

MOTION PRACTICE: MOVING FROM GOOD TO GREAT

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I. GENERALLY APPLICABLE FEDERAL BANKRUPTCY RULES OF PROCEDURE AND LOCAL RULES

The Federal Rules of Bankruptcy Procedure and Local Rules are primarily derived from the Federal Rules of Civil Procedure, with an emphasis on creating more timely resolutions.

A. MOTIONS GENERALLY: FED. R. BANK. P. 9013 AND LOCAL RULES 9013-1 TO 9013-5

1. Motion Form

Fed. R. Bank. P. 9013 and Local Rule 9013-1 provide that all requests for an order shall be made by a motion in “writing.” Local Rule 9006-1 makes clear that such requests for relief include a request for an expedited hearing. An exception to the written motion rule is a motion “made during a hearing.” Fed. R. Bankr. P. 9013. That exception should be used sparingly.

Local Rule 9013-2(a) describes the pleadings that must comprise a written motion. They include:

- 1) a notice of hearing and motion; 2) if facts are at issue, an affidavit or verification of the motion; 3) a separate, concise memorandum of facts and law; 4) a proposed order; and 5) proof of service on those parties not automatically served through the court’s Electronic Case Filing System.

Each of these requirements, and applicable rules, is discussed below.

(a) Notice and Motion

The Local Rule provides that the notice of hearing and motion shall “comply substantially” with Local Form 9013-2. The notice shall state the date and, if appropriate, the time by which a response must be filed under these rules. The notice shall also state that unless a response opposing the motion is timely filed, the court may grant the motion without a hearing. Motions that fail to comply with the Rules and the local form may be dismissed.

Certain requests for relief may be made by application – “written request for an order which is made without scheduling a hearing and with limited or no notice.” Local Rule 9001-1(2). The requests for relief that may be made by application include to employ a professional (Local Rule 9013-4(a)) and to compensate a professional (Local Rule 9013-4(b)). Requirements for such applications are found in Fed. R. Bankr. P. 2014 and 2016 and Local Rules 2014-1 and 2016-1.

Fed. R. Bank. P. 9013 requires that the grounds for motions to be stated “with particularity.” Courts have interpreted this to mean the heightened level of pleading required by Fed. R. Civ. P. 9(b) for pleading fraud or mistake:

A proper motion will contain factual allegations concerning the various requirements necessary for the relief being sought. Conclusory allegations or a mechanical recitation of those elements will not suffice; the motion should allege

facts supporting those conclusions or satisfying those elements. In other words, the movant should plead the essential facts that it expects prove at trial: facts that, if true, would make a prima facie showing that it is entitled to the relief it seeks.

In re White, 409 B.R. 491, 492 (N.D. Ind. 2009).

(b) Verification of Facts

If facts are at issue in the motion, a verification or affidavit is required. Local Rule 9013-2(d) requires that affidavits are to be “made on personal knowledge,” set forth facts that “would be admissible in evidence” and that the “affiant or verifier is competent to testify as to the matters stated.” While an attorney may verify a motion, like all verifications, it must be based on facts of which the verifier has personal knowledge. It is not common that an attorney will have sufficient personal knowledge of facts to verify a motion.

While verification may be by affidavit, Fed. R. Bankr. P. 9011(e) provides that an unsworn declaration “satisfies the requirement of verification.” An unsworn declaration must be in writing and state “I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).” 28 U.S.C. § 1746.

(c) Memorandum

The Local Rule requires the memorandum as a separate document from the motion, providing the legal basis and relevant facts for the relief requested. The memorandum must include relevant binding authority. While the primary goal is persuasiveness the drafter should keep in mind if you are the prevailing party, portions of your memorandum could be used as part of the opinion.

Local Rule 9013-5 contains a limited exception to memorandum requirement. It provides that “trustees” (which can include the debtor-in-possession, but is limited in practice to Chapter 7 trustees) are not required to include a separate memorandum for motions to dismiss, for turnover, sale of property, approval of a compromise or settlement, or in connection with an objection to a claim of exemption or a proof of claim. An exception to the exception exists. Specifically, if the trustee anticipates a serious contest to the motion or objection, then a memorandum must accompany the motion.

(d) Proposed Order

The proposed order should state the relief to be ordered by the court. It should be in a form such that the Judge could affix his or her signature and docket the order as submitted.

(e) Service

(i) Parties to be Served

Local Rule 9013-3 provides the ‘Service List’ indicating the parties required to be served in the bankruptcy cases under each chapter of the Bankruptcy Code. In Chapter 7, 12 and 13 cases, the required parties include, but are not limited to, the debtor, parties having filed notices

of appearance or requests for notice, secured parties, if property is involved, and in Chapter 12 cases, the United States Attorney for the District of Minnesota. In Chapter 11 cases, the list of parties is expanded to include all committees or the 10 largest unsecured creditors if no committee has been appointed, District Counsel and District Director of the IRS as well as the Minnesota Department of Revenue.

For certain types of motions, often referred to as “21-day motions,” Fed. R. Bankr. P. 2002 requires that 21 days notice is provided to the debtor, the trustee and all creditors. Examples of 21-day motions include motions for the use, sale or lease of property outside the ordinary course of business, motions to approve of compromise agreements, motions to dismiss or convert a case and a request for compensation if the amount requested exceeds \$1,000. In a Chapter 11 case, however, Local Rule 2002-1(b) provides that notice of motions to sell property outside the ordinary course of business, other than a proposed sale of substantially all assets, approve a compromise agreement or requests for compensation of more than \$1,000 do not need to be served on all creditors, but only to those parties identified in the Service List of Local Rule 9013-3.

(ii) Effectuating Service

In many cases, other than the debtor, service is accomplished upon filing and the resulting “Notice of Electronic Filing” automatically generated by the court’s CM/ECF system. If there are parties required to receive notice who are not filing users, service must be accomplished by other means as permitted by Rule 4 of the Rules of Civil Procedure and a certificate of service must be filed in the case indicating how service was accomplished on such parties. Local Rule 9006-1(a). A certificate of service should be in a form similar to Local Form 9001-1.

Service to non filing users is usually accomplished by first class mail, but with written consent, can be made through electronic means. If your service list is large, obtaining this written consent can be a significant saver of time and cost. Also, it is very important that your service list is continually updated, as it can, and often will, change during the course of a case.

2. Responsive Documents

Local Rule 9013-2(b) describes the requirements of responses or objections to a motion. The relief that can be requested in a response is limited to denying the motion or requesting an order imposing costs, fees, and expenses. The response may not include a “request for any other relief.” *Id.*

In contrast to the notice of hearing, the form of the responsive pleading is not prescribed. Local Rule 9013-2(b), however, provides that the pleading shall include a “concise memorandum of facts and law.” If the facts are at issue, it shall also include an affidavit or be verified.

If no response opposing a motion is timely filed, the court may, in its discretion, enter an order granting the motion without a hearing. Local Rule 9013-2(f).

3. Notice of Witness

Local Rule 9013-2(c) provides that if a party filing or responding to a motion anticipates offering oral testimony, the moving or responsive pleading shall state the “name, address, and substance of the testimony of the proposed witness.” As a matter of good practice, every motion or response should identify a witness. The substance of the proposed testimony often is described as the facts set forth in the motion or affidavit as follows:

Pursuant to Local Rule 9013-2(c), the movant gives notice that it may, if necessary, call _____, the _____ of the movant, whose business address is _____ to testify regarding the facts set out in this motion.

In the event a motion or response is supported by multiple affidavits, greater care must be taken describing the anticipated testimony of each potential witness.

4. Exhibits

Local Rule 9013-2(e) provides that all exhibits or attachments to a motion or response must be filed “in electronic form.” If the exhibits accompanying a motion or response exceed 50 pages in total, the party may provide a summary of the exhibits for purposes of service only, but shall state that the full exhibits were filed and are available upon request. As a matter of practice, summaries should be utilized in limited circumstances such as voluminous services on parties with only an incidental interest in the motion.

5. Electronic Format

The pleadings comprising a motion or response, in particular proposed orders, should be converted from an electronic format directly into a pdf. The documents should not be scanned. Scans are of poor quality and unnecessarily increase the file size, making the documents difficult to read and impossible to modify. Only exhibits and the verification page or the signature page of affidavits should be scanned.

6. Signatures

An attorney’s CM/ECF log-in and password serve as that attorney’s signature for all electronic documents filed with the court and for purposes of the Fed. R. Bankr. P., including Fed. R. Bankr. P. 9011. Local Rule 9011-4(b). The filing attorney is permitted to sign filed documents with an /e/ signature. For all other signatures, an original signature is required with limited exceptions. One such exception is a debtor’s signature on the petition, schedules and statements, including amendments, as well as Chapter 13 plans and amendments. In this case, the filed documents may contain the debtor’s /e/ signature if the debtor’s original signature on a Signature Declaration form is scanned and submitted with the pleading. Another exception is multiple signatures to a single document, such as a stipulation, as there can only be one filing user able to use an /e/ signature. Local Rule 9011-4(f) requires that the filed document either include the scanned image of the non-filing user’s signature or include the electronic signature of any parties who authorize the filer to do so, as long as the document contains a provision providing for the use of electronic signatures.

7. Personal Financial Information

Fed. R. Bankr. P. 9037, which is similar to Rule 5.2 of the Federal Rule of Civil Procedure, requires the protection of personal and financial information. Review all pleadings for such information and REDACT, REDACT, REDACT. Redacting by using Adobe Acrobat's rectangle tool DOES NOT redact, and with a few keystrokes, any party can expose the underlying information. Sanctions have been issued for the failure to protect personal and financial information. *Engseth v. the County of Isanti, Minnesota*, File No. 06-CV-2410 (D. Minn. 2009) (Davis, C.J.) (attorney filed affidavit containing social security number and dates of birth for 179 individuals; ordered to provide credit report and credit monitoring to each as well as pay \$5,000 to local food bank); *Yath v. Fairview Clinics, N.P. et al*, 767 N.W. 2d 34 (Minn. Ct. App. 2009) (publicity element of an invasion-of-privacy tort claim is satisfied under Minnesota law when private information is posted on a publicly accessible internet website; the number of people who may be exposed to the information is not relevant).

B. MOTIONS IN A CONTESTED MATTER: FED. R. BANK. P. 9014

A contested matter is a general term that includes all disputes, other than adversary proceedings. Contested matters include the filing of an objection to a proof of claim, to a claim of exemption or to a disclosure statement, and the filing of an opposition to the amount of compensation sought by a professional. Hearings on contested matters are required when there are disputed issues of material fact. As a general matter of practice in the District of Minnesota, all contested matters are heard.

There is overlap between Fed. R. Bankr. P. 9013 and 9014. Relief in a contested matter is made by motion. However, not all motions lead to a contested matter. Frequently, the moving party will not know whether a motion will lead to a contested matter until an objection is filed.

Fed. R. Bankr. P. 9014(c) specifically incorporates the procedural provisions governing adversary proceedings before the bankruptcy court – Part VII of the Fed. R. Bank. P. – for contested matters. The rules provide, among other things, parties the opportunity to engage in discovery.

Contested matters may arise at various stages of the bankruptcy proceeding. When they do arise, they trigger the “reasonable notice and opportunity” provision of Fed. R. Bank. P. 9014.

When PW objected to the trustee's motion to approve the stipulation the matter became a contested matter under *Rule 9014*. . . . Once a contested matter is initiated by the movant, numerous other rules apply to the matter pursuant to *Rule 9014(c)*. Those rules that apply include 7026, and 7027 which give the parties the opportunity to engage in discovery.

[T]he initiation of a contested matter triggers *Rule 7052* which incorporates *Fed. R. Civ. P. 52*. *Rule 52* requires the court to make findings of fact in all matters tried upon the facts without a jury. The rule states in pertinent part ‘in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon...’ *Fed. R. Civ. P. 52(a)*.

In re Racing Services, Inc., 332 B.R. 581, 585-86 (8th Cir. B.A.P. 2005) (reversing bankruptcy court for failing to hold a hearing on the objection to trustee's motion to approve the stipulation).

C. MOTIONS FOR SUMMARY JUDGMENT AND MOTION PRACTICE IN ADVERSARY PROCEEDINGS: FED. R. BANK. P. 7056 AND LOCAL RULE 7007-1

Fed. R. Bank. P. 7056 provides that Fed. R. Civ. P. 56 governs summary judgment motions in adversary proceedings. Local Rule 7007-1 provides that Rules 9013-1 (motion practice generally), 9013-2 (moving and responsive pleadings), 9006-1 (time periods for service and filing), and 9017-1 (nature of hearings). Local Rule 7007-1 provides that a motion in an adversary proceeding may not include a request for relief that should properly be made by motion in the bankruptcy case.

There exists some confusion concerning the time period for filing a motion for summary judgment in bankruptcy. Local Rule 7007-1 and 9006-1 provide that 14 days notice is sufficient.

II. TIMING OF MOTIONS, RESPONSES, NOTICES AND FIRST-DAY HEARINGS

A. MOTIONS AND RESPONSES: FED. R. BANK. P. 9006 AND 9006-1

1. General Time Periods

Fed. R. Bankr. P. 9006(d) provides that a motion shall be served not later than "seven days" and a response not later than "one day" before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court.

The local rules, however, set different time periods. Local Rule 9006-1(b) provides that unless a Local Rule or Federal Rule of Bankruptcy Procedure requires "longer notice," moving documents shall be filed and served not later than 14 days before the hearing date. Further, the moving documents shall be filed within 5 days after the date and time for a hearing was obtained from the judge's calendar clerk. That requirement exists to enable Judges better control over their calendars.

Local Rule 9006-1(c) provides any responsive documents shall be filed and served by delivery or by mail not later than 5 days before the hearing date. When counting, 5 days includes any weekends or holidays. Fed. R. Bankr. P. 9006(a).

No reply documents to the responsive documents need be served and filed. Local Rule 9006-(d). However, if such documents are served and filed, they should be done so as timely as possible under the circumstances to provide parties with adequate notice and the Court time to review the submission.

When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service was accomplished by mail or under Rule 5(b)(2)(D), (E), or (F) of the Federal Rules of Civil Procedure, three days are added after the prescribed period would otherwise expire under Rule 9006(a). Federal Rule 9006(f).

2. Expedited Relief

Local Rule 9006-1(e) provides that expedited relief – shortened notice of motion – may be obtained if “necessary.” The rule expressly authorizes the moving party to obtain a hearing date on shorter notice from the Judge's calendar clerk. The motion, however, must include a separate request for expedited hearing. Often, the Judge will first rule on the request for expedited hearing when the motion is heard. The party seeking expedited relief shall take all reasonable steps to provide all parties to be noticed with the most expeditious service and notice possible and shall file an affidavit specifying the efforts made.

In circumstances where expedited relief is sought, a party opposing the motion may not be required to file written objection. Indeed, hearings are required for almost all expedited motions to ensure adequate notice has been provided to all parties.

B. TIMING OF CERTAIN NOTICES: FED. R. BANKR. P. 2002

Fed. R. Bank. P. 2002 governs the timing and method of notice required for creditors, equity security holders, administrators in foreign proceedings, persons against whom provisional relief is sought in ancillary and other cross-border cases, the United States, and the United States Trustee. The timing of the notices varies according to the recipient and the type of notice, but is typically 21 days or 28 days. The rule, however, must be consulted to ensure compliance.

The rule also contains detailed provisions governing the caption of notices, whether notices are required to be served by mail, how to provide notice to creditors with foreign addresses, how to provide notices to other entities in the rule's title, and when it is appropriate to give notice by publication.

C. CHAPTER 11 CASES AND FIRST DAY HEARINGS

Chapter 11 practice in the District of Minnesota is governed by the Rules and “Chapter 11 Instructions.” The Chapter 11 Instructions are available on the Bankruptcy Court's website.

Chapter 11 cases typically involve “first-day hearings” – emergency motions addressing the issues surrounding the debtor-in-possession's continued operation immediately following the filing of the case. To schedule first-day hearings, the moving party (which is almost exclusively the debtor-in-possession) must contact the calendar clerk for the Judge to whom the case has been assigned. The calendar clerks have been instructed to make time available for hearings within two working days of the date that the petition is filed. In the event that the assigned Judge is not available, another Judge may be assigned or hear the first-day matters.

Once a hearing date is obtained, the moving party must file and serve the motions on all parties entitled to service under the rules, including Local Rules. No first-day motions will be heard on less than 36 hours notice except in true emergency situations.

The motion on first-day matters must comply with Local Form 9013-2 and include a separate request for expedited relief. In addition, the first-day motions must be accompanied by a “Notice of Intention to Seek Relief on an Expedited Basis.” A form accompanies the Chapter 11 Instructions. The purpose of the notice is to give everyone interested in the case as much

advance warning as possible of the debtor-in-possession's intentions with respect to seeking expedited relief in the first days of the case.

III. PARTICULAR MOTIONS

A. RELIEF FROM STAY AND ADEQUATE PROTECTION

1. FED. R. BANK. P. 4001(a)

Fed. R. Bank. P. 4001(a) governs relief from automatic stay and prohibiting or conditioning the use, sale, or lease of property. It provides that Fed. R. Bank. P. 9014 – contested matters – governs the form of the motion.

The rule expressly provides that an order granting a motion for relief from an automatic stay made is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise. If requested, courts routinely order that the matter is not stayed.

Fed. R. Bank. P. 4001(2) sets forth the requirements for seeking “ex parte relief.” This extraordinary relief that is rarely appropriate. “There are extremely few situations in which threatened harm is both irreparable and so imminent that opposing parties cannot be given at least some notice on the opportunity to participate in a hearing. *In re Delaney-Morin*, 304 B.R. 365 (9th Cir. B.A.P. 2003) (citing 9 *Collier on Bankruptcy*, P. 4001.04[5] (Lawrence P. King et al. eds., 15th ed. Rev. 1996).

2. LOCAL RULE 4001-1

Local Rule 4001-1 provides that all motions for relief from the automatic stay are governed by Local Rule 9013-1 and 9013-2.

Most significantly, Local Rule 4001-1(b) provides specific requirements in the event the moving party is seeking relief from the stay with respect to an individual debtor's “principal residence.” The motion “shall” include a separate verification by a person with “personal knowledge of the facts” containing the following information:

(1) Evidence of standing. Evidence that the moving party has standing to bring the motion, including, at a minimum, a) a copy of the note, b) a copy of the mortgage; c) evidence of perfection of the mortgage; and d) if the movant is not the original mortgagee, evidence that the movant has authority to make the motion.

(2) Description of property. The legal description and any street address, including zip code, of the property.

(3) Value. The current tax-assessed value of the property and the movant's estimated current market value.

(4) Loan History. A complete loan history, indicating all advances made to or charges of any kind made against the debtor beginning on the date of the default applicable to this motion, up to the date the motion is verified. The loan history

shall be provided on Local Form 4001-1.

(5) Equity. If the amount of equity is at issue, the name of all other lien holders, the amounts due, as scheduled or as provided in any proofs of claim, and their priority with respect to the movant.

(6) Payments to Chapter 13 Trustee. If the motion is based on a default in making plan payments to the chapter 13 trustee, the month, amount, and current status of such payments.

3. Practice Issues

When a relief from stay motion is made, the motion must be accompanied by a separate memorandum of law. In that memorandum of law, counsel must cite the specific section of statute that applies. It is insufficient to generally ask for relief from the automatic stay. Also, the proposed order should include the full legal description for the property, not just the street address.

Attention must be paid to when the automatic stay as to the debtor or property of the debtor expires by its own term. A moot motion for relief from stay will be dismissed.

B. SALES

1. Fed. R. Bank. P. 6004

The “use, sale, or lease of property” is governed by Fed. R. Bank. P. 6004. It too provides that Fed. R. Bank. P. 9014 – contested matters – governs the form of the motion. In addition, it expressly provides that sales outside of the ordinary course of business must comply with the notice requirements of Fed. R. Bank. P. 2002.

The rule expressly provides that an order granting a motion authorizing the use, sale or lease of property is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise. If requested, courts routinely order that the matter is not stayed.

2. Local Rule 6004-1

Local Rule 6004-1 is primarily limited to Chapter 7 cases. It provides that a trustee may sell property where the value to the estate is less than \$5,000, after serving notice of the proposed disposition only on the United States Trustee, each entity that has filed a request for notice or notice of appearance under Fed. R. Bank. P. 2002(I) or 9010(b), and each member of any creditors' committee. The notice shall conform substantially to Local Form 6004-1(a). Further, the clerk is directed to service notice to all entities listed on the matrix.

Local Rule 6004-1(c) provides that an objection shall be delivered to the trustee and the United States Trustee and filed not later than noon the day before the date set for the proposed disposition.

C. SETTLEMENTS

1. Fed. R. Bank. P. 9019

Fed. R. Bank. P. 9019 governs approval of compromise or settlements. It provides that the motion is to be made by the trustee or debtor-in-possession. Further, notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Fed. R. Bank. P. 2002 and to any other entity as the court may direct.

2. Local Rule 9019-1 and Local Rule 6004-1

Local Rule 9019-1 applies to settlements, agreed orders, and stipulated relief. It incorporates the process that exists to approve the use, sale or lease of property existing under Local Rule 6004-1. Accordingly, a trustee may enter into a compromise, after serving notice of the proposed disposition only on the United States Trustee, each entity that has filed a request for notice or notice of appearance under Federal Rule of Bankruptcy Procedure 2002(I) or 9010(b), and each member of any creditors' committee. Again, the notice shall conform substantially to Local Form 6004-1(a). Further, the clerk is directed to service notice to all entities listed on the matrix.

Any objection shall be delivered to the trustee and the United States Trustee and filed not later than noon the day before the date set for the proposed approval of the agreement.

3. Practice Issues

The bankruptcy court has broad discretion under Rule 9019 to approve or disapprove all compromises and settlements affecting the bankruptcy estate. Nevertheless, the court is required, as part of its decision, to consider and weigh the following five factors: (1) the probability of success on the merits in litigation; (2) the difficulties, if any, to be encountered in collection of any judgment that might be obtained; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (4) the paramount interests of creditors and the proper deference to their reasonable views in the premises; and (5) whether the conclusion of the litigation promotes the integrity of the judicial system. *In re Bates*, 211 B.R. 338, 343-44 (D. Minn. 1997); *see also, In re Y-Knot Construction, Inc.*, 369 B.R. 405 (B.A.P. 8th Cir. 2007) (citing *Drexel Burnham Lambert Inc. v. Flight Transp. Corp (In re Flight Transp. Corp.)*, 730 F.2d 1128, 1135 (8th Cir. 1984)).

The *Bates* court also noted, “the court must also consider the principle that ‘the law favors compromise Indeed, in determining whether to approve a proposed settlement, ‘the court does not substitute its judgment for that of the trustee Instead, the court will at the hearing on the proposed settlement, ‘canvas’ the issues and see if the settlement falls below the lowest point in the realm of reasonableness.’” *Id.* (citations omitted).

Do not forget to notify the court of settlements/agreements reached on any issue. If a party withdraws an objection or the parties have reached an agreement on a continuance, it is always worth a call to chambers to notify the court, even if it is shortly before the hearing.

D. CASH COLLATERAL AND DIP FINANCING MOTIONS

1. Fed. R. Bank. P. 4001(b) and (c)

Fed. R. Bank. P. 4001(b) and (c) govern use of cash collateral or obtaining credit. Both requests are to be made by motion in accordance with Fed. R. Bank. P. 9014.

The court may commence a final hearing on a motion to authorize use of cash collateral or obtain credit “no earlier” than 14 days after service of the motion. The court may grant interim relief prior to the 14 days, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing. When a hearing on a motion for authority to obtain credit or use cash collateral is held prior to the 15th day, courts have construed the resulting order to be an interim order, not a final order. *In re Visionaire Corp.*, 299 B.R. 530, 533-34 (8th Cir. B.A.P. 2003). Appellate courts have strictly enforced the time period requirement, noting that it is not within the district court’s discretion to waive this notice period. *Id.*

Fed. R. Bank. P. 4001 also provides specific requirements on the contents of a motion for use of cash collateral and to obtain credit. A motion for use of cash collateral must begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:

- (i) the name of each entity with an interest in the cash collateral;
- (ii) the purposes for the use of the cash collateral;
- (iii) the material terms, including duration, of the use of the cash collateral; and
- (iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity’s interest is adequately protected.

Fed. R. Bank. P. 4001(b)(1)(B).

Similarly, a motion to obtain credit shall begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. Fed. R. Bank. P. 4001(c). The motion must specifically describe the nature and extent of each of the following provisions:

- (i) a grant of priority or a lien on property of the estate under 11 U.S.C §§ 364(c) or (d);
- (ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained

under 11 U.S.C. § 364 to make cash payments on account of the claim;

(iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;

(iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;

(v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under 11 U.S.C. § 363(c), or request authority to obtain credit under 11 U.S.C. § 364;

(vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;

(vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

(viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

(ix) the indemnification of any entity;

(x) a release, waiver, or limitation of any right under 11 U.S.C. § 506(c); or

(xi) the granting of a lien on any claim or cause of action arising under 11 U.S.C. §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

Fed. R. Bank. P. 4001(c)(1)(B).

2. LOCAL RULE 4001-2 AND CHAPTER 11 INSTRUCTIONS

The local rules contain additional requirements for a motion for use of cash collateral. Specifically, Local Rule 4001-2 requires the debtor-in-possession to attach “separate verified statements” including:

1) the debtor's calculation of the amount of debt secured by the collateral;

2) the debtor's description of the collateral and estimate of the collateral's value on the date of the filing of the petition and at the beginning of the period of time for which the debtor currently seeks authorization to use cash collateral;

3) the debtor's description of the collateral and estimate of the collateral's value at the end of the period of time for which the debtor currently seeks authorization to

use cash collateral; and

4) the debtor's cash flow projections.

Local Rule 4001-2(a).

Moreover, Local Rule 4001-2(b) provides that if the hearing on a motion for use of cash collateral is a preliminary hearing (i.e. relief requested before the 15th day after service of the motion), the debtor's separate verified statement shall also contain an itemization of the proposed uses of cash collateral that are required to avoid immediate and irreparable harm to the estate pending a final hearing on the motion.

The Chapter 11 Instructions make express that a motion for use of cash collateral or to obtain financing must comply with the applicable requirements of Local Rule 4001-2(a) and Fed. R. Bankr. P. 4001.

In addition, the instructions provide the motion must contain a clear statement of the material terms and reference where such terms are in the applicable agreements or proposed order as required by Fed. R. Bankr. P. 4001(b)(1)(B) or (c)(1)(B). The moving papers must also contain a clear statement of the material terms of any carve out agreements and reference where such terms are in any applicable agreements or proposed order. The motion shall also explain why all material provisions addressed in the papers are necessary in the context of the proposed use of cash collateral or financing.

The Chapter 11 Instructions provide that proposed orders should not contain factual findings if they are not necessary and the moving party must provide a record to specifically support the findings.

Finally, the Chapter 11 Instructions admonish parties to “[a]void unnecessary, burdensome or overreaching provisions.”

3. Practice Issues

The debtor-in-possession must provide a budget setting forth the expenditures sought to be approved when using cash collateral. That budget, however, is not sufficient to satisfy the requirement of Local Rule 4001-2(b). Rather, the motion must include a separate “itemization of the proposed uses of cash collateral that are required to avoid immediate and irreparable harm to the estate pending a final hearing on the motion.”

The debtor-in-possession must also specifically identify which lenders are over-secured, which are adequately secured, and which are under-secured. If there is an equity cushion, parties should identify the value of that cushion. The court needs parties to make an evidentiary record on these issues.

IV. DISCOVERY AND RULES OF EVIDENCE

A. DISCOVERY IN CONTESTED MATTERS

Part VII of the Fed. R. Bankr. P. applies to all adversary proceedings of the kind identified in Rule 7001. Certain enumerated rules contained in Part VII of the rules also apply in contented matters. Unless the court orders otherwise, Fed. R. Bankr. P. 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069 and 7071 apply in contested matters. Fed. R. Bankr. P. 9014(c). These particular Part VII rules permit parties in contested matters to conduct discovery, including depositions, requests for admissions, interrogatories and production of documents, seek dismissal or entry of summary judgment or judgment, consolidate matters, request separate trials, and ultimately execute on judgments obtained. While contested motions do not usually necessitate the formal procedural approach in adversary proceedings, where necessary, the rules permit parties to avail themselves of these rules to aid in the resolution of the contested matter.

B. FEDERAL RULES OF EVIDENCE APPLY.

Where facts are at issue, a motion must be verified. A verification provides the court with evidence that can serve as a basis for ruling on a motion. As a result, a motion, and its verification, must be supported by admissible evidence. In assessing admissibility of evidence, the Court will apply the Federal Rules of Evidence. Fed. R. Bankr. P. 9017.

C. ELECTRONIC PRESENTATION OF EVIDENCE

For hearings scheduled for St. Paul, you may be required to present all evidence to the Court in electronic form. Judge O'Brien currently requires the use of electronic exhibits for all evidentiary hearings, whether in an adversary proceeding or a contested motion. Judge Kishel has not yet made this a requirement, but may. This courtroom technology is not currently available in the Minneapolis courthouse. Instead of bringing multiple sets of hearing books, binders, or other exhibits, you will bring a flash drive, DVD or other storage devices containing all exhibits for your hearing. During the hearing, all exhibits will be simultaneously shown to the parties, witnesses and the Judge on multiple computer screens throughout the courtroom.

Prior to the hearing, attorneys (and anyone assisting with the presentation of evidence in the courtroom) are required to attend a hands-on training session in the courtroom in St. Paul. At this training, court personnel will answer your questions and instruct you on the use of the equipment. Registration for this training is through CM (select the Utilities menu, and then Sign Up for Classes).

V. PREFERENCES/PRACTICES OF MINNESOTA BANKRUPTCY JUDGES

A. CHIEF JUDGE KISHEL

FBA Practice Pointers and Preferences found at:

<http://fedbar.org/Chapters/Minnesota-Chapter/Judges-Practice-Pointers-and->

Preferences.aspx.

- It is permitted to contact Judge Kishel's law clerk or judicial assistant regarding preferences, policies and calendars – but they cannot provide legal advice.
- For cases venued in Duluth, contact the Duluth Clerk's office for scheduling of hearings.
- Uncontested Motions – In court appearance is required, unless advised by chambers otherwise
- Contested Motions – Absent exigent circumstances or a need for final relief on an emergency basis, if there is a contested issue of fact the initial hearing will be treated as a preliminary hearing and an evidentiary hearing will be scheduled for a later date and time.
- Adversary Proceedings - After an answer is filed, Judge Kishel will usually issue an order requiring parties to appear telephonically for a Rule 16 Scheduling Conference prior to issuing Scheduling Order setting forth the trial date and the deadlines for discovery and pre-trial submissions to the Court.

B. JUDGE KRESSEL

- Review and apply the Order Preparation Guidelines available on Court's website
- Uncontested Motions – If no response is filed, generally no hearing will be held and an order will be entered granting the motion.
- Contested Motions – Absent exigent circumstances or a need for final relief on an emergency basis, if need for evidence is established at the initial hearing, an evidentiary hearing will be scheduled for a later date and time.
- Adversary Proceedings - Scheduling Order issued once an answer is filed setting forth the trial date and deadlines for discovery and pre-trial submissions to the Court.

C. JUDGE O'BRIEN

- Uncontested Motions - If no response is filed, no hearing will be held, and order entered by default.
- Contested Motions - Absent exigent circumstances or a need for final relief on an emergency basis, if need for evidence is established at initial hearing, evidentiary hearing will be scheduled for a later date and time.
- Adversary Proceedings - Scheduling Order issued once an answer is filed setting forth the trial date and deadlines for discovery and pre-trial submissions to the Court.
- Requires use of electronic exhibits for all proceedings.

D. JUDGE DREHER

- Uncontested Motions - Uncontested Motions - If no response is filed, no hearing will be held, and order entered by default
- Contested Motions - Absent exigent circumstances or a need for final relief on an emergency basis, if need for evidence is established at initial hearing, evidentiary

hearing will be scheduled for a later date and time.

- Adversary Proceedings - Scheduling Order issued once an answer is filed setting forth the trial date and deadlines for discovery and pre-trial submissions to the Court. If a party to an adversary proceeding is pro se, a separate pretrial order will also be issued.
- Trials/Evidentiary Hearings - At the start of the proceeding, parties should provide courtesy copies (one for the Judge and one for the law clerk) of all exhibits tabbed and in a 3-ring binder.

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