**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

**January 18, 2017 at 10:00 a.m.**

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**INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS**

**1. Matters resolved without oral argument:**

**Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'**

**If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.**

**2. The court will not continue any short cause evidentiary hearings scheduled below.**

**3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.**

**4. If no disposition is set forth below, the matter will be heard as scheduled.**

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| 1. | 14-25820-D-11<br>FWP-38 | INTERNATIONAL MANUFACTURING GROUP, INC. | MOTION FOR COMPENSATION BY THE LAW OFFICE OF BAKER & MCKENZIE, LLP FOR JAMES P. BAKER, SPECIAL COUNSEL(S)<br>12-21-16 [1024] |

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.**

2. 16-27720-D-7 BERTEN EASLEY — MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
PPR-1
WELLS FARGO BANK, N.A.
VS..DEBTOR
12-14-16 [22]

**Final ruling:**

**This case was dismissed on December 9, 2016. As a result the motion will be denied by minute order as moot. No appearance is necessary.**

3. 16-27522-D-7 MARIETES PIPER — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1
WELLS FARGO BANK, N.A. VS.
12-8-16 [9]

**Final ruling:**

**This matter is resolved without oral argument. This is Wells Fargo Bank, N.A.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtor is not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.**

4. 16-26323-D-7 JOSEPH CARNATION AND SILVIA VELARDE — MOTION TO AVOID LIEN OF JAMES WADDELL
DMB-1
12-9-16 [25]

**Tentative ruling:**

**This is the debtors' motion to avoid a judicial lien held by James Waddell. The motion was filed and serve more than 28 days prior to the hearing date; thus, it appears the moving parties intended the motion to be heard pursuant to LBR 9014-1(f)(1). However, the second page of the notice of hearing is not on file, so the court cannot determine what information, if any, was provided the lienholder as to whether, and if so, when written opposition would be required. Therefore, the court intends to hear the matter as a motion pursuant to LBR 9014-1(f)(2) to determine whether the lienholder has any opposition.**

5. 16-26323-D-7 JOSEPH CARNATION AND SILVIA VELARDE — MOTION TO AVOID LIEN OF SIERRA CENTRAL CREDIT UNION
DMB-2
12-9-16 [30]

**Final ruling:**

**This is the debtors' motion to avoid a judicial lien held by Sierra Central Credit Union (the "Credit Union"). The motion will be denied because the moving parties failed to serve the Credit Union in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served the Credit Union (1) through the attorney who obtained its abstract of judgment; and (2) by certified mail to the attention of its agent for service of process. The first method was insufficient because there is no evidence the attorney is authorized to receive service of process on behalf of the Credit Union in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004). The second method was insufficient because service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, such as the Credit Union, must be by first-class mail, not certified mail. Compare Fed. R. Bankr. P. 7004(b)(3) and preamble to 7004(b) with 7004(h).**

**As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.**

6. 16-26323-D-7 DMB-3 — JOSEPH CARNATION AND SILVIA VELARDE — MOTION TO AVOID LIEN OF LES SCHWAB TIRES 12-9-16 [35]

**Final ruling:**

**This is the debtors' motion to avoid a judicial lien held by Les Schwab Tires ("Les Schwab"). The motion will be denied because the moving parties failed to serve Les Schwab in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served Les Schwab by certified mail to the attention of its agent for service of process. This was insufficient because service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, such as Les Schwab, must be by first-class mail, not certified mail. Compare Fed. R. Bankr. P. 7004(b)(3) and preamble to 7004(b) with 7004(h).**

**As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.**

7. 15-29031-D-7 DNL-4 — OKSANA KOPCHUK — MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH SERGIY KOPCHUK 12-20-16 [77]

**Final ruling:**

**The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.**

8. 10-50339-D-7 15-2245 — ELEFTHERIOS/PATRICIA EFSTRATIS HSM-1 — ATHENE ANNUITY AND LIFE COMPANY V. ACEITUNO ET AL — MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR PARTIAL SUMMARY JUDGMENT 12-9-16 [111]

**DEBTOR DISMISSED: 08/12/2016**

**Tentative ruling:**

**This adversary proceeding was begun a little over a year ago by a complaint to interplead disputed funds. The funds have now been deposited in the court's registry, the interpleader plaintiff has been dismissed from the proceeding, and the proceeding has been resolved except as to two of the defendants, who have filed cross-claims against each other, and now, cross-motions for summary judgment, both on this calendar. This is the motion of cross-claimant Thomas A. Aceituno, who is also the trustee in the chapter 7 case in which this adversary proceeding is pending (the "trustee"), for summary judgment against cross-defendant Larry Phipps ("Mr. Phipps"). Mr. Phipps has filed opposition and the trustee has filed a reply. For the following reasons, the motion will be granted.**

**In considering a motion for summary judgment, the court looks beyond the**

pleadings and considers the materials in the record, including depositions, documents, declarations, discovery responses, and so on. Fed. R. Civ. P. 56(c)(1), incorporated herein by Fed. R. Bankr. P. 7056. "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). The moving party bears the burden of producing evidence showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has met its initial burden, the non-moving party must present affirmative evidence showing the existence of genuine issues of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

The funds in the court's registry, along with certain other funds held by the trustee, are the proceeds of a state court action brought in June of 2011 by the debtors in the underlying case, Eleftherios Efstratis and Patricia Efstratis, and one of their companies, Genesis Specialty Tile & Accessories LLC ("GSTA"), against various insurance companies and individuals. There were originally other plaintiffs; all except Patricia Efstratis and GSTA were later dismissed. (Another company apparently also owned by Mr. and Mrs. Efstratis, Genesis Tile Corporation ("Tileco"), was never a plaintiff.[1]) In January of 2011, Mr. Phipps had filed a complaint in the United States District Court for this district against his employer, Tileco. He also named Tileco's employee benefit plan as a defendant; he did not name Mr. or Mrs. Efstratis or GSTA. A year later, in January of 2012, Mr. Phipps obtained a default judgment against Tileco and its employee benefit plan. At no time was Patricia Efstratis or GSTA a named party to Mr. Phipps' district court action and neither is named in his default judgment. Nevertheless, in April of 2015, Mr. Phipps filed a notice of lien in GSTA's state court action against the insurance companies. He now alleges Tileco was an alter ego of GSTA and/or Patricia Efstratis, and thus, he is entitled to be paid from the proceeds of GSTA's and Patricia Efstratis' lawsuit against the insurance companies.

The trustee's several arguments that it is too late for Mr. Phipps to assert claims against the settlement proceeds are dispositive. The conduct on which Mr. Phipps' district court complaint was based occurred, according to that complaint, during a period that ended almost eight years ago. He filed his complaint against Tileco and its employee benefit plan almost six years ago and obtained his default judgment against those entities almost five years ago. He has long since missed the deadlines to seek to amend his judgment to add GSTA or Patricia Efstratis as a judgment debtor or to sue either of them on an alter ego theory. The trustee has separately analyzed any rights Mr. Phipps could possibly have to seek either (1) to amend his judgment to add GSTA or Patricia Efstratis as an additional judgment debtor, under Fed. R. Civ. P. 59(e) (Fed. R. Bankr. P. 9023); (2) to seek relief from his judgment under Fed. R. Civ. P. 60(b) (Fed. R. Bankr. P. 9024); (3) to amend his district court complaint to add them as defendants; (4) to file a new action against them on an alter ego theory on account of his original claims against Tileco; or (5) to file a creditor's suit against them. The court adopts the trustee's authorities and arguments herein as its own. The court has no need of any evidence other than Mr. Phipps' district court complaint and his district court judgment to reach these conclusions and Mr. Phipps does not object to the admission of those documents into evidence.

Mr. Phipps raises a number of arguments in an attempt to circumvent these conclusions. The court will take them in the order presented by Mr. Phipps. First, relying on Fed. R. Civ. P. 56(d), incorporated herein by Fed. R. Bankr. P. 7056, he claims the court should allow him a reasonable opportunity to conduct investigation and discovery on his alter ego theory. He complains that the parties stipulated to

an extension of the deadline to exchange initial disclosures until September 15, 2016 and that the trustee has since failed to provide complete responses to Mr. Phipps' interrogatories and failed until the day before Mr. Phipps' opposition to this motion was due to provide even a partial production of the documents Mr. Phipps had requested, although the responses and documents were due in mid-December.

The problem with the argument is that, so far as the dispute between Mr. Phipps and the trustee (or GSTA or Patricia Efstratis) is concerned, this particular adversary proceeding is a procedural anomaly. It was not commenced by Mr. Phipps or the trustee (or GSTA); it was commenced by one of the defendants in the state court action who was unsure to whom to distribute its settlement money. That defendant might have decided instead simply to turn over the money to the trustee and hope he would preserve it until the disputes among the various claimants to it were resolved. In that case, there might have been no adversary proceeding at all, and hence, no delayed discovery period available for Mr. Phipps to rely on. Assuming he could have gotten around the various rules and statutes of limitations cited by the trustee, Mr. Phipps has had almost five years to formally assert his claims against GSTA and/or Patricia Efstratis and almost two years to formally assert a claim against the trustee,[2] and thereby to obtain discovery. The fact that one of the state court defendants chose to file an interpleader action does not operate to open up to Mr. Phipps an entirely new period in which to seek discovery on the alter ego theory he could and should have asserted years ago.[3]

Second, Mr. Phipps contends he does not need to establish a claim against GSTA in order to prevail because Tileco, one of his judgment debtors, was a party to and signed the settlement agreement between the trustee and the named plaintiffs in GSTA's state court action, on the one hand, and the last remaining defendant in that action, on the other hand. That single fact, Phipps alleges, "is conclusive of the fact that Tileco has an interest in the State Court Action." Phipps' Opp., DN 121 ("Opp."), at 7:20-21. Therefore, in Phipps' view, "all of such settlement proceeds are subject to the Phipps judgment lien." Id. at 7:13-14.

The argument is simply misplaced and unconvincing. First, the settlement agreement is not admissible to prove that Tileco had a claim against the settling defendant. Fed. R. Evid. 408(a)(1). Second, parties often settle their disputes as a means of avoiding or limiting the costs and aggravation of litigation; there is nothing about a settlement in general that supports a conclusion that one party has or does not have a valid claim. As the trustee points out, Eleftherios T. Efstratis (father), Eleftherios D. Efstratis (son), Jessica Efstratis, and New Horizons Tile & Stone LLC, who either had never been plaintiffs in the action or who had been dismissed as plaintiffs much earlier, were also parties to the settlement agreement. According to the plaintiffs' state court counsel, the presence of all of these persons and entities as parties to the settlement agreement, although they were not parties to the litigation, was based on the defendant's request that the mutual releases include, essentially, everyone in sight, which is not uncommon. The court has carefully read the settlement agreement and finds nothing therein that demonstrates or even suggests that Tileco had any claims against the settling defendant or any of the defendants who settled earlier or any right to or interest in the settlement proceeds.

Third, Mr. Phipps contends the trustee has no right to any of the settlement funds because GSTA's claims in the state court action were assigned to the trustee by GSTA by way of an invalid agreement. Because Mr. Phipps has and had no claim against or interest in the assets of GSTA, he has no standing to complain about what GSTA does or did with those assets.

Fourth, Mr. Phipps claims that, notwithstanding Fed. R. Civ. P. 59(e), he may still amend his judgment to add GSTA as a judgment debtor because "GSTA had full notice of Larry Phipps claims." Opp. at 9:26. He continues: "GSTA knew that its interests and liabilities were indistinguishable from those of its sister company Tileco. GSTA had an opportunity to defend against the claims of Larry Phipps, if it so desired." Id. at 9: 27-28. As against the federal rules the trustee has cited, Mr. Phipps cites Fed. R. Civ. P. 69(a), which provides that the procedure for execution on a money judgment "must accord with the procedure of the state where the court is located . . . ." Fed. R. Civ. P. 69(a)(1) (incorporated herein by Fed. R. Bankr. P. 7069). Mr. Phipps relies on Levander v. Prober (In re Levander), 180 F.3d 1114 (9th Cir. 1999), as supporting his theory that he may amend his judgment under state law to add GSTA as a judgment debtor.

The Levander court cited an earlier decision as holding that Rule 69(a) "empowers federal courts to rely on state law to add judgment-debtors under Rule 69(a), which 'permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits.'" Levander, 180 F.3d at 1120-21, citing Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 421 (9th Cir. 1998). Where there is applicable state law, Rule 69(a) overrides the deadline fixed by Rule 59(e). Levander, at 1121, citing Cigna, at 421. "California law allows amendment of a judgment to add a judgment-debtor . . . ." Levander, at 1121, citing Cigna, at 421-22. "Under California Code of Civil Procedure § 187, a court 'has the authority to amend a judgment to add additional judgment debtors.'" Levander, at 1121, citing Issa v. Alzammar, 38 Cal. App. 4th Supp. 1, 4 (1995). Two requirements must be met: "'(1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns.'" Levander, at 1121, quoting Tripplet v. Farmers Ins. Exch., 24 Cal. App. 4th 1415, 1421 (1994).

The argument breaks down where the judgment to which the plaintiff seeks to add the new defendant was, as here, a default judgment. The Fourteenth Amendment of the United States Constitution (the due process clause) "'guarantees that any person against whom a claim is asserted in a judicial proceeding shall have the opportunity to be heard and to present his defenses. To summarily add [the three individuals] to the judgment heretofore running only against [the corporation] without allowing them to litigate any questions beyond their relation to the allegedly alter ego corporation would patently violate this constitutional safeguard.'" Wolf Metals Inc. v. Rand Pacific Sales Inc., 4 Cal. App. 5th 698, 704 (Oct. 25, 2016), quoting Motores de Mexicali, S. A. v. Superior Court of Los Angeles County, 51 Cal. 2d 172, 176 (1958).

The California Supreme Court in the Motores de Mexicali decision went on to reject the argument Mr. Phipps makes here – that GSTA had the opportunity to defend his district court action against Tileco if GSTA had so desired, and the two entities, GSTA and Tileco, and their principals "collectively exercised full control over the decision of whether or not to proffer a defense to the Phipps Action." Opp. at 11:8-9. "Nor is this difficulty [violation of the due process clause] overcome by the suggestion that Resnick and the Cowans should have intervened in the action brought solely against Erbel, Inc., if they desired to assert any personal defenses against the drafts. They were under no duty to appear and defend personally in that action, since no claim had been made against them personally." Motores de Mexicali, 51 Cal. 2d at 176. The decision is still good law – it has been followed as recently as last year. See Wolf Metals, 4 Cal. App. 5th at 708-09; see also Gottlieb v. Kest, 141 Cal. App. 4th 110, 152-53 (2006); NEC Electronics

Inc. v. Hurt, 208 Cal. App. 3d 772, 780 (1989); Southern Cal. Pipe Trades Dist. Council No. 16 v. Merritt, 126 Cal. App. 3d 530, 539-40 (1981). In addition, the United States District Court for this district recognized and followed the Motores de Mexicali decision in Directi Internet Solutions Pvt. Ltd. v. Dhillon, 2014 U.S. Dist. LEXIS 91960, *3-5 (E.D. Cal. July 7, 2014).[4]

Finally, as the trustee aptly responds, Mr. Phipps' attempt to distinguish Motores de Mexicali on the basis that it involved an attempt to add an individual as a judgment debtor whereas Mr. Phipps is seeking to add a corporation is unavailing. The Motores de Mexicali rule has been applied to motions seeking to add corporations as well as individuals. See Writers Guild of Am., West, Inc. v. BTG Prods., LLC, 2016 U.S. Dist. LEXIS 16414, *21-22 (C.D. Cal. Feb. 9, 2016) ("organization of unknown entity type"); Directi Internet Solutions Pvt. Ltd., 2014 U.S. Dist. LEXIS 91960, at *4-5 (individual and corporation); Torres v. San Diego County, 2007 U.S. Dist. LEXIS 53821, *7-8 (S.D. Cal. 2007) (individuals and LLCs).

To conclude, Mr. Phipps has provided no legitimate basis on which GSTA or Patricia Efstratis could be named as an additional judgment debtor on his district court judgment or that he could sue them independently on an alter ego theory for the claims that gave rise to his district court judgment or that he has any right to or interest in the proceeds of the state court action. Therefore, the court concludes there are no genuine issues of material fact remaining for trial. Accordingly, the court will grant the trustee's motion and judgment will be entered against Mr. Phipps on the trustee's cross-claim. The court will hear the matter.

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1 The precise ownership of these companies is not relevant to this decision and the court is making no findings in that regard.

2 The underlying chapter 7 case of Mr. and Mrs. Efstratis was originally closed in May of 2012. It was reopened in December of 2012 and closed again in January of 2013. It was reopened in March of 2015 and the trustee was reappointed as trustee at that time.

3 Mr. Phipps did file a proof of claim in the Efstratis bankruptcy case in February of 2011, based on his judgment against Tileco and its employee benefit plan. But he took no steps to amend his judgment to include Patricia Efstratis as a judgment debtor or to independently pursue her and he took no steps against GSTA at all. (As indicated above, the chapter 7 case has been closed and reopened twice, but there was a period of over two years when it was closed; that is, when there was no automatic stay in place. In fact, it is likely the automatic stay did not revive as to Patricia Efstratis when the case was reopened the first time, as she had already received her discharge.)

4 The Levander decision cited by Mr. Phipps did not involve a default judgment.

9. 16-25239-D-7 DIVINDER HUNDAL — MOTION FOR TURNOVER OF PROPERTY
CDH-3 — 12-21-16 [62]

Tentative ruling:

The court intends to use this hearing as a status conference.

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| 10. | 16-27439-D-7 | CHRISTINA BUNNELL | TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS<br>12-8-16 [15] |
| 11. | 10-26347-D-7<br>GJH-1 | LESLIE BRACK | MOTION FOR COMPENSATION BY THE LAW OFFICE OF HUGHES LAW CORPORATION FOR GREGORY J. HUGHES, TRUSTEE'S ATTORNEY(S)<br>12-20-16 [57] |
| 12. | 16-27349-D-11 | JACOB WINDING | CONTINUED ORDER TO SHOW CAUSE - FAILURE TO FILE DOCUMENTS<br>11-22-16 [36] |
| 13. | 16-27349-D-11<br>UST-1 | JACOB WINDING | MOTION TO DISMISS CASE AND/OR MOTION TO IMPOSE A ONE-YEAR BAR AGAINST THE FILING OF A NEW CASE<br>12-6-16 [39] |

14. 14-29061-D-7 DBJ-4 — MARK LIGHT — MOTION TO AVOID LIEN OF FORD MOTOR CREDIT COMPANY, LLC 12-1-16 [31]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

15. 14-29061-D-7 DBJ-5 — MARK LIGHT — MOTION TO AVOID LIEN OF SUSQUEHANNA COMMERCIAL FINANCE, INC. 12-1-16 [36]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

16. 16-27672-D-12 JPJ-1 — DAVID LIND — MOTION TO DISMISS CASE 12-22-16 [32]

17. 16-27879-D-7 MMM-1 — KATHRYN MULLIN — MOTION TO AVOID LIEN OF AMERICAN EXPRESS CENTURION BANK 12-20-16 [9]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

18. 16-27879-D-7 KATHRYN MULLIN — MOTION TO AVOID LIEN OF BEST SERVICE CO., INC.
MMM-2 — 12-20-16 [14]

**Final ruling:**

**The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.**

19. 16-26080-D-7 ERIC/ANNE-MARIE RESLOCK — MOTION TO COMPEL ABANDONMENT
EJS-1 — 12-13-16 [17]

**Final ruling:**

**The matter is resolved without oral argument. There is no timely opposition to the debtors' motion to compel the trustee to abandon property and the debtors have demonstrated the property to be abandoned is of inconsequential value to the estate. Accordingly, the motion will be granted and the property that is the subject of the motion will be deemed abandoned by minute order. No appearance is necessary.**

20. 13-35288-D-7 DUSTIN/KAREN BOLE — PRE-TRIAL CONFERENCE RE: COMPLAINT TO DETERMINE NON-DISCHARGEABILITY OF DEBT
14-2097 — 4-8-14 [1]
GENERAL COUNCIL OF THE ASSEMBLIES OF GOD V. BOLE ET

21. 13-35288-D-7 DUSTIN/KAREN BOLE — CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
14-2097 MGB-6 — 9-21-16 [185]
GENERAL COUNCIL OF THE ASSEMBLIES OF GOD V. BOLE ET

**Tentative ruling:**

**This is the plaintiff's motion to dismiss with prejudice the remaining claims in this adversary proceeding, pursuant to Fed. R. Civ. P. 41, incorporated herein by Fed. R. Bankr. P. 7041, with each party to bear its or their own attorney's fees and costs. The defendants have filed opposition and the plaintiff has filed a reply. For the following reasons, the motion will be granted. Because the moving papers are not entirely clear, however, the court will begin by making clear what relief will and will not be afforded by the order granting the motion.**

By its complaint in this adversary proceeding, the plaintiff sought a determination that a pre-petition judgment of the United States District Court for the Northern District of Illinois in favor of the plaintiff and against the defendants (among others) (the "District Court Judgment") is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code. By the District Court Judgment, the district court awarded both monetary and injunctive relief to the plaintiff and against the defendants in this adversary proceeding and others. The injunctive relief afforded was both prohibitory and mandatory. By final ruling filed August 24, 2016 on the plaintiff's motion for partial summary judgment, this court determined that those portions of the District Court Judgment imposing prohibitory injunctions against the defendants are not "claims," as defined in the Bankruptcy Code, and therefore, are not dischargeable. This court issued a judgment on August 30, 2016 determining that the prohibitory injunctions, which were quoted in this court's judgment directly from the District Court Judgment, are not dischargeable. The defendants did not appeal and this court's judgment is now final.

This court's August 30, 2016 judgment leaves outstanding the plaintiff's complaint to determine to be nondischargeable those portions of the District Court Judgment awarding monetary relief and mandatory injunctive relief. The plaintiff now seeks dismissal of "the remaining claims of" this adversary proceeding with prejudice (Plaintiff's Memorandum in Support of Motion, DN 187 ("Memo."), at 1:2), adding that "further litigation appears to be unnecessary because the injunction portion of the Infringement Judgment remains in effect and the Debtors have represented that they do not have the financial means to pay the monetary award of the Infringement Judgment." Id. at 1:23-25. So the record is clear, "the injunction portion" of the District Court Judgment that would remain in effect if this adversary proceeding is dismissed is the portion awarding prohibitory injunctive relief, not the portion awarding mandatory injunctive relief. This is because the plaintiff's motion for partial summary judgment and the court's ruling and judgment on that motion addressed only the prohibitory aspects of the injunctive relief and not the mandatory ones.

Further, the record needs to be clear that any claims the defendants' bankruptcy estate may have against the plaintiff will not be affected by the order granting this motion. The plaintiff states, "Defendants do not have any affirmative claims in this proceeding." Memo. at 19-20. By order filed October 23, 2014, this court dismissed for lack of jurisdiction the defendants' claims for relief set forth in the "Request for Relief" portion of their answer to the complaint. The order was based on the court's ruling, included in the civil minutes, that any claims the defendants might have against the plaintiff are property of their bankruptcy estate in the chapter 7 case in which this adversary proceeding is pending, and therefore, the defendants had no standing to pursue them. Those claims were not dismissed with prejudice and the order granting the present motion will have no effect on those claims, if any, which remain property of the estate.

Turning to the relief that will be granted, the court's order will dismiss with prejudice the plaintiff's remaining claims in this adversary proceeding; that is, all of the plaintiff's claims except its claim for a determination that the prohibitory injunctions in the District Court Judgment are nondischargeable, that claim having already been determined by this court's August 30, 2016 order. "The Ninth Circuit has long held that the decision to grant a voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the [court]." Sharp v. SKPM Corp., Inc., 2015 U.S. Dist. LEXIS 36152, *4 (E.D. Cal. March 23, 2015), quoting Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 145 (9th Cir. 1982).

"A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." Sharp, 2015 U.S. Dist. LEXIS 36152 at *4, quoting Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001). In this context, "'legal prejudice' means 'prejudice to some legal interest, some legal claim, some legal argument.'" Smith, 263 F.3d at 976.

The only prejudice the defendants have alleged in opposition to this motion is that they will not have their day in court; that is, their opportunity "to prove their innocence in a public record . . . ." Defendants' Opposition, DN 204, at 2:1-2. The defendants have submitted no authority for the proposition that the right to prove one's innocence of allegations made in a civil action is a legal right subject to protection in response to a motion for voluntary dismissal. As the plaintiff points out, the effect of the voluntary dismissal will have the same practical effect as if the case proceeded to trial and the defendants prevailed. That is, the bankruptcy discharge the defendants received in the underlying case almost a year ago will now apply to the plaintiff's remaining claims in this adversary proceeding and the plaintiff's rights under the District Court Judgment, except as discussed above. That is, the plaintiff's rights will be limited to the enforcement, if necessary, of the prohibitory injunction portions of the District Court Judgment. The defendants will be discharged of an alleged monetary obligation alleged by the plaintiff to be in excess of $6 million.

The plaintiff, on the other hand, will not incur the attorney's fees and costs of continuing through trial only to receive, if anything, an uncollectible judgment, and the court will conserve judicial resources. This is not a situation where the plaintiff files a complaint and then voluntarily seeks to abandon its claims having received no relief. Instead, the plaintiff has received relief in the form of the August 30, 2016 judgment, and the defendants have apparently made it clear they would have no ability to pay a monetary judgment if the plaintiff were to prevail at trial. Although the defendants state that they would like the opportunity to vindicate themselves at a trial, that desire is simply not a legal right that takes precedence over a court's responsibility to conserve judicial resources or over a plaintiff's right to stop expending its own resources where the outcome can have no monetary impact on anyone.

The defendants have not challenged the plaintiff's request that its remaining claims be dismissed with each side to bear its or their own attorney's fees and costs. The defendants have represented themselves throughout this proceeding, and thus, have incurred no attorney's fees, and they have not demonstrated they have incurred any costs or that there is a legal basis for shifting any costs they have incurred to the plaintiff.

For the reasons stated, the motion will be granted and the plaintiff's remaining claims will be dismissed with prejudice, each party to bear its or their own attorney's fees and costs. The court will hear the matter.

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| 22. | 13-35288-D-7<br>14-2097<br>GENERAL COUNCIL OF THE<br>ASSEMBLIES OF GOD V. BOLE ET | DUSTIN/KAREN BOLE<br>MGB-7 | CONTINUED MOTION TO RESTRICT OR<br>REDACT PUBLIC ACCESS RE AND/OR<br>MOTION FOR SANCTIONS<br>9-21-16 [189] |

**Tentative ruling:**

**This is the plaintiff's motion to remove from the court's public record Exhibit D-124 filed August 10, 2016 as part of the defendants' exhibits in opposition to the plaintiff's motion for partial summary judgment and for sanctions against the defendants. For the following reasons, the motion will be denied as unnecessary or moot.**

**In October of 2015, the parties signed a stipulation for a protective order and the court entered a protective order providing that a party could designate certain documents as confidential and that the documents so designated would be required to be kept confidential and "not disclosed to anyone other than the parties, their counsel of record in this proceeding, and the Court and its personnel." Protective Order, DN 121 at 1:5-6. The plaintiff claims the defendants thereafter filed certain documents the plaintiff had designated as confidential as exhibits to (1) the defendants' pretrial conference statement, DN 133, and later (2) the defendants' opposition to the plaintiff's motion for summary judgment, DN 174. In each case, the parties later stipulated and the court ordered that the allegedly confidential documents would be removed from the publically available document. The second instance occurred after this motion was filed. Thus, by order filed November 3, 2016 on a stipulation filed the day before, the allegedly confidential documents were ordered removed from the public record. The clerk's office has in fact sealed all of the documents filed by the defendants as DNs 133 and 174. Therefore, to the extent this motion seeks an order removing the allegedly offending documents from the public record, the motion is moot.**

**The plaintiff also seeks an order of sanctions against the defendants for their alleged repeated violations of the protective order. In support, the plaintiff has filed an affidavit of its counsel concerning her attempts to get the defendants to remove the documents from the court's record. The court is aware the defendants have represented themselves in pro se and finds it likely they would not know how to bring documents to the court's attention while keeping them out of the public record, and in turn, would not know how to remove them once they were part of the public record. Further, the plaintiff has not shown how, if at all, it has been damaged by the documents being in the public record temporarily. Therefore, the court will not impose sanctions.**

**For the reasons stated, the motion will be denied. The court will hear the matter.**

23. 16-27594-D-7 CHRISTINA LINTON — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 — 12-8-16 [9]
SANTANDER CONSUMER USA VS.

**Final ruling:**

**This matter is resolved without oral argument. This is Santander Consumer USA's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.**

24. 16-24321-D-12 PAUL SCHMIDT — MOTION TO EXTEND TIME
DBL-6 — 1-5-17 [57]

**Final ruling:**

**This is the debtor's second motion for a second extension of time to file a chapter 12 plan. The motion will be denied for the following reasons. In a tentative ruling issued in advance of the debtor's first motion (for the second extension), the court noted three procedural defects with the motion. First, the second page of the notice of hearing was missing, so the court could not determine whether the motion was noticed pursuant to LBR 9014-1(f)(1) or (f)(2). Second, the first page of the notice of hearing did not advise creditors of the address of the courthouse. And third, the moving party had failed to serve Gary Johnson who, according to the debtor's Schedule E/F, holds the largest unsecured claim in this case, at $40,000.**

**With this second motion, the moving party filed both pages of the notice of hearing. The notice of hearing indicates the motion will be heard pursuant to LBR 9014-1(f)(2); in other words, opposition may be presented at the hearing. This makes it all the more important that creditors be advised of the address of the courthouse, as required by LBR 9014-1(d)(3). Yet the notice of hearing of this second motion does not provide the address. Finally, this time around, the attached list referred to in the proof of service is not attached, so there is no evidence any creditors were served.**

**The motion will be denied for those procedural reasons and for the following independent reason. The Bankruptcy Code permits a chapter 12 debtor to obtain an extension of time to file a chapter 12 plan if the need for the extension "is attributable to circumstances for which the debtor should not justly be held accountable." § 1221. In this case, confirmation of the debtor's original plan was denied at hearing on December 14, 2015 because, among other things, confirmation of the plan depended on the debtor's obtaining an order valuing the secured claim of Steve Rasmussen, whereas the debtor's motion to value the claim had been denied two weeks earlier.**

**On December 14, 2015, the debtor filed his first motion for a second extension of time to file a plan. The ground for the motion was simply that the information**

**provided in his original plan regarding secured creditors "was incorrect and meant that the plan filed was not confirmable." Debtor's Motion, DN 49, at 1:23-24. The motion stated the debtor needed a short extension to January 6, 2017 to file his plan "and all the Motions to Value now needed." Id. at 1:25. The debtor added that he "fully believes that his Chapter 12 Plan will be filed on or before the requested date." Id. at 2:1. The motion for an extension was denied for the reasons described above.**

**This second motion merely repeats that the information in the original plan about secured claims was incorrect and that the debtor needs a short extension to file his plan and all motions to value. This time, he adds that "fully believes that his Chapter 12 Plan will be filed on or before January 20, 2017." As of this date of this ruling, the debtor has failed to file an amended plan or any motions to value other than the one that was earlier denied. In other words, although he "fully believed" he would file those documents by January 6, 2017, he failed to do so, and has not now explained his continuing failure to do so. The court has no basis on which to conclude the need for the extension is attributable to circumstances for which the debtor should not justly be held accountable.**

**For the reasons stated, the court motion will be denied by minute order. No appearance is necessary.**

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| 25. | 10-50339-D-7<br>15-2245<br>ATHENE ANNUITY AND LIFE<br>COMPANY V. ACEITUNO ET AL | ELEFTHERIOS/PATRICIA<br>EFSTRATIS BCB-1 | COUNTER MOTION FOR SUMMARY<br>JUDGMENT OR IN THE ALTERNATIVE<br>SUMMARY ADJUDICATION<br>1-4-17 [122] |

**DEBTOR DISMISSED: 08/12/2016**

**Tentative ruling:**

**This is the counter-motion of cross-claimant Larry Phipps for summary judgment against cross-defendant Thomas A. Aceituno, who is also the trustee in the chapter 7 case in which this adversary proceeding is pending (the "trustee"). The trustee has filed opposition and Mr. Phipps has filed a reply. For the following reasons, the motion will be denied.**

**Mr. Phipps seeks a judgment declaring that the trustee has no interest in the funds held in the court's registry (or the funds held by the trustee) representing the proceeds of certain state court litigation and ordering the trustee to deposit the funds he is holding into the court registry. Mr. Phipps bases these requests on his theory that the agreement by which Genesis Specialty Tile & Accessories LLC assigned to the trustee its claims in the state court action was invalid. The court has ruled on the trustee's motion for summary judgment, also on this calendar, that Mr. Phipps has no interest in or right to those proceeds, and therefore, no standing to pursue an allegation that the assignment agreement was invalid. In that regard, the court incorporates herein its ruling on the trustee's motion for summary judgment.**

**Because Mr. Phipps has no standing concerning the proceeds of settlement of the state court action, the motion is denied. The court will hear the matter.**

26. 16-27272-D-7 EVANGELINO BUENAVISTA
ADR-1
R.E.I. 209, LLC VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
12-28-16 [22]

**Final ruling:**

**The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the court finds a hearing is not necessary because (1) the debtor's statement of intentions indicates he intends to surrender the vehicle and (2) the trustee has filed a Report of No Assets. As a result, the court will grant relief from stay and waive 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.**

27. 16-27672-D-12 DAVID LIND

CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION
11-18-16 [1]

28. 14-25779-D-7 JOHN/VALERIE ROBERTSON
CJY-2

MOTION TO AVOID LIEN OF CITIBANK, N.A.
1-4-17 [27]

29. 14-25779-D-7 JOHN/VALERIE ROBERTSON
CJY-3

MOTION TO AVOID LIEN OF DISCOVER BANK
1-4-17 [33]