

**UNITED STATES BANKRUPTCY COURT**  
**Eastern District of California**  
**Honorable René Lastreto**  
**Hearing Date: Thursday, October 6, 2016**  
**Place: U.S. Courthouse, 510 19<sup>th</sup> Street**  
**Bakersfield, 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.

9:00 A.M.

1. [15-13200](#)-B-13 ARMANDO/CATALINA CERNA MOTION TO DISMISS CASE  
MHM-1 9-2-16 [[37](#)]  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

The trustee's motion has been withdrawn. No appearance is necessary.

2. [15-11302](#)-B-13 DENISE WILEY MOTION TO APPROVE LOAN  
JCW-1 MODIFICATION  
U.S. BANK TRUST, N.A./MV 8-17-16 [[68](#)]  
ROBERT WILLIAMS/Atty. for dbt.  
JENNIFER WONG/Atty. for mv.

The motion will be granted without oral argument. The moving party shall submit a proposed order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice and there is no opposition. The court does not approve or disapprove the terms of a mortgage modification outside of a chapter 13 plan. See *In re Wofford*, 449 B.R. 362 (Bankr. W.D. Wis. 2011). However, the court will authorize the debtor to enter into a modification agreement on terms to be negotiated between the debtor and the mortgagee so long as modification of the mortgage does not interfere with the debtor's duties and trustee's administration of the chapter 13 plan.

3. [16-11106](#)-B-13 NICOLE BENTLEY  
SJS-3  
NICOLE BENTLEY/MV  
SUSAN SALEHI/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO MODIFY PLAN  
8-18-16 [[50](#)]

Unless the trustee's objection to confirmation is withdrawn before hearing, this matter will proceed as scheduled.

This motion to confirm or modify a chapter 13 plan was fully noticed in compliance with the Local Rules of Practice. The trustee has filed an opposition to the motion. If the debtor is not current at the time of hearing, the court intends to deny confirmation on the grounds stated in the opposition.

If the opposition is withdrawn or the debtor is current at the time of hearing, the other respondents' defaults will be entered and the motion will be granted. If the motion is granted, the movant shall submit a proposed order that resolves the trustee's opposition to the attorney fees and that includes the docket control number of the motion and references the plan by the date it was filed.

4. [16-12407](#)-B-13 KEVIN/NICCOLE LOUISE  
MHM-1 STONE  
MICHAEL MEYER/MV  
PHILLIP GILLET/Atty. for dbt.

MOTION TO DISMISS CASE  
8-22-16 [[17](#)]

The trustee's motion has been withdrawn. No appearance is necessary.

5. [16-11209](#)-B-13 MOISES PALMA  
PLG-6  
MOISES PALMA/MV  
  
STEVEN ALPERT/Atty. for dbt.

MOTION TO AMEND ORDER ON  
MOTION/APPLICATION TO VALUE  
COLLATERAL  
9-15-16 [[77](#)]

This matter will proceed as scheduled.

It appears that due to a scrivener's error the valuations of the creditor's collateral, a truck and a trailer, were switched. 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 LBR 9014-1(f)(2). The moving party shall submit a proposed order.

6. [16-11209](#)-B-13 MOISES PALMA  
PLG-7  
MOISES PALMA/MV  
STEVEN ALPERT/Atty. for dbt.

MOTION TO EXTEND AUTOMATIC STAY  
9-21-16 [[83](#)]

**This matter will proceed as scheduled.**

It appears that the resolution of the two motions, above at calendar no. 5, PLG-6, and below, at calendar no. 7, PLG-8, will affect the resolution of this motion.

Unless opposition is presented at the hearing on any of these three motions, 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 a civil minute order extending the automatic stay as to Bank of the Ozarks to December 31, 2016 or until confirmation of the debtor's Chapter 13 Plan, whichever first occurs.

7. [16-11209](#)-B-13 MOISES PALMA  
PLG-8  
MOISES PALMA/MV  
  
STEVEN ALPERT/Atty. for dbt.

MOTION TO AMEND ORDER ON MOTION  
TO VALUE COLLATERAL OF BANK OF  
THE OZARKS  
9-21-16 [[87](#)]

**This matter will proceed as scheduled.**

It appears that due to a scrivener's error the valuations of the creditor's collateral, a truck and a trailer, were switched. 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 LBR 9014-1(f)(2). The moving party shall submit a proposed order.

8. [16-12410](#)-B-13 EDWARD GUTIERREZ  
  
\$156.00 INSTALLMENT PAID  
9/15/16

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
9-6-16 [[28](#)]

**This motion will be dropped as moot. The court intends to dismiss the case below at calendar no. 9 (MHM-1). No appearance is necessary.**

9. [16-12410](#)-B-13 EDWARD GUTIERREZ  
MHM-1  
MICHAEL MEYER/MV

MOTION TO DISMISS CASE  
8-23-16 [[24](#)]

The motion will be granted without oral argument for cause shown. The court will issue a civil minute order. No appearance is necessary.

This matter was fully noticed in compliance with the Local Rules of Practice 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 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 record shows there has been unreasonable delay by the debtor that is prejudicial to creditors, including, the failure to provide the trustee with required documentation including, Class 1 Mortgage Checklist with payment coupon or last statement; 2015 State and Federal Tax Return; proof of all income, i.e., pay advices; profit and loss statements; rental income; unemployment compensation; social security income; disability; and retirement for the six months prior to filing; failure to file complete and accurate schedules and statements; failure to set a plan for hearing with notice to creditors; failure to file a complete and accurate Plan; failure to provide Credit Counseling Certificates; failure to file Official Form 122C-2 Chapter 13 Calculation of Your Disposable Income. Accordingly, the case will be dismissed.

10. [16-12411](#)-B-13 CANDACE WILKERSON  
RSW-1  
CANDACE WILKERSON/MV

MOTION TO VALUE COLLATERAL OF  
ACCREDITED SURETY AND CASUALTY  
COMPANY, INC.  
8-31-16 [[32](#)]

ROBERT WILLIAMS/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The debtor shall submit a proposed order consistent with this ruling as set forth below. No appearance is necessary.

This motion to value the collateral for a consensual lien against real property was fully noticed in compliance with the Local Rules of Practice and there was 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 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.

Based on the evidence offered in support of the motion, the respondent's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. The debtor may proceed under state law to obtain a reconveyance of respondent's trust deed upon completion of the chapter 13 plan and entry of the discharge. If the chapter 13 plan has not been confirmed, then the order shall specifically state that it is not effective until confirmation of the plan.

*This ruling is only binding on the named respondent in the moving papers and any successor who takes an interest in the property after service of the motion.*

11. [16-12411](#)-B-13 CANDACE WILKERSON  
RSW-2  
CANDACE WILKERSON/MV  
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO CONFIRM PLAN  
8-26-16 [[24](#)]

This matter 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).

If the motion is granted, the moving party shall submit a proposed confirmation order that includes the docket control number of the motion and references the plan by the date it was filed.

12. [16-12411](#)-B-13 CANDACE WILKERSON  
RSW-3  
CANDACE WILKERSON/MV

MOTION TO AVOID LIEN OF  
MOUNTAIN LION ACQUISITIONS,  
INC.  
8-31-16 [[36](#)]

ROBERT WILLIAMS/Atty. for dbt.

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 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. It appears from the court's review of the evidence and the record that the lien the debtor seeks to avoid impairs an exemption to which the debtor is otherwise entitled.

13. [16-12411](#)-B-13 CANDACE WILKERSON  
RSW-4  
CANDACE WILKERSON/MV

MOTION TO VALUE COLLATERAL OF  
U.S. DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT  
8-31-16 [[40](#)]

ROBERT WILLIAMS/Atty. for dbt.

The motion will be granted without oral argument based upon well-pled facts. The debtor shall submit a proposed order consistent with this ruling as set forth below. No appearance is necessary.

This motion to value the collateral for a consensual lien against real property was fully noticed in compliance with the Local Rules of Practice and there was 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 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.

Based on the evidence offered in support of the motion, the respondent's junior priority mortgage claim is found to be wholly unsecured and may be treated as a general unsecured claim in the chapter 13 plan. The debtor may proceed under state law to obtain a reconveyance of respondent's trust deed upon completion of the chapter 13 plan and entry of the discharge. If the chapter 13 plan has not been confirmed, then the order shall specifically state that it is not effective until confirmation of the plan.

*This ruling is only binding on the named respondent in the moving papers and any successor who takes an interest in the property after service of the motion.*

14. [16-12424](#)-B-13 RYAN/ANNMARIE DICKSON  
MHM-1  
MICHAEL MEYER/MV  
NEIL SCHWARTZ/Atty. for dbt.  
WITHDRAWN

OBJECTION TO DEBTOR'S CLAIM OF  
EXEMPTIONS  
8-31-16 [[20](#)]

The objection has been withdrawn. No appearance is necessary.



15. [15-11029](#)-B-13 TERRY WHEELER  
MHM-5  
MICHAEL MEYER/MV  
PATRICK KAVANAGH/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO DISMISS CASE  
9-2-16 [[177](#)]

Unless it is withdrawn by the trustee prior to the hearing, this matter will proceed as scheduled. The trustee's motion to dismiss is based on the default in payments under the debtor's plan. The debtor has filed a response, with evidence of plan payments dated September 2 and September 21 in the total amount of \$1,500. The debtor in the declaration acknowledges the default but alleges the payments are now current.

If the trustee concurs with the debtor's conclusion then the court intends to deny the motion without prejudice. Otherwise, the court will consider the trustee's position and determine whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue a civil minute order.

16. [16-11129](#)-B-13 DAVID/LINDA MILAZZO  
LKW-3  
DAVID MILAZZO/MV  
LEONARD WELSH/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO SELL  
8-25-16 [[64](#)]

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

This matter was fully noticed in compliance with the Local Rules of Practice. The holder of the secured interest in the subject property has filed a notice of non-opposition and there is no other response. Accordingly, the other 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.

This sale is pursuant to the debtors' confirmed chapter 13 plan. The debtors shall submit a proposed order to which the preliminary escrow closing statement is attached. After the sale of the property the debtors shall file and serve on the chapter 13 trustee the final escrow closing statement.

17. [15-10233](#)-B-13 PEDRO/ZENAIDA NAVEIRAS  
LKW-3  
PEDRO NAVEIRAS/MV

MOTION TO COMPROMISE  
CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH THE INTERNAL  
REVENUE SERVICE  
8-25-16 [[129](#)]

LEONARD WELSH/Atty. for dbt.  
NEIL SCHWARTZ/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 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 motion will be construed as one under §1303 and §363. *In re Cohen*, 305 B.R. 886, 897 (9th. BAP, 2004).

18. [15-10233](#)-B-13 PEDRO/ZENAIDA NAVEIRAS  
LKW-4  
ZENAIDA NAVEIRAS/MV

MOTION TO SUBSTITUTE DEBTOR AS  
MR. NAVEIRAS' SUCCESSOR, TO  
PERMIT THE ADMINISTRATION OF  
DEBTOR'S CASE TO CONTINUE, FOR  
EXEMPTION FROM FINANCIAL  
MANAGEMENT COURSE, TO WAIVE THE  
CERTIFICATION REQUIREMENTS FOR  
THE ENTRY OF DISCHARGE FOR MR.  
NAVEIRAS  
8-26-16 [[137](#)]

LEONARD WELSH/Atty. for dbt.  
NEIL SCHWARTZ/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 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 record shows that the co-debtor is deceased.

19. [16-11636](#)-B-13 FLORENTINO/STELLA MACIAS      MOTION TO DISMISS CASE  
MHM-2      9-6-16 [[29](#)]  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

**The trustee's motion has been withdrawn. No appearance is necessary.**

20. [16-11954](#)-B-13 LAVONE/CHRISTINE HUNTER      MOTION TO DISMISS CASE  
MHM-2      8-23-16 [[22](#)]  
MICHAEL MEYER/MV  
PATRICK KAVANAGH/Atty. for dbt.  
RESPONSIVE PLEADING

**The trustee's motion has been withdrawn. No appearance is necessary.**

21. [16-12158](#)-B-13 RICO PIMENTEL      MOTION TO DISMISS CASE  
MHM-1      8-23-16 [[40](#)]  
MICHAEL MEYER/MV  
DISMISSED

**This case has already been dismissed. No appearance is necessary.**

22. [15-11859](#)-B-13 ARTURO/BERENICE FLORES      MOTION TO MODIFY PLAN  
RSW-2      8-23-16 [[71](#)]  
ARTURO FLORES/MV  
ROBERT WILLIAMS/Atty. for dbt.  
RESPONSIVE PLEADING

**This motion will be set for a continued hearing on November 3, 2016 at 9:00 a.m. The court will issue a civil minute order. No appearance is necessary.**

**The creditor has filed a detailed objection to the debtor's fully noticed motion to confirm a modified chapter 13 plan. Unless this case is voluntarily converted to chapter 7 or dismissed or the creditor's opposition to confirmation has been withdrawn, the debtors shall file and serve a written response not later than October 20, 2016. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtors' position. If the debtors do not timely file their written response as directed then the motion to confirm the modified plan will be denied on the grounds stated in the opposition without a further hearing.**

23. [16-12167](#)-B-13 JAMES/KIMBERLY PADGETT      MOTION TO DISMISS CASE  
MHM-1      8-23-16 [[17](#)]  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

**The trustee's motion has been withdrawn. No appearance is necessary.**

24. [16-10168](#)-B-13 MOISES TURCIOS  
PPR-1  
BRUCE WARREN/MV

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR ADEQUATE PROTECTION  
9-1-16 [[72](#)]

PATRICK KAVANAGH/Atty. for dbt.  
CASSANDRA RICHEY/Atty. for mv.  
RESPONSIVE PLEADING

This matter will proceed as scheduled. Both the debtor and the chapter 13 trustee have filed replies with evidence to this motion for relief from the automatic stay. Movant has filed a reply declaration of Mr. Warren which acknowledges receipt of payments through August 2016; states there is a post-petition property tax delinquency and raises, for the first time, lack of insurance on most of the collateral real property. Movant has waived the time requirements for resolution of this motion under 11 U.S.C. § 362(e).

At the hearing, the court will ask the parties to address the following:

1. Movant's lack of compliance with LBR 4001-1(b).
2. The status of post petition payments to movant as of the date of the hearing.
3. The status of insurance coverage on all of movant's collateral.
4. Post-petition property tax delinquency.

Since lack of equity is admitted by the parties, there are only two issues: "Cause" for stay relief under 11 U.S.C. § 362(d)(1) [lack of insurance, unpaid property taxes and perhaps post-petition payment delinquency] and whether the collateral is necessary for an effective reorganization under 11 U.S.C. § 362(d)(2).

The court may issue a scheduling order or an adequate protection order depending on the parties' presentations. No attorney's fees will be awarded movant as there is no dispute that there is no equity in the property at issue on this motion. See 11 U.S.C. § 506(b).

25. [16-12168](#)-B-13 JENNIFER RIVAS  
PK-1  
JENNIFER RIVAS/MV  
PATRICK KAVANAGH/Atty. for dbt.

MOTION TO VALUE COLLATERAL OF  
EXETER FINANCE CORP.  
9-7-16 [[15](#)]

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

The record does not establish that the motion was served on the named respondent in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(3) (corporation, partnership or unincorporated association). *In re Villar*, 317 B.R. 88 (9th Cir. BAP 2004). The motion was not served on an officer of the corporation. The proof of service shows only that the moving papers were served on "Corporation Service Company Which Will Do Business in California As CSC-Lawyers Incorporating Service, 2710 Gateway Oaks Dr. Ste 150N, Sacramento CA 95833." The proof of service does not show that the respondent was identified on the envelope addressed to its agent.

Information regarding service on a corporation may be obtained from the California Secretary of State's Internet Website, see <http://kepler.sos.ca.gov/>. Litigants are encouraged to attach a copy of their information source (web page, etc.) to the proof of service to assist the court in evaluating compliance with Rule 7004.

26. [16-12469](#)-B-13 ISRAEL/DOREEN FLORES  
MHM-1  
MICHAEL MEYER/MV  
NEIL SCHWARTZ/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO DISMISS CASE  
8-23-16 [[20](#)]

Based on the debtors' response, and unless the trustee's motion is withdrawn prior to the hearing, this matter will proceed as scheduled. If the trustee acknowledges receipt of the necessary documentation, then the court intends to deny the motion to dismiss the case. Otherwise, the court will consider the trustee's position and determine whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue a civil minute order.

27. [16-11473](#)-B-13 SHELBY/CAROL KING  
LKW-2

MOTION FOR COMPENSATION FOR  
LEONARD K. WELSH, DEBTORS  
ATTORNEY(S)  
9-13-16 [[66](#)]

LEONARD WELSH/Atty. for dbt.

This matter 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 a civil minute order.

28. [15-10076](#)-B-13 ESTEBAN ZAVALA  
PK-2  
ESTEBAN ZAVALA/MV  
PATRICK KAVANAGH/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO MODIFY PLAN  
8-10-16 [[138](#)]

**This motion will be dropped as moot. The case has already been dismissed.  
No appearance is necessary.**

29. [16-12581](#)-B-13 JUAN/MARIA MARTINEZ  
AP-1  
U.S. BANK NATIONAL  
ASSOCIATION/MV  
ROBERT WILLIAMS/Atty. for dbt.  
MEGAN LEES/Atty. for mv.

OBJECTION TO CONFIRMATION OF  
PLAN BY U.S. BANK NATIONAL  
ASSOCIATION  
9-13-16 [[14](#)]

**This matter will proceed as scheduled.**

**The court notes that the form of the proof of service does not comply with  
LBR 9014-1(d)(2) and/or 9004-1, and an amended proof of service needs to be  
filed by October 13, 2016.**

30. [10-62282](#)-B-13 DIANE LUNN  
MHM-2  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE  
9-2-16 [[82](#)]

**The trustee's motion to dismiss was fully noticed and the debtor's response  
acknowledges she is delinquent still, although a *de minimus* amount and  
although she has a plan to become current. The court also notes that the  
debtor has only two payments remaining in this 60 month plan. For these  
reasons, the hearing will proceed as scheduled to determine whether the  
trustee still wants the court to dismiss the case.**

31. [15-13887](#)-B-13 BERNARD NAWORSKI  
MHM-3  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE  
9-2-16 [[52](#)]

**Unless the trustee has withdrawn his motion prior to the hearing, the  
motion will be granted without oral argument for cause shown. The court  
will issue a civil minute order. No appearance is necessary.**

**The chapter 13 trustee's motion to dismiss was fully noticed in compliance  
with the Local Rules of Practice. The debtor's late response is not  
supported by evidence that the default has been cured and the trustee's  
motion has not been withdrawn. The record shows that the debtor is  
delinquent in plan payments in an amount of \$10,200. The court notes that  
a modified plan was just confirmed on August 29, 2016. The case will be  
dismissed.**

32. [16-11189](#)-B-13 RUBEN BEGA  
MHM-2  
MICHAEL MEYER/MV  
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO DISMISS CASE  
8-23-16 [[31](#)]

**The trustee's motion has been withdrawn. No appearance is necessary.**

9:30 A.M.

1. [15-13167](#)-B-12 DOUG KOPHAMER FARMS  
JM-3  
DEERE & COMPANY/MV  
LEONARD WELSH/Atty. for dbt.  
JAMES MACLEOD/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
9-6-16 [[274](#)]

This matter will proceed as scheduled. The debtor has filed an opposition to the movant's fully noticed motion. Movant filed a reply on September 29, 2016 which the Court has reviewed. The court intends to issue the following ruling denying the motion without prejudice. The court will issue a civil minute order after the hearing unless the court determines that further hearing and evidence is necessary under LBR 9014-1(f)(2).

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). Section 362(d)(1) provides that a creditor may move for relief from stay "for cause, including the lack of adequate protection . . ." The movant concedes the significant equity cushion in the equipment of approximately \$100,000, in contrast to a secured debt of \$70,509.87. Likewise, the movant concedes that the debtor is not in default under the plan with regard to the movant. Other than lack of adequate protection, the only "cause" identified in the moving papers is the fact that the debtor is in default in plan payments to third party creditors.

Should the court grant the trustee's motion to dismiss (item #2 below), the stay would be terminated by operation of law. If not, the court has no evidence before it establishing "cause" for relief as to this movant.

The court will consider any legal authority that supports the movant's explanation why the debtor's equity cushion is insufficient to provide adequate protection, and/or, how the debtor's default in payments to third party creditors constitutes "cause" here should the court be convinced further hearing is necessary.

2. [15-13167](#)-B-12 DOUG KOPHAMER FARMS  
MHM-1  
MICHAEL MEYER/MV  
LEONARD WELSH/Atty. for dbt.  
RESPONSIVE PLEADING

MOTION TO DISMISS CASE  
8-19-16 [[269](#)]

This matter will proceed as scheduled.



3. [15-14685](#)-B-11 B&L EQUIPMENT RENTALS,  
LKW-36 INC.

MOTION FOR COMPENSATION FOR  
LEONARD K. WELSH, DEBTORS  
ATTORNEY(S)  
9-13-16 [[502](#)]

LEONARD WELSH/Atty. for dbt.

**This matter 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 a civil minute order.

10:00 A.M.

1. [16-12804](#)-B-7 MARISA PERALTA  
JHW-1  
TD AUTO FINANCE LLC/MV  
VINCENT GORSKI/Atty. for dbt.  
JENNIFER WANG/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-15-16 [[13](#)]

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 of Practice 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 proposed order shall specifically describe the property or action to which the order relates. If the notice and motion requested a waiver of Federal Rule 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).

2. [15-12211](#)-B-7 BONIFACIO VEGA  
PWG-2  
BONIFACIO VEGA/MV  
PHILLIP GILLET/Atty. for dbt.

MOTION TO AVOID LIEN OF  
CALIFORNIA SERVICE BUREAU, INC.  
9-7-16 [[19](#)]

**This matter will be continued to November 3, 2016, at 10:00 a.m. The court will issue a civil minute order. No appearance is necessary.**

**The debtor shall file evidence by October 20, 2016, 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).**

3. [12-18024](#)-B-7 MICHAEL BENGE  
JTW-2  
JANZEN, TAMBERI & WONG/MV  
  
FRANK SAMPLES/Atty. for dbt.

MOTION FOR COMPENSATION FOR  
JANZEN, TAMBERI AND WONG,  
ACCOUNTANT(S)  
9-6-16 [[50](#)]

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

**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 evidence shows that the applicable compensation period is May 16, 2016, through August 19, 2016.**

4. [16-13225](#)-B-7 BAKERSFIELD MOVING &  
KDG-2 STORAGE DBA RELIABLE  
RANDELL PARKER/MV

MOTION TO EMPLOY GOULD AUCTION  
& APPRAISAL COMPANY AS  
AUCTIONEER, AUTHORIZING SALE OF  
PROPERTY AT PUBLIC AUCTION AND  
AUTHORIZING PAYMENT OF  
AUCTIONEER FEES AND EXPENSES  
9-14-16 [[11](#)]

NEIL SCHWARTZ/Atty. for dbt.  
LISA HOLDER/Atty. for mv.

**Unless it is withdrawn prior to the hearing, this matter will proceed as scheduled. The trustee shall inform the court of the status of the proposed agreement with the holder of the lien on some of the property the trustee wishes to sell.**

5.     [16-13225](#)-B-7     BAKERSFIELD MOVING &     MOTION TO SELL  
          KDG-3             STORAGE DBA RELIABLE     9-19-16 [[19](#)]  
          RANDELL PARKER/MV  
          NEIL SCHWARTZ/Atty. for dbt.  
          LISA HOLDER/Atty. for mv.  
          OST 9/20/16

**This matter 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 a civil minute order.**

6.     [16-11730](#)-B-7     FLEET CARD FUELS, A     MOTION FOR COMPENSATION FOR  
          JTW-2             CALIFORNIA CORPORATION     JANZEN, TAMBERI & WONG,  
          JANZEN, TAMBERI & WONG/MV     ACCOUNTANT(S)  
  9-6-16 [[14](#)]  
  
          RILEY WALTER/Atty. for dbt.

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

**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 evidence shows that the applicable compensation period is July 27, 2016, through August 19, 2016.**

7. [16-11031](#)-B-7 GILBERT/OLIVIA GARCIA  
RP-1  
RANDELL PARKER/MV  
LEONARD WELSH/Atty. for dbt.  
LISA HOLDER/Atty. for mv.

MOTION TO SELL  
9-5-16 [[63](#)]

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 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 sale of the non exempt equity in the debtors' 2007 Honda Ridgeline to the debtors appears to be a reasonable exercise of the trustee's business judgment.

8. [16-12335](#)-B-7 FRIEDA FINNEY  
RSW-1  
FRIEDA FINNEY/MV  
ROBERT WILLIAMS/Atty. for dbt.

MOTION TO REDEEM  
9-19-16 [[13](#)]

Unless this motion is withdrawn prior to the continued hearing, it will be continued for submission of further evidence on the Fresno calendar on October 19, 2016 at 9:30 am. Telephonic appearances will be permitted. No appearance is necessary at this hearing. Supplemental evidence as indicated below must be filed and served by October 12, 2016.

The debtor filed this motion in an attempt to redeem, for a payment of \$8,100, her 2010 Toyota Camry, for which the record shows she owes C.A.H.P. Credit Union \$15,170. Neither the debtor's motion nor the record shows that she has complied with all the requirements necessary to redeem personal property.

Although her Statement of Intent, filed within 30 days after the petition or meeting of creditors, listed "redemption" as her intent regarding this property, there is nothing that shows that the Statement of Intent was served on C.A.H.P. Credit Union, on or before filing of the Statement, in compliance with FRBP 1007(b)(2).

The record also shows that the motion was not filed within 30 days after date first set for meeting of creditors, which was July 26, 2016, pursuant to § 521(a)(2)(B).

The court notes that the debtor's discharge has been entered, and more than 45 days have passed since the date first set for the §341 hearing. Accordingly, the automatic stay has expired by operation of law. There is, however, nothing in the Code that prohibits the debtor from entering into a post-petition agreement regarding this property.

9. [16-12036](#)-B-7 VERONICA SANDOVAL  
ETL-1  
U.S. BANK NATIONAL  
ASSOCIATION/MV  
NEIL SCHWARTZ/Atty. for dbt.  
ERICA LOFTIS/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-26-16 [[12](#)]

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 of Practice 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 proposed order shall specifically describe 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 Rule 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. [16-13136](#)-B-7 JOSE OLIVAS BELTRAN

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
9-12-16 [[13](#)]

FEE PAID IN FULL ON 9/19/16

The OSC will be vacated. The record shows that the required fee has been paid in full. No appearance is necessary.

11. [16-11945](#)-B-7 DEANGELO BRAGG

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
9-6-16 [[35](#)]

The OSC will be vacated. The record shows that the required fee has been paid in full. No appearance is necessary.

12. [16-12375](#)-B-7 ULISES/ALEJANDRA CAMACHO  
VVF-1  
AMERICAN HONDA FINANCE  
CORPORATION/MV  
D. GARDNER/Atty. for dbt.  
VINCENT FROUNJIAN/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR ADEQUATE PROTECTION  
9-6-16 [[11](#)]

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 of Practice and there was no opposition. The debtors' 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. If the notice and motion requested a waiver of Federal Rule 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).



13. [12-17580](#)-B-7 XTECH INDUSTRIES, INC.  
VG-3  
VINCENT GORSKI/MV  
BENJAMIN SHEIN/Atty. for dbt.  
LISA HOLDER/Atty. for mv.

MOTION FOR ADMINISTRATIVE  
EXPENSES  
8-21-16 [[126](#)]

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 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.

14. [16-12289](#)-B-7 IMELDA JUAREZ  
EAT-1  
NATIONSTAR MORTGAGE LLC/MV  
D. GARDNER/Atty. for dbt.  
DARLENE VIGIL/Atty. for mv.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
9-2-16 [[15](#)]

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 of Practice 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 proposed order shall specifically describe 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 Rule 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).

11:00 A.M.

1. [16-12726](#)-B-7 JUAN/GLORIA JARAMILLO PRO SE REAFFIRMATION AGREEMENT  
WITH NISSAN MOTOR ACCEPTANCE  
CORPORATION  
9-13-16 [[14](#)]

**This matter will proceed as scheduled.**

2. [16-12635](#)-B-7 TERRA GAINES REAFFIRMATION AGREEMENT WITH  
SANTANDER CONSUMER USA INC.  
8-25-16 [[9](#)]

STEVEN STANLEY/Atty. for dbt.

**Approval of the Reaffirmation Agreement will be denied. No appearance is necessary.**

**This agreement relates to an executory contract or lease of personal property. The case was filed July 20, 2016, 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.**

3. [16-12349](#)-B-7 STEVE/SANDRA LACKEY REAFFIRMATION AGREEMENT WITH  
ACAR LEASING LTD  
8-23-16 [[13](#)]

STEVEN STANLEY/Atty. for dbt.

**Approval of the Reaffirmation Agreement will be denied. No appearance is necessary.**

**This agreement relates to an executory contract or lease of personal property. The case was filed June 29, 2016, 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.**

STEVEN ALPERT/Atty. for dbt.

This agreement is a reaffirmation of a debt based on a revolving credit card account and is not the reaffirmation of a secured debt for personal property. The agreement requires the debtor to make payments to the unsecured creditor for 3 years on a \$7,215.18 credit card debt at an interest rate of prime plus 6.99%, currently in the amount of \$201.

The court must disapprove the reaffirmation agreement if the agreement poses an undue hardship on the debtor or the debtor's dependants. This debtor has no dependants, therefore the court looks at the debtor's financial circumstances. In this case it is clear that a payment of \$201 per month, as proposed in the agreement, will impose an undue hardship. The debtor's schedules I and J show a negative net income of \$27.98 without including this payment. The debtor states, in the reaffirmation agreement, that she will be able to make the payments because she has reduced her food expenses, however she provides no new numbers to rebut the presumption of hardship.

The debtor was represented by counsel in the execution of this agreement and, although the debtor's attorney executed the agreement, the attorney could not affirm that, (a) the agreement was not an undue hardship and, (b) the debtor would be able to make the payments. §524(k)(5)(B).

Where the presumption of hardship arises, as it does here, and the debtor's counsel does not make the required attestations, the court will consider whether reaffirming the debt is in the best interest of the debtor and the debtor's dependants. "Because no evidence has been provided that the [creditor] holds a valid security interest, on these grounds . . . the court cannot find that the reaffirmation agreement is in the best interest of the debtor." *In re Kamps*, 217 B.R. 836 (Bankr. CD Cal. 1998). If the debtor's financial circumstances change in the future, nothing prevents her from making payments to this creditor. §524(f).

1:30 P.M.

1.	<a href="#"><u>16-10003</u></a> -B-7 MELLANIE RAPOZO	STATUS CONFERENCE RE: AMENDED
	<a href="#"><u>16-1050</u></a>	COMPLAINT
	SELLERS V. RAPOZO	8-17-16 [ <a href="#"><u>36</u></a> ]
	KLAUS KOLB/Atty. for pl.	

**This matter will proceed as scheduled. The parties should be prepared to discuss dates for the scheduling of the case.**

2.	<a href="#"><u>16-10003</u></a> -B-7 MELLANIE RAPOZO	MOTION TO DISMISS ADVERSARY
	<a href="#"><u>16-1050</u></a> DMG-3	PROCEEDING/NOTICE OF REMOVAL
	SELLERS V. RAPOZO	9-2-16 [ <a href="#"><u>40</u></a> ]
	D. GARDNER/Atty. for mv.	
	RESPONSIVE PLEADING	

**This matter will proceed as scheduled. Unless opposition to the tentative ruling is presented at the hearing, the court intends to enter civil minute orders as indicated. If opposition is presented at the hearing, the court will consider the opposition and whether further briefing and a hearing is necessary pursuant to Local Bankruptcy Rule 9014-1(f)(2).**

**The court's Tentative Ruling: The court will issue a Civil Minute Order as follows:**

**At a prior hearing Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (FAC) under FRCP 12(b)(6) made applicable to this Adversary Proceeding by FRBP 7012 was DENIED as to the First Claim for Relief under 11 U.S.C. §523(a)(2).**

**The Motion was GRANTED with leave to amend as to the Second Claim for Relief under 11 U.S.C. § 523(a)(4) and as to the Third Claim for Relief under 11 U.S.C. § 523(a)(6). Plaintiff was to file and serve a Second Amended Complaint on or before August 19, 2016, and Defendant was to file and serve a responsive pleading on or before September 2, 2016. The motion to strike was DENIED.**

**The Plaintiff filed and served a Second Amended Complaint (SAC) and the Defendant filed another motion under FRCP 12(b)(6).**

**Discussion-**

**This is the third time the court has decided an FRCP 12(b)(6) motion in this Adversary Proceeding. The first motion was granted with leave to amend. This motion addresses the SAC.**

**For the first time the Defendant, in the pending motion, makes the bare assertion that this complaint is barred by the statute of limitations without citation to any applicable law or recitation of the relevant dates. The Plaintiff responds, that the only damages sought are the damages awarded in the fee arbitration award and that this award was made within**

the applicable time and not barred by the statute of limitations. It is not the court's job to comb the record in search of the relevant dates nor to research the law to discover whether there is some statute of limitations somewhere that might relate to these claims.

The Defendant also argues that the Plaintiff is limited to asserting a breach of contract claim for \$20,000 against the Plaintiff based on the unconfirmed fee arbitration award. The court agrees that the only effect of the fee arbitration award is to liquidate the Plaintiff's damages against the Defendant. In order to prevail the Plaintiff will have to prove the each element of his claim in order to except those liquidated damages from the Defendant's discharge.

#### SAC Allegations

Plaintiff retained Defendant, a lawyer, in 2009 to assist him in deflecting creditor harassment stemming from a business transaction. Defendant sent out letters to several parties which eventually led to the cessation of harassment by a collection agency and restoration of Plaintiff's credit rating. The other parties were not responsive to Defendant's efforts at settlement and she filed a civil complaint on Plaintiff's behalf. Defendant did not vigorously prosecute the claim and was unsuccessful in obtaining a default judgment against the other parties. Two years after being retained by the Plaintiff, the Defendant withdrew as Plaintiff's counsel. Plaintiff paid \$33,500 in fees for Defendant's efforts. Using other counsel, Plaintiff obtained settlements with the other parties. Plaintiff then demanded a refund of certain fees which he believed Defendant did not earn. Informal overtures being unsuccessful, Plaintiff started a Mandatory Fee Arbitration (MFA) process with the Sacramento County Bar Association. Defendant did not participate in the MFA other than filing a written response and providing documents to the three-person MFA panel. One issue raised by Defendant was the fee contract's requirement for mediation as a pre-requisite to further proceedings. The MFA panel agreed and continued the arbitration so that mediation could proceed, however Defendant declined to participate despite Plaintiff's counsel's "repeated" requests.

On March 10, 2014 the MFA panel issued an award giving Plaintiff a partial victory by finding that \$20,000 of the \$33,500 should be refunded. The MFA panel found it "more probable than not" that Defendant did not spend the time [that Defendant] claimed on her billings." Also, that "the fee collected for the work that had been accomplished 'shocked the conscience' and thus was unconscionable." Neither Defendant or Plaintiff objected to the award which was served on all parties. Plaintiff filed a petition in the Sacramento County Superior Court to confirm the award but this never occurred. Plaintiff alleges that Defendant avoided service of the notice of the petition.

In the SAC Plaintiff claims the \$20,000 MFA award against Defendant is nondischargeable under three theories. First, that the debt arises from Defendant's "actual fraud" under 11 U.S.C. § 523(a)(2). Second, that the

debt arises from "fraud or defalcation" by a fiduciary under 11 U.S.C. §523(a)(4). Third, that the "injury" suffered by Plaintiff in "overpaying" \$20,000 to Defendant was a "willful and malicious" injury under 11 U.S.C. §523(a)(6).

#### Standards Applicable.

A claim may be dismissed under Civil Rule 12(b)(6) either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F. 3d 780, 783 (9th Cir. 1996). In addressing a Civil Rule 12(b)(6) challenge, the court accepts all factual allegations in the complaint as true (*Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740(1976)), and construes the pleading in the light most favorable to the nonmoving party. *Tanner v. Heise*, 879 F. 2d 572, 576 (9th Cir. 1989). "Dismissal without leave to amend is improper unless it is clear. . . that the complaint could not be saved by any amendment." *Schneider v. Cal. Dep't of Corr.*, 151 F. 3d 1194, 1196 9th Cir., 1998) (quoting *Chang v. Chen*, 80 F. 3d 1293, 1296 (9th Cir., 1996)). To survive a motion to dismiss under Civil Rule 12(b)(6), a complaint need only set forth a short and plain statement of the claim showing the pleader is entitled to relief; it "does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). Nevertheless a plaintiff must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* For purposes of a 12(b)(6) motion attached documents are treated as part of the complaint. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308 (2007).

#### Section 523(a)(2) - First Claim for Relief.

Section 523(a)(2)(A) excepts from discharge debts incurred through "false pretenses, a false representation or actual fraud." For this exception to apply, a creditor must allege and prove by a preponderance of the evidence each of the following elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of the statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damages to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Oney v. Weinberg (In re Weinberg)*, 410 B.R. 19,35 (9th Cir. BAP 2009), quoting *Turtle Rock Meadows Homeowner's Association v. Slyman (In re Slyman)*, 234 F. 3d 1081, 1085 (9th Cir. 2000). All five elements must be asserted in the creditor's complaint for an exception to discharge. *Weinberg*, 410 B.R. at 35. FRCP 9(b)'s pleading particularity requirement means: "the plaintiff must set forth what is misleading about a statement and why it is false. In other words, the plaintiff must set forth an explanation as to why the statement or omission complained of was false or misleading." *Yourish v. California Amplifier*, 191 F. 3d 983, 993 (9th Cir. 1999).

Defendant argues the complaint is not specific enough and "over broad" when it alleges that the inflated bills were fraudulent representations. The court disagrees. While most of the allegations are on information and belief, paragraph 21 of the complaint (the claim incorporates the background allegations including the MFA award) sets forth the representations of the Defendant: billings exceeding the actual time spent on services by \$20,000. Bills that inflated the time spent and charging for such time are "false statements" if proven. The finding of the MFA panel that it was "more probable than not" the bills were inflated certainly at least is an allegation that meets an evidentiary burden of proof. Defendant does not challenge any other aspect of this claim. The first claim for relief in the FAC satisfies FRCP 9(b)'s requirements. This claim has enough particularity to apprise Defendant of what she must defend. Intent is alleged by inference through the volitional act of sending the bills that are false.

#### Section 523(a)(4) - Second Claim for Relief.

Section 523 (a)(4) excepts from discharge debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. In the 9th Circuit, the elements that need to be plead and proven for a defalcation by fiduciary claim are (1) an express trust; (2) that debt was caused by fraud or defalcation; and (3) that debtor was a fiduciary to the creditor at the time the debt was created. In re Jacks, 266 B.R. 728 (9th Cir BAP 2001).

While it is beyond cavil that an attorney is a fiduciary to her client, as alleged here, the question of whether the fiduciary capacity of the debtor will support an objection to discharge under § 523(a)(4) is one of federal law. An express trust is necessary. The second amended complaint alleges that here the debtor in the retention agreement between the plaintiff and the debtor agreed to keep payments for fees including the initial deposit in the client trust account. That is an "express trust" under the elements. Under California law, funds held for a client's benefit must be placed in one or more identifiable client trust accounts. CRPC 4-100(A). An attorney is bound to maintain the funds in the trust account when the agreement between the client and the attorney so provides. *S.E.C. v. Interlink Data Network of Los Angeles, Inc.*, 77 F. 3d 1201, 1205-07 (9th Cir 1996); *Prakashpalan v. Engstrom, Lipscomb and Lack*, 223 Cal.App.4th 1105, 1123-24 (Cal.App. 2nd Dist., 2014) ("There can be no reasonable dispute that an attorney's client trust account is an express trust").

Here it is alleged that the agreement between plaintiff and defendant provided for maintenance of a trust account and there was authorization for withdrawal and replenishment under specified circumstances. Thus both the express trust and defendant's fiduciary relationship as trustee of the trust account (distinguished from defendant's general fiduciary obligations to plaintiff) are sufficiently alleged. *Banks v. Gill Distribution Centers, Inc. (In re Gill)*, 263 F. 3d 862, 871 (9th Cir. 2001) ["once client funds are placed in the trust account, the attorney became his client's fiduciary."]



The fraud and defalcation are alleged as the complaint states the funds were withdrawn based on billings that contained false representations. This amounts to alleged defalcation of client trust account funds. See, *Braud v. Stokes (In re Stokes)*, 142 BR 906, 910 (Bank.N.D. Cal. 1992) [professional rule as to trust funds sole exception to the general statement that no California statute elevates the attorney client relationship to one of trustee beneficiary]; *In re Bigelow*, 271 BR 178 (9th Cir., BAP 2001); *In re Gasster*, 301 BR 568, 569-70 (Bankr. N.D. Cal., 2003).

Section 523(a)(6) - Third Claim for Relief.

A simple breach of contract cannot give rise by itself to a nondischargeable debt. *In re Jercich*, 238 F. 3d 1202, 1205 (9th Cir. 2001). But § 523(a)(6) can apply to a breach of contract claim when the breach is accompanied by willful tortious conduct. *Id.* Section 523(a)(6) precludes discharge of a debt incurred by willful and malicious injury to an entity or property of an entity. Both "malice" and "willfulness" must be plead and proved. An act is "willful" when the debtor subjectively intended to injure the creditor or subjectively knew that injury to the creditor was substantially certain to occur. *Su v. Carillo*, 290 F. 3d 1140, 1142-43 (9th Cir. 2002). An injury is malicious if it involves: (1) a wrongful act; (2) done intentionally; (3) which necessarily causes injury, and (4) is done without just cause or excuse. *Jercich*, 238 F. 3d at 1209.

In Defendant's prior motion she argued in the motion that nothing in the FAC "describes or alludes" to the Plaintiff's intent. In construing the FAC in the light most favorable to the Plaintiff, which the court must, the court found that the complaint did allege that Defendant inflated her bills. The method of doing so can be inferred to be an intentional act (i.e., sending overinflated bills which were paid by Plaintiff). Thus, the court did not agree with Defendant's argument.

The court did grant the motion to dismiss this claim because it did not allege a subjective intent to injure or facts from which that could be inferred. A "willful" injury is a "deliberate or intentional act that leads to injury." *In re Barboza*, 545 F. 2d 702, 706 (9th Cir., 2008) quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974 (1988) (emphasis in original). An intent to misrepresent may be accompanied by a subjective intent to injure, but the FAC did not contain any allegation of facts suggesting that Defendant did intend to injure Plaintiff. Also, the FAC did not contain any allegations that there was no excuse for the allegedly inflated bills.

To support this claim, the SAC includes allegations that the Plaintiff repeatedly told the Defendant that he was forced to sell property, including tools and collectible auto parts, to raise the money to pay the Defendant, and that he was having to liquidate for less than the property was worth to pay her during the two years she represented him, that it was becoming increasingly difficult for the Plaintiff to raise this money, and

for that reason she knew, or should have known, that the false billing statements were substantially certain to cause injury to the Plaintiff and that there was no excuse for her actions.

The Defendant, in this motion to dismiss, argues that the complaint fails to allege facts establishing a claim for relief under this section. The court disagrees and will overrule the motion as to this claim.

3.	<a href="#"><u>16-10016</u></a> -B-13	KEVIN DAVEY	CONTINUED STATUS CONFERENCE RE:
	<a href="#"><u>16-1074</u></a>		AMENDED COMPLAINT
	DAVEY V. OCWEN LOAN SERVICING,		8-30-16 [ <a href="#"><u>50</u></a> ]
	LLC ET AL		
	VINCENT GORSKI/Atty. for pl.		
	RESPONSIVE PLEADING		

A new summons has been issued in this proceeding for November 3, 2016, at 1:30 p.m. This matter will be continued to that date. No appearance is necessary.