

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

February 24, 2015 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.	14-91205-D-13	DAVID MCMAHON	CONTINUED OBJECTION TO
	RDG-1		CONFIRMATION OF PLAN BY RUSSELL
			D. GREER
			10-21-14 [21]

2.	14-91206-D-13	NICHOLIS CROWE	CONTINUED OBJECTION TO
	RDG-1		CONFIRMATION OF PLAN BY RUSSELL
			D. GREER
			10-21-14 [24]

3. 10-92309-D-13 KEVIN/JANET GARVIN
CJY-3

MOTION TO MODIFY PLAN
1-19-15 [103]

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.

4. 14-91509-D-13 ROBERTO VENTURA
RDG-2

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
1-5-15 [24]

Final ruling:

This case was dismissed on January 28, 2015. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

5. 12-91616-D-13 LORENA ORTEGA
TOG-5

MOTION TO MODIFY PLAN
1-6-15 [65]

6. 10-90219-D-13 TIMOTHY/DONNA YADRON
JDP-1

MOTION TO MODIFY PLAN
1-16-15 [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.

7. 11-92924-D-13 GARY GERVASE MOTION TO MODIFY PLAN
BSH-2 1-11-15 [26]

8. 15-90029-D-13 ALAN KWIATEK MOTION TO VALUE COLLATERAL OF
TOG-1 REAL TIME SOLUTIONS
1-23-15 [9]

Final ruling:

This is the debtor's motion to value collateral of Real Time Solutions. The motion will be denied because the notice of hearing gives the hearing date as February 24, 2015 in the caption but March 3, 2015 in the text.

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

9. 14-91034-D-13 THOMAS/RENEE SMITH MOTION TO CONFIRM PLAN
LBG-2 1-5-15 [46]

Final ruling:

This motion was denied by minute order dated February 13, 2015. The matter removed from calendar.

10. 14-91236-D-13 LOUIS COSTA MOTION TO CONFIRM PLAN
MLP-4 1-9-15 [51]

11. 14-91337-D-13 LUIS/SONIA DELGADO

CSL-3

Final ruling:

MOTION TO CONFIRM PLAN

1-14-15 [44]

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons: (1) the "attached Matrix" referred to in the proof of service is not attached; thus, except for CarMax Auto Finance, service on which is referred to in the text of the proof of service, there is no evidence of service on any creditors; and (2) the moving parties gave only 41 days' notice of the hearing, rather than 42 days', as required by LBR 3015-1(d)(1) and applicable rules. The court is aware that an earlier motion was denied for, among other reasons, failure to serve CarMax, and this time, the debtors have served CarMax. However, the plan served with this motion is a different plan from the one that was the subject of the earlier motion; thus, the debtors were clearly required to serve all creditors. Fed. R. Bankr. P. 2002(b).

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

12. 14-91145-D-13 MARTHA KOPIEJ

RDG-4

Final ruling:

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS

1-5-15 [107]

This case was dismissed on January 27, 2015. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

13. 09-93154-D-13 BRAD/SUSAN LASH

CWC-5

MOTION FOR COMPENSATION FOR
CARL W. COLLINS, DEBTORS'
ATTORNEY

1-27-15 [135]

14. 14-91156-D-13 TRISTAN BATES

BSH-2

CONTINUED MOTION TO CONFIRM
PLAN

10-12-14 [32]

Tentative ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The hearing was continued to this date to allow the debtor to serve creditors Nc Financial and Ornl Credit Union, who were not previously served, or to confirm that reasonable efforts were undertaken to locate addresses for those creditors. As of this date, the debtor has neither served those creditors nor filed anything to demonstrate that reasonable steps were taken to find addresses for them.

As a result of this service defect, the court intends to deny the motion. The court will hear the matter.

15. 13-90357-D-13 ROBERT/DIANE ROSE
CSL-4

MOTION TO MODIFY PLAN
1-9-15 [65]

Final ruling:

This is the debtors' motion to confirm a modified chapter 13 plan. The motion will be denied because the moving parties failed to serve the creditors filing Claim Nos. 7, 8, 9, 11, and 12 at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g). (The moving parties used a PACER matrix printed May 22, 2013; thus, they failed to serve creditors that filed proofs of claim or assignments of proofs of claim after that date.) In addition, the moving parties served DirecTV at an undeliverable address ("DirecTV, see note, see note CA 95355").

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

16. 14-91564-D-13 THOMAS LUTTERMAN
RDG-3

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
1-9-15 [35]

Final ruling:

This case was dismissed on January 27, 2015. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

17. 12-90271-D-13 WILLY FARIAS
TOG-1

MOTION TO MODIFY PLAN
12-30-14 [75]

Final ruling:

This is the debtor's motion to confirm a modified chapter 13 plan. The motion will be denied because the moving parties failed to serve the six tenants and subtenants listed on his Schedule G and provided for by the plan. Thus, the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). Minimal research into the case law concerning § 101(5) and (10) of the Code discloses an extremely broad interpretation of "creditor," certainly one including tenants and sub-tenants of the debtor, even those with month-to-month tenancies. Thus, the tenants and sub-tenants should have been served with this motion. Fed. R. Bankr. P. 2002(b). (The tenants and subtenants were not listed on the debtor's master address list, as they should have been (Fed. R. Bankr. P. 1007(a)(1)); however, they were served with the motion to confirm the debtor's presently-confirmed plan.)

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

18. 12-92273-D-13 DEBBIE DEAN
DEF-9

MOTION TO MODIFY PLAN
1-2-15 [122]

19. 14-91376-D-13 DAVID/SUSAN STRANSKY
DLN-2
CARL GWALTNEY VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-16-15 [30]

20. 12-91384-D-13 FAY ADAMS
CJY-4

MOTION TO MODIFY PLAN
1-7-15 [47]

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.

21. 10-93992-D-13 MARK ARRO
CJY-1

MOTION TO MODIFY PLAN
1-8-15 [37]

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.

22. 14-91595-D-13 JAIME/CHERYL JIMENEZ
RDG-2

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
1-23-15 [25]

23. 14-91598-D-13 DOUGLAS MULIC
RDG-2

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
1-23-15 [31]

Final ruling:

This case was dismissed on January 27, 2015. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

24. 15-90102-D-13 MATTHEW HAGERTY
HSM-1

MOTION TO CONFIRM TERMINATION
OR ABSENCE OF STAY AND/OR
MOTION FOR RELIEF FROM
AUTOMATIC STAY
2-9-15 [11]

25. 15-90102-D-13 MATTHEW HAGERTY
PBG-1

MOTION TO IMPOSE AUTOMATIC STAY
2-10-15 [19]

Tentative ruling:

This is the debtor's motion to impose the automatic stay, pursuant to § 362(c)(4)(B) of the Bankruptcy Code.¹ El Dorado Savings Bank (the "Bank") has filed opposition. For the following reasons, the court intends to deny the motion.

Section 362(c)(4)(A) provides that if a case is filed by an individual debtor, and if two or more cases of the debtor were pending with the previous year but were dismissed, other than a case refiled after dismissal of a case under § 707(b), the automatic stay does not go into effect upon the filing of the new case. However, § 362(c)(4)(B) provides that on request made within 30 days after the filing of the new case, the court may order the stay to take effect if the moving party demonstrates that the filing of the new case is in good faith as to the creditors to be stayed. A case is presumptively not filed in good faith if the debtor was a debtor in two or more prior cases pending within the previous year, or if there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the latest prior case, or if there is any other reason to conclude that the new case will not be concluded with a confirmed plan that will be fully performed. § 362(c)(4)(D)(i)(III). The debtor here has been a debtor in two cases pending and dismissed within the past year, Case Nos. 14-90856 and 14-91501;

thus, the presumption arises in this case.

The presumption may be rebutted by clear and convincing evidence that this new case was filed in good faith. § 362(c)(4)(D). The debtor's motion is supported by his declaration, in which he testifies that the first case was dismissed just prior to him making two plan payments to the trustee. The payments were received by the trustee and then refunded to the debtor. The second case was also dismissed for lack of payment. The debtor states that, as in the first case, the money to make the payment was received just days after the case was dismissed. The debtor states: "Timing of income and trustee payments has been a serious issue in the two previous cases. That issue is now resolved and should not be an issue in this new case." Debtor's Decl., filed Feb. 10, 2015, at 1:28-2:1. He adds that he is not trying to abuse the system or process, that he has filed these cases in good faith, and that he is simply trying to save his home, which he believes has about \$340,000 in equity.

The court takes judicial notice of the record in the two prior cases. The first was filed June 13, 2014, which the Bank indicates was two business days before a scheduled foreclosure sale of the debtor's residence. The case was dismissed October 28, 2014 on the trustee's motion, which indicated the debtor was in default by \$3,350 as of October 10, 2014. The plan payment in that case was \$3,350 per month; thus, the debtor apparently made two plan payments - for July and August - before defaulting. The second case was filed November 7, 2014, 10 days after the first one was dismissed and one business day before the continued foreclosure sale date. The case was dismissed January 28, 2015 on the trustee's motion indicating the debtor was in default by \$3,350 as of January 12, 2015. The plan payment in that case was the same, \$3,350. Thus, the debtor failed to timely make the first plan payment in the case, the one for December, although he had testified in support of a motion to extend the stay in that case that he "[would] be able to make each and every payment in this case on a timely basis." Debtor's Decl., filed Nov. 11, 2014 in Case No. 14-91501, at 2:16-17.

The debtor's declaration supporting this motion provides no details as to why he was unable to make the plan payments on time in the prior cases or why he will be able to make them on time in this case. His attorney adds in the motion that "[t]he plan payments [in the prior cases] became due at the same time as other living expenses[,] leaving Debtor short of funds. Debtor has restructured when bills are paid and when income is received so the funds will be timely available." Mot., filed Feb. 10, 2015, at 2:5-7. There is reason to question that conclusion. The debtor's Schedules I in the prior cases disclose two sources of income - \$1,391 in wage income for his non-filing spouse (after taxes and insurance)² and \$4,500 for the debtor from the "sale of guns, ammo, and personal property." There is no indication where the debtor gets the guns, ammo, and other personal property to sell. In the prior cases, he scheduled guns valued at \$28,200 and \$7,400 worth of art; that is, exactly the same amounts in both cases.³ Thus, he is apparently not selling items from his personal collections. It cannot be determined whether he is trading on the Internet or otherwise, as he failed to file a statement of gross receipts and expenses of a business operation as an attachment to his Schedule J, and the only current business listed on his Statement of Financial Affairs involves the development of optical firearm sights. Thus, there is reason to question whether the reported income of \$4,500 per month was steady and reliable. In his schedules filed in the present case, the debtor reports income of \$5,500 per month from this source, which makes the feasibility issue even more important.

Moreover, neither the \$4,500 figure nor the \$5,500 figure is supported by the

debtor's income in the past two years. According to the debtor's Schedule I in the second case, the debtor and his spouse's household income, after deduction of taxes and insurance premiums, was \$5,891 per month (\$5,908 in the first case), which works out to \$70,692 per year. By contrast, his statement of affairs in the second case shows year-to-date gross income (that is, for the first 10 months of 2014) totaling only \$30,083, and only \$42,361 for 2013. The debtor's statement of affairs in the present case shows the same figures for 2014, which means neither the debtor nor his spouse had income in the last two months of 2014. The statement of affairs shows only \$3,820 in income for the debtor's spouse in the year to date 2015 (that is, for the first month of this year), and no income for the debtor.

If these figures are an accurate indication of the household's income on a go-forward basis, and if the debtor proposes the same or a similar plan in this case, the plan will not be feasible. The only debts included in the debtor's plans in the prior cases were his home mortgage, property taxes on the home, \$130 to the State Board of Equalization (total, not per month), and general unsecured debts totaling \$7,764, of which the debtor proposed to pay 100%. In his plan just filed in the present case, the debtor has acknowledged that his prior plan understated the amount of his mortgage arrears, as pointed out by the Bank in its opposition. Thus, he has increased the arrears figure by \$16,422. He has also added an IRS priority claim for \$6,523. Thus, in this case, he has significantly increased the amounts to be paid through the plan, with every indication that even the plan in the second case - without those increases - would not be feasible.⁴ In other words, given that the debtor's income in the past two years has been substantially less than would be needed to make the payments proposed in the plan in his second case, and given that the plan in this new case calls for increases totaling \$22,945 in amounts required to be paid through the plan, the court cannot conclude that the plan currently proposed in this case will be feasible.

The debtor has offered no explanation from which the court might conclude that his financial or personal circumstances have changed substantially and no other basis on which to conclude that the present case will be concluded with a confirmed plan that will be fully performed. The court concludes that the debtor has failed to demonstrate by clear and convincing evidence that this case has been filed in good faith, within the meaning of § 362(c)(4)(D), and the motion will be denied.

The court will hear the matter.

1 The motion refers to § 362(c)(3). However, as the debtor was a debtor in two prior cases pending within the past year that were dismissed, the applicable subdivision is (c)(4).

2 \$1,408 in the first case; \$1,391 in the second. On the debtor's Schedule I filed in this new case, that figure has increased to \$1,609.

3 The debtor reports the same figures on his Schedule B filed in this case.

4 As a result, apparently of the sizeable increase in the mortgage arrears and the addition of the IRS claim, the debtor proposes to reduce the dividend to general unsecured creditors, whose claims total \$8,221, from 100% in the plan in the second case to 0% in this case. He does not explain how such a plan will pass the liquidation test, given that he has, according to his schedules in this case, at least \$300,000 of non-exempt equity in his residence.

26.	10-90128-D-13 CJY-1	JASON/STEPHANIE BETTENCOURT	MOTION TO VALUE COLLATERAL OF RIVER CITY BANK 2-5-15 [53]
27.	15-90043-D-13 CJY-1	CAMERINO GAMBOA	MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 2-3-15 [8]
28.	14-90657-D-13 EWG-1	KATRINA CHANDLER	MOTION TO VACATE DISMISSAL OF CASE 2-3-15 [74]
	CASE DISMISSED 1/5/15		
29.	14-91563-D-13 RDG-1	MANUEL/LUCIA PARTIDA	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 1-9-15 [16]