

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

November 16, 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.	16-25700 -D-7	DAVID SHEVEY	ORDER TO SHOW CAUSE - FAILURE TO PAY FEES 10-21-16 [32]
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2.	11-43803 -D-12 WW-6	TERESA GROESBECK	MOTION FOR ENTRY OF DISCHARGE 10-14-16 [90]
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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 entry of debtor's Chapter 12 discharge pursuant to Bankruptcy Code § 1228 is supported by the record. As such the court will grant the motion and debtor's Chapter 12 discharge will be entered. Moving party is to submit an appropriate order. No appearance is necessary.

3. [16-26219](#)-D-7 DAWN LEYVA
APN-1
SANTANDER CONSUMER USA, INC.
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-6-16 [[9](#)]

Final ruling:

This matter is resolved without oral argument. This is Santander Consumer USA, Inc.'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. [14-25820](#)-D-11 INTERNATIONAL
MANUFACTURING GROUP, INC.

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
5-30-14 [[1](#)]

5. [16-25425](#)-D-7 ANNABEL HARO
DBJ-1

CONTINUED MOTION TO AVOID LIEN
OF SIERRA CENTRAL CREDIT UNION
9-1-16 [[10](#)]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by Sierra Central Credit Union ("Sierra Central"). Sierra Central has filed opposition and the debtor has filed a reply. On November 9, 2016, after the opposition and reply had been filed, the debtor filed a notice of withdrawal of the motion, in which she purported to unilaterally withdraw the motion. As opposition had already been filed, the debtor was not at liberty to unilaterally withdraw the motion. Fed. R. Civ. P. 41(a)(1) and (2), incorporated herein by Fed. R. Bankr. P. 7041 and 9014(c). Therefore, the notice of withdrawal had no effect and the court will rule on the motion. For the following reasons, the court intends to deny the motion.

The debtor conceded in her reply to Sierra Central's opposition that, based on the value of the property as asserted by the debtor, \$285,000, the lien may be avoided to the extent of, at most, \$5,142. The balance of the lien, \$8,102, may not be avoided. With her reply, the debtor filed a declaration of Tom Russo, who has been a licensed real estate broker since 1985. Mr. Russo prepared a comparative market analysis based on three comparable properties, including two closed sales and one listing, and concluded the market value of the property is between \$267,000 and

\$285,000. Mr. Russo testified, "[t]he property has significant repairs needed. The roof and carpet are both in need of replacement." Russo Decl., DN 23, at ¶ 4.

Sierra Central has filed a declaration of James A. Chaussee, who has been a licensed real estate appraiser since 1989. Mr. Chaussee performed an interior and exterior inspection of the property and prepared an appraisal. He concludes the market value of the property is \$300,000. Mr. Chaussee analyzed and made adjustments to the prices of five comparable properties, including three closed sales and two with pending contracts. All of Mr. Chaussee's comparables are located within one mile of the debtor's property; four are within one-half mile. (Mr. Russo's exhibits do not indicate the distance of his three comparables from the debtor's property.) For all five of his comparables, Mr. Chaussee made significant adjustments downward due to the inferior condition of the debtor's property. He stated in his appraisal, the "[h]ome has considerable deferred maintenance." He noted the poor condition of "all carpets and vinyl," as well as the rear fence, lattice patio, and sprinklers, and noted minor damage to the garage door and trim. As regards the roof, he stated in the appraisal, "Roof appears to have remaining life, but there have been leaks around flashing. Gutters are rusted and leaking." Sierra Central's Ex. A. He concluded, "[s]ubject should be valued near the low end of the value range for homes of this size and age." Id.

Mr. Chaussee expanded on the roof issue in his declaration:

I have provided my professional opinion on roofing conditions on over a hundred FHA and conventional appraisals. I additionally have attended classes on construction. When an appraiser sees visible signs of deterioration of roofing shingles, appraisers are required to call for a roofing inspection by a licensed roofing or general contractor. I named these visual clues in my report and did not see them during my inspection. [¶] My appraised value of \$300,000 is based, in part, on my opinion the roofing shingles appear to have sufficient remaining life to make replacement unnecessary to meet lending standards. There is no cupping of shingles, bare spots, missing shingles or active leaks.

Chaussee Decl., ¶¶ 13, 14.

Both Mr. Russo and Mr. Chaussee have extensive experience in the real estate field. However, because Mr. Chaussee is a long-time appraiser, whereas Mr. Russo is a long-time broker, Mr. Chaussee's opinion carries more weight. It also carries more weight because of the level of detail with which Mr. Chaussee evaluated the issue with the roof. Considering the evidence submitted by both parties, the court concludes the fair market value of the property is \$300,000. At that value, there is sufficient equity in the property over and above the mortgage loan and the debtor's exemption that Sierra Central's judgment lien does not impair the exemption, and the motion will be denied.

The court will hear the matter.

6. [15-28653](#)-D-7 SALLY SPANN ORDER TO SHOW CAUSE - FAILURE
TO PAY FEES
10-21-16 [[34](#)]

Final ruling:

The deficiency has been corrected. As a result the court will issue a minute order discharging the order to show cause and the case will remain open. No appearance is necessary.

7. [16-25554](#)-D-7 MATTHEW ARCHER AND MOTION TO COMPEL ABANDONMENT
FF-1 GENEVEE CATES
10-19-16 [[21](#)]

Final ruling:

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

8. [16-25554](#)-D-7 MATTHEW ARCHER AND MOTION FOR RELIEF FROM
JHW-1 GENEVEE CATES AUTOMATIC STAY
CAB WEST, LLC VS. 10-13-16 [[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. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they 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.

9. [16-26162](#)-D-7 GLEN/KATHLEEN O'BRIAN MOTION FOR RELIEF FROM
JHW-1 AUTOMATIC STAY
FIRST INVESTORS FINANCIAL 10-14-16 [[11](#)]
SERVICES VS.

Final ruling:

This matter is resolved without oral argument. This is First Investors Financial Services'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.

10. [16-26669](#)-D-7 DAVID MASON
VVF-1
AMERICAN HONDA FINANCE
CORPORATION VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
10-18-16 [[11](#)]

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.

11. [15-28170](#)-D-7 KEVIN ARMSTEAD
UST-1

MOTION TO EXTEND DEADLINE TO
FILE A COMPLAINT OBJECTING TO
DISCHARGE OF THE DEBTOR
10-6-16 [[41](#)]

12. [16-26873](#)-D-11 DEF ENTERPRISES, INC.

PRELIMINARY STATUS CONFERENCE
RE: VOLUNTARY PETITION
10-17-16 [[1](#)]

Final ruling:

This preliminary status conference is continued to November 30, 2016 at 10:00 a.m. per the attorney's request.

This is the initial status conference in this chapter 11 case. Although the court does not ordinarily issue tentative rulings for status conferences, in this case, the court has significant concerns. First, the Order to (1) File Status Report; and (2) Attend Status Conference ("Order") required the debtor to serve the Order on, among others, the holders of the 20 largest unsecured claims, whereas the debtor failed to serve the only creditor on the list of the 20 largest unsecured creditors, the Franchise Tax Board. The debtor also did not serve its Status Report on the Franchise Tax Board, although it did serve the Internal Revenue Service, which is not scheduled as a creditor at all.

Second, the debtor's counsel, David Foyil, is also its president, sole shareholder, sole tenant, and sole source of revenue. As such, he is, by definition, not a disinterested person (see § 101(14) of the Bankruptcy Code), as required by § 327(a). Further, Mr. Foyil's position in all of these capacities, if not in any one of them, almost by definition renders him a person who holds an interest adverse to the estate.¹ Mr. Foyil's intention, according to his Rule 2016(b) statement, to render services to the debtor pro bono does not exempt him

from the requirements of disinterestedness and absence of an adverse interest. Although denial of compensation "puts teeth into the requirement of disinterestedness" (3 COLLIER ON BANKRUPTCY ¶ 327.04[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)), the standards go to the heart of the professional's status as a fiduciary to the estate, with a duty "to represent the estate and act only in its best interest, not the interest of the debtor." Shat v. Kistler (In re Shat), 2009 Bankr. LEXIS 4547, *14 (9th Cir. BAP 2009).²

Third, the debtor has altered the form of the Statement of Financial Affairs such that pertinent information may have been omitted; in addition, the debtor has failed to disclose other required information. The form of the Statement of Financial Affairs, Official Form 207, question 1, includes a chart on which the debtor is required to disclose its gross business revenue from the beginning of the fiscal year to the filing date, for the prior year, and for the year before that. The chart also includes the dates for the periods covered and a check-the-box chart for listing the income sources. The debtor in this case answered the question "Gross revenue from business" by checking the box for "None." However, the debtor whited out or otherwise deleted the entire chart that is part of the official form. Thus, the debtor's president who signed the statement of affairs (Mr. Foyil) arguably has not sworn under penalty of perjury that the debtor has had no revenues in each of the past three years, as required by the official form. For virtually all the rest of the questions in the statement of affairs, the debtor also answered "None" and deleted the charts in the official form. A debtor is not at liberty to delete whole sections of the official forms.

In addition, it appears the debtor's "None" answers to several of the questions in the statement of affairs are wrong or misleading. The debtor's Schedule G discloses a monthly rental agreement under which the debtor's tenant, Mr. Foyil, pays an amount equal to the debtor's mortgage payment plus taxes, insurance, and maintenance. The debtor does not say Mr. Foyil pays those amounts directly and individually to the mortgage holder, the tax collector, the insurance company, and persons providing maintenance services. Instead, it says he pays "an amount equal to" the total of those items, which implies he pays that amount to the debtor. Yet the debtor's Schedule B shows it has no bank account (in fact, no assets of any kind other than the real property), and as indicated, in the statement of affairs (as altered), the debtor stated it has had no revenue.

The debtor also answered "None" where required to list payments to any creditor within the 90 days prior to the case filing. It may be that the debtor made no mortgage, tax, insurance, or other payments during that period, but if it did, or if Mr. Foyil made such payments on the debtor's behalf, the debtor was required to list those payments. If instead Mr. Foyil has not been making those payments, that fact should have been disclosed somewhere in the statement of affairs, either in answer to question 9 (gifts) or question 30 ("value in any form" provided by the debtor to an insider), yet the debtor answered those questions "None" and "No." If Mr. Foyil has not made those payments but is liable to the debtor for them, it appears he is, in addition to the other hats he wears, a creditor of the debtor (albeit not scheduled as such), which renders him per se ineligible to be its attorney.³

Next, if the debtor's statement of affairs is accurate, the debtor maintains no books or records. (Where required to list all firms or individuals in possession of the debtor's books and records at the time of filing, the debtor answered "None.") This is troubling for a corporate debtor going into a chapter 11. Finally, where required to list its officers, directors, and other controlling persons, the debtor

left the answer space blank. That is, the debtor did not answer "None" and did not provide any names. Although it appears Mr. Foyil is the only person occupying any of those positions, an answer was required.

Mr. Foyil is an experienced bankruptcy attorney who should be more than capable of preparing complete and accurate schedules and statements. Yet those he prepared in this case raise many significant concerns, not the least of which is his status as the debtor's tenant and sole source of income in a situation where, according to the corporate resolution authorizing the bankruptcy filing, the debtor is unable to make the balloon payment due on the note secured by its real property (Mr. Foyil's business premises) and the debtor has no other assets. For all of these reasons, the court intends to consider at the status conference, as permitted by the Order, dismissal or conversion of the case or appointment of a chapter 11 trustee.

No appearance is necessary on November 16, 2016.

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- 1 A generally accepted definition of "adverse interest" is the (1) possession or assertion of an economic interest that would tend to lessen the value of the bankruptcy estate; or (2) possession or assertion of an economic interest that would create either an actual or potential dispute in which the estate is a rival claimant; or (3) possession of a predisposition under circumstances that create a bias against the estate.

Dye v. Brown (In re AFI Holding, Inc.) (AFI Holding I), 355 B.R. 139, 148-49 (9th Cir. BAP 2006).

- 3 "[C]ounsel for a corporate Chapter 11 debtor in possession owes a fiduciary duty to the corporate entity estate - the client - and represents its interests, not those of the entity's principals." In re Wilde Horse Enterprises, Inc., 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991). In this instance, the debtor's attorney is the debtor's principal. A more striking instance of absence of disinterestedness and an interest adverse to the estate is hard to imagine.

- 3 "It is black-letter law that a 'creditor' is not 'disinterested.'" In re Kobra Props., 406 B.R. 396, 403 (Bankr. E.D. Cal. 2009).

13. [15-28774](#)-D-7 OTASHE GOLDEN
SSA-3

MOTION TO COMPROMISE
CONTROVERSY/APPROVE SETTLEMENT
AGREEMENT WITH DAMERON HOSPITAL
ASSOCIATION
9-27-16 [[47](#)]

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.

14. [16-24982](#)-D-7 ASHLEY KING
JHW-1
FORD MOTOR CREDIT COMPANY,
LLC VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
10-17-16 [[11](#)]

Final ruling:

This matter is resolved without oral argument. This is Ford Motor Credit Company 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.

15. [16-22183](#)-D-7 JOHN/AMANDA ANTICH
BLL-4

MOTION FOR COMPENSATION FOR
BYRON LEE LYNCH, TRUSTEE'S
ATTORNEY
10-19-16 [[42](#)]

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.

16. [13-35288](#)-D-7 DUSTIN/KAREN BOLE
[14-2097](#) MGB-6
GENERAL COUNCIL OF THE
ASSEMBLIES OF GOD V. BOLE ET

CONTINUED MOTION TO DISMISS
ADVERSARY PROCEEDING
9-21-16 [[185](#)]

Final ruling:

The hearing on this motion is continued to January 18, 2017 at 10:00 a.m. No appearance is necessary on November 16, 2016.

17. [13-35288](#)-D-7 DUSTIN/KAREN BOLE
[14-2097](#) MGB-7
GENERAL COUNCIL OF THE
ASSEMBLIES OF GOD V. BOLE ET

CONTINUED MOTION TO RESTRICT OR
REDACT PUBLIC ACCESS AND/OR
MOTION FOR SANCTIONS
9-21-16 [[189](#)]

Final ruling:

The hearing on this motion is continued to January 18, 2017 at 10:00 a.m. No appearance is necessary on November 16, 2016.

18. [11-22685](#)-D-7 BLUE RIBBON STAIRS, INC. CONTINUED MOTION FOR RELIEF
CSR-2 FROM AUTOMATIC STAY
GATEWAY ACCEPTANCE COMPANY 9-23-16 [[1291](#)]
VS.

Final ruling:

This motion was granted by order entered on November 7, 2016. As such, the matter is removed from calendar.

19. [16-27097](#)-D-7 NORMAN/BEVERLY PIERRO MOTION FOR RELIEF FROM
DO-1 AUTOMATIC STAY
UMPQUA BANK VS. 10-31-16 [[11](#)]

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtors' Statement of Intentions indicates they intend to surrender the collateral and the trustee has filed a Statement of Non-Opposition. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.