

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil  
Bankruptcy Judge  
Sacramento, California

September 18, 2018 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.	<a href="#">17-27504</a> -D-13	LILLIAN GLEASON	AMENDED MOTION TO APPROVE LOAN MODIFICATION 8-14-18 [ <a href="#">108</a> ]
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Final ruling:

This is the debtor's amended motion for an order authorizing a loan modification. The motion will be denied because there is no proof of service on file. The motion will be denied by minute order. No appearance is necessary.

2.	<a href="#">17-27504</a> -D-13	LILLIAN GLEASON	MOTION TO CONFIRM PLAN 8-7-18 [ <a href="#">99</a> ]
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Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because there is no proof of service on file. Thus, the court need not reach the issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

3. [18-20004](#)-D-13 JALON/MIRANDA HARRISON  
[JCK](#)-4

OBJECTION TO CLAIM OF REAL TIME  
RESOLUTIONS, INC, CLAIM NUMBER 1  
7-19-18 [[55](#)]

Tentative ruling:

This is the debtors' objection to the claim of Real Time Resolutions, Inc., as agent for Waterview 2007-1 Trust ("Real Time"), Claim No. 1 on the court's claims register. Real Time has filed opposition. For the following reasons, the objection will be sustained.

In support of the objection, the debtors testify that, on August 1, 2005, they entered into an obligation for \$95,000 secured by a second position deed of trust on a home in Stockton. They state the home was foreclosed on in 2008 and the debtors moved out and "never heard of any further collection attempts for the last ten years." Debtors' Decl., filed July 19, 2018, at 1:18-19. They contend Real Time's claim is barred by the four-year statute of limitations on actions for breach of written contracts, Cal. Code Civ. Proc. § 337.

Real Time argues (1) the applicable statute of limitations is six years, not four;<sup>1</sup> (2) the statute on a monthly installment note like the one at issue here begins to run against each monthly installment from the time it becomes due, not from the time the debtors first miss a payment; and (3) as to installments coming due in the future, the statute begins to run only when the creditor exercises its option to accelerate the note, which Real Time never did. Thus, because the note by its terms was not all due and payable until August 1, 2020, Real Time contends the statute of limitations had not even begun to run when the debtors filed this bankruptcy case, on January 2, 2018.

The court will assume without deciding that Real Time's first point is correct and that its second and third points are also correct, except that the latter two are subject to a duty in the creditor not to unreasonably delay bringing an action when the debtors are in default and not to unreasonably delay exercising its option to accelerate the note. Because Real Time unreasonably delayed taking any action, the court concludes the statute of limitations on the claim, whether four years or six years, had run by the time the debtors commenced this case.

The promissory note was dated August 1, 2005. It provided for monthly payments of principal and interest based on a 30-year amortization schedule, but was, by its terms, all due and payable on August 1, 2020; that is, in 15 years. The note stated that if the debtors were in default, the lender could require them to immediately pay the full amount due under the note. The right to accelerate the note was optional, not automatic.

For its second proposition - that the statute of limitations on an installment contract runs from the time each installment comes due, Real Time cites cases construing the laws of jurisdictions other than California, but California law is to the same effect. Thus, "where performance of contractual obligations is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due." Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1388 (2004), and cases cited therein.

Absent an exception to the rule, therefore, as the debtors continued to fail to pay the monthly installments coming due during the six years prior to the commencement of their bankruptcy case (that is, from January of 2012 through December of 2017), a new statute of limitations began to run on each installment, such that all monthly payments coming due during those six years (and thereafter, until August 1, 2020) are fair game for Real Time.<sup>2</sup> Real Time cites a single exception to the rule: if the note gives the creditor the right to accelerate the loan, the statute of limitations begins to run as to installments coming due in the future from the date the creditor exercises that right and accelerates the loan. Real Time states, without evidence, that it never accelerated the note, adding that the debtors have failed to satisfy their burden to show Real Time did accelerate the note.

There is another exception, however, and it applies here:

it is absolutely clear that California law imposes limits on Appellants' [the plaintiffs'] freedom to choose when to make their demand: "[N]o one can suspend the running of the statute of limitations indefinitely and thereby defeat its purpose by unreasonably delaying the making of a demand or by unreasonably delaying the doing of some other act. . . . A party cannot by his own negligence, or for his own convenience, stop the running of the statute."

Lien Huynh v. Chase Manhattan Bank, 465 F.3d 992, 999 (9th Cir. 2006) (citations omitted). "[O]ne . . . cannot postpone the running of the statute of limitation by failing for an unreasonable period to thus assert his right, and unless the demand is made within such period the cause of action is barred.' Rather, the linchpin of the demand requirement is that 'the demand must be made within a reasonable time after it can lawfully be made.'" Id. (citations omitted).

The debtors have testified that their home - Real Time's collateral - was foreclosed on (presumably by the senior lienholder) in 2008 and the debtors moved out of the property. The debtors "never heard of any further collection attempts" by Real Time. Real Time has submitted no evidence to contradict this testimony; that is, no evidence it made any attempt to collect on the loan or even to locate the debtors. According to Real Time's proof of claim and attachments, Real Time acquired the loan for collection purposes, in July of 2007, as part of a package of "Defaulted Loans referred by the Owner to [Real Time] from time to time . . . ." Collection Agreement attached to Real Time's proof of claim, Claim No. 1, p. 1, ¶ A (emphasis added). Thus, Real Time knew or should have known, more than ten years before the debtors filed this bankruptcy case, that the debtors were in default. Yet according to the debtors' testimony, Real Time made no efforts to collect. Under the "absolutely clear" California law quoted above, Real Time had a duty not to sleep on its rights for over ten years and then try to claim the statute of limitations has not run, or as to some of the installments, not even begun to run.

Real Time cites a single California case, Andrews v. Zook, 125 Cal. App. 19 (1932), in which the court construed what was drafted as an automatic, rather than optional, acceleration clause. In the language Real Time finds helpful to its cause, the court stated that permitting a borrower, pursuant to a purportedly automatic acceleration clause, to trigger the statute of limitations on the entire debt, which may, as in the present case, have been a long-term debt, simply by paying his first payment one day late would be unfair to the lender. Andrews, 125 Cal. App. at 22 (citation omitted). "Instead of simply compelling the creditor to sue upon his demand within a reasonable time after it is due, it would enable a

dishonest debtor, if his interest prompted it, to compel the creditor to take payment long before it is due, and thereby escape the payment of future interest." Id. (emphasis in original). In short, the court recognized that in any event, the creditor could be "compell[ed] to sue upon his demand within a reasonable time after it is due."

The rationale of the Andrews case is of no help to Real Time, which neither demanded payment of overdue installments, accelerated the loan, nor sued or attempted in any other way to collect, either during the period of limitations, whether four years or six, or during the several years that followed before the debtors filed for bankruptcy. Further, permitting Real Time to avoid application of the statute of limitations in this case would violate the "primary policy behind California's statute of limitations," which is "to protect California defendants and California courts from being required to litigate stale claims." ABF Capital Corp. v. Osley, 414 F.3d 1061, 1066 (9th Cir. 2005) (citation omitted).

Real Time makes a final argument that borders on the disingenuous. Citing Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017), Real Time states that "the Supreme Court has determined that a proof of claim cannot be disallowed based on a claim of time-barred debt alone." P. & A., attached to Real Time's Notice of Opp. and Opp., filed Aug. 8, 2018, at 1:14-16. This characterization is blatantly incorrect: it was not the Court's "determination," in the sense of the holding of the case, and it directly contradicts dicta in the decision.

In Midland Funding, a creditor filed a proof of claim for a claim barred by the statute of limitations. The debtor objected to the claim on that ground and the bankruptcy court disallowed the claim. The debtor then filed an action against the creditor for damages for violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq. ("FDCPA"). The Supreme Court held that the filing of a proof of claim that on its face indicates the statute of limitations has run does not violate the FDCPA. 137 S. Ct. at 1411. The Court recognized that the running of the statute of limitations is an affirmative defense to a bankruptcy claim (id. at 1412) and that "a proof of claim is a statement by the creditor that he or she has a right to payment subject to disallowance (including disallowance based upon, and following, [an] objection for untimeliness). §§101(5)(A), 502(b), 704(a)(5), 1302(b)(1)." Id. at 1413 (emphasis added). Clearly, Real Time's citation of this case as "determining" that a claim cannot be disallowed based solely on a statute of limitations defense was improper.

For the reasons stated, the objection will be sustained and the claim will be disallowed. The court will hear the matter.

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- 1 Real Time also includes a curious citation to Cal. Com. Code § 3118(b), which provides for a ten-year statute of limitations on a note payable on demand, where the creditor makes no demand. Real Time's promissory note was not payable on demand.
  - 2 Again, the court assumes, without deciding, that the statute of limitations is six years rather than four.

4. [18-21606](#)-D-13 PHILLIP/KIMBERLY ORTIZ OBJECTION TO CLAIM OF ACAR  
[RDG-2](#) LEASING LTD, CLAIM NUMBER 13  
8-6-18 [[21](#)]

5. [18-23814](#)-D-13 JOSE AGUILERA AND LETICIA OBJECTION TO DEBTORS' CLAIM OF  
[RDG-2](#) ROMERO EXEMPTIONS  
8-13-18 [[20](#)]

**Final ruling:**

This is the trustee's objection to the debtors' claim of a \$20,000 exemption in a worker's compensation claim under Cal. Code Civ. Proc. § 703.140(b)(11)(E). On August 17, 2018, the debtors filed an amended Schedule C on which they changed the amount claimed as exempt to \$3,160 and the code section under which the exemption is claimed to Cal. Code Civ. Proc. § 703.140(b)(5). 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.

6. [17-25225](#)-D-13 CHRIS NGUYEN AND AMANDA MOTION TO MODIFY PLAN  
[MC-2](#) CHANG 8-8-18 [[50](#)]

**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. [18-20932](#)-D-13 RICHARD SANDOVAL MOTION FOR RELIEF FROM  
[NLL-2](#) AUTOMATIC STAY  
M&T BANK VS. 8-16-18 [[52](#)]

8. [16-22336](#)-D-13 LARRY/MICHELLE OLIVAN MOTION TO MODIFY PLAN  
[JWS-2](#) 8-10-18 [[48](#)]

**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. [18-22250](#)-D-13 RUSSELL/SHIRLEY SMITH CONTINUED MOTION TO CONFIRM  
[CLH-1](#) PLAN  
7-5-18 [[32](#)]

10. [17-27960](#)-D-13 CRAIG GILMORE CONTINUED MOTION TO CONFIRM  
[GMW-3](#) PLAN  
6-5-18 [[100](#)]

11. [15-26163](#)-D-13 JOHN/ANNETTE PAYAN MOTION TO MODIFY PLAN  
[JM-4](#) 7-23-18 [[60](#)]

12. [14-20173](#)-D-13 DEANN STEWARD MOTION TO INCUR DEBT  
[PGM-1](#) 8-15-18 [[32](#)]

**Final ruling:**

This is the debtor's motion to incur debt. The court is not prepared to consider the motion because it was served only the chapter 13 trustee, the United States Trustee, and the creditor requesting special notice in the case. It was not served on the many other creditors in the case. The hearing will be continued to October 2, 2018, at 10:00 a.m., the moving party to file a notice of continued hearing and serve it, together with the motion and supporting documents, on all creditors no later than September 18, 2018. The notice of continued hearing shall be a notice pursuant to LBR 9014-1(f)(2) (no written opposition required). The hearing will be continued by minute order. No appearance is necessary on September 18, 2018.

13. [18-22673](#)-D-13 RONALD/MAFFIE DIOSO OBJECTION TO DEBTORS' CLAIM OF  
[RDG-2](#) EXEMPTIONS  
8-13-18 [[37](#)]

**Final ruling:**

This is the trustee's objection to the debtors' claim of exemption of funds in a bank account. The objection was brought on the ground the debtors had claimed the exemption under an improper code section. On August 14, 2018, the debtors filed an amended Schedule C on which they changed the code section under which they claim the exemption. As a result of the filing of the amended Schedule C, this objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

14. [18-23573](#)-D-13 DANILO DIWA MOTION TO CONFIRM PLAN  
[CLH-1](#) 7-26-18 [[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.

15. [17-23175](#)-D-13 BENJAMIN MANSHIP MOTION TO MODIFY PLAN  
[CLH-2](#) 8-10-18 [[66](#)]

16. [15-27287](#)-D-13 GINA TOSCANO CONTINUED MOTION TO MODIFY PLAN  
[PGM](#)-7 7-5-18 [[114](#)]
17. [18-23814](#)-D-13 JOSE AGUILERA AND LETICIA CONTINUED OBJECTION TO  
[RDG](#)-1 ROMERO CONFIRMATION OF PLAN BY TRUSTEE  
RUSSELL D. GREER  
8-13-18 [[17](#)]
18. [18-25336](#)-D-13 GERALDINE WILLIAMS MOTION TO EXTEND AUTOMATIC STAY  
[PGM](#)-1 9-4-18 [[16](#)]
19. [18-22741](#)-D-13 MICHAEL/ORINA WHITE CONTINUED MOTION TO CONFIRM  
[RKW](#)-2 PLAN  
7-26-18 [[39](#)]



20. [18-22250](#)-D-13 RUSSELL/SHIRLEY SMITH CONTINUED MOTION FOR RELIEF  
[PPR](#)-1 FROM AUTOMATIC STAY AND/OR  
WILMINGTON SAVINGS FUND MOTION FOR ADEQUATE PROTECTION  
SOCIETY, FSB VS. 7-25-18 [[43](#)]
21. [18-24867](#)-D-13 CHRISTOPHER MURRAY MOTION TO VALUE COLLATERAL OF  
[TLA](#)-1 INTERNAL REVENUE SERVICE  
8-27-18 [[17](#)]
22. [18-25489](#)-D-13 CHARMAINE MARTIN MOTION FOR RELIEF FROM  
[ADR](#)-1 AUTOMATIC STAY  
9-1-18 [[9](#)]  
MCR REAL ESTATE AND PROPERTY  
MANAGEMENT VS.
23. [15-29725](#)-D-13 TYESHA LINDSEY MOTION TO SELL O.S.T.  
[TBK](#)-6 9-6-18 [[103](#)]