

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

March 15, 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.	16-28018-D-7 BLL-3	TERRENCE/NANCIE HOFMANN	MOTION FOR ORDER AUTHORIZING TRUSTEE TO COLLECT RENTS AND PAY EXPENSES ON RENTAL PROPERTY 2-15-17 [42]
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2.	16-28018-D-7 BLL-4	TERRENCE/NANCIE HOFMANN	MOTION TO ABANDON 2-15-17 [46]
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Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to abandon real and personal property and the trustee has 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.

3. 17-20418-D-7 KYLE/STEPHANIE PERREIRA MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
1-23-17 [5]

4. 16-25331-D-7 CAROL BENEDETTI MOTION TO SELL AND/OR MOTION
DNL-4 FOR COMPENSATION FOR COLDWELL
BANKER REAL ESTATE, BROKER(S)
2-7-17 [47]

5. 17-20731-D-11 CS360 TOWERS, LLC STATUS CONFERENCE RE: VOLUNTARY
PETITION
2-3-17 [1]

Tentative ruling:

This is the initial status conference in this chapter 11 case. The court does not ordinarily issue tentative rulings in connection with status conferences. However, in this case, the court has some preliminary concerns.

First, the Order to (1) File Status Report; and (2) Attend Status Conference (the "Scheduling Order") required the debtor to serve a copy of the Scheduling Order on certain parties no later than February 17, 2017. On February 17, 2017, the debtor filed a proof of service (DN 18) purporting to evidence service of a Chapter 11 Status Report. However, there is no such document on file. A week later, on February 24, 2017, the debtor's counsel signed and filed a Preliminary Status Report. The document served on February 17, 2017 may have actually been the Scheduling Order; if so, the debtor will need to file a corrected proof of service. If the Scheduling Order was in fact not served, the court will require the debtor to serve it on all required parties at the time the debtor also serves a notice of continued status conference, as discussed below.

Second, the debtor failed to serve David Teigen, listed on the debtor's Schedule G, as required by the Scheduling Order. Third, the debtor failed to serve equity security holder The Chisick Family Trust. The court is aware the debtor served Mark Chisick, the debtor's manager, who is likely connected with, if not the trustee of, the trust; however, the Scheduling Order required service on all equity security holders specifically.

Next, there is a separate proof of service of the debtor's Preliminary Status Report, filed and served February 24, 2017. This time, however, the debtor failed to serve any of the tenants listed on Schedule G, as specifically required by the Scheduling Order.

The debtor's Statement of Financial Affairs raises questions about certain persons and entities who, given the extremely broad interpretation of "creditor" under § 101(5) and (10) of the Bankruptcy Code and applicable case law, appear to be creditors of the debtor but who were not scheduled, apparently have never received notice of this case, and were not served with the Scheduling Order or status report. The statement of affairs refers to an individual named Arthur Williams, who the debtor describes as an "alleged creditor with close relationship to Former Manager" (apparently Raymond Sahadeo). In addition, an entity named Brady & Vinding is listed in the statement of affairs as the plaintiff in a lawsuit against the debtor and Guy Swanson, a lawsuit listed in the statement of affairs as pending at the time of filing. Under the Code's definition of "creditor," an "alleged creditor" is a "creditor," as are a plaintiff and a co-defendant in pending litigation against the debtor, and required to be scheduled and notified of the bankruptcy case. Further, if these individuals and entities are secured creditors (albeit disputed by the debtor), they were specifically required by the Scheduling Order to be served, and if they are unsecured, they are among the debtor's 20 largest unsecured creditors (the debtor scheduled only 12), and as such, under the Scheduling Order, required to be served.

Finally, the statement of affairs lists two entities in care of Raymond Sahadeo and three LLCs listed as "LLCs under common control" that are listed as insiders that received payments on debts during the year prior to the filing. The debtor will need to advise the court whether these LLCs and other entities and the individuals and entities discussed in the above paragraph are "creditors," as defined in the Code. For those who are, the debtor will need to amend the schedules to include them, give them notice of the case, and serve them with a notice of continued status conference, along with the Scheduling Order and Preliminary Status Report.

The court will hear the matter.

6. 16-28438-D-7 KYLE OLSON
NLG-1
SETERUS, INC. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
2-15-17 [16]

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 he 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. 17-20038-D-12 LANE FAMILY LIMITED CONTINUED STATUS CONFERENCE RE:
PARTNERSHIP NO. ONE VOLUNTARY PETITION
1-4-17 [1]
8. 17-20038-D-12 LANE FAMILY LIMITED MOTION TO CONVERT CASE FROM
MBG-2 PARTNERSHIP NO. ONE CHAPTER 12 TO CHAPTER 7 AND/OR
MOTION TO DISMISS CASE
2-13-17 [57]
9. 10-50339-D-7 ELEFThERIOS/PATRICIA MOTION FOR COMPENSATION BY THE
HSM-15 EFSTRATIS LAW OFFICE OF HEFNER, STARK &
MAROIS, LLP FOR HOWARD S.
NEVINS, TRUSTEE'S ATTORNEY(S)
2-14-17 [425]

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.

10. 16-21659-D-7 TRONG NGUYEN CONTINUED MOTION TO ABANDON
CDH-3 11-30-16 [73]

Final ruling:

Moving party filed a notice of continued hearing continuing this motion to March 29, 2017 at 10:00 a.m. No appearance is necessary on March 15, 2017.

11. 16-25460-D-7 GABRIEL/CHRISTINA PAULL CONTINUED MOTION TO EMPLOY
SSA-2 BRIAN YAMADA AS SPECIAL COUNSEL
1-20-17 [21]

Final ruling:

This motion was granted by order entered on February 21, 2017. As such, the matter is removed from calendar as moot.

12. 16-27672-D-11 DAVID LIND CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
11-18-16 [1]

13. 17-20088-D-7 RACHAEL SANCHEZ MOTION FOR WAIVER OF THE
CHAPTER 7 FILING FEE OR OTHER
FEE
1-6-17 [5]

14. 17-20689-D-11 MONUMENT SECURITY, INC. STATUS CONFERENCE RE: VOLUNTARY
PETITION
2-1-17 [1]

15. 15-29890-D-7 GRAIL SEMICONDUCTOR
16-2088 DNL-8
CARELLO V. STERN ET AL

MOTION FOR PRELIMINARY
INJUNCTION
2-8-17 [197]

Tentative ruling:

This is the motion of the plaintiff, Sheri L. Carello, who is also the chapter 7 trustee in the bankruptcy case in which this adversary proceeding is pending (the "trustee"), for a preliminary injunction against defendants Frank Bauder and MOM OS, LLC ("MOM"). Mr. Bauder has filed opposition and the trustee has filed a reply. MOM has not filed opposition. For the following reasons, the court intends to grant the motion.

By an earlier motion, the trustee sought a preliminary injunction against Mr. Bauder's and MOM's co-defendants, Donald Stern and Billion Hope International, Ltd. ("BHI") (the "earlier motion"), including essentially the same relief the trustee now seeks against Mr. Bauder and MOM. The court granted the earlier motion and enjoined Stern and BHI from selling, assigning, transferring, or otherwise dissipating any of the \$2.75 million that is the subject of this adversary proceeding and requiring them to turn over those funds to the trustee. In its ruling on the earlier motion, the court found that the trustee is likely to prevail on the merits of her preference claim against Stern and BHI. That claim is a predicate to the trustee's claim to recover the transfer from Mr. Bauder and MOM under § 550 of the Bankruptcy Code. Therefore, the court incorporates herein its findings and conclusions issued on the earlier motion, which appear in the court's minutes at DN 174, including the conclusion that the trustee is likely to prevail on her preference claim. Mr. Bauder and MOM, along with their co-defendants, filed opposition to the earlier motion; thus, they had the opportunity to make and did make their objections known.

However, as for the amount in question as regards Mr. Bauder and MOM, the court will limit any preliminary injunction issued against them to the amounts of \$250,000 and \$400,000, respectively. Although the present motion and accompanying memorandum do not mention those amounts, the trustee's complaint alleges Mr. Bauder and MOM received \$250,000 and \$400,000, respectively, out of the \$2.75 million originally transferred by the debtor into the Hong Kong bank account. The trustee's complaint seeks relief against Mr. Bauder and MOM under § 550 as transferees of the initial transferees, Stern and BHI, in the form of a judgment against Mr. Bauder and MOM for those limited amounts only. Although the complaint includes a cause of action purportedly against all the defendants for turnover and an accounting under oath of the \$2.75 million, the complaint does not allege that either Mr. Bauder or MOM ever had control over any portion of the \$2.75 million in excess of \$250,000 and \$400,000, respectively. Thus, the preliminary injunction, as against Mr. Bauder and MOM, will be limited to those amounts, respectively, and will not extend to the balance of the \$2.75 million.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008). The possibility of irreparable harm is insufficient; instead, the plaintiff must persuade the court that absent an injunction, irreparable harm is likely to occur. Id. at 22. "[A] stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might

offset a lesser showing of likelihood of success on the merits." Alliance For The Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011).

As already indicated, the court concluded in its ruling on the earlier motion that the trustee had satisfied the first element; that is, that she is likely to prevail on her preference claim against Stern and BHI. As to her claim against Mr. Bauder, Mr. Bauder is "hard put to find more than a few fleeting references to him in all the pleadings and declarations submitted by Plaintiff." Bauder's Opp., DN 271 ("Opp."), at 2:2-3. The court is inclined to agree - the moving papers do not seem to be tailored to Bauder or MOM. However, taken together with the evidence in support of the trustee's earlier motion which, as indicated above, Mr. Bauder opposed, the evidence is sufficient for the court to conclude the trustee is likely to prevail on her § 550 claims against Mr. Bauder and MOM. The court takes judicial notice of the evidence submitted by the trustee in support of the earlier motion, and in particular, the trustee's Exhibit E, which purports to be an email from the bank in Hong Kong confirming the dates and amounts of the transfers out of the account to Mr. Bauder and MOM.

Mr. Bauder objects that the email exhibit is hearsay and violates the best evidence rule. The court overruled similar objections raised by the defendants, including Bauder, in opposition to the earlier motion, and overrules the hearsay and best-evidence rule objections here. First, the rules of evidence are more relaxed on a motion for a preliminary injunction than they would be at trial.¹ Second, Mr. Bauder does not raise a genuine question about the email's authenticity and he suggests no way in which the circumstances make it unfair to admit the duplicate in lieu of an original. See Fed. R. Evid. 1003. Mr. Bauder does not testify or suggest that the transfer to him out of the Hong Kong account was not made.²

Mr. Bauder also complains about the volume of the trustee's exhibits "without any reference or identification of the purpose of the exhibits or the particular content to which Bauder should be referred to determine the basis for the claim against him." Opp. at 2:21-22. The trustee has submitted 14 exhibits, some in excess of 100 pages, most of which have to do with the trustee's preference and fraudulent transfer claims against Stern and BHI and few of which make any mention of Mr. Bauder. In addition, the trustee omitted the key piece of evidence - Exhibit E to her earlier motion - from her exhibits supporting this motion, although the supporting declaration of Brad Woods mentions it. In any event, the court finds the moving papers were sufficient to put Mr. Bauder on notice of the trustee's case for a preliminary injunction precluding him from disposing of the funds he received out of the Hong Kong account and requiring him to turn those funds over to the trustee.

Bauder quotes two of the rare references to him in the moving papers, where the trustee alleges Bauder is a personal friend of Stern and "the court may presume that Bauder (as a former director and friend of Donald [Stern]) knew or should have known of the wrongful acts taken to make the Subject Transfer." Opp., at 2:6-8, quoting trustee's declaration. The trustee makes that argument in support of her proposition that she is likely to prevail on her fraudulent transfer claim. As the court has already found the trustee will likely prevail on her preference claim, the court has no need to reach the issue of what Bauder knew or should have known. To the extent Bauder's quotation of this language is intended as a reference to the good faith and for value defense of an immediate transferee under § 550(b), the burden of proof on that defense will be on Mr. Bauder. Woods & Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 736 (9th Cir. BAP 2008); BR Festivals, LLC v. Uptown Theatre, LLC (In re BR Festivals, LLC), 2014 Bankr. LEXIS 4915, *5-6 (Bankr. N.D. Cal. 2014). Mr. Bauder's knowledge is not an element of the trustee's

prima facie case for recovery under § 550 and the trustee need not demonstrate she is likely to prevail on that issue in order to obtain a preliminary injunction.

The court concludes that the trustee has shown she is likely to prevail on the merits of her § 550 claim against Mr. Bauder and MOM, as she will likely be able to show they received the \$250,000 and \$400,000 transfers as immediate transferees of the initial transferees, Stern and BHI. The court also concludes, absent any argument to the contrary by Mr. Bauder (or MOM), that the trustee has shown the estate is likely to suffer irreparable harm if preliminary relief is not granted, that the balance of equities tips in the estate's favor, and that an injunction is in the public interest. For further specifics on these issues, the court adopts its findings and conclusions on the trustee's earlier motion.

Finally, Mr. Bauder claims "there is no evidence that the \$250,000 transferred to Bauder is traceable to the alleged transfer to Donald Stern." Opp. at 2:16-17. He goes on: "It is presumably from an account into which other funds were deposited, and it is well settled that the Plaintiff has the burden of tracing those funds back to the alleged illegal transfer." Opp. at 2:17-19, citing In re Advent Management Corporation, 104 F.3d. 293 (9th Cir. 1997) [no pin cite]. The suggestion that the \$2.75 million deposited into the Hong Kong bank account was commingled with other funds was first raised by the defendants in their opposition to the trustee's earlier motion, but only in their evidentiary objections to the trustee's declaration. "Funds received by BHI from Niro were comingled with other funds as the BHI company had been in operation since Woods set it up in 2012. (Stern Declaration)" Defendants' Evid. Objs., DN 153, at ¶ 38. In fact, the declaration of Mr. Stern filed with the opposition to the earlier motion (and with the evidentiary objections) said nothing about the setting up of the account in 2012 and nothing about commingling.

And in reply to Mr. Bauder's opposition to this motion, the trustee has submitted copies of bank statements for the Hong Kong account which she testifies were received from the bank. Although the bank statements are somewhat difficult to read, as there are portions in Chinese as well as English, the court has identified the bank statement, dated October 27, 2015, that evidences the \$2.75 million deposit (actually, \$2,749,981.60) and finds that at the time of the deposit, the account had only \$4.01 in it. Between the date of the deposit, October 14, 2015, and the date of the payment to Mr. Bauder, February 26, 2016, there was a series of withdrawals but only a single deposit - of interest in the amount of \$2.82. Thus, there is no indication the trustee will have a tracing problem insofar as the payment to Mr. Bauder is concerned.

For the reasons stated, the court finds each of the four factors the court is to consider in determining whether to issue a preliminary injunction weighs in the trustee's favor and against Mr. Bauder and MOM. Accordingly, the motion will be granted. The court will hear the matter.

1 See Sharp v. SKMP Corp. (In re SK Foods, L.P.), 2011 Bankr. LEXIS 5651, *72-75 (Bankr. E.D. Cal. Oct. 11, 2011) and cases cited therein.

2 See Gonzalez v. Wells Fargo Bank, 2009 U.S. Dist. LEXIS 101036, *7 (N.D. Cal. 2009) [addressing evidentiary objections on motion for preliminary injunction: "[B]ecause Gonzalez does not suggest that any of the documents are anything other than what they purport to be, the court sees no reason to presume otherwise."].

16.	14-25094-D-7	BRIAN PORTER	MOTION FOR COMPENSATION FOR
	BHS-5		BARRY H. SPITZER, TRUSTEE'S
			ATTORNEY
			2-2-17 [106]

Final ruling:

This 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) except the additional "up to \$400" requested for completing the motion, responding to possible opposition, and appearing at the hearing. (The fees being approved include fees for 1.9 hours for preparing the motion.) Except for that additional "up to 400," the court will grant the motion and the moving party is to submit an appropriate order. No appearance is necessary.

17.	17-20731-D-11	CS360 TOWERS, LLC	CONTINUED MOTION TO USE CASH
	TBG-2		COLLATERAL
			2-15-17 [12]

18.	14-25148-D-11	HENRY TOSTA	MOTION FOR RELIEF FROM
	THB-1		AUTOMATIC STAY
	CNH INDUSTRIAL CAPITAL		3-1-17 [685]
	AMERICA, LLC VS.		

19.	16-28360-D-7	JOSEPH GLADNEY	AMENDED MOTION FOR WAIVER OF
			THE CHAPTER 7 FILING FEE OR
			OTHER FEE
			2-24-17 [30]

20. 17-21266-D-11 HARD STONE CBO TRUST

ORDER TO SHOW CAUSE RE
DISMISSAL
3-2-17 [10]

21. 16-27620-D-7 JULIE LINCOLN

TRUSTEE'S MOTION TO DISMISS FOR
FAILURE TO APPEAR AT SEC.
341(A) MEETING OF CREDITORS
2-2-17 [19]