UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 13, 2015 at 1:30 p.m.

THIS CALENDAR IS DIVIDED INTO TWO PARTS. THEREFORE, TO FIND ALL MOTIONS AND OBJECTIONS SET FOR HEARING IN A PARTICULAR CASE, YOU MAY HAVE TO LOOK IN BOTH PARTS OF THE CALENDAR. WITHIN EACH PART, CASES ARE ARRANGED BY THE LAST TWO DIGITS OF THE CASE NUMBER.

THE COURT FIRST WILL HEAR ITEMS 1 THROUGH 12. A TENTATIVE RULING FOLLOWS EACH OF THESE ITEMS. THE COURT MAY AMEND OR CHANGE A TENTATIVE RULING BASED ON THE PARTIES' ORAL ARGUMENT. IF ALL PARTIES AGREE TO A TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING PURSUANT TO LOCAL BANKRUPTCY RULE 3015-1(c), (d) [eff. May 1, 2012], GENERAL ORDER 05-03, ¶ 3(c), LOCAL BANKRUPTCY RULE 3007-1(c)(2)[eff. through April 30, 2012], OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED TO DEVELOP THE WRITTEN RECORD FURTHER. IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE ON AUGUST 17, 2015 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY AUGUST 3, 2015, AND ANY REPLY MUST BE FILED AND SERVED BY AUGUST 10, 2015. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THE DATE AND TIME OF THE CONTINUED HEARING DATE AND OF THESE DEADLINES.

THERE WILL BE NO HEARING ON ITEMS 13 THROUGH 26 IN THE SECOND PART OF THE CALENDAR. INSTEAD, THESE ITEMS HAVE BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS; IF IT IS, IT INCLUDES THE COURT'S FINDINGS AND CONCLUSIONS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

IF THE COURT CONCLUDES THAT FED. R. BANKR. P. 9014(d) REQUIRES AN EVIDENTIARY HEARING, UNLESS OTHERWISE ORDERED, IT WILL BE SET ON JULY 20, 2015, AT 2:30 P.M.

Matters to be Called for Argument

1. 15-23801-A-13 JPJ-1 — ALBERTO PEREZ AND ISELA RAMIREZ — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE 6-17-15 [18]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because this hearing on an objection to the confirmation of the proposed chapter 13 plan and a motion to dismiss the case was set pursuant to the procedure required by Local Bankruptcy Rule 3015-1(c)(4), the debtor was not required to file a written response. If no opposition is offered at the hearing, the court will take up the merits of the objection. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The objection will be sustained and the motion to dismiss the case will be conditionally denied.

First, the debtor has failed to give the trustee financial records for a closely held business. This is a breach of the duties imposed by 11 U.S.C. § 521(a)(3) & (a)(4). To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Second, Local Bankruptcy Rule 3015-1(b)(6) provides: "*Documents Required by Trustee*. The debtor shall provide to the trustee, not later than the fourteen (14) days after the filing of the petition, Form EDC 3-088, *Domestic Support Obligation Checklist,* or other written notice of the name and address of each person to whom the debtor owes a domestic support obligation together with the name and address of the relevant state child support enforcement agency (see 42 U.S.C. §§ 464 & 466), Form EDC 3-086, *Class 1 Checklist*, for each Class 1 claim, and Form EDC 3-087, *Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By The Trustee*." Because the plan includes a class 1 claim, the debtor was required to provide the trustee with a Class 1 checklist. The debtor failed to do so.

Third, the debtor admitted that the plan filed is not the plan filed by the debtor. The plan has not been filed in accordance with Fed. R. Bankr. P. 9011.

Fourth, the debtor has not established that the plan will pay all projected disposable income to unsecured creditors as required by 11 U.S.C. § 1325(b) because the debtor has erroneously deducted business expenses when calculating current monthly income. Gross business income, without expense deduction, is part of the debtor's current monthly income. Once total current monthly income is calculated, business expenses may be deducted as an expense when calculating current monthly income. Accord In re Weigand, 386 B.R. 238 (9th Cir. BAP 2008). The distinction is material here because with gross business income a part of the debtor's current monthly, the debtor's current monthly income exceeds the state median income for a comparably sized household. As a result, the debtor must complete Form 22 in its entirety in order to calculate projected disposable income. The debtor has failed to complete the portion of Form 22 necessary to calculate projected disposable income. Without doing so, the debtor cannot prove compliance with 11 U.S.C. § 1325(b).

Because the plan proposed by the debtor is not confirmable, the debtor will be given a further opportunity to confirm a plan. But, if the debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the debtor has not confirmed a plan within 75 days, the case will be dismissed on the trustee's ex parte application.

2. 15-23215-A-13 FRANCISCO AGREDANO ESQUIVIAS AND ROSA GUZMAN — ORDER TO SHOW CAUSE 6-24-15 [40]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The case will remain pending but the court will modify the terms of its order permitting the debtor to pay the filing fee in installments.

The court granted the debtor permission to pay the filing fee in installments. The debtor failed to pay the $56 installment when due on June 19. While the delinquent installment was paid on June 26, the fact remains the court was required to issue an order to show cause to compel the payment. Therefore, as a sanction for the late payment, the court will modify its prior order allowing installment payments to provide that if a future installment is not received by its due date, the case will be dismissed without further notice or hearing.

3. 12-35128-A-13 ERWIN/MARY ANN SANTOS PGM-2 — MOTION TO MODIFY PLAN 6-4-15 [125]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained.

The plan is not feasible as required by 11 U.S.C. § 1325(a)(6). While schedules I and J show that the debtor will have monthly net income of approximately $50, this assumes the debtor's unemployment income will continue. However, it ceased in June. As a result, the debtor has no monthly income. The infeasibility of the plan is corroborated by the debtor's failure to make a $50 plan payment in June.

4. 10-38544-A-13 ROBERT/PAULA GREEN GG-4 — MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY 4-22-15 [126]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted in part.

Counsel opted into the voluntary chapter 13 fee guidelines which at the time authorized a $3,500 flat fee for consumer cases like this one. Those guidelines provided:

"If . . . the initial [$3,500} fee is not sufficient to fully compensate

counsel for the legal services rendered in the case, the attorney may apply for additional fees. The court will not approve, however, additional compensation in cases in which no plan is confirmed, or for work necessary to confirm the initial plan. Further, counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. This fee is sufficient to fairly compensate counsel for all preconfirmation services and most post-confirmation services such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. The form application attached hereto may be used by the attorney when seeking additional fees. The necessity for a hearing on the application shall be governed by Bankruptcy Rule 2002(a)(6)."

A review of the fee application reveals that counsel has billed 19.1 hours of work at $300 for work done prior to the September 14, 2011, confirmation of the initial plan. This totals to $5,730 for preconfirmation services. Because counsel agreed, at a minimum, to accept $3,500 for all preconfirmation work, the court will disallow at least $2,230 of the requested additional compensation.

To the extent counsel argues that additional work was necessary because of the trustee's handling of confidential information in court-filed documents, this work could have been avoided if the debtor had redacted the debtor's confidential information before giving the documents to the trustee. At any rate, it was the trustee who remedied the problem, not the debtor's attorney.

But, the problem runs deeper.

Counsel has been paid $3,500 for fees and $274 for costs. This application asks for an additional $13,495 in fees and costs, which means counsel's total requested compensation is a whopping $16,995 in fees and $274 in costs. After deducting the $5,730 charged for preconfirmation services, $11,265 represents compensation for post-confirmation services.

A review of the contemporaneous time records filed with the initial motion reveals they are inadequate because they do not describe the work done by counsel in sufficient detail. For instance, a total of 4.95 hours has been billed for legal research with no description of the issues researched. Similarly, there are numerous time entries for phone calls, letters, emails, and facsimile transmissions with no indication of topics discussed. Given these vague entries, proving that the services were necessary, reasonable or beneficial, whether to the debtor or even the estate, is difficult.

Some of these problems are corrected by the "updated" billing records filed with the debtor's June 2 reply. Assuming that these "contemporaneous" time records are ideal it appears that the post-confirmation services relate primarily to the debtor's efforts to resist the confirmation of a modified plan proposed by the trustee. The court cannot conclude that all of these services were necessary or reasonable to the debtor. See 11 U.S.C. § 330(a)(4)(B).

The trustee discovered that the debtor's income had increased by $8,500 a month soon after confirmation of the debtor's plan. A confirmation order was entered on September 14, 2011. Prior to the trustee's discovery, the debtor did not move to modify the plan or even disclose the increase in income. The trustee then moved to modify the plan on May 17, 2013 by proposing a modified plan

which increased the debtor's plan payment and increased the dividend payable to nonpriority unsecured creditors from nothing to 100%. This modified plan was replaced by another proposed by the trustee that reduced the 100% dividend to 70%.

The debtor proposed a competing plan that allowed the debtor to keep all of the additional income even though holders of nonpriority unsecured claims would be paid nothing. Given the significant increase in the debtor's income, it was unrealistic for counsel and the debtor to believe that the court would not confirm a modified plan that both increased the plan payment and provided for a significant dividend to nonpriority unsecured creditors (who were to receive nothing pursuant to the original confirmed plan).

Ultimately, the trustee and the debtor agreed to an increase of the monthly plan payment beginning in month 39 of the plan. The monthly plan payment increased from $1,400 to $3,000 which is enough to pay a 40% dividend to nonpriority unsecured creditors. That plan was confirmed on October 30, 2013.

Had the debtor cooperated with the trustee by timely turning over income records, not attempting to confirm a modified plan that assumed the court would permit the debtor to retain, to the exclusion of unsecured creditors, a very large increase in monthly income (not to mention a $9,000 income tax refund that indicated the debtor was over-withholding for income taxes), the confirmation of a modified plan would hot have been six-month ordeal that necessitated dueling motions. Rather, the issue could have, and should have, been resolved by the confirmation of a modified plan using the "minor modification" procedure permitted by Local Bankruptcy Rule 3015-1(d)(3).

$11,265 for additional post-confirmation work is unreasonable because most of the services were unnecessary. The court will permit an additional $2,400 in fees for the post-confirmation services. This is compensation for 8 additional hours of professional time at $300. This is what, in the judgment of the court, it should have taken counsel to field the inquiries of the trustee and confirm a modify plan along the lines ultimately approved by the court. These services were reasonable, necessary, and beneficial to the debtor.

5. 10-49746-A-13 EVIE CORREA — MOTION TO APPROVE LOAN MODIFICATION
CJO-1 — 6-8-15 [51]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained.

First, the motion fails to explain why the loan modification was entered into in 2013 without court approval.

Second, the motion fails to include proof that the debtor is able to afford the modified loan while continuing to perform the chapter 13 plan. The debtor failed to file amended Schedules I and J.

Third, to the extent the approval is retroactive, the modified loan is inconsistent with the confirmed plan. Therefore, the trustee has overpaid the home lender pursuant to the confirmed plan. The motion fails to address this overpayment.

6. 12-22549-A-13 RICHARD/LYNNDA LOPEZ — MOTION TO MODIFY PLAN
TJW-2 — 5-20-15 [31]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained.

First, to pay the dividends required by the plan at the rate proposed by it will take 84 months which exceeds the maximum 5-year duration permitted by 11 U.S.C. § 1322(d). This problems arises because the plan provides for payment in full of priority claims as required by 11 U.S.C. § 1322(a)(2) but understates a priority tax claim at $31,697.51 rather than at the amount demanded in the proof of claim, $180,631.18.

Second, the proposed plan fails to provide for and account for all prior payments, which total $135,963, made by the debtor under the terms of the prior plan.

7. 15-23650-A-13 RUDOLPH/RENEE LUNA — MOTION FOR RELIEF FROM AUTOMATIC STAY
SMR-1 — 6-24-15 [27]
CHINH NGUYEN VS.

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The movant leased residential real property to the debtor. Prior to the filing of the petition, the allegedly defaulted in the payment of rent. Since the filing of the bankruptcy case, the debtor allegedly failed to pay rent for two months.

Given the alleged default, there is cause to modify the automatic stay. See 11 U.S.C. § 362(d)(1). The stay is modified to allow the movant to serve a notice to pay or quit, and if appropriate file, serve and prosecute an unlawful detainer proceeding. If the movant prevails, it is authorized to retake possession of the property.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived. The parties shall bear their own fees and costs.

8. 10-45052-A-13 PATRICK/TRACY APPLEWHITE — MOTION TO APPROVE LOAN MODIFICATION
CJO-1 — 6-8-15 [68]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained.

First, the motion fails to explain why the loan modification was entered into in 2013 without court approval.

Second, the motion fails to include proof that the debtor is able to afford the modified loan while continuing to perform the chapter 13 plan. The debtor failed to file amended Schedules I and J.

Third, to the extent the approval is retroactive, the modified loan is inconsistent with the confirmed plan. Therefore, the trustee has overpaid the home lender pursuant to the confirmed plan. The motion fails to address this overpayment.

9. 12-26457-A-13 DAVID/JANE BENTLEY — MOTION TO CONTINUE ADMINISTRATION
RDS-6 — 6-25-15 [105]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

One of the debtors died after the case was filed and before the plan was completed. Prior to her death, the deceased debtors did not file a certification of completion of a post-petition course on personal financial management and she is unable able to file the remaining documents required by Local Bankruptcy Rule 5009-1. Nonetheless, provided the surviving debtor files such certificate and all other certificates and documents required by Local Bankruptcy Rule 5009-1, and attests under penalty of perjury that his spouse did not receive prior discharge with the time periods specified in 11 U.S.C. § 1328(f), had no outstanding domestic support obligations, and did not owe obligations of the type described in 11 U.S.C. § 522(q), a discharge shall be issued for the deceased spouse at such time as the clerk is in a position to enter the discharge of the surviving debtor.

10. 13-27668-A-13 VINCENT MUNSON
NSV-3

MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY
6-3-15 [54]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

First, among the charges that counsel for the debtor seeks to have paid, are charges incurred during the period January 30, 2013 to May 30, 2013. These dates predate the filing of this case. Therefore, they do not represent fees and costs entitled to payment as administrative expenses. See 11 U.S.C. § 503(b)(1)(A)(i). Inasmuch as no retainer was paid before the case was filed, these services represent an pre-petition claim not paid by the debtor before the case was filed.

Second, many if not most of the charges reported on the contemporaneous time records are for work by "legal support." Review of these charges indicates they are for clerical and secretarial services, not professional services. Such services as "retrieving PACER documents," "saving" documents, telephone calls concerning receipt of documents, are being billed. To the extent these and the other charges by legal support personnel are for professional services cannot be ascertained from the time records.

Third, counsel opted to be compensated pursuant to Local Bankruptcy Rule 2016-1(c), which provides:

"*Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.*

(1) The maximum fee that may be charged is $4,000.00 in nonbusiness cases, and $6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used 7 when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

(4) If an attorney elects to be compensated pursuant to Subpart (c) but the

case is dismissed prior to confirmation of a plan, absent a contrary order, the trustee shall pay to the attorney, to the extent funds are available, an administrative claim equal to fifty per cent (50%) of the total fee the debtor agreed to pay less any pre-petition retainer. The attorney shall not collect, receive, or demand additional fees from the debtor unless authorized by the Court.

(5) The Court may allow compensation different from the compensation provided under this Subpart any time prior to entry of a final decree, if such compensation proves to have been improvident in light of developments not capable of being anticipated at the time the plan is confirmed or denied confirmation."

So, counsel agreed to represent the debtor in this case for a flat fee of $3,500. Counsel knew before the case was filed that the debtor had a significant tax claim that had caused the dismissal of an earlier chapter 13 case. Despite this knowledge, counsel agreed to the $3,500 flat fee without a retainer.

Further, a review of the docket reveals that $5,287.50 out of $6,270 of the time billed is for services prior to confirmation of a plan. Yet, the motion fails to give the explanation required by Local Bankruptcy Rule 2016-1(c)(3): this "fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation." There is no proof that substantial and unanticipated services were required in this case and nothing on the docket suggests that such services were rendered.

11. 13-23271-A-13 BARRIE BENSON — MOTION TO MODIFY PLAN 5-20-15 [63]
SDB-4

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained in part.

The court concludes that the proposed plan has not been proposed in good faith as required by 11 U.S.C. § 1325(a)(3) based on the following facts:

- even though this motion asserts that the debtor's financial circumstances changed materially in March, the debtor failed to file amended Schedules I and J to reflect her current income and expenses.

- the debtor failed to give the trustee financial records relevant to the debtor's asserted change in financial circumstances in violation of Local Bankruptcy Rule 3015-1(b)(5). While ultimately those records were turned over to the trustee, they were provided on the day the trustee's objection to this motion was due.

- the debtor incurred a new unsecured debt without the permission of the trustee or of the court. That debt, a new lease, is for premises that are unnecessary for the maintenance and support of the debtor.

- the debtor failed to turnover to the trustee an employment bonus received in 2015 as required by the confirmed plan. The debtor instead spent the bonus and then asked to modify the plan.

- the motion asserts that the debtor has had a three month gap income because of a delay in the commencement of her retirement income. Not explained, however, if whether the retirement plan will retroactively pay the debtor for the three months in the fourth or at some later time.

12. 13-35880-A-13 GREGORY SWANGIN AND LADRENA GUNN-SWANGIN
AT-1 VILLA SAN JUAN OWNERS ASSOC. VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
6-29-15 [59]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The debtor occupies a condominium. The owner's association assesses a monthly charge for its care of the common areas and the buildings. While the plan provides for a cure of the past due, pre-petition assessments owed by the debtor, the plan does not modify the debtor's obligation to make post-petition assessments. Despite this, the debtor has failed to make over $5,600 in post-petition assessments. Given this default, cause exists to permit the owner's association to enforce its lien rights, if any, against the debtor's condominium.

Because the movant has not established that the value of the condominium exceeds the amount of its claim and other senior liens, the court awards no fees and costs. 11 U.S.C. § 506(b).

The 14-day period specified in Fed. R. Bankr. P. 4001(a)(3) is not waived.

FINAL RULINGS BEGIN HERE

13. 14-28924-A-13 THOMAS/SHANNON SHUMATE — OBJECTION TO CLAIM
JPJ-2
VS. DEPT. STORES NAT'L BANK/MACY'S — 5-11-15 [54]

Final Ruling: This objection to the proof of claim of Department Stores National Bank/Macy's has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(c)(1)(ii). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained and the claim will be disallowed.

According to the documentation attached to the proof of claim, the underlying debt is a contract claim, most likely based on a written contract. California law provides a four year statute of limitations to file actions for breach of written contracts. See Cal. Civ. Pro. Code § 337. This statute begins to run from the date of the contract's breach. According to the claim, the last payment was received on August 3, 2010, which is more than four years prior to the filing of this case. Hence, when the case was filed, this debt was time barred under applicable nonbankruptcy law and must be disallowed. See 11 U.S.C. § 502(b)(1).

14. 15-21526-A-13 DEE LINDERER — MOTION TO CONFIRM PLAN
BLG-2 — 5-27-15 [33]

Final Ruling: This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(c)(3) & (d)(1) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

15. 15-24039-A-13 LEONARD/MARIA LEONIDAS — ORDER TO SHOW CAUSE
6-23-15 [17]

Final Ruling: The order to show cause will be discharged and the case will remain pending.

The court granted the debtor permission to pay the filing fee in installments. The debtor failed to pay the $79 installment when due on June 18. However,

after the issuance of the order to show cause, the delinquent installment was paid. No prejudice was caused by the late payment.

16. 15-22850-A-13 DANIEL/JESSICA PUGLIA — MOTION TO CONFIRM PLAN
SS-3 — 6-1-15 [40]

Final Ruling: This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(c)(3) & (d)(1) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

17. 15-23650-A-13 RUDOLPH/RENEE LUNA — MOTION TO VALUE COLLATERAL
PGM-1 — 6-10-15 [16]
VS. SANTANDER CONSUMER USA, INC.

Final Ruling: This valuation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the trustee and the respondent creditor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the trustee and the respondent creditor are entered and the matter will be resolved without oral argument.

The valuation motion pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a) will be granted. The motion is accompanied by the debtor's declaration. The debtor is the owner of the subject property. The respondent holds a purchase money security interest in the subject personal property (a vehicle) that was created more than 910 days prior to the filing of the case. In the debtor's opinion, the subject property had a value of $6,548 as of the date the petition was filed and the effective date of the plan. Given the absence of contrary evidence, the debtor's opinion of value is conclusive. See Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004). Therefore, $6,548 of the respondent's claim is an allowed secured claim. When the respondent is paid $6,548 and subject to the completion of the plan, its secured claim shall be satisfied in full and the collateral free of the respondent's lien. Provided a timely proof of claim is filed, the remainder of its claim is allowed as a general unsecured claim unless previously paid by the trustee as a secured claim.

18. 11-42358-A-13 MICHAEL/LUANN KOPPEL — MOTION TO INCUR DEBT
JME-1 — 6-24-15 [50]

Final Ruling: The motion will be dismissed without prejudice.

A review of the certificate of service indicates that the motion was served (or will be served) on July 23, 2015. Obviously, this is wrong and if it is not wrong, service after the hearing does no one any good.

Second, the certificate of service does not identify any creditors as being served with the motion.

19. 15-24459-A-13 THOMAS/HEATHER PINTO — MOTION TO VALUE COLLATERAL
SDH-1 — 6-15-15 [9]
VS. VOLKSWAGEN CREDIT, INC.

Final Ruling: The motion has been resolved by stipulation.

20. 15-21762-A-13 PAUL/SHERI D'ANGELO — MOTION TO CONFIRM PLAN
MWB-1 — 5-27-15 [33]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted on the condition that the plan is further modified in the confirmation order to account for all prior payments made by the debtor under the terms of the prior plan, and to provide for a plan payment of $550 beginning July 25, 2015. As further modified, the plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

21. 15-20565-A-13 REV KENNETH ANDERSON — MOTION TO CONFIRM PLAN
KG-5 — 5-29-15 [81]

Final Ruling: This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(c)(3) & (d)(1) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

22. 15-22965-A-13 JOHN PUGH — OBJECTION TO EXEMPTIONS
JPJ-1 — 6-12-15 [32]

Final Ruling: This objection to the debtor's exemptions has been set for

hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the debtor's default is entered and the matter will be resolved without oral argument.

The objection will be sustained.

The debtor has claimed cash and bank deposits as tools of the debtor's art business. While the cash and deposits may be used in connection with the business, they are not "tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial vehicle, one vessel, or other personal property" used in connection with that business. Therefore, the cash and deposits are not made exempt by Cal. Civ. Pro. Code § 704.060(a).

23. 15-21670-A-13 DENISE MEDINA — MOTION TO CONFIRM PLAN
SLH-1 — 5-21-15 [24]

Final Ruling: The motion will be dismissed without prejudice.

Local Bankruptcy Rule 2002-1(c) provides that notices in adversary proceedings and contested matters that are served on the IRS shall be mailed to three entities at three different addresses: (1) IRS, P.O. Box 7346, Philadelphia, PA 19101-7346; (2) United States Attorney, for the IRS, 501 I Street, Suite 10-100, Sacramento, CA 95814; and (3) United States Department of Justice, Civil Trial Section, Western Region, Box 683, Franklin Station, Washington, D.C. 20044.

Service in this case is deficient because the IRS was not served at the second and third addresses listed above.

24. 11-43877-B-13 VINCENT/SHELLY CAPERELLO — OBJECTION TO CLAIM
DF-5 — 5-20-15 [56]
VS. BANK OF AMERICA, N.A.

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The debtor's request for a continuance so that it may propound and compel discovery is granted. The court continues the hearing to September 8, 2015 at 1:30 p.m. Further evidence in support of the objection shall be filed and served by August 18. Further evidence is opposition to the objection shall be filed and served by August 25. Any reply shall be filed and served by September 1.

25. 14-28680-A-13 BALRAJ/BALJIT BRAR — OBJECTION TO CLAIM
JPJ-1 — 5-11-15 [36]
VS. ATLAS ACQUISITIONS, L.L.C.

Final Ruling: This objection to the proof of claim of Atlas Acquisitions, L.L.C., has been set for hearing on at least 44 days' notice to the claimant as

required by Local Bankruptcy Rule 3007-1(c)(1)(ii). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained and the claim will be disallowed.

According to the documentation attached to the proof of claim, the underlying debt is a contract claim, most likely based on a written contract. California law provides a four year statute of limitations to file actions for breach of written contracts. See Cal. Civ. Pro. Code § 337. This statute begins to run from the date of the contract's breach. According to the claim, the last payment was received on August 11, 2008, which is more than four years prior to the filing of this case. Hence, when the case was filed, this debt was time barred under applicable nonbankruptcy law and must be disallowed. See 11 U.S.C. § 502(b)(1).

26. 12-34397-B-13 PRISCILLA BELLARD HODGE — MOTION TO VALUE COLLATERAL
SDB-5
VS. WELLS FARGO BANK, N.A., — 6-3-15 [60]

Final Ruling: This valuation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the trustee and the respondent creditor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the trustee and the respondent creditor are entered and the matter will be resolved without oral argument.

The motion will be granted.

The debtor seeks to value the debtor's residence at a fair market value of $238,000 as of the date the petition was filed. It is encumbered by a first deed of trust held by Wells Fargo Home Mortgage. The first deed of trust secures a loan with a balance of approximately $291,275 as of the petition date. Therefore, Wells Fargo Bank's claim secured by a junior deed of trust is completely under-collateralized. No portion of this claim will be allowed as a secured claim. See 11 U.S.C. § 506(a).

Any assertion that the respondent's claim cannot be modified because it is secured only by a security interest in real property that is the debtor's principal residence is disposed of by In re Zimmer, 313 F.3d 1220 (9th Cir. 2002) and In re Lam, 211 B.R. 36 (B.A.P. 9th Cir. 1997). See also In re Bartee, 212 F.3d 277 (5th Cir. 2000); In re Tanner, 217 F.3d 1357 (11th Cir. 2000); McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 611-13 (3rd Cir. 2000); and Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 840 (B.A.P. 1st Cir. 2000).

Because the claim is completely under-secured, no interest need be paid on the claim except to the extent otherwise required by 11 U.S.C. § 1325(a)(4). If

the secured claim is $0, because the value of the respondent's collateral is $0, no interest need be paid pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii).

Any argument that the plan, by valuing the respondent's security and providing the above treatment, violates In re Hobdy, 130 B.R. 318 (B.A.P. 9th Cir. 1991), will be overruled. The plan is not an objection to the respondent's proof of claim pursuant to Fed. R. Bankr. P. 3007 and 11 U.S.C. § 502. The plan makes provision for the treatment of the claim and all other claims, and a separate valuation motion has been filed and served as permitted by Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a). The plan was served by the trustee on all creditors, and the motion to value collateral was served by the debtor with a notice that the collateral for the respondent's claim would be valued. That motion is supported by a declaration of the debtor as to the value of the real property. There is nothing about the process for considering the valuation motion which amounts to a denial of due process.

To the extent the respondent objects to valuation of its collateral in a contested matter rather than an adversary proceeding, the objection is overruled. Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. Further, even if considered in the nature of a claim objection, an adversary proceeding is not required. Fed. R. Bankr. P. 3007. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's deed of trust will remain of record until the plan is completed. This is required by 11 U.S.C. § 1325(a)(5)(B)(I). Once the plan is completed, if the respondent will not reconvey its deed of trust, the court will entertain an adversary proceeding. See also 11 U.S.C. § 1325(a)(5)(B)(I).

In the meantime, the court is merely valuing the respondent's collateral. Rule 3012 specifies that this is done by motion. Rule 3012 motions can be filed and heard any time during the case. It is particularly appropriate that such motions be heard in connection with the confirmation of a plan. The value of collateral will set the upper bounds of the amount of the secured claim. 11 U.S.C. § 506(a). Knowing the amount and character of claims is vital to assessing the feasibility of a plan, 11 U.S.C. § 1325(a)(6), and determining whether the treatment accorded to secured claims complies with 11 U.S.C. § 1325(a)(5).

To the extent the creditor objects to the debtor's opinion of value, that objection is also overruled, particularly in light of its failure to file any contrary evidence of value. According to the debtor, the residence has a fair market value of $238,000. Evidence in the form of the debtor's declaration supports the valuation motion. The debtor may testify regarding the value of property owned by the debtor. Fed. R. Evid. 701; So. Central Livestock Dealers, Inc., v. Security State Bank, 614 F.2d 1056, 1061 (5th Cir. 1980).