

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA**

Chief Judge Fredrick E. Clement  
Sacramento Federal Courthouse  
501 I Street, 7<sup>th</sup> Floor  
Courtroom 28, Department A  
Sacramento, California

**DAY: MONDAY**  
**DATE: FEBRUARY 6, 2023**  
**CALENDAR: 9:00 A.M. CHAPTER 7 CASES**

**RULINGS**

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

**"No Ruling"** means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

**"Tentative Ruling"** means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

**"Final Ruling"** means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

**CHANGES TO PREVIOUSLY PUBLISHED RULINGS**

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: **"[Since posting its original rulings, the court has changed its intended ruling on this matter]"**.

**ERRORS IN RULINGS**

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [22-22772](#)-A-7     **IN RE: YURIY SVITYASHCHUK**  
[DNL-1](#)

MOTION TO EMPLOY J. RUSSELL CUNNINGHAM AS ATTORNEY(S)  
1-3-2023     [\[11\]](#)

MARK SHMORGON/ATTY. FOR DBT.  
NIKKI FARRIS/ATTY. FOR MV.

### **Final Ruling**

**Application:** Approval of Employment

**Notice:** LBR 9014-1(f)(1); written opposition required

**Disposition:** Approved

**Order:** Prepared by applicant pursuant to the instructions below

Unopposed applications are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

The Chapter 7 trustee, Nikki Farris, seeks an order approving the employment of Desmond, Noland, Livaich & Cunningham as her general counsel pursuant to a hybrid fee agreement. The hybrid fee agreement has been filed concurrently with this motion as Exhibit A, ECF No. 13.

The hybrid fee agreement provides in part: that the attorney will provide services at an hourly fee except for efforts in avoiding three transfers of property identified in detail in the agreement. *Id.*, page 1.

### **EMPLOYMENT**

The court may approve employment of professional persons who "do not hold or represent an interest adverse to the estate, and that are disinterested persons." 11 U.S.C. § 327(a); see also *id.* § 101(14) (defining "disinterested person"). From the factual information provided in the motion and supporting papers, the court will approve the employment.

The order shall contain the following provision: "Nothing contained herein shall be construed to approve any provision of any agreement between [professional's name] and the estate for indemnification, arbitration, choice of venue, jurisdiction, jury waiver, limitation of damages, or similar provision." The order shall also state its effective date, which date shall be 30 days before the date the employment application was filed except that the effective date shall not precede the petition date.

2. [22-21692](#)-A-7     **IN RE: EVERGREEN ARBORISTS, INC.**  
[RAP-3](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
1-6-2023    [\[219\]](#)

GABRIEL LIBERMAN/ATTY. FOR DBT.  
RAYMOND POLICAR/ATTY. FOR MV.  
SUMITOMO MITSUI FINANCE AND LEASING COMPANY, LTD. VS.

### **Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(2); written opposition not required

**Disposition:** Denied without prejudice

**Order:** Civil minute order

Sumitomo Mitsui Finance and Leasing Company, LTD, seeks an order for relief from the automatic stay of 11 U.S.C. S 362(a). For the following reason(s) the court will deny the motion without prejudice.

### **SERVICE AND NOTICE**

As of November 1, 2022, the court adopted Local Bankruptcy Rules 2002-3, 9036-1, and 7005-1 which requires attorneys and trustees to use EDC 7-005 the form certificate of service.

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding.

In this case there are problems with the use and completion of the standardized Certificate of Service, EDC 7-005. See Certificate of Service, ECF No. 224.

### Attachments 6B1 and 6B3

Unless service is on six or fewer parties in interest and a custom service list is used or the persons served are not on the Clerk of the Court's Matrix, the Certificate of Service Form *shall have attached to it the Clerk of the Court's Official Matrix, as appropriate:* (1) for the case or the adversary proceeding; (2) list of ECF Registered Users; (3) list of persons who have filed Requests for Special Notice; and/or (4) the list of Equity Security Holders.

LBR 7005-1(a) (emphasis added).

Attachment 6B1 lists registered users of the clerk's e-filing system. LBR 7005-1(a) requires that the party serving in such a manner under Fed. R. Bankr. P. 9036, LBR 9036-1, affix the Clerk of the Court's Official Matrix of the list of ECF Registered Users. The attachment in this case is not the Clerk's Official Matrix but rather a typed version. The court reminds counsel that the official list is easily obtained on the court's website. Attachment 6B1

purports to be the Clerk's Official List of Registered e-filers. And the Certificate of Service swears that is true. But Attachment 6B1 is not the official list.

Similarly, Attachment 6B3, the list of parties which have filed requests for special notice, is also incorrectly prepared. LBR 7005-1(a) requires use of the Clerk's Official Matrix of Special Notice Parties yet a typed version by counsel was used in preparing this list. The court reminds counsel that the official list of special notice parties is easily obtained on the court's website. Attachment 6B3 purports to be the Clerk's Official List of Special Notice Parties. And the Certificate of Service swears that is true. But Attachment 6B3 is not the official list.

Attachments 6B1 and 6B3 are incorrectly compiled and do not comply with LBR 7005-1 and EDC Form 7-005. As such the court cannot determine whether the proper parties were served, or were served properly, with the motion. The motion will be denied without prejudice.

#### Rule 7004 Service

Service of the motion on the debtor and debtor's counsel is governed by Fed. R. Bankr. 4001(a), which provides that Rule 9014 is applicable in motions for relief from stay. Rule 9014(b) requires service in accordance with Rule 7004. While service on the debtor and counsel is accomplished by first class mail under both Fed. R. Civ. P. 5 and Fed. R. Bankr. P. 7004, the Certificate of Service in this matter should indicate that service is made on the debtor and counsel pursuant to Rule 7004. Part 6 is incorrectly completed. Here the certificate only indicates service under Fed. R. Civ. P. 5, which is appropriate for other parties such as the special notice creditors, and the United States Trustee.

#### Section 7 Incomplete

The certificate is incomplete as no boxes in Section 7 have been checked. See Certificate of Service, p. 4, No. 7, ECF No. 224.

#### Box 5 Fails to State Special Notice Creditors Served

As noted previously in this ruling, Attachment 6B3 was affixed to the certificate listing creditors who have filed a request for special notice. Section 5 of the certificate is inaccurate as the box indicating that special notice creditors were served was not checked. See *id.*, p. 2, No. 5.

#### **CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Sumitomo Mitsui Finance and Leasing Company, Ltd.'s Motion for Relief from the Automatic Stay has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.

3. [22-21692](#)-A-7     **IN RE: EVERGREEN ARBORISTS, INC.**  
[RPM-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY  
12-29-2022    [\[210\]](#)

GABRIEL LIBERMAN/ATTY. FOR DBT.  
RANDALL MROCZYNSKI/ATTY. FOR MV.  
FORD MOTOR CREDIT COMPANY, LLC VS.  
TRUSTEE NON-OPPOSITION

### **Final Ruling**

**Motion:** Stay Relief

**Notice:** LBR 9014-1(f)(1); non-opposition filed by the trustee

**Disposition:** Denied without prejudice

**Order:** Civil minute order

Ford Motor Credit Company, LLC, seeks an order for relief from the automatic stay of 11 U.S.C. § 362(a). For the following reason(s) the court will deny the motion without prejudice.

### **DEBTOR NOT SERVED**

Rule 7004(a)(9) requires that service shall be made:

Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint *to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.*

Fed. R. Bankr. P. 7004(a)(9) (emphasis added).

Although the Certificate of Service indicates at Item 5 that the debtor was served with the motion, Attachment 6B1 does not list the debtor as a party served with the motion. Rule 7004(a)(9) does not differentiate between individual and corporate debtors. While debtor's *counsel* was served with the motion this is not sufficient service upon the debtor under Rule 7004.

### **SERVICE AND NOTICE**

As of November 1, 2022, the court adopted Local Bankruptcy Rules 2002-3, 9036-1, and 7005-1 which requires attorneys and trustees to use EDC 7-005 the form certificate of service.

The form certificate of service is intended to allow parties to memorialize service efficiently and accurately, and to aid the court in ensuring sufficient service is achieved in each proceeding.

In this case there are problems with the use and completion of the standardized Certificate of Service, EDC 7-005.

#### **INITIAL CERTIFICATE OF SERVICE**

##### Rule 7004

The initial Certificate of Service filed is incorrectly completed at Part 6. See Certificate of Service, ECF No. 216.

Service of the motion on the debtor and debtor's counsel is governed by Fed. R. Bankr. 4001(a), which provides that Rule 9014 is applicable in motions for relief from stay. Rule 9014(b) requires service in accordance with Rule 7004. While service on the debtor and counsel is accomplished by first class mail under both Fed. R. Civ. P. 5 and Fed. R. Bankr. P. 7004, the Certificate of Service should indicate that service is made on the debtor and debtor's counsel pursuant to Rule 7004 in this matter. Here the certificate only indicates service under Fed. R. Civ. P. 5, which is appropriate for parties such as special notice creditors, and the United States Trustee.

##### Attachment 6B1

Unless service is on six or fewer parties in interest and a custom service list is used or the persons served are not on the Clerk of the Court's Matrix, *the Certificate of Service Form shall have attached to it the Clerk of the Court's Official Matrix, as appropriate:* (1) for the case or the adversary proceeding; (2) list of ECF Registered Users; (3) list of persons who have filed Requests for Special Notice; and/or (4) the list of Equity Security Holders.

LBR 7005-1(a) (emphasis added).

The initial Certificate of Service fails to use the Clerk's Official Matrix.

Attachment 6B1 has been affixed to the certificate of service. The attachment is intended to prove that electronic service has been made on registered filers of the clerk's e-filing system under Fed. Rule 9036, LBR 9036-1. Use of the Clerk's Electronic Service Matrix is required in this instance. The form is compiled using the feature located on the court's website.

Attachment 6B1 is a not the official clerk's matrix and does not comply with LBR 7005-1.

##### Special Notice Creditors Not Served

The motion will be denied without prejudice as the moving party has failed to properly provide notice to all parties as required.

The following parties filed a request for special notice: AIS Portfolio Services, LLC; Ally Bank AIS Portfolio Services, LP; Frank Greer Reynolds Law Corporation; Commercial Credit Group, Inc.;

National Electrical Annuity Plan; Ford Motor Credit Company, LLC; Tracy Davis; International Brotherhood of Electrical Workers Local Union 1245; Sumitomo Mitsui Finance & Leasing; National Electrical Benefit Fund; Dakota Financial, LLC; California Regional Water Quality Control Board.

As indicated in the Certificate of Service, special notice parties were not served with the motion. See Certificate of Service, p. 2, no. 5, ECF No. 216. Moreover, there is no attachment which includes the special notice parties in the matrix. Counsel is reminded that a matrix of creditors requesting special notice is easily compiled using the clerk's feature developed for this purpose. This feature is located on the court's website.

#### Rules 9013 and 9007

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

- (a) the trustee or debtor in possession and on those entities specified by these rules; or
- (b) *the entities the court directs if these rules do not require service or specify the entities to be served.*

Fed. R. Bankr. P. 9013 (emphasis added).

When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, *the entities to whom*, and the form and manner in which the notice shall be given. When feasible, the court may order any notices under these rules to be combined.

Fed. R. Bankr. P. 9007 (emphasis added).

Rules 9013 and 9007 allow the court to designate additional parties which must receive notice of a motion and opportunity to be heard.

#### LBR 9014-1(d) (3) (B) (iv)

When notice of a motion is served without the motion or supporting papers, the notice of hearing shall also succinctly and sufficiently describe the nature of the relief being requested and set forth the essential facts necessary for a party to determine whether to oppose the motion. *However, the motion and supporting papers shall be served on those parties who have requested special notice and those who are directly affected by the requested relief.*

LBR 9014-1(d)(3)(B)(iv) (emphasis added).

In the Eastern District the court has ordered that parties which have filed requests for special notice must receive notice of motions. LBR 9014-1(d)(3)(B)(iv) includes creditors which have filed requests for special notice as parties who must be served with all motions and supporting papers.

LBR 9014-1(d)(3)(B)(iv) does not limit the notice required to special notice creditors. Thus, the moving party is required to serve its motion on creditors who have filed requests for special notice.

#### **SUPPLEMENTAL CERTIFICATE OF SERVICE**

On January 17, 2023, the movant filed a Supplemental Certificate of Service, ECF No. 228.

The supplemental certificate appears to have been filed to remedy the lack of service to special notice creditors which the court has addressed earlier in this ruling.

The supplemental certificate is deficient as follows.

#### Use of Form EDC 7-005 is Mandatory

The service of pleadings and other documents in adversary proceedings, contested matters in the bankruptcy case, and all other proceedings in the Eastern District of California Bankruptcy Court by *either attorneys, trustees, or other Registered Electronic Filing System Users* shall be documented using the Official Certificate of Service Form (Form EDC 007-005) adopted by this Court.

LBR 7005-1(emphasis added).

Pursuant to LBR 7005-1 use of Form EDC 7-005 is mandatory in this matter. The movant failed to use Form EDC 7-005 in filing the Supplemental Certificate of Service.

#### List of Special Notice Parties

Unless service is on six or fewer parties in interest and a custom service list is used or the persons served are not on the Clerk of the Court's Matrix, the Certificate of Service Form shall have attached to it the Clerk of the Court's Official Matrix, as appropriate: (1) for the case or the adversary proceeding; (2) list of ECF Registered Users; (3) list of persons who have filed Requests for Special Notice; and/or (4) the list of Equity Security Holders.

LBR 7005-1(a).

The list of special notice parties attached to the Supplemental Certificate of Service fails to use the Clerk's Official Matrix for



persons who have filed Requests for Special Notice. See Supplemental Certificate of Service, ECF No. 228.

Dismissal of Action for Failure to Comply with Local Rules

Failure of counsel or of a party to comply with these Rules, with the Federal Rules of Civil Procedure or the Federal Rules of Bankruptcy Procedure, or with any order of the Court may be grounds for imposition of any and all sanctions authorized by statute or rule or within the inherent power of the Court, including, without limitation, *dismissal of any action*, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions.

LBR 1001-1(g) (emphasis added).

Because the moving party has failed to comply with the Federal Rules of Bankruptcy Procedure and Local Rules regarding service of the motion the court will deny the motion without prejudice.

**CIVIL MINUTE ORDER**

The court shall issue a civil minute order that conforms substantially to the following form:

Ford Motor Credit Company, LLC's Motion for Relief From the Automatic Stay has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is denied without prejudice.