

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

August 20, 2018 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 8. 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 SEPTEMBER 17, 2018 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY SEPTEMBER 4, 2018, AND ANY REPLY MUST BE FILED AND SERVED BY SEPTEMBER 10, 2018. 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 9 THROUGH 13 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 AUGUST 27, 2018, AT 2:30 P.M.

August 20, 2018 at 10:00 a.m.

Matters to be Called for Argument

1. 15-28024-A-13 ARTEMIO/MARISA VILLEGAS MOTION TO
KE-3 RECONSIDER
7-30-18 [67]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

The motion asks the court to vacate an order dismissing the case and to allow the debtor's to oppose the trustee's motion (JPJ-2) to dismiss the case.

At the July 16 hearing on the trustee's motion, his counsel voluntarily dismissed the motion, not the case. The case is pending. It was not dismissed. This motion is unnecessary.

2. 18-23639-A-13 JUANITO COPERIO MOTION TO
AF-2 CONFIRM PLAN
7-9-18 [22]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the debtor failed to appear at the meeting of creditors. Appearance is mandatory. See 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the trustee and any creditors who appear, the debtor is also failing to cooperate with the trustee. See 11 U.S.C. § 521(a)(3). Under these circumstances, attempting to confirm a plan is the epitome of bad faith. See 11 U.S.C. § 1325(a)(3). The failure to appear also is cause for the dismissal of the case. See 11 U.S.C. § 1307(c)(6).

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 has failed to fully and accurately provide all information required by the petition, schedules, and statements. As noted in the objection, the debtor has omitted business assets from Schedule A/B. This nondisclosure is a breach of the duty imposed by 11 U.S.C. § 521(a)(1) to truthfully list all required financial information in the bankruptcy documents. 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).

Fourth, the debtor has misclassified two auto loans in Class 4. Class 4 is

reserved for secured claims that are not in default, that do not mature during the duration of the plan, and that are modified by the plan. The two claims in question will mature during the plan's duration. Therefore, they belong in Class 2.

Fifth, the secured claim classified in Class 1 does not belong in that Class. Class 1 secured claims are long-term claims that are not modified by the plan but which were in default when the case was filed. The plan cures the default and maintains contract installment payments to the creditor. Here, the additional provisions provide for no installment payments and just payment of the arrears. If this is acceptable to creditor, and there is no indication that it is, the claim belongs in Class 2. If it is not accepted by the creditor, the failure to provide for the maintenance of installment payments violates 11 U.S.C. § 1322(b)(2) & (5).

Sixth, counsel for the debtor has opted to receive fees pursuant to Local Bankruptcy Rule 2016-1 rather than by making a motion in accordance with 11 U.S.C. §§ 329, 330 and Fed. R. Bankr. P. 2002, 2016, 2017. However, counsel has not complied with Rule 2016-1 by filing the rights and responsibilities agreement. The abbreviated procedure for approval of the fees permitted by Local Bankruptcy Rule 2016-1 is not applicable. Therefore, the provision in the proposed plan requiring the trustee to pay the fees without counsel first making a motion in accordance with 11 U.S.C. §§ 329, 330 and Fed. R. Bankr. P. 2002, 2016, 2017, permits payment of fees without the required court approval. This violates sections 329 and 330.

3. 18-23639-A-13 JUANITO COPER0 MOTION TO
AF-2 DISMISS CASE
8-3-18 [29]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted and the case dismissed.

The debtor failed to appear at the meeting of creditors. Appearance is mandatory. See 11 U.S.C. § 343. The failure to appear is cause for the dismissal of the case. See 11 U.S.C. § 1307(c)(6).

4. 18-22357-A-13 LEONEL/LISA LAXAMANA MOTION TO
BLG-4 CONFIRM PLAN
7-9-18 [50]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The plan does not comply with 11 U.S.C. § 1325(b) because it neither pays unsecured creditors in full nor pays them all of the debtor's projected disposable income. The plan will pay unsecured creditors \$11,870 even though Form 122C shows that the debtor will have \$45,480 of projected disposable income over the next five years.

And, the problem becomes even more pronounced when one considers Schedule I/J. The debtor's monthly income has increased significantly since the case was

filed. Before the case was filed, the debtor's current monthly income was \$8,287. However, Hamilton v. Lanning, 130 S.Ct 2464 (2010) permits the trustee to rebut the presumption that the amount of projected disposable income is as stated in Form 122C. As reported on Schedule I/J, the debtor's household income is now \$10,660. Using current income rather than the average for six pre-petition months, the debtor's monthly projected disposable income is \$1,623. This will permit payment of \$97,428 to nonpriority unsecured creditors. Because the plan will these creditors only \$11,870, the plan does not comply with 11 U.S.C. § 1325(b).

5. 18-21658-A-13 CECILIA BETKER MOTION TO
JGD-1 CONFIRM PLAN
5-10-18 [20]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the plan assumes that the monthly contract installment on the Class 1 secured claim is \$1,795.55 even though the creditor demands \$2,459.62, and that the arrears on the claim are \$21,546.60 even though the creditor demands \$50,602.31. At this larger amounts, the plan either is not feasible or it will not pay the objecting secured claim in full as required by 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5)(B). See 11 U.S.C. § 1325(a)(6).

Second, with the higher monthly installment due on the Class 1 claim, the monthly plan payment will not be sufficient to pay all required dividends and expenses. In months 1 through 3, the monthly plan payment of \$2,375 is less than the \$3,078.21 in dividends and expenses. In months 4 through 60, the monthly plan payment of \$2,600 is less than the \$3,280.13 in dividends and expenses.

Third, even though 11 U.S.C. § 1322(b)(2) prevents the proposed plan from modifying a claim secured only by the debtor's home, 11 U.S.C. § 1322(b)(2) & (b)(5) permit the plan to provide for the cure of any defaults on such a claim while ongoing installment payments are maintained. The cure of defaults is not limited to the cure of pre-petition defaults. See In re Bellinger, 179 B.R. 220 (Bankr. D. Idaho 1995). Because the debtor has failed to make timely plan payments in April and May, the trustee was unable to pay the ongoing contract installment due on the Class 1 home loan claim. The proposed plan, however, does not provide for a cure of these arrears. By failing to provide for a cure, the debtor is, in effect, impermissibly modifying a home loan. Also, the failure to cure the default means that the Class 1 secured claim will not be paid in full as required by 11 U.S.C. § 1325(a)(5)(B).

Fourth, counsel for the debtor has opted to receive fees pursuant to Local Bankruptcy Rule 2016-1 rather than by making a motion in accordance with 11 U.S.C. §§ 329, 330 and Fed. R. Bankr. P. 2002, 2016, 2017. However, the rights and responsibilities agreement executed and filed indicates that counsel has received \$3,190 in fees. The plan, on the other hand, requires payment of an additional \$600. Therefore, the provision in the proposed plan requiring the trustee to pay the fees contradicts the agreement with the debtor.

Fifth, the plan does not comply with 11 U.S.C. § 1325(b) because it neither pays unsecured creditors in full nor pays them all of the debtor's projected disposable income. The plan will pay unsecured creditors \$435.56 but Form 122C

shows that the debtor will have \$7,527 over the next five years.

6. 18-21658-A-13 CECILIA BETKER OBJECTION TO
JGD-2 CLAIM
VS. WELLS FARGO BANK, N.A. 6-27-18 [38]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The objection will be overruled.

The creditor has filed a proof of claim asserting that its claim totals \$802,503.47 including arrearages of \$50,602.31. The monthly payment on the loan was \$2,459.62.

The debtor objects to the claim on the ground that it is inconsistent with a loan modification which provided for a principal balance of \$773,395.20, arrearages of \$29,055.71, and a monthly payment of \$1,795.55.

The loan modification agreement is appended to the debtor's objection. It is dated December 7, 2016 and it modified monthly payments beginning in January 2017. The agreement provided that time was of the essence and conditioned its effectiveness on the claimant signing the agreement and was to be effective February 1, 2017.

While the debtor has produced a loan modification agreement with the objection, it is not signed by the claimant and she did not sign it until March 15, 2017, more than six weeks after it was to be effective. The claimant advised the debtor in writing on or about March 24, 2017 that it was unwilling to modify the loan because the debtor had not returned the signed modification agreement to it timely.

7. 18-22872-A-13 VALENTINA MORGAN MOTION TO
MRL-2 CONFIRM PLAN
7-8-18 [22]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The plan assumes the arrearages on the objecting creditor's Class 1 secured claim are approximately \$33,000. The creditor indicates that the arrearages are more than \$35,000. At this higher level, the plan either is not feasible or it will not pay the objecting secured claim in full. The plan fails to comply with 11 U.S.C. §§ 1325(a)(5)(B) & (a)(6).

8. 18-22593-A-13 BRANDON/TRACY MCBROOM MOTION TO
KWS-3 CONFIRM PLAN
7-12-18 [46]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The debtor has failed to make \$1,200 of the payments required by the plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

However, even if plan payments were current the plan would not be feasible because the monthly plan payment of \$2,400 is less than the \$2,515.63 in dividends and expenses the plan requires the trustee to pay each month.

FINAL RULINGS BEGIN HERE

9. 18-22856-A-13 CHERYL ALLEN MOTION TO
MMM-1 CONFIRM PLAN
7-9-18 [21]

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.

10. 17-22962-A-13 EBI FINI MOTION FOR
MAC-2 SANCTIONS
7-5-18 [53]

Final Ruling: This is a motion for sanctions based on an alleged violation of the automatic stay by the respondents.

The court continues the hearing to September 4, 2018 at 1:30 p.m. in order to give the parties an opportunity to brief the issues discussed below and in order to consider the motion with a related motion for relief from the automatic stay.

This is the debtor's third chapter 13 case. The first, Case No. 15-24321, was filed on May 29, 2015 and dismissed on May 31, 2016. The second, Case No. 16-27988, was filed on December 2, 2016 and dismissed on January 21, 2017. The current case was filed on April 30, 2017.

Thus, when this case was filed, the debtor had filed two earlier cases which were both dismissed within prior year.

Because two prior cases that were dismissed within one year of the filing of the current case, the automatic stay did not go into effect when this petition was filed. See 11 U.S.C. § 362(c)(4). Instead, it was incumbent on the debtor to make a motion to impose the stay. While the debtor did this on May 1, 2017, and while the court ruled on May 15 that it would impose the stay except as to the IRS, the debtor failed to lodge an order granting the motion. Hence, there is no order imposing the automatic stay in this case. And, even if the court had entered an order at the May 15 hearing, there was no automatic stay from April 30 to May 15, 2017.

This motion fails to explain how the alleged conduct could possibly violate the automatic stay when there is no order imposing the automatic stay. Each party may file and serve a supplemental brief on this issue no later than August 27.

11. 18-21884-A-13 ERIC/ADINA HENDERSON OBJECTION TO
DBL-2 CLAIM
VS. EDUCATIONAL CREDIT MANAGEMENT CORP. 8-6-18 [36]

Final Ruling: The objection will be dismissed without prejudice.

The hearing on the objection to a proof of claim was set on just 14 days of notice to the creditor. Consistent with Fed. R. Bankr. P. 3007(a), Local Bankruptcy Rule 3007-1 requires a minimum of 30 days' notice of the hearing on the objection and, if the notice requires the creditor to file written opposition to the objection, 44 days' notice of the hearing. Because only 14 days' notice was given in this case notice was insufficient.

12. 18-23795-A-13 DENNIS GARRETT MOTION TO
BB-5 SELL
7-23-18 [65]

Final Ruling: The motion will be dismissed without prejudice.

Local Bankruptcy Rule 2002-1(b) provides that notices in adversary proceedings and contested matters that are served on the various state and federal agencies shall be to particular addresses that can be found on the Roster of Public Agencies maintained by the clerk of court.

The Roster provides that service of motions and notices on the California Franchise Tax Board shall be mailed to Franchise Tax Board, Bankruptcy Section MS A-340, PO Box 2952, Sacramento, CA 95812-2952

Service in this case is deficient because the debtor served the motion on the Franchise Tax Board at PO Box 942867, Sacramento, CA 94267-0001 rather than the correct address.

13. 18-23795-A-13 DENNIS GARRETT MOTION TO
BB-6 SELL
7-18-18 [53]

Final Ruling: The motion will be dismissed without prejudice.

Local Bankruptcy Rule 2002-1(b) provides that notices in adversary proceedings and contested matters that are served on the various state and federal agencies shall be to particular addresses that can be found on the Roster of Public Agencies maintained by the clerk of court.

The Roster provides that service of motions and notices on the California Franchise Tax Board shall be mailed to Franchise Tax Board, Bankruptcy Section MS A-340, PO Box 2952, Sacramento, CA 95812-2952

Service in this case is deficient because the debtor served the motion on the Franchise Tax Board at PO Box 942867, Sacramento, CA 94267-0001 rather than the correct address.