believe Defendant needed the funds to assist in opening three "Dickey's BBQ" franchises in Hollister, Riverside, and Seaside, California. But after the petition was filed, she alleges, she learned the loaned funds were spent on personal expenses and luxury items. She also learned that Defendant sold the three locations for little or no consideration. Also, she contends, Defendant concealed the status of his relationship with the "Dickey's" franchise when the loan was made. She asserts the debt is based on false pretenses or actual fraud under 11 U.S.C. § 523(a)(2); embezzlement under § 523(a)(4); and Defendant's actions are a pattern of willful and malicious injury under § 523(a)(6). She also alleges Defendant has not satisfactorily explained the loss of the stores and should not receive a discharge under § 727(a)(5).

Defendant has denied the allegations and his answer alleges the stores Plaintiff complains about were not in existence when the loan was made. In fact, Defendant claims, the funds were used for the Hanford, Fresno and Clovis, California stores. The funds were used for business purposes, says Defendant: obligatory travel required by the franchisor; fees for opening the stores, architect services and alcohol licenses; equipment purchases; and other "start - up" expenses. The transferred stores, Defendant explains, were losing



close to \$10,000 per month and that the transfers were for adequate consideration and were acquired and transferred long after Plaintiff's loan funds were exhausted.

While the extent is unclear from the record, the parties did engage in both the "Rule 26 (b) disclosure" process and informal discovery before both Plaintiff and Defendant propounded written discovery to each other. Plaintiff propounded written discovery to Defendant including document requests and interrogatories. Defendant propounded similar discovery to Plaintiff. Neither party has provided the disputed discovery requests as part of the record on this motion. Neither party has said the number of requests exceed what the parties agreed to as part of their discovery plan in this case. Plaintiff has apparently subpoenaed several third-party witnesses including an accountant who worked with Defendant, a bank, and the "Dickey's" franchise.

#### The Motion

Defendant asks for a protective order against discovery propounded by Plaintiff pursuant to Federal Rule of Civil Procedure 26(c) (made applicable to bankruptcy adversary proceedings under Federal Rule of Bankruptcy Procedure 7026).<sup>2</sup> Defendant contends: the document requests are "oppressive" because they are "voluminous and duplicative;" the documents are not relevant to this adversary proceeding; and Plaintiff improperly requests documents from third parties. Doc. #21. Also, Plaintiff has "refused and rejected each and all of the Defendants [sic] overtures and suggestions for a mutual agreement to voluntarily reduce" the discovery requests. Id.

Plaintiff timely opposed, generally denying the factual allegations and arguing that a protective order is not warranted because Defendant did not attempt to resolve the issues raised in the motion before bringing the motion. Doc. #26.

Defendant's counsel's ("Hemb") declaration states that she has "met and conferred with Plaintiff numerous times, including a telephonic meeting . . . and engaged in no fewer than 45 exchanges of email correspondence . . . ." Doc. #23. On July 15, 2019 Defendant provided Plaintiff's counsel ("Schlechter") with over 360 pages of documents per Plaintiff's request, and in return "has only received responses from Plaintiff claiming that no documents exist to support the request made by Defendant as to Defendant's Requests for Production of Documents served on Plaintiff's attorney's office." Id.

Schlechter's declaration states that at least one of the subpoenas at issue in this motion was suggested by Hemb. Doc. #27, ¶7, see also Doc. #28, exh. C. Hemb argues that 30 document production demands are excessive, yet the joint discovery plan permits a maximum of 35 requests for production. Doc. #15.

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<sup>2</sup> References to the Federal Rules of Civil Procedure will be noted as "Civil Rule." References to the Federal Rules of Bankruptcy (b) Procedure will be noted as "Rule."

Defendant does not attach the document requests in dispute. There is no analysis of which (or all requests) ask for irrelevant information. Under Civil Rule 26(b)(1) the requested information need not be admissible in evidence to be discoverable. There is no quantification of how or why the requests are "oppressive" or "excessive."

Civil Rule 26(c)(1) gives the court authority to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . " for good cause. The motion must include certification that the movant has "in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test" (quoting Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (internal quotation marks omitted)). See also Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003).

Civil Rule 37(a)(5) (made applicable in bankruptcy adversary proceedings under Rule 7037) is applicable in Civil Rule 26 motions. Civil Rule 26(c)(3). Civil Rule 37(a)(5) states that "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses in making the motion, including attorney's fees." Fees will not be ordered if "the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action," and so on.

Defendant includes a certification that Defendant has "in good faith conferred" with Plaintiff to resolve the dispute, in conformance with Rule 26(c)(1) and the court's scheduling order. See doc. #18. Plaintiff claims there was no letter or phone call before this motion was filed. But Plaintiff does not dispute the numerous occasions Hemb testifies she attempted to discuss matters with Plaintiff's counsel. The problem here is there is not enough evidence of specific issues with Plaintiff's specific demands.

Defendant's motion lacks the specific evidence needed to find "good cause" to issue a protective order. Defendant mentions multiple times the "voluminous and wayward discovery demands of Plaintiff." But the only evidence provided that comes close to support that is Hemb's declaration, which is contradicted by Schlechter's declaration. Without specifics, the court has no evidence to weigh whether the discovery requests are inconsistent with the scope of discovery under Civil Rule 26(b)(1) or whether the annoyance, burden or expense to be suffered by Defendant in responding is in any way more than any litigant would need to experience in a case of this size.

Defendant's claim that they attempted to resolve the issue pre-motion is directly contradicted by Schlechter's declaration. Doc. #27, § F. Hemb provides no specific details about dates and times phone calls were made or emails sent to attempt to meet and confer

before the filing of the motion. But Schlechter does not deny the parties have been communicating on these issues.

Schlechter's declaration states that many of the subpoenas at issue in this motion were not objected to by the subpoenaed witness, nor by Defendant. Doc. #27, ¶¶13, 14. Defendant has not produced evidence contradicting that.

Defendant also fails to comply with Civil Rule 37(a)(5) and the court's scheduling order (doc. #18) in that Hemb did not submit evidence of fees and expenses incurred in preparing the motion. The court notes that Schlechter did. Doc. #27, § G.

The court finds that there is not sufficient good cause to issue a protective order. The record does not include enough persuasive or relevant evidence to make that finding. A protective order is only appropriate if the moving party shows good cause by showing a particular need for protection. Pearson v. Miller, 211 F. 3d 57, 72 (3d Cir. 2000) quoting Pansy v. Stroudsberg, 23 F. 3d 57,72 (3d Cir. 1994). If a document request asks for documents that are not in the defendant's possession, custody or control, Civil Rule 34 (a)(1)(A) provides the proper response. Discovery need not be admissible in evidence to be discoverable. See Civil Rule 26(b)(1). The court is not left with any factual basis in this motion to determine whether the limitations to be considered under Civil Rule 26(b)(1) apply.

The motion is DENIED.

#### Reimbursement of Expenses

The party against whom expense reimbursement is sought has the burden of showing special circumstances or justification for bringing the unsuccessful discovery motion to avoid an expense award. See, Hyde & Drath v. Baker, 24 F. 3d 1162, 1171 (9th Cir. 1994) and David v. Hooker, 560 F. 2d 412, 418 (9th Cir. 1977). Unfortunately for Defendant here, nothing in the record provided by Defendant establishes a legitimate dispute regarding the discovery requests. Under Civil Rule 37(a)(5), which applies to protective order motions under Civil Rule 26(c)(3), requires the court enter an order for reimbursement of expenses.

Schlechter states that the costs incurred to defend against this motion total \$3,247.00 - \$2,975.00 in fees (9.5 hours at \$350.00, four hours of which are estimated to be travel) and \$272.00 in transportation costs. The court find that 3.5 hours plus .5 hours for attendance at the hearing is a reasonable time for an attorney of Schlechter's experience to prepare the opposition to the protective order motion. No particularly difficult legal questions were involved, and the primary tasks were presentation of the facts. So, the court finds \$1,400.00 to be appropriate for the preparation of opposition plus attendance at the hearing

The court does not find four hours of travel time billed at the same rate for legal services is reasonable. The estimated four hours travel time should be charged at \$175.00 per hour. So, fees and

expenses will be tentatively awarded Plaintiff in the amount of \$2,100.00 payable by Defendant.

Schlechter can choose to attend the hearing by telephone. If that occurs, no fees for time to travel will be awarded. But, because of the telephone option, the court will not award \$272.00 for reimbursement of travel costs.