

\*E-Filed 11/18/09\*

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION

11 THERESA CALLOWAY,

Case No. C 09-04858 RS

12 Plaintiff,

13 v.

**ORDER CONTINUING HEARING  
AND REQUESTING FURTHER  
BRIEFING**14  
15 CASH AMERICA NET OF CALIFORNIA,  
LLC, et al.,16 Defendants.  
17 \_\_\_\_\_/

18 Defendants filed a motion to dismiss, arguing, among other things, that plaintiff lacks  
19 standing because she filed a personal bankruptcy after her claim arose. Specifically, defendants  
20 argued that plaintiff (1) initially failed to list the claim among her assets, (2) thereafter improperly  
21 asserted the claim was exempt under an inapplicable provision of the California Code of Civil  
22 Procedure, and (3) failed to establish abandonment of the claim by the bankruptcy trustee. In  
23 opposition, plaintiff acknowledged that she had not initially listed the claim as an asset but asserted  
24 that she properly amended her schedules to list it while the bankruptcy proceedings were pending.  
25 Plaintiff offered arguments and authorities directed at showing that the Code of Civil Procedure  
26 exemption on which she relied *did* apply, and that the trustee abandoned the claim by operation of  
27 law when the bankruptcy proceedings concluded.  
28

1 On reply, defendants did not attempt to rebut plaintiffs' arguments that the exemption was  
2 applicable to the claim and that the trustee effectively abandoned the claim. Instead, defendants  
3 raise a more fundamental argument that it is inconsistent for plaintiff to have used the bankruptcy  
4 proceedings to avoid her debt obligation, while attempting to preserve her affirmative claims  
5 relating to that same debt. Although this argument is related to the grounds on which the motion  
6 was originally brought, it presents new matter to which plaintiff has not had the opportunity to  
7 respond. Accordingly, the hearing on the motion to dismiss is hereby continued to December 23,  
8 2009. No later than December 2, 2009, plaintiff may file a supplemental opposition brief, not to  
9 exceed 15 pages. No later than December 14, 2009, defendants may file a supplemental reply, also  
10 not to exceed 15 pages. The supplemental filings should not include further discussion as to  
11 whether the complaint states a claim against defendant Cash America International, Inc.; that  
12 question has been sufficiently briefed.

13 Finally, a question has arisen as to when papers must be served under the Local Rules and  
14 Federal Rule of Civil Procedure 6. Civil Local Rule 5-5(b) provides that in ECF cases such as this,  
15 the rules governing the ECF program apply. General Order 45, Section IX, in turn, dispenses with  
16 service of the actual documents being filed, and instead provides that an e-mail message will be  
17 automatically generated by the ECF system and sent to all parties in the case. The order provides  
18 that "[r]eceipt of this message shall constitute service on the receiving party." Thus, absent  
19 circumstances where for some reason a party does not receive the automatic e-mail notice from the  
20 ECF system, service occurs automatically and within minutes of the time a document is e-filed.

21 Federal Rule of Civil Procedure 6 would, of course, prevail over any inconsistent local rule  
22 or general order. Subdivision (d) of that rule provides that "when a party may or must act within a  
23 specified time after service," and service is made by e-mail, "3 days are added after the period  
24 would otherwise expire." That provision simply has no application to briefing schedules under the  
25 local rules, which set filing and service deadlines at a minimum number of days *prior* to the hearing  
26 date, and do not run from the time any document has been served, by e-mail or otherwise.<sup>1</sup>

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28 <sup>1</sup> Rule 6(c)(1)(c) also authorizes courts to vary the timing requirements by order, so there would be  
no conflict in any event.

1           Accordingly, in ECF cases, parties generally may adhere to the schedule set out in Civil  
2 Local Rule for *filing* papers and rely on the fact that *service* will be automatic, contemporaneous,  
3 and timely. The only question remaining here, therefore, arises from the fact that even though the  
4 opposition was filed (and automatically served) 21 days before the hearing, that day happened to be  
5 a court holiday.<sup>2</sup> Defendants contend plaintiff therefore was obligated to file and serve the  
6 opposition prior to the holiday. No rule explicitly imposes such a requirement and the ECF system  
7 permits filing (and automatic service) when the Court is closed. General Order 45 expressly  
8 provides that a filing completed “prior to midnight” is “considered timely filed that day.” Thus, the  
9 opposition was timely.

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13 IT IS SO ORDERED.

14 Dated: November 18, 2009

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16 RICHARD SEEBORG  
17 UNITED STATES MAGISTRATE JUDGE

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26 <sup>2</sup> Defendants assert that it must also be taken into account that two additional holidays intervene  
27 prior to the original hearing date, citing subdivision (a)(2) of Rule 6. That subdivision, however,  
28 calls for excluding weekends and legal holidays only where the period of time being counted is less  
than 11 days. Opposition briefs are due 21 days prior to the hearing, so neither that subdivision nor  
the subsequent holidays are relevant. The parties should note also that subdivision (a)(2) has been  
eliminated from the version of Rule 6 that takes effect December 1, 2009. Thereafter weekends and  
holidays will be counted even when the time period is less than 11 days.