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FIRST SEALORD SURETY, INC.

7
8 UNITED STATES BANKRUPTCY COURT
9 CENTRAL DISTRICT OF CALIFORNIA -RIVERSIDE DIVISION

10
11 *In re*
12 DAVID WILLIAM BELL and CYNTHIA S.
13 BELL,
14 Debtors.

15 FIRST SEALORD SURETY, INC.
16 Plaintiff,

17 v.
18 DAVID WILLIAM BELL, an individual;
19 and CYNTHIA S. BELL, an individual,
20 Defendants.

CASE NO.: 6:10-BK-38390-SC
Chapter 7

ADVERSARY NO.: 6:10-AP-01743-SC

**PLAINTIFF IN ADVERSARY
PROCEEDING, FIRST SEALORD
SURETY, INC.'S NOTICE OF MOTION
AND MOTION FOR SANCTIONS
AGAINST DEFENDANTS FOR
FAILURE TO MAKE RULE 26
DISCLOSURES, TO COOPERATE IN
DISCOVERY AND FOR VIOLATION
OF COURT'S ORDER**

**DATE: September 7, 2011
TIME: 2:00 p.m.
PLACE: 3420 Twelfth Street
Video Hearing Room 126
Riverside, CA 92501**

Adversary Complaint Filed: 12/13/2010

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN to the Defendants and Debtors and their attorneys, and
3 other interested parties that on September 7, 2011 in the above-referenced Court, at 2:00 p.m. at
4 3420 Twelfth Street, Video Hearing Room 126, Riverside, CA 92501, Plaintiff in the adversary
5 proceeding and moving party First Sealord Surety, Inc. ("First Sealord") will move this Court for
6 an Order of sanctions against Defendants and Debtors David and Cynthia Bell ("Defendants"),
7 for their failure to make Rule 26 disclosures as required by law and in violation of the Court's
8 prior Order, and more specifically, as follows:

9 1. That Defendants are precluded from using any evidence or witnesses, other than
10 the Defendants themselves, at any hearing or trial of this matter under Rule 37(c)(1); (*In Re*
11 *Walter B. Scott & Sons*, 436 B.R. 582 (D. Idaho 2010)[debtor-in-possession precluded from
12 using expert witness to oppose summary judgment motion where debtor failed to timely disclose
13 expert in Rule 26 disclosures]);

14 2. That Defendants are sanctioned the amount of \$1,595.00 for First Sealord's fees
15 and costs expended in bringing and appearing at this motion under Rule 37(c)(1)(A); and

16 3. That Defendants' answer is stricken in whole under Rule 37(b)(2)(A)(iii). (See *In*
17 *Re Lebbos*, 385 B.R. 737 (E.D. Cal. 2008)[trustee's motion to strike defendant in adversary
18 proceeding's answer where defendant failed to attend scheduled deposition and to produce
19 documents].)

20 This Motion is being heard on regular notice pursuant to Local Bankruptcy Rule 9013-1.
21 If you wish to oppose this Motion, Local Bankruptcy Rule 9013-1(f) requires that you must file a
22 written response to this Motion with the Bankruptcy Court and serve a copy of it upon First
23 Sealord's attorney at the address set forth above no less than 14 days before the above hearing

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1 and must appear at the hearing of this Motion. The undersigned hereby verifies that the above
2 hearing date and time were available for this type of Motion according to the Judge's self-
3 calendaring procedures.

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5 DATED: August 12, 2011

SEDGWICK LLP

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By: Matthew R. Hicks

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Marilyn Klinger

Matthew Hicks

Attorneys for Plaintiff

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FIRST SEALORD SURETY, INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
2 **SANCTIONS FOR FAILURE TO MAKE RULE DISCLOSURES AND FOR**
3 **VIOLATION OF COURT'S ORDER**

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5 **I. INTRODUCTION**

6 This Motion is necessitated by Defendants and Debtors David Bell and Cynthia Bell's
7 ("Defendants") failure to engage in the Rule 26 disclosures. First Sealord has been attempting
8 since February to have Defendants provide the Rule 26 disclosures, and but for one telephone
9 conversation in April constituting the Rule 26(f) conference, Defendants have failed to meet any
10 of their Rule 26 obligations. Defendants conduct not only violates the applicable Federal Rules
11 of Civil Procedure and Bankruptcy Rules, but also violates this Court's July 6, 2011 Order
12 regarding such disclosures.

13 **II. DEBTORS' FAILURE TO COMPLY WITH RULE 26 DISCLOSURE**
14 **REQUIREMENTS AND THIS COURT'S ORDER; MEET AND CONFER**

15 On February 22, 2011, when this matter was before the Honorable Catherine Bauer in
16 Riverside's bankruptcy court, First Sealord's counsel sent correspondence to the Defendants
17 regarding the Rule 26(f) meeting and initial disclosures under Rule 26(a). (Declaration of
18 Matthew R. Hicks ["Hicks. Decl."], par. 3, Exhibit "A".) First Sealord's counsel advised
19 Defendants of their availability to conduct the conference in March, set the Defendants'
20 depositions in March. Defendants failed to respond or appear for deposition. (*Id.*)¹ On April 11,
21 2011, First Sealord's counsel wrote Defendants providing several available dates in April for the
22 telephonic conference. (Hicks Decl., par. 4, Exhibit "B".) First Sealord's counsel advised
23 Defendants that the court continued the status conference until April 27, 2011. (*Id.*)

24 On April 19, 2011, First Sealord's counsel and David Bell spoke by phone and conducted
25 the Rule 26(f) conference. (Hicks Decl., par. 5.) Defendant Bell agreed to produce all
26 documents that were previously requested in the notice of deposition by May 18, 2011, and that
27 the parties would comply with Rule 26(a). (*Id.*, Exhibit "C".) Defendant Bell also agreed in that

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¹ First Sealord also has on calendar its motion to compel Defendants' depositions.

1 April 19th call to have his and his spouse's depositions re-set for the week of May 23 or May
2 30th, after the production of documents. This was memorialized in First Sealord counsel's April
3 21, 2011 correspondence. (*Id.*, Exhibit "C".)

4 Defendants failed to appear at the April 27, 2011 status conference. (Hicks Decl., par. 6.)
5 First Sealord's counsel appeared and was informed by Judge Bauer that the matter was being
6 transferred to this Court. (*Id.*) On May 14, 2011, the Order Setting Status Conference was
7 issued reassigning this adversary proceeding to this Court, and continuing the status conference
8 until June 22, 2011.

9 On June 22, 2011, the status conference was held before the Honorable Scott C. Clarkson
10 in this Court. Defendants failed to appear. This Court ordered that Rule 26 disclosures must be
11 completed by July 22, 2011. (See Hicks Decl., par. 7, Exhibit "D", Court's July 6, 2011 Order.)
12 First Sealord timely served its Rule 26 disclosures on July 5, 2011. (*Id.*, par. 7, Exhibit "E".)
13 Defendants failed to serve the Rule 26 disclosures.

14 As required by local rule and the federal rules of civil procedures, on July 25, 2011, First
15 Sealord's counsel met and conferred with Defendants regarding their failure to comply with this
16 Court's Order regarding the Rule 26 disclosures. (Hicks Decl., par. 8, Exhibit "F".) Defendants
17 failed to respond to the meet and confer effort. (*Id.*)

18 **III. SANCTIONS ARE JUSTIFIED AS PERMITTED BY THE APPLICABLE RULES**

19 Federal Bankruptcy Rule 7037 states: "Rule 37 F.R.Civ.P. applies in adversary
20 proceedings." Federal Rule of Civil Procedure, 37(a)(3)(A) provides: "If a party fails to make a
21 disclosure required by Rule 26(a), any other party may move to compel disclosure and for
22 appropriate sanctions." Rule 37(c), entitled "Failure to Disclose or Supplement" states:

23 If a party fails to provide information or identify a witness as
24 required by Rule 26(a) or (e), the party is not allowed to use that
25 information or witness to supply evidence on a motion, at a
26 hearing, or at trial, unless the failure was substantially justified or
27 is harmless. In addition to or instead of this sanction, the court, on
28 motion and after giving an opportunity to be heard: (A) may order
payment of reasonable expenses, including attorney's fees, caused
by the failure; and (C) may impose other appropriate sanctions,
including any of the orders listed in Rule 37(b)(2)(A)(i) – (vi).

1 Rule 37(b), addresses the "Failure to Comply with a Court Order" regarding discovery,
2 and sub-section (2)(A) states:

3 If a party . . . fails to obey an order to provide or permit discovery,
4 . . . the court where the action is pending may issue further just
5 orders. They may include the following: . . . (iii) striking pleadings
6 in whole or in part.

7 Here, Defendants have failed to make Rule 26 disclosures despite First Sealord counsel's
8 many attempts and in violation of the recent Court Order. Accordingly, First Sealord requests
9 that the following sanctions be ordered:

10 1. That Defendants are precluded from using any evidence or witnesses, other than
11 the Defendants themselves, at any hearing or trial of this matter under Rule 37(c)(1); (*In Re*
12 *Walter B. Scott & Sons*, 436 B.R. 582 (D. Idaho 2010)[debtor-in-possession precluded from
13 using expert witness to oppose summary judgment motion where debtor failed to timely disclose
14 expert in Rule 26 disclosures];

15 2. That Defendants are sanctioned in the amount of \$1,595.00 for First Sealord's
16 fees and costs expended in bringing and appearing at the hearing of this motion under Rule
17 37(c)(1)(A) (Hicks Decl., par. 9); and

18 3. That Defendants' answer is stricken in whole under Rule 37(b)(2)(A)(iii). (See *In*
19 *Re Lebbos*, 385 B.R. 737 (E.D. Cal. 2008)[trustee's motion to strike defendant in adversary
20 proceeding's answer where defendant failed to attend scheduled deposition and to produce
21 documents].)

22 **IV. CONCLUSION**

23 First Sealord respectfully requests that this Motion be granted.

24 DATED: August 12, 2011

SEDGWICK LLP

25 By: Matthew R. Hicks
26 Marilyn Klinger, Esq.
27 Matthew R. Hicks, Esq.
28 Attorney for Plaintiff
FIRST SEALORD SURETY, INC.