

UNITED STATES BANKRUPTCY COURT  
Eastern District of California  
Honorable René Lastreto II  
Hearing Date: Wednesday, September 13  
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. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 p.m. at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling under FRCP 60(a) (FRBP 9024) because of the court's error ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 p.m. one business day before the hearing.

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 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.	<a href="#">16-12900</a> -B-7	ARTBEAT, INC., A	MOTION FOR COMPENSATION FOR
	TGM-3	WASHINGTON CORPORATION	TRUDI G. MANFREDO, TRUSTEES
			ATTORNEY(S)
			8-7-17 [ <a href="#">31</a> ]

HAGOP BEDOYAN/Atty. for dbt.

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

**DISPOSITION:**                      Granted.

**ORDER:**                              No appearance is necessary. Moving Party shall submit a proposed order in conformance with the ruling below.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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. Accordingly, the respondents' defaults will be entered.

The court notes that the narrative submitted in support of the application refers to trustee's counsel "appearing at hearing on Trustee's application to employ broker," which appears to be an error, however there was no time entry for this notation and so no prejudice from the error.

2. [15-12702](#)-B-7 MARTIN STEBBEN  
JTW-2  
JANZEN, TAMBERI AND WONG/MV  
  
GLEN GATES/Atty. for dbt.

MOTION FOR COMPENSATION FOR  
JANZEN, TAMBERI AND WONG,  
ACCOUNTANT(S)  
8-11-17 [[78](#)]

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

**DISPOSITION:**            The hearing will be dropped and the motion granted.

**ORDER:**                    No appearance is necessary. The court will issue an  
order granting the application.

Pursuant to Federal Rule of Bankruptcy Procedure 2002(a)(6), the court may consider the applicant's request for compensation that does not exceed \$1,000 without a noticed hearing.

3. [17-12606](#)-B-7 LETICIA JACKSON  
APN-1  
SANTANDER CONSUMER USA,  
INC./MV  
NEIL SCHWARTZ/Atty. for dbt.  
AUSTIN NAGEL/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-4-17 [[11](#)]

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

**DISPOSITION:**            Granted.

**ORDER:**                    No appearance is necessary. 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.

A waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The movant has shown that the vehicle is in debtor's possession and that insurance coverage is not verified.

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).

4. [15-14833](#)-B-7 FRED ALLEN  
JDW-1  
FRED ALLEN/MV  
JOEL WINTER/Atty. for dbt.

MOTION TO AVOID LIEN OF COLEMAN  
FARMING CO, LLC  
8-23-17 [[55](#)]

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

**DISPOSITION:**           Denied without prejudice.

**ORDER:**                 No appearance is necessary. The court will issue an order.

This motion to avoid a lien uses the same DC# as the motion to avoid lien below, calendar no. 5. However, it is clear that these motions are intertwined in more substantial ways and both will be denied without prejudice.

First, this motion was not served on the respondent named in the motion, Coleman Farming Co., LLC.

In addition, the declaration submitted in support of the motion lists the amount of the lien held by Coleman Farming Co., LLC, as \$49,403, recorded October 20, 2008, however the abstract of judgment filed by Coleman Farming Co., LLC, lists the lien amount as \$226,551, recorded August 25, 2015.

Also, there is nothing to show that the debtor possessed an interest in the subject property to which the judgment lien could have attached at the time the judgment lien was recorded. *Farrey v. Sanderfoot*, 111 S.Ct. 667 (1991).

Finally, 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). As debtor admits in the pleadings, the property sought to be protected was not listed as exempt in the debtor's schedule C and the debtor must establish that he is entitled to the exemption claimed. In order to avoid the judgment lien, the property must be listed as exempt on the debtors' schedule C. Unless the homestead is claimed as exempt there is no predicate for 11 U.S.C. §522(f) relief. The schedule C filed January 1, 2016, does not show an exemption is claimed.

Movant is reminded that creditors and the trustee have 30 days after any amendment to exemptions is filed to object to the amended exemption. FRBP 4003(b)(1).

5. [15-14833](#)-B-7 FRED ALLEN  
JDW-1  
FRED ALLEN/MV  
JOEL WINTER/Atty. for dbt.

MOTION TO AVOID LIEN OF SOC  
RESOURCES, INC.  
8-23-17 [[60](#)]

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

**DISPOSITION:**            Denied without prejudice.

**ORDER:**                    No appearance is necessary. The court will issue an order.

This motion to avoid a lien uses the same DC# as the motion to avoid lien above, calendar no. 4. However, it is clear that these motions are intertwined in more substantial ways and both will be denied without prejudice.

The court will not iterate each defect the motion may have, but most substantively, first, there is nothing to show that the debtor possessed an interest in the subject property to which the judgment lien could have attached at the time the judgment lien was recorded. *Farrey v. Sanderfoot*, 111 S.Ct. 667 (1991).

Second, 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). As debtor admits in the pleadings, the property sought to be protected was not listed as exempt in the debtor's schedule C and the debtor must establish that he is entitled to the exemption claimed. In order to avoid the judgment lien, the property must be listed as exempt on the debtors' schedule C. Unless the homestead is claimed as exempt there is no predicate for 11 U.S.C. §522(f) relief. The schedule C filed January 1, 2016, does not show an exemption is claimed.

Movant is reminded that creditors and the trustee have 30 days after any amendment to exemptions is filed to object to the amended exemption. FRBP 4003(b) (1) .

6. [17-13035](#)-B-7 EPIFANIO MUNOZ

ORDER TO SHOW CAUSE  
8-22-17 [[5](#)]

**TENTATIVE RULING:** This matter will proceed as scheduled.

**DISPOSITION:** The case will be dismissed if the required fee has not been paid at the time of the hearing.

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

This matter will proceed as scheduled. If the required filing fee has not been paid by the time of the hearing, the case will be dismissed on the grounds stated in the Order to Show Cause.

7. [17-12438](#)-B-7 RICHARD/CHANNIE DOYLE  
RHT-1  
ROBERT HAWKINS/MV  
DAVID JENKINS/Atty. for dbt.  
ROBERT HAWKINS/Atty. for mv.

OBJECTION TO DEBTOR'S CLAIM OF  
EXEMPTIONS  
8-16-17 [[12](#)]

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

**DISPOSITION:** Sustained.

**ORDER:** No appearance is necessary. The Moving Party shall submit a proposed order in conformance with the ruling below.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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. Accordingly, the respondents' defaults will be entered and the objection will be sustained.

8. [15-13455](#)-B-7 HIROAKI TERANISHI  
TGM-4

MOTION FOR COMPENSATION FOR J.  
STANLEY TEIXEIRA, SPECIAL  
COUNSEL(S)  
8-11-17 [[96](#)]

ROSALINA NUNEZ/Atty. for dbt.

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

**DISPOSITION:**            Granted.

**ORDER:**                    No appearance is necessary. The Moving Party shall  
submit a proposed order in conformance with the ruling  
below.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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. Accordingly, the respondents' defaults will be entered and the motion will be granted.

9. [11-60165](#)-B-7 ANTONIO/CAROL MARCELINO CONTINUED STATUS CONFERENCE RE:  
TPH-4 MOTION TO AVOID LIEN OF A.L.  
ANTONIO MARCELINO/MV GILBERT COMPANY  
5-25-17 [[67](#)]  
  
THOMAS HOGAN/Atty. for dbt.  
RESPONSIVE PLEADING

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

**DISPOSITION:**           Continued to October 18, 2017, at 9:30 a.m.

**ORDER:**                 No appearance is necessary. The court will issue an order.

Based on the respondent's status conference statement, this matter will be continued to October 18, 2017, at 9:30 a.m. The parties shall file and serve separate or joint status conference statement(s) on or before October 11, 2017.

10. [11-60165](#)-B-7 ANTONIO/CAROL MARCELINO CONTINUED STATUS CONFERENCE RE:  
TPH-5 MOTION TO AVOID LIEN OF  
ANTONIO MARCELINO/MV VETERINARY SERVICE, INC.  
5-25-17 [[73](#)]  
  
THOMAS HOGAN/Atty. for dbt.  
RESPONSIVE PLEADING

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

**DISPOSITION:**           Continued to October 18, 2017, at 9:30 a.m.

**ORDER:**                 No appearance is necessary. The court will issue an order.

Based on the respondent's status conference statement, this matter will be continued to October 18, 2017, at 9:30 a.m. The parties shall file and serve separate or joint status conference statement(s) on or before October 11, 2017.



11. [17-13070](#)-B-7 DAVID RABNER  
DJP-1  
EDUCATIONAL EMPLOYEES CREDIT  
UNION/MV  
TIMOTHY SPRINGER/Atty. for dbt.  
DON POOL/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-25-17 [[11](#)]

**TENTATIVE RULING:** This matter will proceed as scheduled.

**DISPOSITION:** Granted.

**ORDER:** 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 waiver of Federal Rule of Bankruptcy Procedure 4001(a) (3) will be granted. The moving papers show the collateral was repossessed pre-petition.

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).

12. [17-12771](#)-B-7 BILLY RIVERS  
JCW-1  
U.S. BANK NATIONAL  
ASSOCIATION/MV  
PETER FEAR/Atty. for dbt.  
JENNIFER WONG/Atty. for mv.

MOTION TO APPROVE LOAN  
MODIFICATION  
8-16-17 [[13](#)]

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

**DISPOSITION:**            Granted in part and denied in part

**ORDER:**                    No appearance is necessary. The Moving Party shall  
submit a proposed order in conformance with the ruling  
below.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. There is nothing in the Bankruptcy Code that requires the bankruptcy court to review and approve the modification of a mortgage by the debtors in a chapter 7 case so long as the mortgage modification' does not affect the trustee's administration of the case. The subject property is still property of the bankruptcy estate. It has not been exempted and it has not been abandoned by the chapter 7 trustee. The request to affirmatively approve the mortgage modification is therefore denied. To the extent that the creditor and the debtor seek clarification that the debtor is merely authorized to enter into the proposed mortgage modification, that request will be granted without oral argument for cause shown without prejudice to the trustee's right to administer the property.

13. [17-12683](#)-B-7 EDWARD/PATRICIA SOGGE  
APN-1  
FORD MOTOR CREDIT COMPANY/MV  
PATRICK KAVANAGH/Atty. for dbt.  
AUSTIN NAGEL/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-15-17 [[16](#)]

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

**DISPOSITION:**            Granted.

**ORDER:**                    No appearance is necessary. 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 debtors' 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.

If adequate protection is requested, it will be denied without prejudice. Adequate protection is unnecessary in light of the relief granted herein.

If an award of attorney fees has been requested, it will be 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. In addition, any future request for an award of attorneys fees will be denied unless the movant can prove there is equity in the collateral. 11 U.S.C.A. §506(b). The court notes that, while the moving papers allege there is equity in the collateral over and above movant's lien, the debtors' schedules show the claim as undersecured in that the value listed in schedule B for the vehicle is less than movant's claim.

The waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The debtor's schedules show the collateral is a depreciating asset in which they have no equity.

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).

14. [16-12687](#)-B-7 LORAINÉ GOODWIN MILLER  
TGM-2  
JAMES SALVEN/MV  
  
TRUDI MANFREDO/Atty. for mv.  
RESPONSIVE PLEADING

CONTINUED FURTHER STATUS  
CONFERENCE RE: OBJECTION TO  
DEBTOR'S CLAIM OF EXEMPTIONS  
3-29-17 [[55](#)]

**NO RULING:**

15. [16-12687](#)-B-7 LORAINÉ GOODWIN MILLER  
[17-1039](#)  
SALVEN V. GOODWIN MILLER ET AL  
TRUDI MANFREDO/Atty. for pl.  
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
3-29-17 [[1](#)]

**NO RULING:**                    **This matter will proceed as scheduled.**

**The court reminds the defendant that the court is unable to provide legal advice.**

16. [13-11489](#)-B-7 FERNANDO/LUCILA  
TGM-4 BAGUINGUITO

MOTION FOR COMPENSATION FOR  
TRUDI G. MANFREDO, TRUSTEES  
ATTORNEY(S)  
7-31-17 [[74](#)]

JAMES MILLER/Atty. for dbt.

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

**DISPOSITION:**                    **Granted.**

**ORDER:**                            **No appearance is necessary. The Moving Party shall submit a proposed order in conformance with the ruling below.**

**This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. 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. Accordingly, the respondents' defaults will be entered.**

17. [17-10489](#)-B-7 JAMIE MEDEIROS

CONTINUED ORDER TO SHOW CAUSE -  
FAILURE TO PAY FEES  
8-9-17 [[49](#)]

FEE PAID \$31.00

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

**DISPOSITION:**            The OSC will be vacated.

**ORDER:**                    No appearance is necessary. The OSC will be vacated.

The record shows that the required fee has been paid.

18. [17-12692](#)-B-7 DANNY/FRANCES RIVERA  
MBW-1  
ALLIANT CREDIT UNION/MV  
MARK ZIMMERMAN/Atty. for dbt.  
HAYDEE GARBERO/Atty. for mv.  
NON-OPPOSITION

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-22-17 [[33](#)]

**TENTATIVE RULING:** This matter will proceed as scheduled.

**DISPOSITION:** Granted.

**ORDER:** 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. The debtors have filed a notice of non-opposition to the motion. Unless opposition is presented at the hearing, the court intends to enter the trustee's default 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 waiver of Federal Rule of Bankruptcy Procedure 4001(a)(3) will be granted. The debtors filed a notice of non-opposition and 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).

11:00 A.M.

1. [17-12190](#)-B-7 GURDEEP TALANGA AND REAFFIRMATION AGREEMENT WITH  
KULWINDER KAUR TOYOTA MOTOR CREDIT CORPORATION  
8-8-17 [[25](#)]

JAMES MILLER/Atty. for dbt.

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

**DISPOSITION:**            Dropped from calendar.

**ORDER:**                    No appearance is necessary. The court will issue an  
order.

dropped

Counsel shall inform his clients that no appearance is necessary at this hearing.

Debtors were represented by counsel when they entered into the reaffirmation agreement. Pursuant to 11 U.S.C. §524(c)(3), "if the debtor is represented by counsel, the agreement *must* be accompanied by an affidavit of the debtor's attorney' attesting to the referenced items before the agreement will have legal effect." *In re Minardi*, 399 B.R. 841, 846 (Bankr. N.D. Ok, 2009) (emphasis in original). In this case, the debtors' attorney affirmatively represented that the agreement presented an undue hardship on the debtor or the debtors' dependants that was not rebutted. Therefore, the agreement does not meet the requirements of 11 U.S.C. §524(c) and is not enforceable.

1:30 P.M.

1. [16-11605](#)-B-7 CAROLYN CHARLTON  
[16-1078](#)  
CHARLTON V. CHARLTON  
NANETTE BEAUMONT/Atty. for pl.

STATUS CONFERENCE RE: AMENDED  
COMPLAINT  
2-16-17 [[25](#)]

**NO RULING.**

2. [16-11605](#)-B-7 CAROLYN CHARLTON  
[16-1078](#) JRL-2  
CHARLTON V. CHARLTON  
JERRY LOWE/Atty. for mv.  
RESPONSIVE PLEADING

MOTION TO DISMISS ADVERSARY  
PROCEEDING/NOTICE OF REMOVAL  
8-10-17 [[78](#)]

**TENTATIVE RULING:** This matter will proceed as scheduled.

**DISPOSITION:** Denied. The movant shall file and serve an answer to the second amended complaint on or before September 27, 2017.

**ORDER:** The court will issue an order.

Defendant Carolyn Charlton ("Movant") seeks to dismiss plaintiff Robert H. Charlton's ("Respondent") Second Amended Complaint to Determine Debt is Non-Dischargeable on the ground the allegations do not state a claim for relief under FRCP 12(b)(6) (made applicable to adversary proceedings by FRBP 7012). The motion is opposed by Respondent.

The complaint alleges the movant is the successor trustee of the Robert G. Charlton Family Trust and that Movant, Respondent, and sibling Edward, are the surviving beneficiaries. It is alleged that Respondent misappropriated trust assets and provided Respondent with an accounting showing respondent was owed over \$30,000 from the trust. It is also alleged that Movant represented she would return the funds but only \$11,000 of the funds were returned in December 2014. At that time, Movant allegedly said she would return the funds to the trust at the rate of \$500 per month but failed to do so. It is alleged the representations when made by the movant were intentionally false. Approximately \$19,000 is allegedly still owed by Movant and Respondent claims that sum is non-dischargeable under 11 U.S.C. §523(a)(4) ["fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny"] and § 523(a)(2) ["false pretenses, a false representation, or actual fraud . . . ."].

The Movant contends, in the motion, that the complaint does not allege Movant misappropriated the funds for her personal use but only alleges Respondent did not receive what he was owed. The motion also states Movant did not admit wrongdoing. Further the motion states the complaint does not allege Movant intended to deceive the Respondent since she actually paid



approximately \$11,000 back to Respondent. The motion attaches and references the trust document. The Movant also argues the complaint's allegations are deficient because they are (a) conclusory on the fraud claims; (b) Movant took possession of trust property under the trust document.

First, the motion was filed in contravention of a court order. When the court ordered the default to be set aside on July 28, 2017 Movant was to file and serve an answer to the complaint within fourteen days of the date of the order. A motion to dismiss is not an answer to the complaint. Movant has other procedural mechanisms to challenge the sufficiency of the pleadings or the proof.

Second, the reference to the trust document and attachment of the document is outside the pleadings and under FRCP 12(d) if allowed by the court, the motion is to be treated as a summary judgment motion under FRCP 56. All parties are to be given reasonable opportunity to present all material that is pertinent to the motion. FRCP 12(d), *emphasis added*. The court excludes consideration of the trust document as applied to this motion. Summary judgment motions require far more factual development including the preparation of statements of material facts which has not been done in this case. The complaint did not attach the trust document and thus the analysis and application of the document's provisions to the allegations is beyond the scope of this motion.

Third, neither party has addressed a critical issue: the state of mind necessary for defalcation or embezzlement under § 523(a)(4). In *Bullock v. BankChampaign, N.A.*, 569 U.S. 267 (2013) the Supreme Court addressed the issue. At least recklessness is necessary. See, *Stoughton Lumber Co., Inc. v. Sverum*, 787 F. 3d 1174, 1177 (7th Cir. 2015). As the Ninth Circuit has opined, its previous authority on state of mind necessary for defalcation may have been abrogated by *Bullock*. *Perez v. Tomco Auto Products, Inc.*, 594 F. Appx. 930 (9th Cir. 2015).

Fourth, should the issue of the terms of the trust be raised again in the appropriate forum, the court notes the following:

- 1)The trustee of the trust at issue in this proceeding is authorized to defer distributions under section 5.3 of the trust;
- 2)The settlor waived conflicts of interest in section 7.1 of the trust;
- 3)The trustee has authority to seek expert assistance should issues about administration of the trust arise, section 7.6(f);
- 4)The trustee is authorized to extend time for payment of obligations owed the trust under section 7.6(m);



5. [16-11855](#)-B-7 HARJOT SINGH AND INDERJIT MOTION FOR SUMMARY JUDGMENT  
[16-1096](#) SANDHU BA-2 8-14-17 [[46](#)]  
RATTAN V. SINGH ET AL  
EDWARD WRIGHT/Atty. for mv.  
RESPONSIVE PLEADING

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

**DISPOSITION:** Denied without prejudice to filing another motion.

**ORDER:** The court will issue an order.

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). The more-than 600 pages of plaintiff’s exhibits filed in support of the motion are stricken as non-compliant with the LBR. See Local Rules of Practice for the U.S. Bankruptcy Court, Eastern District of California, Appendix II, EDC.002-901, E.D. Cal. Bankruptcy Court’s Guidelines for the Preparation of Documents (effective August 12, 2015), Section II.D, Section III.A., and Section IV.A-C. Accordingly, the motion was filed without admissible supporting evidence as required by LBR 9014-1(d)(7).

If the plaintiff re-files the motion and the stricken exhibits, they shall be filed in accordance with the LBR. In addition, a binder/binders shall be lodged with the court formatted consistent with the LBR and with each reference listed in the Separate Statement of Undisputed Facts highlighted and tabbed.

6. [14-13880](#)-B-7 JUAN GONZALES  
[17-1045](#)  
SALVEN V. GONZALEZ ET AL  
DAVID JENKINS/Atty. for pl.

RESCHEDULED STATUS CONFERENCE  
RE: COMPLAINT  
5-5-17 [[1](#)]

**NO RULING.** This matter will proceed as scheduled. The court will inquire as to the parties' progress to settle the adversary complaint.