

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil  
Bankruptcy Judge  
Sacramento, California

November 7, 2017 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.	17-23005-D-13	ERIC ARMSTRONG	MOTION TO CONFIRM PLAN
	SNM-1		9-25-17 [39]

2.	16-25709-D-13	ELEANOR GOMEZ	MOTION FOR ADMINISTRATIVE
	CLH-1		EXPENSES
			10-2-17 [97]

**Final ruling:**

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion for administrative expenses for post-petition rent in the amount of \$29,269.80 is supported by the record. As such the court will grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

3. 16-21825-D-13 JUAN/NADINE MORGA  
CLH-5

MOTION TO MODIFY PLAN  
9-27-17 [97]

**Final ruling:**

This is the debtors' motion to confirm a modified chapter 13 plan. The motion will be denied because the moving parties served the motion, notice of hearing, and proposed modified plan on the trustee, United States Trustee, and parties requesting special notice only. As to the other creditors, the moving parties served only the notice of hearing and not the motion or the plan. It is the practice in this court that motions to confirm amended or modified plans are served on all creditors, together with the notice of hearing and the plan itself. Assuming without deciding that LBR 9014-1(d)(3)(B)(iv) governs such motions, the notice of hearing in this instance failed to comply in that it failed to describe the nature of the relief being requested and failed to set forth the essential facts necessary for a party to determine whether to oppose the motion. In particular, the notice did not describe any of the terms of the proposed modified plan.

As a result of this notice defect, the motion will be denied and the court need not reach the issues raised by the trustee or the Bank of Hope at this time. The motion will be denied by minute order. No appearance is necessary.

4. 17-24626-D-13 VICTOR/GLORIA LUERA  
EAT-1

CONTINUED OBJECTION TO  
CONFIRMATION OF PLAN BY WELLS  
FARGO BANK, N.A.  
9-13-17 [37]

**Tentative ruling:**

This is Wells Fargo Bank's objection to confirmation of the debtors' proposed chapter 13 plan. In a joint status report filed October 26, 2017, the Bank and the debtors report they agree the pre-petition arrearage due the Bank is \$31,936. Because the debtors' plan provides for an arrearage of only \$24,000, it appears the plan cannot be confirmed and the court intends to sustain the objection.

The court will hear the matter.

5. 17-22627-D-13 GRACIELLA HERNANDEZ  
SCF-4

MOTION FOR COMPENSATION BY THE  
LAW OFFICE OF FLORES & BARRIOS  
FOR SIDNEY C. FLORES, DEBTOR'S  
ATTORNEY(S)  
9-13-17 [75]

**Tentative ruling:**

This is the motion of Sidney C. Flores ("Counsel") for an award of compensation as the debtor's counsel. The trustee has filed opposition. The court intends to deny the motion because (1) the moving party failed to serve the debtor, as required by Fed. R. Bankr. P. 2002(a)(6); and (2) the moving party failed to serve three of the creditors who had filed proofs of claim by the time this motion was filed at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g). In the alternative, the court will continue the hearing to permit the moving party to cure these service defects.

Further, for the guidance of the moving party, the court agrees with the trustee's objections that (1) a charge of \$1,200 for a "Motion to Avoid Lien" (actually, a motion to value collateral) is included in the responsibilities provided for in the Rights & Responsibilities, signed by the debtor and Counsel, as to be covered by the initial fee; and (2) a charge of \$450 for a motion to convert the case is excessive.

Counsel claims he expects his fees on a hourly basis to exceed \$8,310. First, as counsel has elected to receive fixed fees pursuant to Local Rule 2016-1(c), what his fees would be if he had chosen to be paid hourly is irrelevant. In fact, part of (c) (3) specifically provides that "the fee permitted under this subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees." The court finds several problems with Counsel's time records. Second, he has not demonstrated his hourly rate, \$450, is reasonable. Third, the debtor might have retained counsel in Modesto, rather than San Jose; thus, Counsel's charge of 3.5 hours to appear at the meeting of creditors should have been unnecessary, and thus, was unreasonable. Fourth, much of the work was done by Counsel's paralegal, who is unidentified and whose qualifications to bill at \$150 per hour are not provided. Fifth, although much of the paralegal's work appears to have been substantive, the paralegal also billed for secretarial services, such as keying the client's information into the bankruptcy filing program, scanning and uploading documents, e-filing and serving documents, and arranging CourtCall appearances, which are considered part of overhead and are not compensable.

The court will hear the matter.

6. 17-22627-D-13 GRACIELLA HERNANDEZ MOTION TO VALUE COLLATERAL OF  
SCF-5 BAC HOME LOANS AND/OR MOTION TO  
AVOID LIEN OF NATIONSTAR  
MORTGAGE, LLC  
9-13-17 [79]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Nationstar Mortgage, 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 Nationstar Mortgage, LLC's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

7. 17-22627-D-13 GRACIELLA HERNANDEZ MOTION TO CONFIRM PLAN  
SCF-6 9-13-17 [85]

8. 16-25832-D-13 TIMOTHY HOSKER AND MOTION TO MODIFY PLAN  
MJD-3 CRYSTAL HOSKER-STARR 9-22-17 [57]

**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. 17-23333-D-13 SONIA MCDADE-THREADGILL MOTION TO CONFIRM PLAN  
PGM-3 9-25-17 [64]

**Final ruling:**

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied because the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(g). The moving party failed to serve Roman Ray Threadgill, listed on her Schedule H as a co-debtor on the debtor's mortgage. Minimal research into the case law concerning § 101(5) and (10) of the Bankruptcy Code discloses an extremely broad interpretation of "creditor," certainly one that includes parties who are co-debtors on debts of the debtor. In addition, the debtor has failed to comply with Fed. R. Bankr. P. 1007(a)(1), which requires debtors to include on their master address the names and addresses of all parties included or to be included on their schedules, including Schedule H.

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

10. 16-21452-D-13 MARIO ORTIZ NOTICE OF DEFAULT AND INTENT TO  
DISMISS CASE  
9-6-17 [79]

**Tentative ruling:**

This is the debtor's objection to the trustee's notice of default and intent to dismiss. The trustee has filed a response. For the following reasons, the court intends to continue the hearing.

The attachment to the trustee's notice of default indicates the debtor has made all plan payments required under his confirmed plan and has made them on time. The alleged default arises from a Notice of Mortgage Payment Change filed by Wells Fargo Bank (the "Bank") on April 12, 2017, stating the debtor's ongoing mortgage payment would increase to \$4,059.27 effective June 1, 2017. The ongoing mortgage payment, as listed in the debtor's confirmed plan, has been \$1,088.80, so the purported increase is dramatic. The Bank's notice provides no explanation for this increase; instead, it indicates only that the escrow portion of the payment would drop by \$40.

The court confirmed the debtor's plan in December of 2016 over the Bank's opposition. In a detailed ruling, the court concluded, "based on the debtor's evidence and the Bank's complete lack of evidence, that the debtor entered into a

valid and binding loan modification agreement providing for ongoing monthly payments of \$1,088.88, and that he was 10 months in arrears when the petition in this case was filed, such that the figure for arrears listed in the debtor's plan [\$10,880.80] is accurate." Civil Minutes for Oct. 4, 2016, DN 71. In other words, the court accepted the debtor's evidence that the parties had entered into a pre-petition loan modification agreement and rejected the Bank's unsupported conclusion that they had not.

Six weeks after the debtor filed this objection to the trustee's notice of default, the Bank filed a proof of claim in which it claimed pre-petition arrears of \$219,143, roughly the same amount it had claimed in its objection to confirmation of the debtor's plan, \$221,513. As shown above, it was over that objection, and based on the debtor's evidence and the Bank's lack of evidence, that the court confirmed the plan, a plan providing for pre-petition arrears of \$10,881. The debtor's objection to the notice of default, which was served on the law firm that had filed the objection to the debtor's plan, should have been more than sufficient to remind the Bank that the issue of the amount of its pre-petition arrearage had been determined by the court. But it was not.<sup>1</sup>

According to the trustee, the matter has been discussed between the debtor's attorney and the trustee's office, with the debtor's attorney indicating he believed the Bank would withdraw the Notice of Mortgage Payment Change, and if not, that he would object to it. In the circumstances, the court is sympathetic to the steps the debtor has already had to take to enforce his pre-petition loan modification agreement and takes a decidedly unfavorable view of the Bank's filing of its Notice of Mortgage Payment Change and proof of claim. Based on the evidence, it appears the trustee's notice of default was filed solely because of the Bank's filing of the Notice of Mortgage Payment Change, which appears to have been filed in direct contravention of the debtor's plan and the order confirming it.

Nevertheless, Fed. R. Bankr. P. 3002.1(e) provides a procedure for the court to determine the accuracy of a Notice of Mortgage Payment Change that governs here. The rule provides the debtor or the trustee may file a motion on noticed hearing. Thus, the court intends to continue this hearing to allow the debtor or the trustee to file such a motion. The court will hear the matter.

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1 In his response to this objection, the trustee noted that no claim for mortgage arrears had been filed and the deadline to do so had passed. In fact, the claims bar date was July 19, 2016, over a year ago. Yet the Bank waited until October 20, 2017, two days after the trustee filed his response and six weeks after the debtor filed his objection to the notice of default, before filing its proof of claim. In short, it strongly appears the proof of claim was filed in response to the debtor's objection to the notice of default and/or the trustee's response to it.

11. 17-25252-D-13 DOUGLAS SMITH OBJECTION TO DEBTOR'S CLAIM OF  
RDG-2 EXEMPTIONS  
9-25-17 [18]

Final ruling:

This case was dismissed on October 4, 2017. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

12. 17-22955-D-13 JOSE OCHOA MOTION TO VALUE COLLATERAL OF  
TOG-2 ONEMAIN FINANCIAL GROUP, LLC  
9-22-17 [59]

**Final ruling:**

The matter is resolved without oral argument. The court's records indicate that 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, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

13. 17-22955-D-13 JOSE OCHOA MOTION TO CONFIRM PLAN  
TOG-3 9-22-17 [65]

14. 17-25374-D-13 RICKY CLEARY AND KIM MOTION TO VALUE COLLATERAL OF  
RWF-2 PHUONG NGUYEN-CLEARY UNION BANK & TRUST  
10-10-17 [28]

**Final ruling:**

The matter is resolved without oral argument. The court's records indicate that 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, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

15. 14-21284-D-13 SAUL BERNABE MOTION TO MODIFY PLAN  
HWW-4 9-30-17 [55]

**Tentative ruling:**

This is the debtor's objection to the claim of BMO Harris Bank N.A. (the "Bank"), Claim No. 1 on the court's claims register. The Bank has filed opposition, the debtor has filed a reply, and the Bank has filed a supplemental opposition. For the following reasons, the objection will be overruled without prejudice.

There are two preliminary matters. First, the Bank filed an amended proof of claim after the debtor filed this objection which, technically, moots the objection. However, as the amount of the amended claim differs very little from the original,<sup>1</sup> and as the arguments of the parties regarding the original claim pertain equally to the amended one, the court will construe the debtor's objection and the Bank's opposition as pertaining to the amended claim. Second, the Bank contends the debtor has no standing to object to the claim because debtors have no pecuniary interest in the distribution of estate assets. The cases cited by the Bank were chapter 7 cases; the principle has no application in chapter 13.

Pursuant to Fed. R. Bankr. P. 3001(f), there is an evidentiary presumption that the claim is valid. In re Garvida, 347 B.R. 697, 706 (9th Cir. BAP 2006). That presumption puts on the debtor the burden of going forward; that is, the burden of producing evidence to counter the validity of the claim. Id. at 706-07. The court finds the debtor has not satisfied this burden so as to shift the burden to the Bank to produce further evidence supporting the claim.

The debtor contends the claim with attachments "fails to demonstrate any right to payment . . . and is false and filed in bad faith." Debtor's Obj., DN 34, at 1:20-23. The debtor contends, first, that the Notification of Disposition of Collateral filed as an attachment to the claim is false because it states that the Bank's predecessor, General Electric Capital Corporation ("GECC"), disposed of the debtor's two 2012 Freightliner trucks, which had been collateral for a loan to the debtor, whereas one of the trucks had been totaled earlier; thus, there was only one truck remaining for GECC to sell. In support, the debtor testifies one of the Freightliners was totaled in an accident three months before the date of the Notification and his insurer paid \$31,437 to GECC and retained the truck as salvage. The debtor does not demonstrate he has personal knowledge of these alleged facts regarding the insurance payment or GECC's retention of the truck or explain how he came to learn of them other than through the out-of-court statements of someone else; thus, the testimony is inadmissible.

Further, the debtor's assertion that the truck was totaled in the accident appears to be simply inaccurate. The Bank has submitted evidence that, while ambiguous, clearly supports the conclusion that the truck was not totaled and was not retained by the debtor's insurer. A custodian of the Bank's records testifies an insurance payment was made on the Freightliner after the accident and the debtor apparently had the vehicle repaired, without the Bank's involvement. The statement that the debtor apparently had the vehicle repaired is speculative and inadmissible. The Bank has, however, filed a copy of a check from American International Group, Inc. for \$32,678 listing the debtor as the claimant and stating on its face that it was for the repair of a 2012 Freightliner. Further, the Bank has submitted copies of documents that appear to evidence the sales of both trucks at auction for the

Bank in early 2016, for net proceeds of \$6,375 and \$34,200, which the Bank credited against the amount of the debt.

The debtor chose not to reply to this evidence other than by claiming that the California Secretary of State's office (1) shows that GECC surrendered its right to do business in California in January of 2016 and (2) "shows no registration of BMO Harris Bank N.A. and any right to conduct business within the State of California." Debtor's Reply, DN 49, at 1:16-17. As pointed out by the Bank in its supplemental opposition, the argument is foreclosed by the law governing national banks. And the debtor's failure to make any other reply to the Bank's evidence strongly suggests the debtor's testimony about the truck being totaled and the insurance proceeds being paid to the Bank was inaccurate.

The debtor also contends the Bank's loss is due to the failure of the Bank or its predecessor to honor a warranty to cover engine repairs to the other truck - the one that was not damaged in the accident. The debtor has offered no evidence other than testifying that "the engine work was warrantied" (Debtor's Decl., DN 36, at 1:21-22), and the Sales Order/Proposal of Blackmun Equipment Leasing, who sold the trucks to the debtor, and the debtor's Loan and Security Agreement with GECC strongly suggest to the contrary. Finally, the debtor challenges the Bank's continuing accrual of unpaid monthly payments after the Bank recovered the trucks and sold them. The debtor's analysis is far from sufficient for the court to disallow the claim in its entirety, as the debtor requests,<sup>2</sup> and it is not up to the court to calculate the correct amount of a claim but to sustain or overrule an objection to a claim in the amount asserted by the objecting party.

For the reasons stated, the debtor has failed to meet his burden of producing evidence to counter the presumptive validity of the Bank's claim and the objection will be overruled without prejudice. The court will hear the matter.

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1 The original claim was for \$144,996; the amended one is for \$145,537.

2 The debtor's argument, unsupported by any authority, is simply this: "A deficiency claim is for the unpaid indebtedness remaining following the disposition of collateral with interest and possible attorneys fees based on the contract. It does not involve the continuation ad infinitum of monthly payments and late charges." Obj. at 2:6-8.

17. 17-21688-D-13 ROBIN/DONA JOHNSTON MOTION TO CONFIRM PLAN  
PSB-4 9-19-17 [79]

Tentative ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The trustee has filed opposition on the basis that the Class 2 payments and the attorney's fees payment in months 3 through 60 total \$1,553.33 without trustee compensation and \$1,725.92 with trustee compensation, whereas the plan payment is only \$1,713. Thus, the trustee contends the plan is not feasible.

The debtors have replied that as the total of the Class 2 payments and attorney's fee payment is \$1,553.33 per month without trustee compensation, and as the amount of trustee compensation at most would be 10%, or \$155.33, that would bring the total required to \$1,708 per month, whereas the plan payment is \$1,713. Thus, the debtors contend the plan is feasible.

The debtors, however, have calculated the trustee's fee only on the total of the Class 2 payments and attorney's fee payment, not on the total plan payment. As the total plan payment will be \$1,713, the trustee's fee, calculated at 10%, would be \$171.30, bringing the total necessary plan payment to \$1,724.63. As the plan payment is lower, the plan is not feasible.

The court will hear the matter.

18. 17-21796-D-13 ARMANDO COVARRUBIAS MOTION TO CONFIRM PLAN  
TOG-2 9-15-17 [47]

19. 17-24399-D-13 CHARLES LAWRENCE MOTION TO CONFIRM PLAN  
HWW-1 9-15-17 [18]

20. 15-22818-D-13 SURINDER SINGH MOTION TO EMPLOY SOUTH HALL  
PGM-4 INVESTORS, INC. AS REALTOR(S)  
10-19-17 [111]

**Tentative ruling:**

This is the debtor's motion to employ Robert J. Peterson of South Hall Investors, Inc. to market and sell one of the debtor's real properties. The court intends to deny the motion because the supporting declaration does not disclose the connections, if any, between Mr. Peterson and/or South Hall Investors, on the one hand, and the debtor, creditors, and any other parties-in-interest, their respective attorneys and accountants, the United States Trustee, and persons employed in the office of the United States Trustee, on the other hand, as required by Fed. R. Bankr. P. 2014(a) and LBR 2014-1(a). Instead, Mr. Peterson merely offers his

opinion that he does not represent or hold any interest adverse to the debtor or the estate in that he is not a creditor or equity security holder in this case and is not, and was not, within two years before the filing of this case, a director, officer, or employee of the debtor.

The conclusions that Mr. Peterson and South Hall Investors are not disinterested parties and do not hold or represent any interest adverse to the estate are for the court to draw, not the person or entity proposed to be employed. It is up to Mr. Peterson to make full disclosure of any and all connections between him and/or South Hall Investors, on the one hand, and the parties listed above, on the other hand.

For this reason, the court intends to deny the motion. In the alternative, the court will continue the hearing for the debtor to supplement the record.

21. 17-26727-D-13 BEVERLY LUCIO MOTION TO EXTEND AUTOMATIC STAY  
KRW-1 10-19-17 [10]

22. 17-25934-D-13 JESUS REYNAGA MOTION FOR RELIEF FROM  
CLH-1 AUTOMATIC STAY  
JOSEPH ESCOVE VS. 10-24-17 [20]

**Tentative ruling:**

This is Joseph Escove's motion for relief from automatic stay (the "motion"). Moving party failed to file a proof of service. As such, the motion will be denied. Alternatively, if moving party files a proof of service sufficiently in advance of the hearing so that the court can review it evidencing service of this motion on all interested parties, the court will consider the matter.

23. 17-25374-D-13 RICKY CLEARY AND KIM OBJECTION TO CONFIRMATION OF  
RDG-2 PHUONG NGUYEN-CLEARY PLAN BY RUSSELL D. GREER  
10-16-17 [33]

24. 17-24399-D-13 CHARLES LAWRENCE  
HWW-2

MOTION TO INCUR DEBT AND/OR  
MOTION TO TRANSFER PERSONAL  
PROPERTY  
10-21-17 [30]

25. 17-24399-D-13 CHARLES LAWRENCE  
HWW-3

MOTION TO SELL  
10-21-17 [35]