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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REENA LEVIN, et al.

No. C-11-04783 DMR

Plaintiff(s),

**ORDER RE PLAINTIFFS'
APPLICATIONS FOR JUDGMENT
DEBTOR EXAMINATIONS [DOCKET
NOS. 231, 232]**

v.

DEBORAH SELLERS, et al.

Defendant(s).

Before the court are two applications by Plaintiffs Steven E. Schwarz and Reena Levin for judgment debtor examinations against Defendant Sellers Markets, Inc (“Sellers Markets”) and APMEX LLC. [Docket Nos. 231, 232.]

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs originally brought this action against James Sellers, Deborah Sellers, Sellers Markets, and other defendants in the Northern District of Illinois. *See* Docket No. 99. Plaintiffs alleged that they invested \$40,000.00 in Sellers Markets securities; that they exercised their contractual redemption rights; and that their redemption demand was not honored. *See* Docket No. 165. On September 27, 2011, Judge Feinerman transferred the case to the Northern District of California. [Docket No. 99.]

On February 9, 2012, default was entered as to several defendants, including Defendants James Sellers, Deborah Sellers, and Sellers Markets. [Docket No. 155.] On April 4, 2012, the parties, including the defaulted defendants, filed a Joint Stipulation of Dismissal wherein Plaintiffs dismissed their complaint with prejudice, and the parties stipulated that this court “retains

1 jurisdiction over any claims or actions in law or in equity necessary to enforce the terms of the
2 Parties' Settlement Agreement executed as of March 10, 2012." [Docket No. 180.] On April 10,
3 2012, the court issued an order dismissing the case with prejudice, and stating that the court "shall
4 retain jurisdiction for the limited purpose of resolving disputes arising out of the parties' March 10,
5 2012 settlement agreement. [See Docket No. 180.]" [Docket No. 183, brackets in original.]

6 On March 14, 2012, all parties entered into the Settlement Agreement. Sellers Markets
7 subsequently defaulted on its obligations under the Settlement Agreement. On July 9, 2013, this
8 court granted Plaintiffs' motion for enforcement of the Settlement Agreement and ordered Sellers
9 Markets to immediately pay Plaintiffs the sum of \$32,000. [Docket No. 224.] On August 15, 2013,
10 the clerk of the court issued a writ of execution directing the sheriff or marshal of San Francisco
11 county to enforce the judgment against Sellers Markets. [Docket No. 226.]

12 **II. JUDGMENT DEBTOR EXAMINATIONS**

13 This court generally follows California state procedures for execution of a money judgment.
14 See Fed. R. Civ. P. 69(a)(1) (providing that with respect to a money judgment, "procedure on
15 execution—and in proceedings supplementary to and in aid of judgment or execution—must accord
16 with the procedure of the state where the court is located, but a federal statute governs to the extent
17 it applies"), 69(a)(2) ("In aid of the judgment or execution, the judgment creditor or a successor in
18 interest whose interest appears of record may obtain discovery from any person—including the
19 judgment debtor—as provided in these rules or by the procedure of the state where the court is
20 located.").

21 California Code of Civil Procedure § 708.110 governs judgment debtor examinations in
22 California. "The judgment creditor may apply to the proper court for an order requiring the
23 judgment debtor to appear before the court, or before a referee appointed by the court, at a time and
24 place specified in the order, to furnish information to aid in enforcement of the money judgment."
25 Cal. Civ. Proc. Code § 708.110(a). "'Judgment debtor' means the person against whom a judgment
26 is rendered." Cal. Civ. Proc. Code § 680.250.

27 **A. Examination of Sellers Markets**

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1 Judgment has been rendered against Sellers Markets, and the court grants Plaintiffs’
2 application for an order directing Sellers Markets to appear for a judgment debtor exam. Plaintiff is
3 directed to contact the courtroom deputy Ivy Garcia at (510) 637-3639 to schedule a date and time
4 for the judgment debtor exam.

5 **B. Examination of APMEX LLC**

6 With respect to APMEX LLC, that entity is not a judgment debtor, as no judgment has been
7 rendered against it. Instead, Plaintiffs appear to argue that APMEX LLC is the appropriate target for
8 a judgment debtor exam because Plaintiffs believe APMEX LLC owes a cash debt to Sellers
9 Markets for the purchase price of the lease.

10 Plaintiffs’ application for a judgment debtor exam of a third party must satisfy the
11 requirements of California Code Civ. Proc. § 708.120(a). *See also Gordon v. Vitalis Partners, LLC*,
12 No. 10-MC-00070 WBS, 2012 WL 161033 at *1-2 (E.D. Cal. Jan. 18, 2012) (denying plaintiffs’
13 application for a judgment debtor examination where it failed to satisfy the requirements of the
14 California Civil Procedure Code). That statute provides:

15 Upon ex parte application by a judgment creditor who has a money judgment and proof by
16 the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a
17 third person has possession or control of property in which the judgment debtor has an
18 interest or is indebted to the judgment debtor in an amount exceeding two hundred fifty
dollars (\$250), the court shall make an order directing the third person to appear before the
court [for a judgment debtor exam]. The affidavit in support of the judgment creditor’s
application may be based on the affiant’s information and belief.

19 Cal. Civ. Proc. Code § 708.120(a).

20 According to Plaintiffs, Sellers Markets sent Plaintiffs a letter on July 8, 2013. *See* Docket
21 No. 232-3. That letter states that Sellers Markets ceased operating on July 8, 2013 due to the
22 “deterioration of its operating performance, precipitated by the dramatic increase in the presence of
23 food trucks in the Financial District of downtown San Francisco.” *Id.* Sellers Markets’ assets as of
24 July 8 consisted of “cash in the approximate sum of \$1000, used [furniture, fixtures, and equipment],
25 and a small amount of inventory.” *Id.* Sellers Markets transferred its lease to “APMEX, Inc.” under
26 a bulk sale whose proceeds would not be sufficient to pay any other secured claims other than those
27 of Sellers Markets’ senior secured creditor, Heritage Bank. *Id.*

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1 Plaintiffs submitted an affidavit which declares that Schwarz performed internet research
2 into the identity of “APMEX, Inc.” and could not locate any entities by that name registered to do
3 business in California. However, “APMEX LLC” is an “active restaurant company engaged in the
4 restaurant business¹ located in San Francisco, California.” Schwarz Aff. [Docket No. 238-1] at ¶ 3.
5 Based upon Schwarz’s research, Plaintiffs “believe that APMEX LLC, not APMEX, Inc., owes a
6 cash debt to Sellers Markets . . . for the purchase price of SMI’s restaurant lease . . . [and] that
7 APMEX LLC owes SMI an amount exceeding two hundred fifty dollars.” *Id.* at ¶¶ 3-4.

8 Under Section 708.120, the judgment creditor must present “proof . . . by affidavit or
9 otherwise to the satisfaction of the proper court that a third person has possession or control of
10 property in which the judgment debtor has an interest or is indebted to the judgment debtor in an
11 amount exceeding two hundred fifty dollars (\$250).” Plaintiffs’ affidavit in support of the
12 examination application simply recites the statutory language and offers the conclusory assertion
13 that APMEX LLC is indebted to the judgment debtors in an amount exceeding \$250.00. Even if the
14 affidavit is based on Plaintiffs’ information and belief, it fails to provide credible, non-speculative
15 evidence that APMEX LLC “has possession or control of property” in which Sellers Markets retains
16 any interest, or that APMEX LLC is indebted to Sellers Markets in any amount as a result of the
17 bulk sale of Sellers Markets’ assets to APMEX LLC. Plaintiffs’ request for an order directing
18 APMEX LLC to appear for a judgment debtor exam is therefore denied because it fails to meet the
19 requirements of Section 708.120(a).²

20 III. CONCLUSION

21 _____
22 ¹ Documents purportedly from the California Secretary of State’s website only indicate that
23 APMEX LLC is an active business entity in California, but do not state that it is in the restaurant
24 industry. Plaintiffs submitted a purported printout from the website CorporationWiki indicating that
25 “Apmex LLC” is in the restaurant industry. *See* Docket No. 232-4.

26 ² On November 9, 2013, Plaintiffs filed a supplemental declaration stating that on November
27 4, 2013, they had effected personal service of a third party levy and writ of execution on APMEX LLC.
28 [Docket No. 264 at ¶ 3.] The court notes that this procedure may uncover some of the information that
Plaintiffs seek in their application for a judgment debtor exam of APMEX LLC. *See* California Practice
Guide, Enforcing Judgments and Debts (2013) at 6:1281 (“Before examining a third party, it is generally
advisable to serve him or her with a writ of execution (garnishment). Even if the levy is ineffective, the
third person must complete a garnishee’s memorandum. This may provide the same information that
could be obtained from an exam, and will be much cheaper.”) Plaintiffs are apparently still awaiting
a response to the levy on APMEX LLC.


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For the reasons stated above, the court grants Plaintiffs' application for a judgment debtor examination against Sellers Markets and denies the application for the judgment debtor examination against APMEX LLC.

Immediately upon receipt of this Order, Plaintiffs shall serve Sellers Markets with a copy of this Order and file a proof of service with the court.

IT IS SO ORDERED.

Dated: November 15, 2013



DONNA M. RYU
United States Magistrate Judge