

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

WILLIAM H. PAYNE and
ARTHUR R. MORALES,

Plaintiffs,

v.

CIVIL NO. 97-266 MCA/LFG

NATIONAL SECURITY AGENCY,

Defendant,

UNITED STATES OF AMERICA,

Garnishor,

and,

SANDIA LABORATORY FEDERAL CREDIT UNION
AND ITS SUCCESSORS OR ASSIGNS
ATTENTION: LOSS PREVENTION,

Garnishee.

UNITED STATES' RESPONSE TO DEBTOR'S
MANDATORY JUDICIAL NOTICE NO. 1 (Doc. 144)

The United States is not sure exactly what this Mandatory Judicial Notice No. 1 is that was filed by the Debtors as Docket No. 144. To the extent that it may be deemed an objection to the garnishment proceeding under 28 U.S.C. § 3205(c)(5), the United States provides this response to the Debtors' numbered assertions in Docket No. 144.

1. First, the Debtors complain that the Court did not send them copies of the documents shown as Docket Nos. 103 - 135. Any possible obligation of the Court to do so would only arise for orders and judgments issued by the Court itself. See FED. R. CIV. P. 77(d). Any service obligation as to documents filed by the United States or the garnishees would lie with them under FED. R. CIV. P. 5(a).

The only document issued by the Court from Docket Nos. 103-135 are the abstracts of judgment, Docket Nos 106 & 107, the Clerk's taxation of costs, Docket Nos. 109 & 110¹ and the writs of garnishment, Docket Nos. 118-123. The Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. § 3205(c)(3), requires service of the writs of garnishment by the United States, not the Court. The certificates of service filed by the United States, Docket Nos. 124-130, reflect that service of the writs of garnishment was made on the Debtors by the United States. Thus, nothing more is required as to the writs.

The United States is not aware of any requirement that an abstract of judgment or the Clerk's taxation of costs be served on the Debtors by the Court, as opposed to an order or judgment entered by the Court which is required to be served by the Clerk under FED. R. CIV. P. 77(d). The United States believes that the issuance of an abstract of judgment by the Clerk is a mere ministerial act without significance independent of the judgment. Further, the notices of electronic filing issued by the Clerk as to Docket Nos. 106 & 107 reflect that they were mailed by the Clerk to the Debtor's

¹ Docket No. 108 states that it was entered in error and it should be disregarded.

address of record in the Courts' file². See Exhibits 1 & 2 attached hereto. However, even if the Court determines that service of the abstracts of judgment by the Clerk on the Debtors was required and in fact was not made here, that issue would be irrelevant to the garnishment which has nothing to do with the abstracts.

As to the Clerk's taxation of costs, the bills of costs submitted by the United States, Docket Nos. 104 & 105, were served by first class mail on the Debtors as shown by the Declaration of Lois Agnes attached hereto as Exhibit 3. Copies of the transmittal letters are affixed thereto as Attachments 4 and 5. The Debtors have waived any objection to the taxation of costs by the Clerk by failing to respond. Further, the notices of electronic filing issued by the Clerk as to Docket Nos. 109 & 110 reflect that they were mailed by the Clerk to the Debtors' addresses of record in the Court's records. See Exhibits 4 & 5 attached hereto. However, if the Court believes that service of the taxation of costs by the Clerk on the Debtors was required and in fact was not made here, the amount is only \$18.00 and the United States would waive it.

2. Second, the Debtors again raise the issue of whether they were properly served by the United States with the garnishment paperwork. The United States incorporates by reference its previous arguments on this issue in its Pre-Hearing Memorandum of Law on United States' Objection to Claims of Exemption, Docket No. 143, pp. 5-8.

² Mr. Morales' address has apparently changed but he has filed nothing with the Court informing the Clerk of that change. See D.N.M.L.R.Cv-83.6.

3. Third, the Debtors assert that the United States' Objection to Claims of Exemption and Request for Hearing (Docket No, 135) was a motion requiring notice under D.N.M.L.R.Cv-7.4. On its face, the document was not a motion but was an objection filed under the statutory procedures of the FDPCA at 28 U.S.C. § 3014(b)(2). Thus, Plaintiff's assertion is without merit.

4. Fourth, the Debtors claim that correspondence from the Court to the parties and counsel and from undersigned counsel to the Court concerning the request for hearing were improper ex parte communications outside the record. However, both of the Debtors were copied on the correspondence and there was nothing improper about them, particularly since they dealt with procedural matters not substantive ones.

5. Fifth, the Debtors assert that all judges in this district have been recused in this matter referencing an alleged statement made by retired United States Magistrate Judge William Deaton at an initial scheduling conference in 2000. This alleged statement by Judge Deaton was apparently made, if at all, in another matter since the docket in this case does not reflect that Judge Deaton was ever assigned and the initial scheduling conference occurred years before the date stated by the Debtors. Likewise, the fact that Senior United States District Court Judge James Parker may have entered orders of recusal in certain other cases in the past while the Debtors had pending actions naming the judges as defendants in those actions is no longer relevant since those other actions have all been dismissed. No motion or affidavit in support of recusal has been filed in this case. Further, recusal under either 28 U.S.C. § 144 or 28

U.S.C. § 455, must be based on something more than adverse rulings in the case at hand or a party's dislike of a judge. Peterson v. United States, 239 Fed. App'x 428, 431 (10th Cir. 2007); Wheeler v. American Heritage Bank, 2004 WL 5459803, at *2 (D.N.M.), *appeal dismissed*, 175 Fed. App'x 250 (10th Cir. 2006). The Debtors have stated no meritorious basis for recusal here.

6. Sixth, the Debtors request transfer of this case to the United States District Court for the District of Columbia. The United States assumes that the basis for this request is the same as the recusal issue above, which is without merit as previously argued.

7. Seventh, the Debtors ask that all judgments in this case be voided. Again, the United States assumes that the basis for this request is the same as the recusal issue above, which is without merit as previously argued.

8. Eighth, the Debtors ask that the garnishment of their bank accounts at Sandia Federal Credit Union be removed. The United States assumes that the basis for this request is that the accounts were exempt or that service was improper. The United States incorporates by reference its previous arguments on these issue in its Pre-Hearing Memorandum of Law on United States' Objection to Claims of Exemption, Docket No. 143, pp. 1-8.

9. Ninth, the debtor William Payne asks that the garnishment of his safety deposit box at Bank of America be removed. The United States assumes that the basis for this request is only that service was improper, since he has not claimed an

exemption as to the safety deposit box in any document of which the United States is aware. The United States incorporates by reference its previous arguments on the service issue in its Pre-Hearing Memorandum of Law on United States' Objection to Claims of Exemption, Docket No. 143, pp. 5-8. The United States does acknowledge that it cannot recover more than the judgment debt of \$11,018. If that debt is satisfied by the Credit Union garnishment, it will voluntarily withdraw the garnishment of Mr. Payne's safety deposit box at Bank of America.

10. Tenth, the Debtors ask that the case be settled or tried to a jury. The only remaining matter in this case is the payment of the sanctions previously imposed by the Court. Docket No. 100. Thus, there is nothing to settle or try to a jury.

11. Eleventh and last, the Debtors ask for the issuance of injunctions against the actions of the United States Attorney and the judges in this case as violations of New Mexico criminal law. If the Debtors wished to challenge the imposition of the sanctions, the proper method for doing so was to file an appeal. The time for doing so has long passed and there is nothing improper about enforcing the Court's order. The Debtors' request is frivolous and sanctionable on its face under FED. R. CIV. P. 11.

WHEREFORE, the United States requests that all relief in the Debtors' Mandatory Judicial Notice No. 1 be denied.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

/s/ Electronically filed March 19, 2008

JOHN ZAVITZ
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103-0607
(505) 224-1414
(505) 346-6884 (facsimile)
E-mail: john.zavitz@usdoj.gov

I HEREBY CERTIFY that a true copy of the foregoing pleading was mailed, postage prepaid, on March 19, 2008, to the following non-participants in the CM/ECF electronic filing system:

William H. Payne at 13015 Calle De Sandias NE, Albuquerque, New Mexico 87111-2924;

Arthur Morales at 1400 Camino Amparo NW, Albuquerque, New Mexico 87107-2608;
and

Sandia Laboratory Federal Credit Union, c/o Kevin D. Hammar, Attorney for Garnishee,
1212 Pennsylvania NE, Albuquerque, New Mexico 87110.

/s/ JOHN ZAVITZ

JOHN ZAVITZ

Assistant United States Attorney

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