

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

December 23, 2014 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.

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| 1. | 09-92304-D-13 | ALFRED/DEBRA SCHMIDT | MOTION TO INCUR DEBT |
| | DEF-5 | | 11-18-14 [71] |

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 to incur debt is supported by the record. As such the court will grant the motion to incur debt by minute order. No appearance is necessary.

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|----|---------------|-------------------------|------------------------|
| 2. | 13-90205-D-13 | MATTHEW/JOSIELYNN CRUDO | MOTION TO APPROVE LOAN |
| | PGM-8 | | MODIFICATION |
| | | | 11-24-14 [151] |

Tentative ruling:

This is the debtors' motion to approve a mortgage loan modification. The trustee has filed opposition, and the debtors have filed a reply. For the following reasons, the motion will be denied.

The court will begin with the observation that this is the fifth ruling in this case in which the court has had occasion to question the debtors' good faith, and the fifth time the debtors have sought court approval, for either confirmation of a plan or approval of a loan modification, based on schedules showing they are making large amounts of voluntary retirement contributions each month. Three times, the debtors sought confirmation of a plan while proposing to make \$1,053 per month in voluntary retirement contributions. Three times the trustee objected, and three times the court denied confirmation on that basis, among others. Finally, in February of this year, a year after the debtors filed this case, the court confirmed a plan based on schedules showing the debtors had stopped making the voluntary contributions.

Now, in support of a loan modification that would save the debtors \$1,060 per month on their mortgage payment, and at a time when they have enjoyed an increase of \$2,397 per month in their gross income, the debtors are once again making voluntary retirement contributions, this time at a total of \$916 per month. Once again, the trustee opposes this proposal; once again, the court concurs.¹ As the court has explained before in this case, the court follows Parks v. Drummond (In re Parks), 475 B.R. 703, 709 (9th Cir. BAP 2012), on this issue, and will deny the motion on that basis.

The debtors' reply to the trustee's opposition is based on the fact that their new plan proposes a 100% dividend to general unsecured creditors and on the debtors' conclusion that the new plan is feasible.² In the debtors' opinion, the plan would fund at \$3,618.74 per month for the remainder of the plan, whereas they are proposing to pay \$4,500 per month for that remaining term, or \$881.26 more per month than is necessary to fund the plan.³ The \$881.26 figure is roughly 20% of \$4,500. Thus, the debtors conclude: "While the deductions [the voluntary retirement contributions] are increased[,] the plan pays all claims in full at a rate of 20% more than is required for feasibility of the plan at 100%[,] which reflects good faith." Debtors' Reply, filed Dec. 16, 2014, at 2:3-5. This conclusion incorrectly equates good faith with feasibility.

In this case, the debtors tried three times to confirm a plan that would have allowed them to make voluntary retirement contributions totaling \$1,053 per month, persisting despite the trustee's repeated opposition and the court's repeated denial of their motions, and ultimately taking a year to confirm a plan. The court notes also that when the debtors commenced this case, they proposed a plan that would have paid only 1% on claims estimated at \$221,814, or a total of only \$2,218 to general unsecured creditors. They gradually increased the proposed dividend - to 23%, then to 30%, then to 65%, as the trustee and the court continued to find their proposed plans objectionable. Now that the debtors have enjoyed increases totaling \$2,397 per month in their gross income and have been approved for a loan modification that would save them \$1,060 per month, they propose to increase the dividend to unsecured creditors by a total of \$9,087 over the remaining term of the plan, 38 months, at a rate of only \$239 per month, while the debtors resume making voluntary contributions to their retirement accounts at \$916 per month, thus retaining for themselves the great majority of the upside to their financial circumstances and putting creditors at risk of future negative developments.⁴ Finally, the court recalls that the first time the debtors sought approval of this loan modification, by motion filed just six weeks before this one, the debtors increased their other household expenses by \$1,387 per month over those scheduled less than a year ago, thus more than offsetting all the savings on their mortgage payment. It was not until after that motion was denied that the debtors proposed to increase their plan payments by any amount at all.

Given these facts, and assuming the court would be prepared to overlook the Parks decision in this case, the debtors have simply not established a track record that would allow the court to conclude that their proposal to resume their voluntary retirement contributions has been made in good faith, despite the fact that the proposed plan is a 100% plan.

For the reasons stated, the court concludes that the motion has not been made in good faith, and the motion will be denied. Accordingly, the court need not address the trustee's other objections to the motion at this time. The court will hear the matter.

1 In October of this year, the debtors filed their first motion for approval of this loan modification. At that time, they filed schedules showing the \$916 per month in voluntary retirement contributions. The trustee did not mention this aspect of the amended schedules in his opposition to that motion, and the court did not mention it in its ruling. Both the trustee and the court focused instead on the substantial increases the debtors had made to their living expenses - a total of \$1,387 per month, with no explanation until after the trustee opposed the motion. In a reply to that opposition, the debtors offered the weakest of explanations - they claimed they have deferred home maintenance, their children now use telecommunications devices, and the joint debtor's employment has required increased driving. Nothing about the explanation would support increases totaling \$1,387 per month.

The fact that the trustee and the court did not mention the voluntary retirement contributions in response to the debtors' first motion apparently led them to conclude neither had any problem with the contributions, which is surprising given that the trustee had opposed the debtors' first three plans on the basis of the voluntary contributions, among other things, and the court had denied confirmation of those three plans on that basis, among other things.

2 The debtors noted in the motion that the new plan would increase the dividend from 65% to 100%. This increase is much less significant than it appears at first glance. In their confirmed plan, the debtors proposed to pay 65% of claims estimated at \$213,628, which would mean they would pay a total of \$138,858 on those claims. In the new plan, they propose to pay 100% of claims totaling \$147,945. Thus, under the new plan, they would be paying only \$9,087 in total more than they proposed to pay under the existing plan.

3 The conclusion that the plan is feasible is based on the debtors' statement that the "balance due" under the plan is \$123,773. They do not indicate how they arrived at that figure, and the trustee stated in his opposition to the motion that the plan, at a proposed plan payment of \$4,500 for the remaining term, is not feasible.

4 The court notes also that the debtors are supporting, at the expense of their creditors, two adult children who contribute nothing to the household, along with a minor child and a minor grandchild.

3. 14-91034-D-13 THOMAS/RENEE SMITH MOTION TO CONFIRM PLAN
LBG-1 11-5-14 [27]

4. 14-91337-D-13 LUIS/SONIA DELGADO OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
11-21-14 [26]

5. 14-90845-D-13 NORA AMBRIZ AND ALEJANDRO MOTION TO CONFIRM PLAN
SAC-4 ORDONEZ 11-11-14 [79]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons. First, the proof of service states that the motion and other documents were served "on or about November 11, 2014." That language is not sufficiently precise for the court to determine the date the documents were actually served, and thus, whether the moving parties gave the required 42 days' notice of the hearing. See LBR 3015-1(d)(1). Second, the proof of service purports to evidence service of a "Chapter 13 Plan - Second Amended," whereas there is no such plan on file. As the trustee points out, the debtors filed two different plans on November 11, 2014; both are entitled "Chapter 11 Plan - Amended." The trustee is correct that it cannot be determined which plan the debtors are attempting to confirm. Further, it cannot be determined which of the two plans was served.¹ Third, the motion states that the "Debtors' general unsecured creditors will be paid in full . . .," whereas the plan provides for only a 2% dividend or a 3% dividend on general unsecured claims, depending on which of the two plans filed with the motion is the plan the debtors are seeking to confirm.

As a result of these service and notice defects, the motion will be denied, and the court need not reach the other issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

¹ The court is aware of the debtors' response to the trustee's opposition, in which they identify which of the two plans they are seeking to confirm. However, this does not solve the problem of notice to creditors. Creditors are entitled to clear notice, at the time the motion is originally served, of which plan the debtors seek to confirm.

6. 14-90845-D-13 NORA AMBRIZ AND ALEJANDRO MOTION TO SHORT-SELL REAL
SAC-6 ORDONEZ PROPERTY
11-19-14 [86]

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 to short-sell real property is supported by the record. As such the court will grant the motion to short-sell real property. Moving party is to submit an appropriate order that has been signed off by the trustee approving its form. No appearance is necessary.

7. 12-91857-D-13 MARK/ANGELA BUTCHER MOTION TO MODIFY PLAN
JAD-3 11-14-14 [59]

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 attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

8. 10-93460-D-13 ALEX/LORENA GARCIA MOTION TO MODIFY PLAN
CJY-3 11-12-14 [60]

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 attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

9. 14-90461-D-13 JANIS WHITBY MOTION TO CONFIRM PLAN
SJS-3 11-6-14 [59]

10. 12-92273-D-13 DEBBIE DEAN
DEF-8

MOTION TO MODIFY PLAN
10-28-14 [111]

11. 14-91376-D-13 DAVID/SUSAN STRANSKY
CARL GWALTNEY VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
11-13-14 [18]

Final ruling:

The motion is denied for the following reasons: (1) moving party failed to use a docket control number as required by LBR 9014-1(c); (2) moving party failed to file a relief from stay information sheet as required by LBR 4001-1(c); (3) moving party filed their notice of hearing and motion as a single document which does not comply with LBR 9014-1(d)(2); (4) the notice/motion indicates December 23, 2014 as the hearing date in the caption, but then indicates December 9, 2014 as the hearing date in the text; (5) the notice/motion does not contain the opposition requirement for potential respondents as required by LBR 9014-1(d)(3); (6) the proof of service was not filed as a separate document as required by LBR 9014-1(e)(3); and (7) the proof of service references an attached service list (which was not attached), so the court does not know if proper service of the motion was accomplished. The court will deny the motion for the above-referenced procedural defects by minute order. No appearance is necessary.

12. 14-90378-D-13 LORENA ZAVALA
TOG-3

MOTION TO MODIFY PLAN
10-30-14 [30]

13. 09-92981-D-13 DANIEL/LINDA JUAREZ
CJY-1

MOTION TO VALUE COLLATERAL OF
BANK OF AMERICA, N.A.
11-24-14 [46]

14. 14-91184-D-13 WILSON/AVELAIN SARHAD OBJECTION TO DEBTORS' CLAIM OF
RDG-2 EXEMPTIONS
11-7-14 [30]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response has been filed. The objection is supported by the record. The court will sustain the trustee's objection to claim of exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

15. 14-90494-D-13 WARREN/LYNETTE MCGHEE MOTION TO MODIFY PLAN
JAD-1 11-13-14 [28]

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 attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

16. 14-91400-D-13 JERROLD/SHARON BUER MOTION TO VALUE COLLATERAL OF
CJY-2 JPMORGAN CHASE BANK, N.A.
12-9-14 [19]

17. 14-91400-D-13 JERROLD/SHARON BUER MOTION TO VALUE COLLATERAL OF
CJY-1 ONEMAIN FINANCIAL, INC.
12-9-14 [25]

18. 13-90939-D-13 KENT GONZALES MOTION TO SELL
CJY-2 12-3-14 [33]
19. 10-90956-D-13 LAWRENCE/CLAUDIA ANDERSON MOTION TO VALUE COLLATERAL OF
CJY-1 BANK OF AMERICA, N.A.
12-2-14 [60]
20. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO VALUE COLLATERAL OF
DN-1 FRANCHISE TAX BOARD
12-9-14 [36]
21. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO VALUE COLLATERAL OF
DN-2 SPECIALIZED LOAN SERVICING, LLC
12-9-14 [40]

22. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO AVOID LIEN OF ARROW
DN-3 FINANCIAL SERVICES, LLC
12-9-14 [44]
23. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO AVOID LIEN OF CAPITAL
DN-4 ONE BANK
12-9-14 [49]
24. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO AVOID LIEN OF FIA
DN-5 CARD SERVICES, N.A.
12-9-14 [54]
25. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO AVOID LIEN OF HILCO
DN-6 RECEIVABLES, LLC
12-9-14 [59]

26. 13-92159-D-13 MICHAEL/CAROL MCDANIEL MOTION TO AVOID LIEN OF PACIFIC
DN-7 SERVICE EMPLOYEE CREDIT UNION
12-9-14 [64]
27. 14-91564-D-13 THOMAS LUTTERMAN MOTION FOR RELIEF FROM
CJO-1 AUTOMATIC STAY
FEDERAL NATIONAL MORTGAGE 12-9-14 [12]
ASSOCIATION VS.
28. 14-91477-D-13 JARED PRICE MOTION TO VALUE COLLATERAL OF
JDP-1 BANK OF THE WEST
12-5-14 [19]