

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil  
Bankruptcy Judge  
Modesto, California

July 9, 2019 at 10:00 a.m.

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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.

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1.	18-90901-D-13	GARY/COLEEN EDWARDS	MOTION TO CONFIRM PLAN
	JAD-2		5-20-19 [59]

Tentative ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied for two reasons. First, the moving parties served the IRS, scheduled by the debtors as holding priority claims totaling \$24,193, at the partial address of the Franchise Tax Board and failed to serve the IRS at its address on the Roster of Governmental Agencies.<sup>1</sup>

Second, because the debtors' master address list includes the IRS at the Franchise Tax Board's partial address, the debtors have failed to comply with Fed. R. Bankr. P. 1007(a)(1), which requires a debtor to include on his or her master address list the names and addresses of all parties included or to be included on his or her schedules. As a result, the court's creditor list, as reflected on the court's website for this case and on the PACER matrix, does not include the IRS at its Roster address. Thus, the IRS has not received and will not receive notices served by the Bankruptcy Noticing Center or by creditors in the case.

It is the moving parties' responsibility to serve the motion on all creditors, which, presumably, they will do when they file another motion. However, they also have a responsibility to be sure their master address list includes "each entity included . . . on Schedules D, E/F, G, and H . . ." (Fed. R. Bankr. P. 1007(a)(1)) at the entity's correct address. Thus, the plan cannot be confirmed because the debtors have failed to comply with their duty to file a complete and accurate list of creditors, as required by § 521(a)(1)(A), as implemented by Fed. R. Bankr. P. 1007(a)(1), and thus, have not complied with § 1325(a)(1).

For the reasons stated, the motion will be denied by minute order. Alternatively, the court will continue the hearing to allow for the service defect to be corrected.

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1 The IRS was served at the FTB's post office box address in Sacramento (albeit without the mailing code), whereas the IRS's address is a post office box in Philadelphia. This is how the debtors listed the IRS on their Schedule E and master address list, and the mistake has been carried throughout the case. The court pointed out the mistake in its ruling on an earlier motion filed by the debtors' counsel in another case, but the mistake has been repeated here.

2. 18-90806-D-13 JULIANA PIERI-BELL OBJECTION TO CLAIM OF  
RDG-2 DEPARTMENT OF TREASURY - IRS,  
CLAIM NUMBER 18  
6-5-19 [43]

3. 19-90307-D-13 JAY WHITAKER CONTINUED MOTION TO SELL  
AHN-1 5-24-19 [34]

**Final ruling:**

The matter is resolved by the order entered on July 1, 2019. As such this matter is removed from calendar as moot. No appearance is necessary.

4. 19-90010-D-13 SHALEAH WALKER MOTION TO CONFIRM PLAN  
BSH-3 5-30-19 [40]

5. 17-90812-D-13 PAMELA LOOPER MOTION TO MODIFY PLAN  
PGM-3 5-27-19 [108]

6. 19-90314-D-13 LINDA EXPOSE OBJECTION TO DEBTOR'S CLAIM OF  
RDG-2 EXEMPTIONS  
5-24-19 [20]

**Final ruling:**

**This case was dismissed on June 26, 2019. As a result the objection will be overruled by minute order as moot. No appearance is necessary.**

7. 18-90416-D-13 JENNI/NICHOLAS DENT CONTINUED MOTION TO CONFIRM  
MLP-2 PLAN  
4-9-19 [66]

8. 19-90316-D-13 TERESA AGUILAR MOTION TO CONFIRM PLAN  
BSH-1 5-22-19 [24]

**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.**

9. 19-90520-D-13 CHERYL NICHOLS MOTION TO VALUE COLLATERAL OF  
BSH-1 CENTRAL STATE CREDIT UNION  
6-7-19 [13]

**Final ruling:**

The matter is resolved without oral argument. The court's records indicate that 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, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

10. 19-90222-D-13 JOSHUA/LOTTIE JIMENEZ CONTINUED OBJECTION TO  
RDG-1 CONFIRMATION OF PLAN BY TRUSTEE  
RUSSELL D. GREER  
5-13-19 [24]

11. 19-90222-D-13 JOSHUA/LOTTIE JIMENEZ OBJECTION TO CLAIM OF IRS,  
RKW-1 CLAIM NUMBER 4  
5-13-19 [20]

**Final ruling:**

Objection withdrawn by moving party. Matter removed from calendar.

12. 18-90923-D-13 ESTHER CORTEZ CONTINUED MOTION FOR SANCTIONS  
BSH-3 FOR VIOLATION OF THE AUTOMATIC  
STAY  
5-8-19 [57]

**Tentative ruling:**

This is the debtor's motion for actual damages, attorney's fees, and punitive damages against Beneficial State Bank (the "Bank") for violation of the co-debtor stay of § 1301(a) of the Bankruptcy Code, pursuant to §§ 105(a), 362(k), and 1301(a). The Bank has filed opposition. For the following reasons, the motion will be granted in part.

Section 362(k) provides that, with an exception not applicable here, "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees,

and, in appropriate circumstances, may recover punitive damages."<sup>1</sup> Thus, a prima facie case for damages "requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay." Fernandez v. GE Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 180 (9th Cir. BAP 1998). The "injury" requirement means a debtor must show he or she suffered actual damages. Sorkilmo v. Countrywide Home Loans (In re Sorkilmo), 2007 Bankr. LEXIS 4928, \*13 (9th Cir. BAP 2007), citing Wolkowitz v. Shearson Lehman Bros. (In re Weisberg), 193 B.R. 916, 927 (9th Cir. BAP 1996).

The debtor and her son jointly purchased a vehicle financed by the Bank in May of 2015.<sup>2</sup> A year later, they defaulted on the loan and the vehicle was repossessed and sold. Two and a half years after that, the debtor filed her petition commencing this chapter 13 case. Where required on her Schedule E/F to indicate "who incurred the debt," the debtor answered, "Debtor 1 only," rather than "At least one of the debtors and another," and on her Schedule H, she testified she had no co-debtors. These facts are not determinative of this motion; they do, however, suggest a lack of diligence in the preparation of her schedules that casts at least some doubt on her credibility.

The debtor now complains the Bank violated the co-debtor stay when it filed a state court action against her son roughly four months after the debtor commenced this case. The Bank does not deny that the filing of the action violated the co-debtor stay. Its in-house counsel for its Consumer Lending Department ("Counsel") - the attorney who had filed the state court complaint against the debtor's son - testifies he dismissed the action the day after he was contacted by the debtor's attorney about the co-debtor stay violation, which, in turn, was 27 days after the debtor's attorney filed this motion.<sup>3</sup> Counsel also testifies he offered to settle the motion. There is no evidence the debtor, her son, or her attorney took any action to contact the Bank or its counsel before this motion was filed.

Counsel testifies to the systems in place for putting a "bankruptcy alert" on an account once the Bank is notified of a bankruptcy petition, adding the alert is supposed to show whether the case is a chapter 7 or chapter 13 case. This is to ensure that in chapter 13 cases, actions against all debtors on the account are stopped, whereas in chapter 7s, collection efforts may continue against co-debtors not in bankruptcy. Counsel testifies two human errors combined to produce the filing of the Bank's complaint against the debtor's son - first, a clerical error by a new employee and then an inadvertent oversight by Counsel. Specifically, the new clerk failed to indicate in the bankruptcy alert whether the case was a chapter 7 or a chapter 13, and when Counsel reviewed the account to determine whether to file a complaint, he did not notice this omission and "subconsciously assumed" it was a chapter 7 case. He concludes, "Had I recognized that the bankruptcy was filed under Chapter 13, I would not have filed the complaint." Silver Decl., filed June 24, 2019, 3:21-22.

The debtor has offered nothing to counter this evidence that the Bank has systems in place to prevent collection efforts against co-debtors of

chapter 13 debtors, but the systems simply failed in this case, due to human error. The evidence strongly supports the inference that if the debtor's attorney had simply contacted the Bank through Counsel; that is, through the attorney who had filed the complaint and was listed on it, Counsel would have dismissed the complaint. The debtor has offered nothing that reasonably counters that inference.

The debtor concludes instead it was the filing of her bankruptcy that triggered the Bank to look at the account for possible legal action and that the Bank had not taken action on the account until it received the notice of the commencement of the case, the motion to confirm the plan, and so on.<sup>4</sup> The debtor adds,

[o]nce this case was on its radar again, the bank decided to commence litigation because it either did not understand § 1301 or did not care. Either way, when it comes to a state-sanctioned bank, with its own in-house counsel, it should not be incumbent on the debtor to educate a sophisticated and wealthy creditor as to the scope of the different stays under the Bankruptcy Code.

Mot. at 6:24-28. The court disagrees with this conclusion, as applied to this case. It is not among the purposes of the co-debtor stay to create opportunities for emotional distress and attorney's fee claims for debtors when a simple phone call, could, as it did here, solve the problem. The courts are entitled to expect counsel on both sides of a dispute to act reasonably. The court concludes from the evidence the Bank's violation of the co-debtor stay was not willful and the debtor failed to mitigate her damages (see below).

Further, the court is not persuaded the debtor suffered any type of compensable emotional distress. Although "actual damages" may include damages for emotional distress (see Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1148 (9th Cir. 2004)), to recover, the debtor must "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process)." Id. at 1149. "Fleeting or trivial anxiety or distress does not suffice . . . ." Id.

According to the proof of service filed by the debtor as an exhibit, her son was served through her, after the process server had tried unsuccessfully to serve the son himself. The debtor testifies:

I am 60-years-old, and the service of the summons and complaint has given me serious anxiety which has affected my sleep and work performance. I've had trouble concentrating and I am afraid another lawsuit will come again. It seems that no matter what I do, my creditors will never stop coming for me. If it's not me, it's my son, which, to me, is me.

I am fearful that my bankruptcy will not work. Either what my lawyer is saying is not true or it just won't matter to any of them - the creditors will continue to pursue me like they were before bankruptcy by wage garnishment. Now during bankruptcy; and it would seem they will even be there after bankruptcy.

I figure if I am not going to be protected during this process, I wonder whether it would be better to dismiss the petition so I can focus on the lawsuit. I feel this is all my fault; had I not filed this petition, Beneficial State Bank would have left me and my son alone.

Cortez Decl., filed May 8, 2019, at 2:9-21.

This testimony lacks credibility. First, her attorney waited over a month after the debtor was served before filing this motion. Second, the debtor does not suggest she suffered emotional distress when she and her son defaulted on the car loan one year after they entered into it or when the car was repossessed or during the two and a half years following, or any unusual emotional distress when her wages were garnished by another creditor pre-petition. Third, the co-debtor stay will protect the debtor's son only so long and her bankruptcy will not absolve him of liability, as the debtor seems to believe. It is simply not reasonable to believe the service of the Bank's summons and complaint, directed to her son, caused the debtor any greater emotional distress than their default on the loan, the repossession of the car, or the wage garnishment by another creditor. It is not reasonable to believe the distress she testifies to is any greater than the distress she will suffer when the co-debtor stay is lifted and the Bank is again free to sue her son.

In short, the evidence does not support the conclusion the debtor suffered significant harm, that the Bank's conduct was egregious, or that it was obvious its conduct would cause a reasonable person to suffer significant emotional harm. See Dawson, 390 F.3d 1139 at 1149-50. Nor does the evidence support the conclusion that the debtor's attorney's fees in connection with this motion were reasonably incurred. "[I]n determining reasonable damages under § 362(h) [now § 362(k)], the bankruptcy court must examine whether the debtor could have mitigated the damages. . . . Courts especially scrutinize cases where the debtor's only injuries are those incurred in litigating the motion for sanctions and where there exist no circumstances warranting punitive damages." Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 12 (9th Cir. BAP 2002). The court does acknowledge some amount of fees would have been incurred in addressing the issue of the complaint with the Bank's counsel. Accordingly, the court will award the debtor attorney's fees of \$500, which the court considers generous.

Finally, relief under § 105 of the Code is not available because other substantive remedies are available under the Code for the Bank's conduct (albeit not supported here) . See Willms v. Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir.

2002); Roman, 283 B.R. at 14.

For the reasons stated, the motion will be granted in part and denied in part. The court will hear the matter.

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- 1 Section 362(k) refers to a willful violation of "a stay provided by this section." The debtor contends the Bank's actions were an indirect attempt to collect from the debtor. Specifically, she alleges, "[w]hen [the Bank] served [the debtor's son] by handing the Debtor the documents at the Debtor's residence, the Debtor felt obligated to pay the debt." Debtor's Motion, filed May 8, 2019 ("Mot."), at 7:28-8:1. (She did not pay it.) The court will assume without deciding that § 362(k) provides a remedy for a violation of the co-debtor stay in this situation, if the facts meet the required elements.
- 2 The Bank indicates the debtor's son was the primary borrower on the loan, so apparently, the debtor co-signed for her son.
- 3 The debtor's attorney served the motion on the Bank, by certified mail to the attention of an officer, in Oakland. The debtor's attorney did not serve the Bank's in-house counsel, so identified on the state court complaint, at the name and address listed on the complaint, in Porterville. For reasons unknown to its in-house counsel, the Bank's Oakland headquarters did not forward the motion to its in-house counsel, although that is its regular practice.
- 4 There is no evidence to support the conclusion the Bank had taken no action to collect on the debt until it filed the complaint. According to the debtor's Schedule E/F, the account was "last active" in May of 2018, two years after the debtor and her son defaulted and seven months before the debtor commenced this case.

13. 19-90335-D-13      JOBERT/CARLEY VERCELES  
RDW-1

OBJECTION TO CONFIRMATION OF  
PLAN BY UNCLE CREDIT UNION  
6-12-19 [21]

14. 19-90237-D-13 KENNETH/SAMANTHA CLEMENS CONTINUED MOTION TO VALUE  
ADR-1 COLLATERAL OF CAPITAL ONE AUTO  
FINANCE  
5-14-19 [29]
15. 19-90237-D-13 KENNETH/SAMANTHA CLEMENS CONTINUED OBJECTION TO  
CAS-1 CONFIRMATION OF PLAN BY CAPITAL  
ONE AUTO FINANCE  
4-25-19 [21]
16. 19-90237-D-13 KENNETH/SAMANTHA CLEMENS CONTINUED OBJECTION TO  
RDG-1 CONFIRMATION OF PLAN BY RUSSELL  
D. GREER  
5-13-19 [26]
17. 19-90339-D-13 LINDA EMERSON OBJECTION TO CONFIRMATION OF  
RDG-1 PLAN BY RUSSELL D. GREER  
6-10-19 [15]

18. 15-90855-D-13 PHILLIP/NECY LOPEZ CONTINUED MOTION TO MODIFY PLAN  
TOG-7 4-24-19 [76]

19. 12-91862-D-13 AUGSTIN/ARCELIA OCHOA MOTION TO AVOID LIEN OF MIDLAND  
TOG-2 FUNDING, LLC  
6-5-19 [60]

**Final ruling:**

The matter is resolved without oral argument. The court's records indicate that 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, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

20. 16-90362-D-13 KRISTOPHER/JULIE NABORS MOTION TO MODIFY PLAN  
MSN-3 5-30-19 [140]

**Final ruling:**

**Motion withdrawn by moving party. Matter removed from calendar.**

21. 17-90564-D-13 DANIEL/GERARDEE DONNAN CONTINUED STATUS CONFERENCE RE:  
JAD-4 OBJECTION TO NOTICE OF  
POSTPETITION MORTGAGE FEES,  
EXPENSES, AND CHARGES  
2-16-18 [58]

22. 19-90374-D-13 JOSE TORRES AND LAURA DE OBJECTION TO CONFIRMATION OF  
APN-1 RIOS PLAN BY FORD MOTOR CREDIT  
COMPANY  
6-4-19 [14]

23. 19-90077-D-13 ANGEL MEDRANO MOTION TO CONFIRM PLAN  
JTL-1 5-30-19 [55]

**Final ruling:**

This is the debtor's motion to confirm an amended chapter 13 plan. On June 25, 2019, the debtor purported to withdraw the motion. However, by that time, the trustee had filed opposition and the debtor was not free to unilaterally withdraw the motion. See Fed. R. Civ. P. 41(a)(1) and (2), incorporated herein by Fed. R. Bankr. P. 7041 and 9014(c). Instead, the motion will be denied for the following reasons: (1) the notice of hearing states "you must file your objection in writing . . . before the deadline set forth above," but there is no deadline set forth above or anywhere in the notice, and the notice of hearing does not include the cautionary language required by LBR 9014-1(d)(3)(B)(ii); (2) the moving party failed to serve any of the three creditors listed on his Schedule E/F who have not filed proofs of claim, whose scheduled claims total \$46,073, as required by Fed. R. Bankr. P. 2002(a)(9) and (g); and (3) the proof of service does not include the docket control number, as required by LBR 9014-1(c)(1) and (e)(3).

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

24. 19-90179-D-13 ROBERT/ROBIN SMITH CONTINUED MOTION TO CONFIRM  
JAD-2 PLAN  
4-23-19 [25]

25. 19-90092-D-13 CHRISTOPHER/CARLA MOTION TO CONFIRM PLAN  
MSN-1 REYNOLDS 5-9-19 [19]

**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.

26. 19-90305-D-13 DANI IBRAHIM AND ATOURINA CONTINUED OBJECTION TO  
RDG-1 NISANO CONFIRMATION OF PLAN BY RUSSELL  
D. GREER  
5-24-19 [15]

27. 18-90714-D-13 JARED MEEK AND LAUREN CONTINUED MOTION TO CONFIRM  
BSH-7 LONGWELL PLAN  
5-8-19 [69]

28. 19-90546-D-13 JEFFREY/CLARA PAPPAS MOTION TO EXTEND AUTOMATIC STAY  
HWW-1 6-25-19 [10]

29. 17-90564-D-13 DANIEL/GERARDEE DONNAN MOTION TO ALLOW ACCESS TO REAL  
EGS-1 PROPERTY LOCATED AT 274  
TIMBERWOOD DRIVE, OAKDALE, CA  
95361 TO INSPECT THE INTERIOR  
OF MOVANT'S COLLATERAL  
6-25-19 [109]
30. 19-90365-D-13 RONNIE WILSON OBJECTION TO CONFIRMATION OF  
RDG-1 PLAN BY RUSSELL D. GREER  
6-17-19 [13]
31. 19-90374-D-13 JOSE TORRES AND LAURA DE OBJECTION TO CONFIRMATION OF  
RDG-1 RIOS PLAN BY RUSSELL D. GREER  
6-17-19 [21]
32. 19-90375-D-13 SALVADOR/EMELI RODRIGUEZ OBJECTION TO CONFIRMATION OF  
RDG-1 PLAN BY RUSSELL D. GREER  
6-17-19 [22]

33. 19-90375-D-13 SALVADOR/EMELI RODRIGUEZ OBJECTION TO CONFIRMATION OF  
APN-1 PLAN BY TOYOTA MOTOR CREDIT  
CORPORATION  
6-17-19 [17]
34. 19-90278-D-13 JODY JOHNS CONTINUED OBJECTION TO  
AP-1 CONFIRMATION OF PLAN BY QUICKEN  
LOANS INC.  
5-29-19 [22]
35. 19-90378-D-13 GREGORY THOMPSON OBJECTION TO CONFIRMATION OF  
RDG-2 PLAN BY RUSSELL D. GREER  
6-17-19 [25]
36. 19-90378-D-13 GREGORY THOMPSON OBJECTION TO CONFIRMATION OF  
DWE-1 PLAN BY FREEDOM MORTGAGE  
CORPORATION  
6-18-19 [28]

37. 19-90385-D-13 MIGUEL GUTIERREZ OBJECTION TO CONFIRMATION OF  
RDG-1 PLAN BY RUSSELL D. GREER  
6-17-19 [26]
38. 19-90386-D-13 CARLOS MELGAR AND OBJECTION TO CONFIRMATION OF  
RDG-1 MAYRALICEE TORRES PLAN BY RUSSELL D. GREER  
6-17-19 [15]
39. 19-90388-D-13 LANCE MILER OBJECTION TO CONFIRMATION OF  
RDG-1 PLAN BY RUSSELL D. GREER  
6-17-19 [15]