UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 6, 2017 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 6. 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 DECEMBER 4, 2017 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY NOVEMBER 20, 2017, AND ANY REPLY MUST BE FILED AND SERVED BY NOVEMBER 27, 2017. 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 7 THROUGH 14 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 NOVEMBER 13, 2017, AT 2:30 P.M.

Matters to be Called for Argument

1. 17-25404-A-13 MARIA AZTIAZARAIN — ORDER TO SHOW CAUSE 10-19-17 [34]

- ☐ 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 $77 installment when due on October 16. While the delinquent installment was paid on October 27, 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.

2. 17-25404-A-13 MARIA AZTIAZARAIN — MOTION TO CONFIRM PLAN 9-12-17 [24]
HLG-1

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

If requested by the U.S. Trustee or the chapter 13 trustee, a debtor must produce evidence of a social security number or a written statement that such documentation does not exist. See Fed. R. Bankr. P. 4002(b)(1)(B). In this case, the debtor has breached the foregoing duty by failing to provide evidence of the debtor's social security number. This is cause for dismissal and the lack of cooperation with the trustee is cause to deny confirmation. See 11 U.S.C. § 521(a)(3).

3. 17-26717-A-13 CARRIE NOAH — MOTION TO EXTEND AUTOMATIC STAY 10-23-17 [13]
DBL-1

- ☐ 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.

This is the second chapter 13 case filed by the debtor. A prior case was dismissed within one year of the most recent petition.

11 U.S.C. § 362(c)(3)(A) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, the automatic stay with respect to a debt, property securing such debt, or any lease terminates on the 30th day after the filing of the new case.

Section 362(c)(3)(B) allows a debtor to file a motion requesting the continuation of the stay. A review of the docket reveals that the debtor has filed this motion to extend the automatic stay before the 30th day after the filing of the petition. The motion will be adjudicated before the 30-day period expires.

In order to extend the automatic stay, the party seeking the relief must demonstrate that the filing of the new case was in good faith as to the creditors to be stayed. For example, in In re Whitaker, 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006), the court held: "[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful. If the instant case is one under chapter 7, a discharge must now be permissible. If it is a case under chapters 11 or 13, there must be some substantial change."

Here, it appears that the debtor was unable to maintain her plan payments in the first case due to serious health condition that interrupted her ability to work. That condition has now been treated and the debtor is able to maintain her plan payments. This is a sufficient change in circumstances rebut the presumption of bad faith.

4. 17-25518-A-13 RONALD/RHONDA SHUMAN — MOTION TO CONFIRM PLAN 9-18-17 [27]
RLC-2

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

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, the debtor has failed to fully and accurately provide all information required by the petition, schedules, and statements. Despite being self-employed, the debtor failed to include with Schedule I/J a detained statement of business income and expenses. 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).

Third, 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 will receive $4,000 in fees. The plan, on the other hand, requires payment of $6,000. Therefore, the provision in the proposed plan requiring the trustee to pay the fees contradicts the agreement with the debtor.

Fourth, the plan does not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive $60,380 in a chapter 7 liquidation as of the effective date of the plan. This plan will pay only $31,523.57 to unsecured creditors.

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 $12,363.57 unsecured creditors but Form 122C-1 and 2 shows that the debtor will have $170,119.80 over the plan's duration. The problem is even more significant than this indicates because the debtor has not accurately completed Form 22 in the following particulars:

– The debtor has deducted business expenses on line 5 of Form 122C-1. This artificially depresses the debtor's current monthly income and potentially makes the debtor a below median income debtor when in fact his income is above median. This may have an impact on the length of a plan and on the amount of the debtor's projected disposable income. See 11 U.S.C. § 1325(b).

This issue was presented to the BAP in Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008).

The Wiegands filed a chapter 13 petition. Mr. Wiegand operated a trucking business and so, on the predecessor form of Form 122(c), he reported his business income in order to calculate his current monthly income and projected disposable income. As the official form invited him to do, he reported his net business income as $1,382, after deducting ordinary and necessary business expenses of $5,175 from his gross business income of $6,192. As a result of using net business income rather than gross business income in the calculation of current monthly income, the Wiegands had current monthly income below the state median for a comparably sized household. This meant that the Wiegand's applicable commitment period was three rather than five years. Consistent with this, the Wiegands proposed a 36-month plan.

The trustee objected to confirmation, arguing that the plan violated section 1325(b)(1) because the deduction of business expenses when calculating current monthly income rather than as a deduction from it to calculate projected disposable income made section 1325(b)(2)(B) superfluous. And, if gross monthly business income were used to calculate current monthly income, the Wiegands' current monthly income would exceed the state median. As a result, they would be required to devote 60 months, not 36 months, of projected disposable income to the payment of unsecured claims.

The bankruptcy court overruled the trustee's objection and the trustee appealed to the BAP.

Current monthly income under 11 U.S.C. § 101(10A) is defined as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period" before the dates referenced in section 101(10A)(A)(i)&(ii).

Section 1325(b)(2) provides that "'disposable income' means current monthly

income received by the debtor . . . less amounts reasonably necessary to be expended – . . . (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business."

The BAP in Wiegand noted that the definition of current monthly income in section 101(10A) does not reference any deductions, either for personal maintenance or for the operation of a business. On the other hand, section 1325(b)(2) unambiguously refers to deductions, including business expense deductions for a debtor engaged in business. These deductions are to be taken, not to determine the amount of a debtor's current monthly income, but as a deduction from current monthly income to arrive at a debtor's projected disposable income. Hence, Form 122C is inconsistent with section 1325(b)(2)(B) because it permits business expenses to be deducted to calculate current monthly income.

Rather than take deductions for business expenses after the calculation of current monthly income, the debtor has netted out those expenses from business income when calculating current monthly income. This resulted in the debtor appearing to have less annualized current monthly income than a like-size household and therefore was not required to calculate projected disposable income by using the means test. See 11 U.S.C. §§ 707(b)(2) & 1325(b)(3). This methodology is incorrect. See Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008). Business expenses must be deducted after calculating current monthly income. Had the debtor done this, the debtor's annualized current monthly income would be greater than the average such income. This means that the debtor's projected disposable income must be calculated by using the means test and if there is any projected disposable income, the plan must have a duration of five years.

– the debtor is surrendering the collateral of Seterus and Wells Fargo Bank but has deducted the monthly payments to each as expense on Form 122C-2 at lien 33d. Expenses related to property being surrendered to a secured creditor are not reasonable and necessary expenses that may be deducted from current monthly income. American Express Bank v. Smith (In re Smith), 418 B.R. 359, 369 (B.A.P. 9th Cir. 2009).

– the debtor has taken an impermissible deduction from current monthly income for a $200 retirement contribution. This is disposable income; the debtor may not make those contributions and deduct them from the debtor's current monthly income. Accord Parks v. Drummond (In re Parks), 475 B.R. 703 (B.A.P. 9th Cir. 2012).

– Hamilton v. Lanning, 130 S.Ct 2464 (2010), permits the presumption that the amount of projected disposable income is as stated in Form 122C to be rebutted when a change of income is known and virtually certain at the time of plan confirmation. Based on an asserted average income of $3,178.66 over two years, the debtor claims that average monthly net income for the six months prior to the bankruptcy case is overstated by $1,400 a month. The debtor seeks to reduce monthly net income by that amount. However, no proof of an actual decrease in income has been proven, and as noted by the trustee, the higher amount is consistent with the profit and loss statement given to the trustee.

Without the adjustment to income and with the above deductions corrected, the debtor will have $170.199.80 of projected disposable income over the life of the plan. Because this amount will not be paid to unsecured creditors, the plan does not comply with section 1325(b).

5. 17-26052-A-13 TANISHA MAVY — ORDER TO SHOW CAUSE 10-17-17 [33]

- ☐ 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 $79 installment when due on October 12. While the delinquent installment was paid on October 19, 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.

6. 17-23166-A-13 ROBERT GODFREY — MOTION TO CONFIRM PLAN 9-19-17 [26]
PGM-1

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The debtor has failed to make $770 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).

FINAL RULINGS BEGIN HERE

7. 17-24605-A-13 FREDERICK AGOSTA — ORDER TO SHOW CAUSE 10-16-17 [33]

Final Ruling: The order to show cause will be discharged.

The court granted the debtor permission to pay the filing fee in installments. The debtor failed to pay the $77 installment when due on October 11. However, after the issuance of the order to show cause, the delinquent installment was paid. No prejudice was caused by the late payment.

8. 17-24111-A-13 DOUGLAS/DOLORES GIANNI — MOTION TO CONFIRM PLAN 9-8-17 [38]
DEF-3

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.

9. 17-26530-A-13 TESSA SMITH AND VALERIE SPECHT — MOTION TO VALUE COLLATERAL 10-2-17 [8]
MRL-1
VS. AMERICREDIT FINANCIAL SERVICES, 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 debtor is the owner of the subject property. The debtor's evidence indicates that the replacement value of the subject property is $15,000 as of the effective date of the plan. Given the absence of contrary evidence, the debtor's evidence of value is conclusive. See Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004). Therefore, $15,000 of the respondent's claim is an allowed secured claim. When the respondent is paid $15,000 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.

10. 17-23644-A-13 JOSE RAMIREZ — OBJECTION TO CLAIM
ULC-4
VS. PINNACLE CREDIT SERVICES, L.L.C. — 9-22-17 [60]

Final Ruling: This objection to the proof of claim of Pinnacle Credit Services 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 disallowed.

Because 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 but the statute renews upon each payment made after default. The proof of claim indicates the last payment was on December 28, 2007. Therefore, using this date as the date of breach, when the case was filed on May 31, 2017, more than 4 years had passed. Therefore, when the bankruptcy was filed, this debt was time barred under applicable nonbankruptcy law and must be disallowed. See 11 U.S.C. § 502(b)(1).

11. 17-23644-A-13 JOSE RAMIREZ — OBJECTION TO CLAIM
ULC-5
VS. LVNV FUNDING, L.L.C. — 9-22-17 [65]

Final Ruling: The objection will be dismissed without prejudice.

The objection does not comply with Local Bankruptcy Rule 9014-1 because when filed it was not accompanied by a separate proof/certificate of service. See Local Bankruptcy Rule 9014-1(e)(3). There is no proof that this objection was served on the respondent.

12. 17-23161-A-13 FELIPE/AVELINA MIGUEL — MOTION TO CONFIRM PLAN
PGM-1
9-19-17 [31]

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.

13. 17-23362-A-13 LINDA TRA — MOTION TO CONFIRM PLAN 9-19-17 [33]
PGM-1

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.

14. 16-28073-A-13 JEFFREY/YELENA MAYHEW — MOTION TO CONFIRM PLAN 9-20-17 [103]
PGM-5

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.