

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

May 24, 2017 at 10:00 a.m.

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.

1.	14-26105-D-7	CHERYL MEYERS	MOTION TO SELL
	DNL-2		4-13-17 [27]

2.	12-33210-D-7	NATHANIEL/STACY GREEN	MOTION TO AVOID LIEN OF FORTIS
	HLG-2		CAPITAL, LLC
			4-22-17 [28]

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 debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

3. 12-33210-D-7 NATHANIEL/STACY GREEN MOTION TO AVOID LIEN OF
HLG-3 AMERICAN GENERAL FINANCIAL
SERVICES
Final ruling: 4-23-17 [24]

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 debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

4. 14-22526-D-7 DAVID JONES TRUSTEE'S FINAL REPORT
3-24-17 [217]

5. 17-21127-D-7 HAZEL 71, INC. MOTION TO SELL FREE AND CLEAR
NOS-4 OF LIENS, MOTION TO APPROVE
OVERBIDDING PROCEDURES AND
MOTION FOR ADMINISTRATIVE
EXPENSES
Final ruling: 4-26-17 [39]

This is the trustee's motion to sell real property. On May 17, 2017, three weeks after the motion was filed, the trustee filed an "amended motion" and a "notice of continued hearing" advising that the original buyer has backed out and the trustee has found a new buyer at a different price. The notice of continued hearing states that the hearing previously scheduled for May 24 is continued and the hearing on the amended motion will be held on June 7. The trustee also filed a new declaration and new exhibits in support of the amended motion. The "amended motion," notice of continued hearing, and new declaration and exhibits all bear the same docket control number as the original motion and the documents filed with it, NOS-4.

The court will continue the hearing on the motion bearing DC No. NOS-4 to June 7, 2017, at 10:00 a.m., but advises the trustee's counsel that, as the local rules do not provide for "amended motions," the appropriate procedure would have been to file a new motion with a new docket control number on all the new documents and either file a notice of withdrawal of the original motion (no opposition was filed, so the trustee would have been permitted to unilaterally withdraw the motion under Fed. R. Civ. P. 41(a)(1)(A)) or simply allow the original motion to be denied as moot. The use of different docket control numbers for different motions allows the court and parties to readily track which documents pertain to which motions. As the relief sought by the trustee in the original motion is no longer sought, the appropriate procedure, as indicated, would have been to treat the "amended motion" as a new motion. The court will continue the hearing to June 7, 2017 by minute order. No appearance is necessary.

6. 17-22241-D-7 SHANNON WHITLEY MOTION FOR RELIEF FROM
RCO-1 AUTOMATIC STAY
NAVY FEDERAL CREDIT UNION 4-27-17 [17]
VS.

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. As such the court will grant relief from stay. As the debtor's Statement of Intentions indicates she will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

7. 16-24244-D-7 QUYEN NGUYEN MOTION FOR COMPENSATION FOR
DMW-2 JEFFREY D. WILSON, CPA,
ACCOUNTANT
4-14-17 [25]

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 by minute order. No appearance is necessary.

8. 16-24244-D-7 QUYEN NGUYEN MOTION FOR ADMINISTRATIVE
DMW-3 EXPENSES
4-17-17 [32]

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 for allowance of administrative expenses to the IRS in the amount of \$5,457 is supported by the record. As such the court will grant the motion and the moving party is to submit an appropriate order. No appearance is necessary.

9. 16-28160-D-7 PATRICIA GONSALVES MOTION TO AVOID LIEN OF
EJS-3 FIRESIDE BANK A CA CORP.
4-18-17 [42]

Final ruling:

This is the debtor's second motion to avoid a judicial lien held by Fireside Bank (the "Bank"). The motion will be denied because the moving party failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(b)(3) or (h), whichever is applicable, as required by Fed. R. Bankr. P. 9014(b). The moving party served the first motion as follows:

Fireside Bank A Ca Corp
Prenovost, Normandin, Bergh & Dawe
2122 N. Broadway Suite 200
Santa Ana, CA 92706-2614

The motion was denied by final ruling because the moving party served the Bank only through the attorneys who obtained the Bank's abstract of judgment, whereas there was no evidence those attorneys are authorized to receive service of process on behalf of the Bank 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 court pointed out in its ruling that, according to the FDIC's website, the Bank was closed without government assistance and is no longer in operation. Thus, it appears the Bank would not be correctly served pursuant to Rule 7004(h) and service pursuant to Rule 7004(b)(3) may be appropriate. The court concluded that "in any event, service only on the attorneys who obtained the abstract of judgment is not sufficient."

This time around, the moving party served the Bank in exactly the same way as the first time, except that this time, between the line "Prevonost, Normandin, Bergh & Dawe" and the line "2122 N Broadway Suite 200," the moving party inserted these words: "Attn: Officer/Managing or General Agent/Agent for Service of Process." In other words, although the moving party used the words required by the rule, the moving party still served the Bank only through the attorneys who obtained its abstract of judgment. It is unlikely an officer, managing agent, or general agent of the Bank is to be found at the law firm that happened to obtain the abstract of judgment, and the moving party has provided no evidence the law firm is authorized to receive service of process for the Bank. The court recognizes the difficulty of serving a bank that is no longer in operation; however, at the very least, the moving party might have utilized the address of the Bank itself as listed on the abstract of judgment. In any event, the moving party has still provided no evidence the law firm is authorized to receive service of process on behalf of the Bank pursuant to Rule 7004(b).

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

10. 16-28160-D-7 PATRICIA GONSALVES
EJS-4

MOTION TO AVOID LIEN OF PLACER
CREDITORS BUREAU
4-18-17 [47]

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.

11. 16-23668-D-7 SUZANNE HUNTER
16-2185 EAS-1
MACHLAN V. HUNTER

MOTION TO COMPEL AND/OR MOTION
FOR PRODUCTION OF DOCUMENTS
4-17-17 [20]

Final ruling:

This is the defendant's motion to compel the plaintiff to answer interrogatories and produce documents and for an award of \$1,000 in attorney's fees and costs. The plaintiff has not responded to the motion. On May 16, the defendant filed two documents, DN 26 and 27, advising the court that the plaintiff has agreed to dismiss the complaint with prejudice on condition that both parties bear their own attorney's fees and costs and that the defendant accepts the offer and will withdraw this motion "if plaintiff dismisses the complaint as promised." However, for the following reasons, the motion would not be appropriately granted in any event and will instead be denied. The parties are free to submit a stipulation for dismissal of the complaint, along with a proposed order.

First, the motion was filed five weeks after the discovery bar date in this adversary proceeding, March 10, 2017, as fixed by the Scheduling Order filed November 10, 2016 (the "Order"). The Order explicitly defines the discovery bar date (the "Close of Discovery") as meaning all discovery has been completed, including the resolution of any discovery disputes by appropriate order and "where discovery has been ordered, compliance with the order has been achieved in all respects." Thus, the Order clearly prohibits the filing of a motion to compel answers to interrogatories and production of documents after the "Close of Discovery," March 10, 2017. As the moving party made no motion to reopen discovery, the Order governs and the motion will be denied as untimely.

There are other procedural and substantive defects in the motion. The notice of motion and motion are a single document, rather than being filed separately, as required by LBR 9014-1(d)(3). The proof of service is signed under oath only as to the declarant's citizenship, age, and non-party status, and not as to the facts of service, as required by 28 U.S.C. § 1746. The notice of motion and motion, at 1:24, give an incorrect address for the courthouse (50 I Street). Finally, the moving party has failed to submit evidence sufficient to demonstrate the nature and extent of efforts to meet and confer under the standards enunciated by this court in Sanchez v. Wash. Mutual Bank (In re Sanchez), 2008 Bankr. LEXIS 4239, *2-5 (Bankr. E.D. Cal. 2008), and the cases cited therein.

The only evidence the moving party has submitted on this issue are (1) her counsel's declaration; and (2) copies of an email from the plaintiff's counsel to the defendant's counsel and a responding email from the defendant's counsel to the plaintiff's counsel. Taking the emails first, on March 6, 2017, the plaintiff's counsel requested a 10-day extension to respond to the interrogatories and document production request on the ground that his client was employed at a winter job in the British Virgin Islands and communication was difficult. Counsel added that he understood his client would be returning to California in early to mid-June. On March 24, 2017, the defendant's counsel responded that he did not grant the requested 10-day extension but that, in any event, the 10 days had come and gone but no discovery had been received. He concluded, "Therefore, it would appear necessary for us to file the appropriate motions to compel discovery. If we are in error and the written discovery has been sent, please advise immediately." Defendant's Ex. C. In his declaration, the moving party's counsel adds that he received no response to his March 24 email and that he called the plaintiff's counsel on March 28 and left a

voicemail message asking for a return phone call and "advising that [he] would be forced to file a motion to compel discovery if [the plaintiff's counsel] did not respond by March 31, 2017." Smith Decl., DN 22, at 2:16-17.

This evidence falls far short of the type of showing the court requires to establish that the moving party has in good faith conferred or attempted to confer in an effort to obtain the discovery without court action. Counsel is referred to the Sanchez decision. For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

12. 16-28280-D-7 SUSAN BERGESEN MOTION FOR RELIEF FROM
APN-1 AUTOMATIC STAY
WELLS FARGO BANK, N.A. VS. 4-20-17 [23]

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 debtor received her discharge on April 25, 2017 and, as a result, the stay is no longer in effect as to the debtor (see 11 U.S.C. § 362(c)(3)). Accordingly, the motion will be denied as to the debtor as moot. The court will grant relief from stay as to the trustee and the estate, and will waive FRBP 4001(a)(3). This relief will be granted by minute order. There will be no further relief afforded. No appearance is necessary.

13. 17-20689-D-11 MONUMENT SECURITY, INC. CONTINUED MOTION TO USE CASH
ET-8 COLLATERAL
4-11-17 [89]

Tentative ruling:

This is the debtor's third motion for authority to use cash collateral of Citibank and the Internal Revenue Service. The hearing was continued from the initial hearing date, April 26, 2017, following a discussion between the court and the debtor's counsel at that hearing. The court stated it would grant the motion on an interim basis and would continue the hearing and require the debtor to (1) file a notice of continued hearing and a supplemental declaration and serve them on all parties who were initially served; and (2) serve the notice of continued hearing, supplemental declaration, and the motion and other papers filed originally with the motion on Sharon Brown, scheduled by the debtor as holding a claim in excess of \$255,000. The debtor's counsel indicated these tasks could be accomplished within one week, and the court fixed a deadline of May 8 for the filing and service of the notice of continued hearing and supplemental declaration.

As of this date, the debtor has not filed or served a notice of continued hearing, although it did file, on May 8, a supplemental declaration of its CEO, Michael Bivians. At the initial hearing, the court stated the supplemental declaration should address the following issues. First, the proposed budget includes an interest payment of \$4,571 per month (the recipient is not disclosed, although the debtor's counsel said she believes it is Citibank) and principal reduction payments of \$5,484 and \$10,415 per month, respectively, on the two Citibank loans. The court noted that although those figures are included in the budget, they were not mentioned in the motion, which stated only generally that the budget includes "the on-going non-default monthly payments to Citibank." The court

explained that these are quite substantial amounts for a debtor-in-possession to pay outside of a confirmed plan, especially the principal reduction payments, and that therefore, the amounts should be disclosed in the supplemental declaration so creditors could be made aware of them in a manner clearer than just the line items in the budget.

The court also stated the supplemental declaration should disclose the individuals who are guarantors of or otherwise obligated on the Citibank loans or the IRS debt, including the debtor's prior CEO/sole shareholder and any current officers. The court noted these payments represent very favorable pre-confirmation treatment to Citibank and the IRS, and that if officers of the debtor, either former or current, have guaranteed or are otherwise obligated on those debts, that is something the creditors should be clearly apprised of.

The supplemental declaration of Michael Bivians does not mention the amounts of either the interest payments or the principal reduction payments, as the court specifically stated at the initial hearing it would require. Mr. Bivians does state that, for accounting purposes, the budget has separate line items for principal and interest owed to Citibank, although the debtor makes one flat payment to Citibank that includes both principal and interest. Thus, the declaration not only fails to mention the amounts of the payments at all, it raises an additional question. The budget lists two different Citibank loans, with principal payments of \$5,484 and \$10,415, respectively. Is the interest payment of \$4,571 included in a single payment of principal and interest on one of these loans or does the debtor make a single payment to Citibank that includes principal and interest on both loans?

Mr. Bivians' supplemental testimony regarding the guarantors also raises new questions. He testifies the debtor's former CEO, Scott McDonald, along with an entity called Monument Investigations, Inc., personally guaranteed what Mr. Bivians refers to as the "debt owed to Citibank." He separately states that Scott McDonald, Monument Investigations, Inc., and Mr. McDonald's wife, Kathryn McDonald, guaranteed the Citibank SBA loan. This is the first mention made of Monument Investigations, Inc. in connection with this motion, although it is listed on the debtor's Schedule G as a co-debtor on the two Citibank loans and on the debtor's Schedule E/F as holding a general unsecured claim for \$82,543 on account of a "personal loan." Monument Investigations, Inc. is listed on the debtor's petition at the same address as the debtor, although it is not listed as a dba of the debtor. The court can find no indication in any document in the court's record disclosing the individuals and/or entities who are the principals of Monument Investigations, Inc. which, on account of its guaranty of the two Citibank loans, is benefitting substantially from the interest and especially the principal reduction payments the debtor is making. In addition, the court asked the debtor's counsel expressly at the hearing whether the debtor's current CEO and shareholder, Mr. Bivians, is a guarantor or otherwise obligated on the Citibank loans. Counsel replied she did not believe so, but Mr. Bivians has not answered that question in his supplemental declaration.

As far as the IRS debt is concerned, Mr. Bivians testifies there is no document indicating Scott McDonald is personally liable. Mr. Bivians refers to and attaches a copy of the debtor's Installment Agreement with the IRS, IRS Form 433-D, which refers to the debtor as the taxpayer and bears an illegible signature, presumably that of Mr. McDonald, as the signature is dated January 5, 2016, with the title of the signor listed as "CEO." The IRS has filed a proof of claim for secured and priority unsecured claims totaling in excess of \$934,000. The claim indicates all of the debt is on account of FICA and FUTA taxes, yet the debtor, or Mr. Bivians at any rate, has apparently made no investigation as to whether assessments have been

made against Mr. McDonald personally as a responsible officer.

Finally, as regards Sharon Brown, the court has reexamined the original proof of service of this motion and finds that Ms. Brown was served through an attorney in San Francisco. She was, however, scheduled at an apartment address in Pinole, and has never been scheduled in this case, either on the schedules, the list of 20 largest creditors, or on the statement of affairs, through the attorney in San Francisco. The debtor is free to serve Ms. Brown through the attorney, which is likely a good idea. However, pursuant to Fed. R. Bankr. P. 2002(g), the debtor should also serve Ms. Brown at her address listed on the schedules. (Ms. Brown holds the second largest scheduled general unsecured claim in the case, for \$255,485, on account of a pre-petition judgment for sexual harassment damages.)

Because the debtor failed to file and serve a notice of continued hearing, as required by the court at the initial hearing, failed to serve anything on Ms. Brown at her address on the schedules, failed to disclose in Mr. Bivians' supplemental declaration the amounts of the principal and interest payments to be made to Citibank on a monthly basis, failed to specifically provide evidence as to whether Mr. Bivians is himself a guarantor, and raised new questions as to an entity clearly being benefitted by the payments to Citibank without identifying the principals of that entity, the court intends to deny the motion. Alternatively, the court will continue the hearing one final time to allow the debtor to address the issues raised in this tentative decision. The court will hear the matter.

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| 14. | 15-29890-D-7
MPD-1
MITCHELL NEWDELMAN VS. | GRAIL SEMICONDUCTOR | CONTINUED MOTION FOR RELIEF
FROM AUTOMATIC STAY AND/OR
MOTION FOR ORDER THE AUTOMATIC
STAY DOES NOT APPLY
3-1-17 [579] |
| | | | |
| 15. | 15-29890-D-7
16-2088
CARELLO V. STERN ET AL | GRAIL SEMICONDUCTOR
DNL-6 | CONTINUED MOTION FOR CONTEMPT
1-18-17 [180] |

16. 14-25816-D-7 DEEPAL WANNAKUWATTE MOTION FOR AUTHORITY TO
DNL-67 CONTINUE TO DISBURSE FUNDS
5-3-17 [1157]
17. 16-23223-D-11 SKYHIGH PROPERTY LLC MOTION BY HOWARD S. NEVINS TO
HSM-4 WITHDRAW AS ATTORNEY
5-9-17 [106]
18. 15-29890-D-7 GRAIL SEMICONDUCTOR CONTINUED MOTION TO EMPLOY JESS
DNL-19 LOPEZ AS SPECIAL COUNSEL
4-21-17 [659]
19. 15-29890-D-7 GRAIL SEMICONDUCTOR MOTION FOR RELIEF FROM
DB-1 AUTOMATIC STAY AND/OR MOTION TO
RONALD HOFER VS. CONFIRM TERMINATION OR ABSENCE
OF STAY
5-8-17 [681]

20. 15-24747-D-7
EAS-3

RAYMOND POQUETTE

MOTION BY EDWARD A. SMITH TO
WITHDRAW AS ATTORNEY O.S.T.
5-16-17 [98]