

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

September 27, 2016 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	16-90300-D-13	CRAYTON BOYER	MOTION TO VALUE COLLATERAL OF
	MSN-2		BELL FINANCIAL, LLC
			8-1-16 [24]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Bell Financial, LLC at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Bell Financial, LLC's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

2. 16-90600-D-13 VALERIE AVITIA OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
8-29-16 [27]

3. 15-90909-D-13 MA RHEA PERSIC MOTION TO MODIFY PLAN
CJY-1 8-3-16 [31]

4. 13-91124-D-13 DOUGLAS/TAMMY CAMERON MOTION TO INCUR DEBT
MSN-1 8-30-16 [28]

5. 16-90438-D-13 DANIEL MCCRACKEN CONTINUED MOTION TO CONFIRM
BSH-2 PLAN
7-15-16 [26]

6. 16-90545-D-13 MICHELLE TETENS CONTINUED OBJECTION TO
MWP-1 CONFIRMATION OF PLAN BY MARK
VAN VEEN AND RAPID EQUITY
FUNDING
8-11-16 [23]
7. 16-90645-D-13 TIMOTHY MARTIN MOTION TO CONFIRM PLAN
MF-1 8-12-16 [27]
8. 16-90648-D-13 MOHAMMAD BHUIYAN AND CONTINUED MOTION TO EXTEND
DCJ-1 MOSAMMAT AKTER AUTOMATIC STAY
8-2-16 [9]
9. 12-91853-D-13 KENNETH/LORI FALKENSTROM MOTION TO INCUR DEBT
PGM-1 8-30-16 [30]

10. 16-90755-D-13 DOUGLAS WATKINS MOTION TO VALUE COLLATERAL OF
PSB-2 REAL TIME RESOLUTIONS, INC.
8-30-16 [14]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Real Time Resolutions, Inc. at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Real Time Resolutions, Inc.'s secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

11. 16-90356-D-13 RICHARD AZIZ MOTION TO CONFIRM PLAN
BSH-1 8-2-16 [33]

12. 16-90362-D-13 KRISTOPHER/JULIE NABORS MOTION TO CONFIRM PLAN
BSH-1 8-3-16 [30]

13. 16-90167-D-13 LORENZO OJEDA MOTION TO CONFIRM PLAN
CAS-3 8-8-16 [97]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because (1) there is no evidence of service of the amended notice of hearing by which the moving party changed the hearing date; (2) the original and amended proofs of service are not signed under oath, as required by 28 U.S.C. § 1746; and (3) the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). The moving party failed to serve the Stanislaus County Tax Collector, added to the debtor's Schedule D by amendment filed May 24, 2016 as being owed \$8,300 (and who has now filed a proof of claim for \$8,337.98), at all, and also failed to serve Verizon Wireless, listed on the debtor's Schedule E/F as being owed \$3,000.

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

Tentative ruling:

This is the trustee's objection to the debtors' claim of exemption of the proceeds of settlement of a pre-petition federal district court lawsuit. The debtors filed opposition, the trustee filed a supplemental objection, debtor Angela Mayfield ¹ filed a reply, and the trustee filed a further supplemental objection. For the following reasons, the court intends to overrule the objection.

The total amount of the settlement proceeds was \$104,000. The debtors described the lawsuit on their amended Schedule C as a suit for "Wrongful termination, discrimination and other violations against County of Merced, Cindy Morse, Thomas Pfeiff, Law Office of Morse and Pfeiff."² They claimed \$17,096.44 of the proceeds as exempt under the "wild card," § 703.140(b)(5), \$104,000 under § 703.140(b)(11)(E), and \$25,575 under § 703.140(b)(11)(D).³ (The last figure is the maximum that could be claimed under that subsection at the time this case was filed.)

The trustee objected to the latter two claims of exemption. Thus, there has been no objection to the claim of \$17,096.44 of the proceeds under the wild card and that amount is property of the debtors. The balance, \$86,903.56, remains at issue.⁴ The trustee objects to the claim of exemption under § 703.140(b)(11)(D) on the ground the settlement proceeds are on account of claims for wrongful termination and discrimination, not claims for personal bodily injury, as required for an exemption under that statute. The trustee objects to the claim of exemption under § 703.140(b)(11)(E) on the ground the settlement proceeds are not on account of a loss of future earnings, as required by that statute. The burden of proof on both issues is on the debtors. § 703.580(b); Diaz v. Kosmala (In re Diaz), 547 B.R. 329, 337 (9th Cir. BAP March 11, 2016).

The § 703.140(b)(11)(D) Claim

The trustee objects to this claim of exemption on the grounds that the gravamen of the complaint was wrongful termination and discrimination, not personal injury, and that the complaint, which was drafted by the debtor, an attorney, did not detail any specific bodily injury to the debtor. The complaint alleged the debtor was employed by the defendants as a criminal defense attorney representing indigent defendants in Merced County; that she was consistently, for a period of over seven years, "severely overworked and underpaid" as a result of a pattern of racial and sex discrimination on the part of the defendants; and that the defendants' wrongful conduct caused her "physical, mental and emotional distress, pain and suffering, financial stress, los[t] wages, health care expenses, and other general, special and statutory damages in amounts to be proven at trial." Compl., Debtor's Ex. A (DN 55), at 16:28-17:2. The complaint referred extensively and in considerable detail to the debtor's working conditions, alleging they caused her to feel "extremely anxious, stressed, and humiliated due to her workload and inability to change the situation." Id. at 11:26-27. The complaint included a cause of action for intentional infliction of emotional distress on account of which the debtor sought damages for "mental suffering, anxiety, humiliation, and emotional distress." Compl. at 24:8.

In her declaration in support of the exemption, the debtor testifies to a great deal of stress and anxiety as a result of her workload, which included "the lack of resources, support, unequal treatment, and inadequate compensation" (Decl., Debtors' Ex. C, at ¶ 6), as well as retaliation in response to her complaints. She also testifies to a miscarriage she suffered during her employment and states her doctor told her it was due to stress. Finally, in the settlement agreement, the debtor "request[ed] and acknowledg[ed]" that the settlement amount "represents emotional distress and personal injury damages including but not limited to [the debtor's] 'miscarriage' that she suffered in 2010, and attorneys' fees and costs." Confidential Settlement Agreement and Release of All Claims, Debtors' Ex. B, at ¶ 4.

The debtor cites Sylvester v. Hafif (In re Sylvester), 220 B.R. 89 (9th Cir. BAP 1998), in which the Ninth Circuit Bankruptcy Appellate Panel held that a claim for emotional distress arising out of conduct alleged to amount to wrongful discharge from employment, harassment, retaliation, and the like could support a claim of exemption of the settlement proceeds as being on account of personal bodily injury within the meaning of the statute. 220 B.R. at 93. The panel distinguished Haaland v. Corporate Management, 172 B.R. 74 (S.D. Cal. 1989), in which the debtor's claim arose out of alleged attorney malpractice that led to the loss of the debtor's equity in his residence to foreclosure. The Haaland court held that "personal bodily injury" did not cover the claim as it was in the nature of a claim for loss of property rather than personal injury. 172 B.R. at 77.

In this case, based on the extensive detailed allegations in the debtor's complaint about her working conditions over a long period of time, based on the testimony in her supporting declaration, and based on the characterization of the settlement funds in the settlement agreement, the court finds that at least a portion of the settlement funds represents funds received on account of emotional distress akin to personal bodily injury, as in Sylvester, rather than simply emotional distress alleged as a by-product of the loss of property, as in Haaland. A precise allocation of the amount of the funds so attributable is impossible because the case was never tried. The court is satisfied, however, that the debtors have met their burden of proving that at least \$25,575 of the settlement proceeds is reasonably attributable to personal bodily injury, within the meaning of § 703.140(b)(11)(D).⁵ As to that claim of exemption in that amount, therefore, the trustee's objection will be overruled.

The § 703.140(b)(11)(E) Claim

Deducting the portions claimed under the wild-card exemption, \$17,096.44, and on account of personal bodily injury, \$25,575, there remains \$61,328.56 at issue; the court will construe that to be the amount the debtors claim on account of loss of future earnings, under § 703.140(b)(11)(E). The trustee argues, first, that because in the settlement agreement debtor Angela Mayfield "requested and acknowledged" the settlement amount represented emotional distress and personal injury damages and attorneys' fees and costs, it is inconsistent for the debtors to now assert that a portion of the proceeds was on account of loss of future earnings. In the agreement, the debtor also requested the defendant not withhold any amounts for income taxes or other deductions, but instead issue a Form 1099 to the debtor, who would remain liable for such income taxes and other amounts. The trustee points out that if a portion of the proceeds was for lost wages, the debtor would be liable for income taxes on that portion. However, the debtor's bank statement for January 2016 showed a beginning balance of \$104,002, indicating the funds were received in 2015, whereas the debtors' 2015 tax return shows they reported no income from the settlement.

The court finds that the debtor's decision as to how to characterize the settlement amount in the settlement agreement does not necessarily bind the debtors as to a claim of exemption under a different characterization. Under Law v. Siegel, 134 S. Ct. 1188 (2014), the court may not consider a debtor's bad faith conduct when determining whether to allow an exemption (134 S. Ct. at 1196) except where the exemption is claimed under state law and the applicable state law permits consideration of such conduct. Id. at 1196-97. The trustee has cited no authority for the proposition that bad faith conduct or other misconduct affects a debtor's right to an exemption under California law or, if it does, that the debtor's conduct described above would fall in that category. The court finds no reason to preclude the debtor from claiming a portion of the proceeds as compensation for loss of future earnings.

But for the inconsistency in the debtor's characterization of the proceeds in the settlement agreement as on account of emotional distress and personal injury and the debtor's failure to include any portion of the proceeds as income on her tax return, the trustee does not dispute that a portion of the proceeds was actually compensation for loss of future earnings. The debtor alleged in the district court complaint that her employment was terminated in retaliation for her complaints about her disproportionately heavy caseload and disproportionately low compensation, and she sought damages for loss of future earnings. The settlement agreement provides that in response to requests for employment references for the debtor, the defendants "shall only state plaintiff's dates of working as a contract attorney and job positions and shall make no further comments about plaintiff." Debtors' Ex. B. ¶ 6. This cuts both ways: not only may the defendants make no negative comments, they also may not, and in any event are not likely to, make positive comments, which in itself, especially considering the length of time the debtor worked for them, would be likely to impact her ability to obtain replacement employment.

Further, the debtor testifies this bankruptcy case was caused by her lost income and difficulty finding new employment. She adds, "[t]he lawsuit itself and the gap in my employment has affected my ability to earn a salary comparable with what I earned before I was terminated from my previous employment." Debtors' Ex. C, ¶ 19. She states she has been diligently seeking employment but the job offers she has received "were withdrawn after background checks revealed my lawsuit, bankruptcy and prior employment verifications." Id. at ¶ 20. She adds, "I feel that the way my employment ended has stigmatized me among peers and employers and has casted profound implications on my future career development and earnings. . . . Since I lost my job, I lost almost \$6000.00 per month and I have not yet been able to replace that income." Id. at ¶¶ 21, 23. In light of this evidence, the court has no trouble concluding that \$61,328 of the settlement proceeds reasonably qualifies as compensation for loss of future earnings.

As the trustee points out, such compensation is exempt "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor." § 703.140(b)(11)(E). In making this determination, the courts consider "the debtor's present and anticipated living expenses and income; the age and health of the debtor and his or her dependents; the debtor's ability to work and earn a living; the debtor's training, job skills and education; the debtor's other assets and their liquidity; the debtor's ability to save for retirement; and any special needs of the debtor and his or her dependents." In re Moffat, 119 B.R. 201, 206 (9th Cir. 1990). When the debtors commenced this case, in July of 2014, they reported income for debtor Christopher Mayfield only, with no income reported for debtor Angela Mayfield. With that income, their income exceeded their expenses, which were reasonable in the court's view for a family of four, by only \$101 per

month. On their 2015 tax return, they reported Christopher Mayfield's gross wage income as \$66,795 and Angela Mayfield's gross receipts from her work as an attorney as \$13,500, against expenses of \$11,843, for total profit of \$1,657 for the year.

The debtor has testified she filed for legal separation in April of 2015 and she and her husband were divorced in May of 2016. The debtors have filed amended Schedules I and J showing their income and the expenses of their separate households, hers including their two young children. The debtor has listed her income as \$1,000 per month from her work as a lawyer and \$1,500 per month in family support she receives from debtor Christopher Mayfield, against household expenses, which are quite modest for her and her two young children, totaling \$4,264, for a shortfall of \$1,764 per month. Debtor Christopher Mayfield does not have sufficient income to support the two households, even if he were ordered to do so and even with the \$1,000 income the debtor has scheduled for herself. Considering both parties' income and the expenses of both households, expenses exceed income by <\$1,868> per month. The debtor testifies she supports an older child in addition to the two younger ones, that she has no health insurance, that her mortgage payment has increased three times since the filing of this case, and that her property has needed major safety repairs. The debtors' schedules in this case disclose they have no significant assets that could be liquidated to help with their living expenses.

Given these circumstances, the court draws what it finds to be natural inferences from the debtor's income and expenses and conclude that \$61,328 of the settlement proceeds was, and to the extent funds remain is, reasonably necessary for the debtor's support and that of her children. However, the trustee states that if the exemption for loss of future earnings is determined to be appropriate, he would need an accounting of the debtor's expenditures since receipt of the funds to assess the reasonably necessary test. Depending upon the trustee's position on this issue, as stated at the hearing, the court will consider continuing the hearing to allow the debtor to supplement the record. As the matter now stands, however, the court is inclined to simply overrule the objection.

The court will hear the matter.

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- 1 When "debtor" is used in the singular, the court is referring to joint debtor Angela Mayfield.
 - 2 The debtors disclosed the lawsuit in the same fashion on their original Schedule B, filed when this case was filed; thus, there is no issue of an attempt to conceal it.
 - 3 All statutory references are to the California Code of Civil Procedure.
 - 4 The debtor reduces that amount by another \$25,065 on account of fees and costs she has sought to pay the attorney who represented her during a portion of the district court litigation. This court has already ruled the determination of the attorney's entitlement to those fees and costs should await the disposition of this objection to exemption, and if the settlement proceeds are determined to be exempt, the debtors will be free to pay the attorney without this court's approval. To the extent the proceeds are determined to be not exempt, the court will seek the trustee's input on the issue of the attorney's fees.
 - 5 The trustee appears to agree, at least to some extent.

[T]he trustee was unsure until the debtor filed her reply exactly how she intended to apportion the claim of exemption. If the first \$25,575.00 is intended to be claimed as a personal injury award with the remainder of the award being claimed as loss of future earnings and/or emotional distress, and the court interprets the language in the "Settlement" to mean that the award amounts to personal injury then the personal injury exemption is consistent with the use of the exemption statutes and should be allowed.

Trustee's Further Supp. Obj., DN 81, at 3:20-25.

15. 09-90170-D-13 JOHN/MELISSA ALCORN MOTION TO VALUE COLLATERAL OF
DCJ-5 SABADELL UNITED BANK, N.A.
8-30-16 [73]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of Sabadell United Bank, N.A. at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtors' residence and the amount owed on the senior encumbrance exceeds the value of the real property. No timely opposition has been filed and the relief requested in the motion is supported by the record. As such, the court will grant the motion and set the amount of Sabadell United Bank, N.A.'s secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

16. 14-91070-D-13 HARVEY/KIMIKO HENDRIX MOTION TO VALUE COLLATERAL OF
SJS-3 AMERICAN EXPRESS BANK, FSB
8-30-16 [42]

17. 16-90580-D-13 JUAN JUAREZ OBJECTION TO CONFIRMATION OF
RDG-2 PLAN BY RUSSELL D. GREER
8-29-16 [17]

18. 16-90584-D-13 MANUEL OLIVARES AND OBJECTION TO CONFIRMATION OF
APN-1 AGRIPINA YEPEZ PLAN BY WELLS FARGO BANK, N.A.
8-31-16 [33]

Tentative ruling:

This is the objection of Wells Fargo Bank to the debtors' proposed chapter 13 plan. The objection is grounded on the proposal in the plan to treat the Bank's secured claim as unsecured, and the Bank refers in its objection to the debtors' motion to value its collateral. However, the debtors' motion to value was granted by minute order filed August 17, 2016. As a result of that order, the Bank's objection to confirmation will be overruled.

The court will hear the matter.

19. 16-90388-D-13 CRISTINA ZAMUDIO MOTION TO CONFIRM PLAN
CAS-2 8-10-16 [26]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because (1) the proof of service is not signed under oath, as required by 28 U.S.C. § 1746; and (2) the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). The moving party failed to serve Chase Bank, listed on the debtor's Schedule E/F as being owed \$1,609.

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

20. 12-91395-D-13 SEFERINO/MARIA LEMUS MOTION TO MODIFY PLAN
TOG-2 7-29-16 [54]

21. 15-91195-D-13 SOMCHAY/SANDY VONGSENA MOTION TO CONFIRM PLAN
TOG-5 8-2-16 [62]

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.

22. 16-90802-D-13 WILLIAM LEMMONS MOTION TO EXTEND AUTOMATIC STAY
DCJ-1 9-12-16 [9]
23. 11-92412-D-13 VIQUAR/SAMINA ANSARI MOTION FOR EXEMPTION FROM
CJY-3 FINANCIAL MANAGEMENT COURSE,
MOTION TO EXCUSE DEBTOR VIQUAR
A. ANSARI FROM COMPETING THE 11
U.S.C. SECTION 1328 CERTIFICATE
OR CERTIFICATE OF CHAPTER 13
DEBTOR RE: 11 U.S.C. SECTION
522(Q) EXEMPTIONS
9-7-16 [71]
24. 11-92412-D-13 VIQUAR/SAMINA ANSARI MOTION TO SUBSTITUTE SAMINA
CJY-2 ANSARI AS THE REPRESENTATIVE
FOR VIQUAR A. ANSARI
9-7-16 [76]
25. 16-90827-D-13 MICHAEL LOCARNINI MOTION TO EXTEND AUTOMATIC STAY
DCJ-1 9-12-16 [7]

26. 16-90189-D-13 RENDELL AGBAYANI
TOG-5

MOTION TO APPROVE LOAN
MODIFICATION
9-9-16 [51]