

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

May 30, 2017 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.
3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.
4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	16-90304-D-13	JOHN DEMING	CONTINUED MOTION TO VALUE
	DCJ-6		COLLATERAL OF MERCEDES-BENZ
			FINANCIAL SERVICES USA LLC
			3-21-17 [124]

Tentative ruling:

This is the debtor's motion to value collateral of Mercedes-Benz Financial Services USA LLC ("Mercedes-Benz"); namely, a 2015 Mercedes-Benz Sprinter cargo van. Mercedes-Benz has filed opposition and the hearing has been continued twice for both parties to supplement the record. For the following reasons, the court will set the value of the vehicle at \$29,558.

The debtor testifies that in his opinion, the value of the vehicle is \$22,000, a value he determined by (1) checking its KBB valuation and looking at similar vehicles for sale in "this area," as listed on the KBB website; (2) looking at Craigslist ads for similar vehicles in the Modesto/Merced area; (3) obtaining an opinion of value from the local Mercedes-Benz dealership; and (4) using his knowledge of similar vehicles, "having purchased many in the several decades for [his] business." Debtor's Decl., DN 126, at 2:7-8. The debtor did not submit a copy of a KBB printout or copies of the ads he looked at and did not disclose the

dealer's opinion of value.

Mercedes-Benz, on the other hand, submitted an N.A.D.A. printout for a similar vehicle showing, after application of a mileage adjustment, a wholesale value of \$32,260, a loan value of \$29,110, and a retail value of \$38,435. Given these values, and with no explanation of the discrepancies between them and the debtor's much lower valuation, the court concluded in a tentative ruling issued for the original hearing on the motion that the debtor had failed to meet his burden of proving that the replacement value of the vehicle is \$22,000. The court did, however, continue the hearing to allow the parties to supplement the evidentiary record and required the debtor to submit the vehicle to Mercedes-Benz for inspection and valuation. The parties later stipulated to another continuance and stipulated that both parties would file any additional responses or supporting declarations by May 16, 2017. Mercedes-Benz took advantage of that opportunity; the debtor did not.

On May 16, Mercedes-Benz filed a declaration of an appraiser subcontracted by Property Damage Appraisers, who testified to having inspected the debtor's vehicle on May 15, 2017 and prepared a condition report, estimated the cost of necessary repair work, "run the vehicle through" Mitchell Work Center and obtained a valuation report, and searched for and found six comparable vehicles in local dealer inventories. The appraiser concluded, based on the dealer quotes and Mitchell valuation report, that the market value of the vehicle, before tax, is \$29,558.75. Mercedes-Benz submitted as an exhibit the appraiser's extensive condition report, including the appraiser's very detailed repair estimate, the Mitchell valuation report, the six dealer quotes, and photos.

Thus, on the one hand, the debtor has submitted his own declaration, referring to a KBB valuation and KBB and CraigsList ads of which he did not supply copies and a local dealer's valuation which he did not disclose. Mercedes-Benz, on the other hand, submitted a professional valuation report and testimony. The court finds that Mercedes-Benz' evidence carries far more weight than the debtor's declaration. Accordingly, the court will fix the value of the vehicle at the value arrived at by Mercedes-Benz' appraiser, \$29,558.75.

The court will hear the matter.

2. 16-90304-D-13 JOHN DEMING
DCJ-7

CONTINUED MOTION TO VALUE
COLLATERAL OF MERCEDES-BENZ
FINANCIAL SERVICES USA LLC
3-21-17 [128]

Tentative ruling:

This is the debtor's motion to value collateral of Mercedes-Benz Financial Services USA LLC ("Mercedes-Benz"); namely, a 2012 Mercedes-Benz CLS. Mercedes-Benz has filed opposition and the hearing has been continued twice for both parties to supplement the record. For the following reasons, the court will set the value of the vehicle at \$26,276.

The debtor testifies that in his opinion, the value of the vehicle is \$18,000, a value he determined by (1) checking its KBB valuation and looking at similar vehicles for sale in "this area," as listed on the KBB website; (2) looking at CraigsList ads for similar vehicles in the Modesto/Merced area; (3) obtaining an opinion of value from the local Mercedes-Benz dealership; and (4) using his knowledge of similar vehicles, "having purchased many of them over the years."

Debtor's Decl., DN 130, at 2:7-8. The debtor did not submit a copy of a KBB printout or copies of the ads he looked at and did not disclose the dealer's opinion of value.

Mercedes-Benz, on the other hand, submitted an N.A.D.A. printout for a similar vehicle showing, after application of a mileage adjustment, a rough trade-in value of \$28,600, an average trade-in value of \$31,700, and a clean trade-in value of \$34,300. The printout also showed a "clean loan" value of \$30,750 and a "clean retail" value of \$37,800. Given these values, and with no explanation of the discrepancies between them and the debtor's much lower valuation, the court concluded in a tentative ruling issued for the original hearing on the motion that the debtor had failed to meet his burden of proving that the replacement value of the vehicle is \$18,000. The court did, however, continue the hearing to allow the parties to supplement the evidentiary record and required the debtor to submit the vehicle to Mercedes-Benz for inspection and valuation. The parties later stipulated to another continuance and stipulated that both parties would file any additional responses or supporting declarations by May 16, 2017. Mercedes-Benz took advantage of that opportunity; the debtor did not.

On May 16, Mercedes-Benz filed a declaration of an appraiser subcontracted by Property Damage Appraisers, who testified to having inspected the debtor's vehicle on May 15, 2017 and prepared a condition report, estimated the cost of necessary repair work, "run the vehicle through" Mitchell Work Center and obtained a valuation report, and searched for and found eight comparable vehicles in local dealer inventories. The appraiser concluded, based on the dealer quotes, the Mitchell valuation report, and the N.A.D.A. California Region retail value, that the market value of the vehicle, before tax, is \$26,276.39. Mercedes-Benz submitted as an exhibit the appraiser's extensive condition report, including the appraiser's very detailed repair estimate, the N.A.D.A. report, the Mitchell valuation report, the eight dealer quotes, and photos.

Thus, on the one hand, the debtor has submitted his own declaration, referring to a KBB valuation and KBB and CraigsList ads of which he did not supply copies and a local dealer's valuation which he did not disclose. Mercedes-Benz, on the other hand, submitted a professional valuation report and testimony. The court finds that Mercedes-Benz' evidence carries far more weight than the debtor's declaration. Accordingly, the court will fix the value of the vehicle at the value arrived at by Mercedes-Benz' appraiser, \$26,276.39.

The court will hear the matter.

3. 16-90415-D-13 KYLE WATKINS
MSN-2

MOTION TO MODIFY PLAN
4-24-17 [26]

4. 12-90416-D-13 JEFFREY/NANCY REYNOLDS MOTION TO VALUE COLLATERAL OF
CJY-4 GREEN TREE
4-21-17 [80]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of Green Tree at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtors' residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Green Tree's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

5. 13-92116-D-13 DIANA ROCHA MOTION TO MODIFY PLAN
CJY-5 4-21-17 [106]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

6. 17-90026-D-13 AURANGZEB KHAN MOTION TO CONFIRM PLAN
FF-2 4-17-17 [50]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons: (1) the moving party failed to serve Empire Sanitary District, listed on the debtor's Schedule D, and failed to serve at least 10 creditors listed on Schedule E/F; thus, the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b); (2) the notice of hearing does not state the location of the courthouse, as required by LBR 9014-1(d)(3); and (3) the moving party failed to serve the State Board of Equalization at its complete address on the Roster of Governmental Agencies, as required by LBR 2002-1(b).

As a result of these service and notice defects, the motion will be denied and the court need not reach the issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

7. 17-90026-D-13 AURANGZEB KHAN OBJECTION TO CLAIM OF LANTERN
FF-3 FINANCIAL, CLAIM NUMBER 40
5-2-17 [60]

Final ruling:

This is the debtor's objection to the claim of Lantern Financial, Claim No. 40 on the court's claims register. On May 17, 2017, the debtor filed a purported notice of withdrawal of the objection. The purported withdrawal was ineffective. Because opposition had been filed, the debtor did not have the right to unilaterally withdraw the objection. Fed. R. Civ. P. 41(a), incorporated herein by Fed. R. Bankr. P. 7041. The court deduces from the purported withdrawal, however, that the debtor does not wish to contest Lantern Financial's opposition to the objection. As a result, the objection will be overruled by minute order. No appearance is necessary.

8. 17-90026-D-13 AURANGZEB KHAN OBJECTION TO CLAIM OF LANTERN
FF-4 FINANCIAL, CLAIM NUMBER 41
5-2-17 [65]

Final ruling:

This is the debtor's objection to the claim of Lantern Financial, Claim No. 41 on the court's claims register. On May 17, 2017, the debtor filed a purported notice of withdrawal of the objection. The purported withdrawal was ineffective. Because opposition had been filed, the debtor did not have the right to unilaterally withdraw the objection. Fed. R. Civ. P. 41(a), incorporated herein by Fed. R. Bankr. P. 7041. The court deduces from the purported withdrawal, however, that the debtor does not wish to contest Lantern Financial's opposition to the objection. As a result, the objection will be overruled by minute order. No appearance is necessary.

9. 17-90026-D-13 AURANGZEB KHAN OBJECTION TO CLAIM OF LANTERN
FF-5 FINANCIAL, CLAIM NUMBER 42
5-2-17 [70]

Final ruling:

This is the debtor's objection to the claim of Lantern Financial, Claim No. 42 on the court's claims register. On May 17, 2017, the debtor filed a purported notice of withdrawal of the objection. The purported withdrawal was ineffective. Because opposition had been filed, the debtor did not have the right to unilaterally withdraw the objection. Fed. R. Civ. P. 41(a), incorporated herein by Fed. R. Bankr. P. 7041. The court deduces from the purported withdrawal, however, that the debtor does not wish to contest Lantern Financial's opposition to the objection. As a result, the objection will be overruled by minute order. No appearance is necessary.

10. 12-92040-D-13 JOHN/ROBYN FITZGERALD MOTION TO APPROVE LOAN
CJY-5 MODIFICATION
5-4-17 [77]

11. 16-90946-D-13 DIANE HATTON CONTINUED MOTION TO CONFIRM
DCJ-3 PLAN
3-20-17 [43]
12. 14-91550-D-13 WILLARD/MARILEE CRUZ MOTION TO MODIFY PLAN
CJY-1 4-12-17 [22]
13. 16-90180-D-13 EFREM GRIMES MOTION TO MODIFY PLAN
MSN-2 4-5-17 [37]
14. 17-90190-D-13 WILLIAM HILL AND JUDITH OBJECTION TO CONFIRMATION OF
RDG-1 DE LEON-HILL PLAN BY RUSSELL D. GREER
5-1-17 [13]

15. 12-90299-D-13 ELIZABETH CARDONA MOTION TO VALUE COLLATERAL OF
CJY-5 WELLS FARGO BANK
4-21-17 [79]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Wells Fargo Bank at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Wells Fargo Bank's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

16. 16-91000-D-13 MAURICE/VENISE SMALLEY MOTION TO VALUE COLLATERAL OF
BSH-5 JPMORGAN CHASE BANK, N.A.
5-16-17 [69]

17. 16-91000-D-13 MAURICE/VENISE SMALLEY MOTION TO VALUE COLLATERAL OF
BSH-6 CHRYSLER FINANCIAL
5-16-17 [76]

18. 16-90304-D-13 JOHN DEMING CONTINUED MOTION TO CONFIRM
DCJ-5 PLAN
2-15-17 [109]

Tentative ruling:

This is the debtor's motion to impose the automatic stay, pursuant to § 362(c)(4)(B) of the Bankruptcy Code. The motion was noticed pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling.

The debtor has failed to rebut by clear and convincing evidence the presumption that this case was not filed in good faith. In the court's view, the presumption arises under all three subdivisions of § 362(c)(4)(D): the debtor was a debtor in two previous cases pending within the one year prior to the commencement of this case; at least one of those previous cases was dismissed because the debtor failed, without substantial excuse, to file and obtain confirmation of an amended plan within the deadline fixed by the court; and there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case or any other reason to conclude this case will be concluded with a confirmed plan that will be fully performed.

The debtor testifies that his first prior case (not actually his first prior case, but the first one of the two that were pending and dismissed within the year prior to the filing of this one) was dismissed because he and his wife (who was also a debtor in that case) were unable to confirm a plan by a deadline. He states the plan was denied confirmation because they had not filed their tax returns, did not have liability insurance on income property, and had not provided for payment of real property taxes on income property. Those are not the reasons the plan was denied confirmation, although they were among the trustee's several grounds for opposing the debtors' motions to confirm plans. In both instances, the debtors' motions were denied by final ruling and without a hearing because the plan proposed to pay the \$295,122 claim of Wallace Miller, secured by liens against five parcels and 48 rental units owned by the debtors in Georgia, a total of \$88,181 (increased to \$100,000 in the second amended plan) based on the value of the creditor's collateral, whereas the debtors had failed to file a motion to value that collateral, as required by LBR 3015-1(j).¹

The case was filed on March 31, 2016, and from the beginning the debtors' various plans proposed to strip down Mr. Miller's claim, first to \$88,181 and later to \$100,000, yet during the seven months the case was pending, the debtors never filed a motion to value his collateral. The debtor's declaration in support of the present motion does not mention this issue at all: it does not recognize that this was the reason the plans were denied confirmation and does not suggest how the debtor intends to treat Mr. Miller's secured claim in the present case. Further, in addition to the issues addressed in the debtor's declaration in the present case - the failure to file tax returns, to carry liability insurance, and to provide for property taxes - the trustee raised serious questions of feasibility in opposition to the debtors' two motions to confirm plans in the prior case, yet the debtor makes no mention of those issues in his declaration. The court cannot assess how the debtor intends to treat Mr. Miller's claim or whether the debtor's plan in this case is likely to be feasible because, although the case was filed May 16, 2017, the debtor's schedules and plan are not yet on file.

Finally, the debtor refers to a third previous case that was not pending within

the year prior to the filing of this one, but was dismissed one year and six weeks before this new case was filed. He states that case was dismissed because he and his wife were unable to make plan payments under their confirmed plan "because of issues arising in Georgia with [their] income property there." He does not offer specifics, but the reference to the Georgia property in connection with the first case filed by the debtor and his wife raises additional questions. In the schedules in that case, filed November 25, 2014, the debtor and his wife (who was also a debtor in that case as in the other two previous cases) listed the property as being worth \$450,000. The debtors' confirmed plan provided for Mr. Miller's claim against the property to be paid outside the plan, through the debtors' wholly-owned management company in Georgia. This is the same property the debtors, in their case filed March 31, 2016, valued at only \$150,000 on their Schedule A and in their proposed plan at only \$88,181. In other words, the debtors ultimately defaulted on their plan payments in the 2014 case and the day after that case was dismissed, filed their second case, proposing to strip down to just \$88,181 Mr. Miller's claim on property the debtors had valued in their first case at \$450,000. This suggests that something other than inability to make the plan payments due to unexplained "issues" with the Georgia property was in play in the dismissal of the first case.

The debtor concludes by testifying that his tax returns are now current, he has insurance on the Georgia property, and his income has stabilized. These statements are too conclusory for the court to be able to conclude that this case, when viewed in light of the facts in the debtor and his wife's previous cases, will conclude with a confirmable plan that will be completed. They are also too conclusory to permit the court to conclude that this case has been filed in good faith and not for purposes of further delay. To conclude, the court is not persuaded the debtor's declaration constitutes clear and convincing evidence that this third case filed within one year - and the fourth in just two and one-half years - has been filed in good faith. Alternatively, if the debtors wish to supplement the record to address the issue raised above, the court will consider continuing the hearing. For the reasons stated, the court intends to deny the motion. The court will hear the matter.

1 The documents in that case are confusing, if not misleading. On their Schedule A, filed April 29, 2016, the debtors listed the value of the Georgia property at \$150,000, yet in their original plan, filed the same day, they listed the value at only \$88,181 and proposed to strip down Mr. Miller's claim against the property to that amount. In an amended plan filed July 19, 2016, the debtors again listed the property at \$88,181, with the same proposed strip-down, and in a second amended plan, filed September 13, 2016, they listed the value at \$100,000 and proposed to strip down the claim to that amount. There is no explanation where those valuations came from or why they differed so substantially from the value listed on Schedule A.

20. 13-91526-D-13 KENNETH/ROBIN MOLLESON MOTION TO INCUR DEBT
MSN-1 5-8-17 [23]
21. 17-90153-D-13 JASON UNDERWOOD CONTINUED OBJECTION TO
RCO-1 CONFIRMATION OF PLAN BY WELLS
FARGO BANK, N.A.
5-3-17 [28]
22. 15-90257-D-13 BRANDEN/DEONA HALL MOTION TO SELL
CJY-5 5-5-17 [61]
23. 15-90481-D-13 JOSE/MENDY SOLANO CONTINUED MOTION TO MODIFY PLAN
JAD-2 4-4-17 [41]

Final ruling:

The relief requested in the motion is supported by the record, the trustee having withdrawn his opposition, and no other timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

24. 17-90186-D-13 FRANCISCO PEREZ MOTION TO VALUE COLLATERAL OF
BSH-4 ALLY FINANCIAL
5-16-17 [32]
25. 17-90186-D-13 FRANCISCO PEREZ MOTION TO VALUE COLLATERAL OF
BSH-5 TOYOTA FINANCIAL
5-16-17 [37]
26. 15-90388-D-13 JOSEPH SHAW AND MARY CONTINUED MOTION TO MODIFY PLAN
RLF-2 INDERBITZIN-SHAW 3-30-17 [56]
- Final ruling:**
- The relief requested in the motion is supported by the record, the trustee having withdrawn his opposition, and no other timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.
27. 17-90190-D-13 WILLIAM HILL AND JUDITH MOTION TO VALUE COLLATERAL OF
CJY-1 DE LEON-HILL CONSUMER PORTFOLIO SERVICES
5-16-17 [16]