

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

June 14, 2016 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.	15-29902-D-13	PETER HERRERA	MOTION TO CONFIRM PLAN
	MJD-3		4-28-16 [46]

2.	16-21611-D-13	GABRIEL AYALA	OBJECTION TO DEBTOR'S CLAIM OF
	RDG-1		EXEMPTIONS
	Final ruling:		5-9-16 [16]

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor utilized the exemptions provided by Cal. Code Civ. Proc. § 703.140(b) and those provided by Cal. Code Civ. Proc. §§ 704.010, et seq., whereas the two sets of exemptions are mutually exclusive. On May 24, 2016, the debtor filed an amended Schedule C on which he claimed exemptions under §§ 704.010, et seq. only. As a result of the filing of the amended Schedule C, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

Tentative ruling:

This is the debtor's motion to impose the automatic stay as against all creditors.¹ For the following reasons, the motion will be denied.

The debtor has filed two prior cases that were dismissed within the year prior to the filing of this case. Thus, this case is presumptively not filed in good faith. Bankruptcy Code § 362(c)(4)(D). To obtain an order imposing the stay, the debtor must overcome this presumption by clear and convincing evidence. Id. First, the debtor has failed to submit any evidence - he has failed to submit even his own declaration signed under oath. Even if he had filed such a declaration, however, the reasons presented in the debtor's motion are not sufficient to demonstrate that the case was filed in good faith.

The debtor mentions only one of the two cases dismissed within the past year - Case No. 15-28922, which was dismissed because of the debtor's failure to timely file required schedules and statements. The debtor states he does not have access to electronic filing and mailed his documents, which he claims "were filed according to the court's docket." The documents are not on the court's docket. Instead, the debtor filed a motion to extend the time to file the documents, which was denied, and then a motion to vacate the dismissal of the case, which was also denied. In those two motions, the debtor gave conflicting reasons for his failure to file his schedules and statements on time. (In the first, he said he needed more time because he works full time and was contacting creditors in order to prepare a feasible plan; in the second, he stated he was unable to file the documents on time because he was caring for his wife, who had had surgery.)

The debtor makes no reference to his first 2015 case, Case No. 15-26426, which was dismissed on the trustee's motion because the debtor had failed to set his proposed chapter 13 plan for hearing and had failed to propose a comprehensible plan. The trustee's motion to dismiss noted in particular that the plan failed to state a plan term and failed to include a percentage to be paid to general unsecured creditors.

The debtor does mention an earlier case, Case No. 12-35407, in which he received a chapter 7 discharge. In the debtor's opinion, now that he has "been relieved of all [his] unsecured debt," he can maintain the payments on his home and avoid foreclosure. That does not appear to be the case. According to his schedules filed in his first 2015 case, Case No. 15-26426, between the time he received his chapter 7 discharge, on January 7, 2013, and the time he filed his first 2015 case, on August 13, 2015, the debtor accumulated \$10,200 in new general unsecured debt. In the present case, he lists \$8,813 in general unsecured debt. And the IRS has filed a priority claim in this case for \$6,568 for tax years after the time the debtor received his chapter 7 discharge. (The IRS filed a similar claim in the debtor's first 2015 case.)

Further, the debtor's expenses, as listed on Schedule J in both this new case and his first 2015 case, are lower than those listed on his Schedule J in the 2012 chapter 7 case, and do not appear sufficient to cover normal living expenses for a family of four. (The household includes the debtor's wife and two sons.) In this case, the debtor lists no expense at all for clothing, personal care, medical and

dental expenses, transportation, or entertainment, and no car payment, despite the fact that the debtor lists \$5,250 as owing on his vehicle. (Nor is the car loan provided for in the debtor's plan.) Even with no expenses in those categories, the debtor's income, which includes \$2,000 in "outside support," exceeds his expenses by only \$150 per month.

Although the debtor listed his daughter as a source of contributions to income in his first 2015 case (at \$900 per month), he has submitted no evidence to support the conclusion that she or anyone else is willing and able to contribute \$2,000 per month to the household income. Thus, the only income the debtor can count on is his pension, which provides \$3,110 per month. As against that income, the debtor lists his ongoing mortgage payment at \$2,727 per month, leaving only \$383 for all other household expenses, which is obviously insufficient.

Finally, the debtor has again proposed a chapter 13 plan that, as with the plan in his first 2015 case, fails to state a plan term and fails to state a percentage to be paid to general unsecured creditors. (And, as in the prior case, the debtor has failed to set the plan for a confirmation hearing.) The plan also fails to provide for the IRS's priority claim and fails to provide for the claim of the mortgage lender, although it appears from his Schedule J the debtor proposes to pay that claim outside the plan. The plan fails to provide for any pre-petition arrears on the mortgage, and the lender does not mention any such arrears in its motion to confirm no stay is pending in this case (also on this calendar). However, the lender states it had recorded a notice of trustee's sale on March 28, 2016; thus, it is virtually certain there are pre-petition arrears that are not provided for in the debtor's plan.

For all of these reasons, the court concludes that the debtor has failed to overcome the presumption that this case was not filed in good faith. In addition, the debtor has provided no basis on which to conclude that his financial or personal affairs have changed since the dismissal of his second 2015 case in any way that would suggest the possibility the debtor can obtain confirmation of a plan in this case. Accordingly, the motion will be denied.²

The court will hear the matter.

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- 1 At first glance, it appears the motion was not timely filed. See § 362(c)(4)(B) of the Bankruptcy Code. However, the 30th day after the petition date was May 15, 2016 - a Sunday. Thus, the 30-day period was extended to May 16, which is the day the debtor filed this motion. Thus, the motion was timely filed. Fed. R. Bankr. P. 9006(a)(1)©.
 - 2 As an aside, the court notes that the proof of service of the motion and notice of hearing was filed 15 days after the motion and notice were filed, whereas under LBR 9014-1(e)(2), the proof of service was required to be filed not more than three days later. Further, the mailing list attached to the proof of service is from an entirely different case.

4. 16-22411-D-13 PABLO AHUMADA
AP-1

MOTION TO CONFIRM TERMINATION
OR ABSENCE OF STAY
5-3-16 [14]

Tentative ruling:

This is the motion of GMAT Legal Title Trust 2013-1, U.S. Bank, National Association, as Legal Title Trustee, for an order confirming that no automatic stay is in effect in this case. 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.

At the beginning of the motion, the moving party requests an order confirming that the automatic stay is not in effect "as it applies to Movant and the real property located at [address]," which suggests the moving party is seeking in rem relief as to the real property itself. However, the moving papers do not cite the code section applicable to in rem relief, § 362(d)(4), and do not suggest the filing of this case was part of a scheme to hinder, delay, or defraud creditors. Thus, the court will not grant in rem relief. Because the debtor has filed two prior cases that were dismissed within the one year prior to the filing of this case, the court will grant the motion to the extent of determining that no automatic stay is in place.

The court will hear the matter.

5. 13-28721-D-13 VICKIE MURPHY
JCK-3

MOTION TO MODIFY PLAN
5-9-16 [44]

Tentative ruling:

This is the debtor's motion to confirm a modified chapter 13 plan. The court intends to deny the motion because the "attached mailing matrix" referred to in the proof of service is not attached, and the court cannot determine whether all creditors were served, as required by Fed. R. Bankr. P. 2002(b). If the moving party provides a corrected proof of service at the hearing, the motion will be granted; otherwise, it will be denied.

The court will hear the matter.

6. 16-20231-D-13 DWIGHT MCKEE
ALF-1

MOTION TO CONFIRM PLAN
4-29-16 [38]

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.

7. 15-24334-D-13 RICHARD GOVIA
MLA-5

MOTION TO MODIFY PLAN
4-29-16 [102]

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.

8. 16-21939-D-13 LARY/NENA ULEP
KAZ-1

OBJECTION TO CONFIRMATION OF
PLAN BY WELLS FARGO BANK, N.A.
5-4-16 [13]

9. 16-20443-D-13 STEPHANIE JOHNSON
BSH-2

MOTION TO CONFIRM PLAN
5-3-16 [43]

Tentative ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because the moving party failed to serve the Hinds County (Mississippi) Tax Collector, listed on Schedule D, and failed to serve the two parties listed on Schedule G. As a result, the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b).

As a result of these service defects, the motion will be denied by minute order. Alternatively, the court will continue the hearing to allow for the debtor to cure this service defect. The court will hear this matter.

10. 13-22646-D-13 DAVID/TUESDAY GRAHAM
SJS-3

CONTINUED MOTION FOR WAIVER OF
THE CERTIFICATION REQUIREMENTS
FOR ENTRY OF DISCHARGE
4-8-16 [60]

11. 16-21047-D-13 FABIAN PELAYES
PLL-2

MOTION TO CONFIRM PLAN
5-10-16 [41]

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 the creditor filing Claim No. 2 at the address on its proof of claim, as required by Fed. R. Bankr. P. 2002(g), or at all; (2) the moving party failed to serve the United States Trustee, Fed. R. Bankr. P. 9034; and (3) the moving party gave, at most, only 40 days' notice of the hearing rather than 42 days', as required by LBR 3015-1(d)(1) and applicable rules. In fact, it appears the moving party gave only 35 days' notice. The proof of service, which was signed and filed on May 10, 2016, states that service was made on May 5, 2016. However, the motion and notice of hearing were not signed until May 10, which suggests service was not made until May 10, or 35 days before the hearing date. If the documents were served on May 5, they were served five days before they were signed, which to the court appears unlikely. Finally, the debtor's counsel is cautioned that the general practice in this district is to serve the plan itself separately from the motion, so that the proof of service clearly evidences service of the plan. Here, a copy of the plan was attached to the motion, as filed with the court, and the proof of service, on its face, evidences service of the notice and motion only, and not the plan itself.

As a result of these service and notice defects, the motion will be denied by minute order. No appearance is necessary.

12. 16-21147-D-13 SHERON MAGSAYO
GHB-1

MOTION TO CONFIRM PLAN
5-2-16 [36]

13. 15-28869-D-13 JOSE/ARACELY RAMIREZ
TOG-5

OBJECTION TO CLAIM OF INTERNAL
REVENUE SERVICE, CLAIM NUMBER 2
4-16-16 [38]

Final ruling:

This is the debtors' objection to the claim of the Internal Revenue Service, Claim No. 2. The IRS has not filed opposition. However, that does not by itself entitle the debtors to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable

neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Thus, the court will consider the merits of the objection.

The debtors object to the portion of the claim that is for taxes for tax year 2007, assessed in 2011. The objection states the claim erroneously claims such taxes and erroneously asserts that portion of the claim is secured. According to the objection, "Debtor alleges said taxes are unsecured by property of the estate." That is the extent of the debtors' argument, and the objection is not supported by any evidence. Thus, the debtors have failed to overcome the prima facie validity of the claim. Fed. R. Bankr. P. 3001(f).¹

Further, according to the debtor's schedules, the amount of the equity in their residence, \$18,363, plus the total value of their unencumbered personal property assets, \$17,264.24, exactly equals the amount claimed by the IRS to be secured, \$35,627.24. Therefore, because the debtors have failed to meet their burden of proof and because the evidence of their schedules supports the validity of the claim, the objection will be overruled by minute order. No appearance is necessary.

1 As an aside, the court notes that the proof of service purports to evidence service of an objection to claim filed by Real Time Resolutions, not the IRS.

14. 16-22269-D-13 MIGUEL BERROJALBIZ MOTION TO VALUE COLLATERAL OF
DVD-1 URIARITE INTERNAL REVENUE SERVICE
5-4-16 [10]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Internal Revenue Service 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 Internal Revenue Service's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

15. 16-22874-D-13 ANITA TOMBOC MOTION TO VALUE COLLATERAL OF
MKM-1 WELLS FARGO BANK
5-4-16 [10]

Final ruling:

This is the debtor's motion to value collateral of Wells Fargo Bank (the "Bank"). The motion will be denied because the moving party failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b). The moving party served the Bank to the attention of an "Officer, a Manager or General Agent, or Agent for Service of Process." This was insufficient because the rule requires service on an FDIC-insured institution, such as the Bank, to the attention of an officer and only an officer. Fed. R. Bankr. P. 7004(h).

This distinction is important. For service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, the applicable rule requires service to the attention of an officer, managing or general agent, or agent for service of process (Fed. R. Bankr. P. 7004(b)(3)), whereas service on an FDIC-insured institution must be to the attention of an officer. Fed. R. Bankr. P. 7004(h). If service on an FDIC-insured institution to the attention of an "Officer, a Managing or General Agent, or Agent for Service of Process" were appropriate, the distinction in the manner of service, as between the two rules, would be superfluous.

As a s result of this service defect, the motion will be denied by minute order. No appearance is necessary.

16.	16-21783-D-13	HECTOR PEREZ	OBJECTION TO CONFIRMATION OF PLAN BY CENTRAL VALLEY GMC 5-2-16 [25]
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Final ruling:

Objection withdrawn by moving party. Matter removed from calendar.

17.	15-26188-D-13	MAEHELLENA HARLAN CRG-1	MOTION TO MODIFY PLAN 5-2-16 [22]
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Final ruling:

This case was dismissed on May 31, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

19. 13-21396-D-13 RICK/MELANIE PAYNE
TBK-8

MOTION TO MODIFY PLAN
5-3-16 [117]

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.

20. 16-22099-D-13 RUBEN VALLEJO
JAA-1

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY OCWEN
LOAN SERVICING, LLC
4-19-16 [10]

21. 16-21606-D-13 DIEGA RAMIREZ-REVIER
RDG-1

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY RUSSELL
D. GREER
5-9-16 [13]

22. 16-21825-D-13 JUAN/NADINE MORGA
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
5-23-16 [27]

23. 16-21825-D-13 JUAN/NADINE MORGA OBJECTION TO CONFIRMATION OF
JAR-1 PLAN BY BBCN BANK
5-25-16 [30]

24. 16-22129-D-13 DAPHNE LANCASTER OBJECTION TO CONFIRMATION OF
RDG-2 PLAN BY RUSSELL D. GREER
5-23-16 [28]

Final ruling:

This case was dismissed on May 31, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

25. 16-21940-D-13 JUAN/KIMBERLY MARTINEZ OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
5-23-16 [14]

26. 16-22063-D-13 RANDY/ROSELYN GAJARDO OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
5-23-16 [15]

27.	16-22065-D-13 RDG-1	JACKIE JONES	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 5-23-16 [17]
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28.	16-22084-D-13 WW-1	RICHARD TORREZ AND MONICA TORREZ	MOTION TO VALUE COLLATERAL OF J.P. MORGAN CHASE BANK, N.A. 5-24-16 [25]
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