

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Robert S. Bardwil  
Bankruptcy Judge  
Sacramento, California

**September 21, 2016 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.	16-24703-D-7	JAMES/KRISTY VOGEL	ORDER TO SHOW CAUSE - FAILURE TO PAY FEES 8-25-16 [25]
----	--------------	--------------------	--

2.	14-25820-D-11	INTERNATIONAL	MOTION TO DISMISS ADVERSARY
	16-2090	MANUFACTURING GROUP, INC.	WT-1PROCEEDING AND/OR MOTION TO
	MCFARLAND V. CALIFORNIA BANK &		TRANSFER CASE TO ANOTHER
	TRUST ET AL		DISTRICT
			8-4-16 [29]

**Tentative ruling:**

**This is the motion of defendant Jamestown S'Klallam Tribe (the "Tribe") to dismiss the plaintiff's original complaint in this adversary proceeding. On**

August 24, 2016, within 21 days after service of the motion to dismiss, the plaintiff filed a first amended complaint. The first amended complaint was timely filed and was permitted as a matter of course by Fed. R. Civ. P. 15(a)(1)(B), incorporated herein by Fed. R. Bankr. P. 7015.

The first amended complaint supersedes the original complaint. Armstrong v. Davis, 275 F.3d 849, 878 n.40 (9th Cir. 2001), citing Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1989). The latter "no longer performs any function and is treated thereafter as non-existent." Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992), citing Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). This appears to be a bright-line rule in the Ninth Circuit. The Tribe, however, has taken the position that the court has discretion to consider a motion to dismiss an original complaint where the amended complaint includes no substantial changes, at least with respect to the moving party. The court disagrees. As the plaintiff points out in her opposition to the motion, the suggested exception to the rule would, in some instances, require the parties to litigate and the court to determine the extent and significance of the changes in the amended version, on a case-by-case basis, before addressing the merits of the motion itself. The bright-line rule avoids the time and expense such an exception would entail.

Further, in a multi-party action such as this one, permitting one defendant to proceed on a motion to dismiss an original complaint while others move to dismiss an amended complaint would have different parties treating the different complaints as the operative ones. Such a procedure has virtually nothing to recommend it. The plaintiff makes other arguments; the court is satisfied, however, based on the above considerations, the extent of Ninth Circuit authority supporting it, and the absence of Ninth Circuit case law for the Tribe's position, that the bright-line rule governs. Accordingly, the court will deny the motion to dismiss as moot. Of course, the denial will be without prejudice to the Tribe's right to respond to the plaintiff's amended complaint as it chooses.

The Tribe's motion also includes a request to transfer this adversary proceeding to the Western District of Washington. As the plaintiff points out, the request is conditional - the Tribe argues that if the action is not dismissed as against the Tribe, venue of the adversary proceeding should be changed. Thus, arguably, resolution of the venue portion of the motion should await the Tribe's response to the plaintiff's amended complaint. However, as the dismissal portion of the motion is being denied, albeit as moot, the Tribe is entitled to a ruling on the venue portion of the motion. The plaintiff and one of the other defendants have weighed in against transferring the action, and the court is persuaded, based on the evidence presented by the Tribe, that the Tribe has not met its burden of demonstrating that the applicable factors weigh in favor of transfer. The only evidence the Tribe has submitted are documents filed in 2011 in an action in the King County Superior Court, in Washington. Those documents do not persuade the court that the location of the parties, the ease of access to proof, the convenience of witnesses, the availability of the subpoena power for unwilling witnesses, and the expense of obtaining witnesses weigh in favor of transferring the adversary proceeding. Accordingly, the Tribe's request for change of venue will be denied, again without prejudice to a renewed motion.

The court will hear the matter.

3. 16-23536-D-7 GARY/DEBRA VALDEZ  
DE-1

MOTION TO AVOID LIEN OF  
INVESTMENT RETRIEVERS, INC.  
8-8-16 [15]

**Tentative ruling:**

This is the debtors' motion to avoid a judicial lien held by Investment Retrievers, Inc. ("Creditor"). The motion was noticed pursuant to LBR 9014-1(f) (1) and no opposition has been filed. However, that does not by itself entitle the debtors to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. V. Meyer (In re Meyer), 373 B.R. 84, 88 (9<sup>th</sup> Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9<sup>th</sup> Cir. 1986). Thus, the court will consider the merits of the motion.

For a judicial lien to be avoidable, it must impair an exemption to which the debtors would otherwise be entitled. § 522(f)(1) of the Bankruptcy Code; In re Goswame, 304 B.R. 386, 390-91 (9<sup>th</sup> Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992). Applying the formula set forth in § 522(f)(2)(A), the court first adds the amounts of the judicial lien, \$104,039, unavoidable liens, \$0, and the debtors' exemption, \$100, to arrive at a total of \$104,139. A judicial lien is considered to impair an exemption only to the extent that this total exceeds the value the debtors' interest in the property would have in the absence of any liens; in this case, that value is \$25,000. The total of the judicial lien, unavoidable liens, and the debtors' exemption, \$104,139, exceeds that value, \$25,000, by \$79,139. Thus, the judicial lien may be avoided to the extent of \$79,139. The balance of the lien, \$24,900, may not be avoided. Viewed another way, deducting the amount of the debtors' exemption, \$100, from the value of the property, \$25,000, leaves \$24,900 in equity to secure the Creditor's judicial lien.

Because the evidence demonstrates the judicial lien impairs the debtors' exemption to the extent of \$79,139, the motion will be grated in part, and the lien will be avoided in that amount; the balance of the lien will remain unaffected. The court will hear the matter.

4. 10-50339-D-7 ELEFThERIOS/PATRICIA  
HSM-12 EFSTRATIS

MOTION TO COMPROMISE  
CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH GENESIS  
SPECIALTY TILE & ACCESSORIES,  
LLC, ET AL.  
8-15-16 [395]

5. 12-30140-D-12 PAUL/BETTY DAVIS  
DF-6

MOTION FOR COMPENSATION FOR  
DAVID FILLERUP, DEBTORS'  
ATTORNEY  
8-24-16 [104]

**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 and the moving party is to submit an appropriate order. No appearance is necessary.

6. 16-25556-D-11 AK BUILDERS AND  
COATINGS, INC.

PRELIMINARY STATUS CONFERENCE  
RE: VOLUNTARY PETITION  
8-23-16 [1]

**Tentative ruling:**

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

First, the debtor's counsel failed to serve the chapter 11 status report on anyone, whereas service was required pursuant to the court's Order to (1) File Status Report; and (2) Attend Status Conference. The court intends to continue the hearing and require the debtor's counsel to file a notice of continued hearing and serve it, together with the status report, on all required parties.

Second, the court notes that the debtor's counsel received no fee for this case and apparently intends to receive no fee. The "balance due," as shown on his Rule 2016(b) statement, is \$0 and there is no mention of attorney's fees in the status report. In fact, the Rule 2016(b) statement states the services are to be performed "pro bono." The debtor's counsel will need to advise the court why he has charged no fee for his services in this case, and in particular, whether he has a connection with the debtor or any of its principals, creditors, or other parties-in-interest.

Third, the status report indicates the debtor's income is from leases of its agricultural property and adds the debtor has a "contract in progress." In contrast, the debtor's Schedule G lists no executory contracts or unexpired leases. Thus, it appears the debtor has not filed schedules that are true, complete, and accurate, as required. See Hickman v. Hana (In re Hickman), 384 B.R. 832, 841 (9th Cir. BAP 2008), citing Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 417 (9th Cir. BAP 2007).

The court will hear the matter.

7. 13-35762-D-12 JOSE DASILVA  
MF-18

MOTION FOR ENTRY OF DISCHARGE  
AND/OR MOTION FOR FINAL DECREE  
8-16-16 [229]

**Tentative ruling:**

This is the debtor's motion for entry of a discharge and final decree in this chapter 12 case. The trustee has filed a response indicating the motion is premature because, as of the date the response was filed, the 30-day period for parties-in-interest to object to the trustee's Final Report and Account had not yet run. That period will have run by the time of the hearing on this motion. The court will hear from the parties as to whether objections to the Final Report and Account have been filed or received, and if not, the court will be inclined to grant the motion.

The court has one concern. On January 13, 2015, Atherton & Associates, LLP, the debtor's accountants, filed a proof of claim for allowance of \$3,785.88 as an administrative expense. That administrative expense was approved by the court by order dated November 7, 2014. The PACER matrix as of this date includes Atherton & Associates; however, the matrix the debtor used for service of this motion did not. Thus, Atherton & Associates was not served. The debtor will need to assure the court Atherton & Associates is aware of the motion and does not oppose it.

The court will hear the matter.

8. 16-25064-D-7 JEFFREY GERLACH  
JHW-1  
TD AUTO FINANCE, LLC VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-18-16 [27]

**Final ruling:**

This matter is resolved without oral argument. This is TD Auto Finance, LLC's motion for relief from automatic stay. The court 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 the property is not necessary for an effective reorganization. Accordingly, the court finds there is cause for granting relief from stay. The court will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

9. 16-24475-D-7 SHUNDI SMITH  
TVC-1  
LINCOLN FINANCE COMPANY VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-13-16 [11]

**Final ruling:**

This is a motion for relief from stay filed by Lincoln Finance Company. The moving papers (motion, notice, declaration, exhibit, relief from stay cover sheet, and proof of service) were filed as a single run-on document which is not in compliance the Guidelines for the Preparation of Documents and with LBR 9014-1(d) (3) and (e) (2). As a result of this procedural defect, the court will deny the motion by minute order. No appearance is necessary.

10. 16-25479-D-7 TAMARA MAACK MOTION TO AVOID LIEN OF BANK OF  
DAO-1 AMERICA, N.A.  
8-24-16 [7]

**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. 14-25820-D-11 INTERNATIONAL MOTION TO EMPLOY JAMES P. BAKER  
FWP-33 MANUFACTURING GROUP, INC. AS SPECIAL COUNSEL  
8-30-16 [905]

12. 16-24621-D-7 KATIE WENDLAND MOTION FOR RELIEF FROM  
VVF-1 AUTOMATIC STAY AND/OR MOTION  
HONDA LEASE TRUST VS. FOR ADEQUATE PROTECTION  
8-30-16 [12]

13. 16-24621-D-7 KATIE WENDLAND MOTION FOR RELIEF FROM  
VVF-2 AUTOMATIC STAY AND/OR MOTION  
HONDA LEASE TRUST VS. FOR ADEQUATE PROTECTION  
8-30-16 [19]

14. 16-23341-D-7 GARRY LEBEL  
KAZ-1  
NATIONSTAR MORTGAGE, LLC VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-29-16 [13]

**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 his discharge on September 7, 2016 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.

15. 10-42050-D-7 VINCENT/MALANIE SINGH  
GJH-16

MOTION FOR COMPENSATION BY THE  
HUGHES LAW CORPORATION FOR  
GREGORY J. HUGHES, TRUSTEE'S  
ATTORNEY(S)  
8-31-16 [690]

16. 10-42050-D-7 VINCENT/MALANIE SINGH  
GJH-15

MOTION TO APPROVE INTERIM  
DISTRIBUTION TO CREDITORS  
8-31-16 [685]

17. 16-25351-D-7 ALAN TERRY  
WAJ-1  
NOLEGGIO PROPERTIES LLC VS.

MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
9-6-16 [31]

18.	16-20760-D-7	ADA CONSTRUCTION	MOTION TO DISMISS ADVERSARY
	16-2162	SERVICES, INC. MWT-1	PROCEEDING
	KANTHATHIN ET AL V. ADA		8-29-16 [6]
	CONSTRUCTION SERVICES, INC.		

**Tentative ruling:**

This is the defendant's motion to dismiss this adversary proceeding for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b). The plaintiffs have not filed opposition. For the following reason, the motion will be granted.

By their complaint, the plaintiffs seek a determination that a debt allegedly owed them by the defendant is nondischargeable pursuant to § 523(a)(2), (4), and/or (6) of the Bankruptcy Code. However, as pointed out by the defendant, this is a chapter 7 case and the defendant, who is the debtor in the underlying case, is a corporation. As such, the defendant will not receive a discharge in any event. See § 727(a) ["The court shall grant the debtor a discharge, unless— (1) the debtor is not an individual . . . ."]; NLRB v. Better Bldg. Supply Corp., 837 F.2d 377, 378 (9th Cir. 1988) ["Partnerships and corporations may not discharge their debts in a liquidation proceeding under Chapter 7 of the Code."].

For this reason, the court intends to grant the motion. The plaintiffs not having filed opposition, the court would ordinarily issue a final ruling without a hearing. However, the notice of hearing failed to advise the plaintiffs whether written opposition would be required, as required by LBR 9014-1(d)(4), and the moving party gave only 21 days' notice of the hearing, such that written opposition was not required. LBR 9014-1(f)(2)(C). Therefore, the court will hear the matter.

19.	15-26465-D-7	SCOTT POMEROY	CONTINUED MOTION FOR STAY OF
	GJH-2		ORDER OVERRULING OBJECTION TO
			DEBTOR'S CLAIM OF EXEMPTION
			7-27-16 [79]

20.	16-22565-D-7	JOSE DOMINGUEZ	MOTION TO AVOID LIEN OF
	TOG-3		AMERICAN EXPRESS BANK, FSB
			9-2-16 [42]

