

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

March 15, 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.	12-92400-D-13	DENNIS/DIANE LEMA	MOTION TO SUBSTITUTE DENNIS
	CJY-4		EDWARD LEMA AS THE
			REPRESENTATIVE FOR DIANE
			THERESA LEMA AND TO EXCUSE
			CO-DEBTOR FROM COMPLETING 1328
			AND/OR 522 CERTIFICATES
			1-29-16 [56]

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 substitute Dennis Edward Lema as the representative for Diane Theresa Lema and to excuse co-debtor from completing 1328 and/or 522 certificates 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.

2. 12-92400-D-13 DENNIS/DIANE LEMA
CJY-5

MOTION TO MODIFY PLAN
1-29-16 [61]

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.

3. 16-90003-D-13 JOHN/TAMARA FERNANDEZ
BSH-2

MOTION TO CONFIRM PLAN
2-2-16 [19]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied because the moving parties failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). The moving parties filed their schedules 20 days into the case, and when they did so, they listed creditors that had not been listed on their master address list, filed when the case was commenced. The moving parties failed to file an amended master address list. Thus, when they served this motion, those two creditors - the only creditors listed on Schedule F - did not appear on the PACER matrix, which the moving parties utilized for service of the motion, and therefore, were not served.

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

4. 15-91106-D-13 BARBARA BALLI
MLP-1

CONTINUED MOTION TO AVOID LIEN
OF HLC ENTERPRISES, LLC
1-27-16 [24]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by HLC Enterprises, LLC ("HLC") against real property the debtor claims is her residence. HLC has filed opposition and the debtor has filed a reply. For the following reasons, the motion will be granted in part.

The debtor requests an order avoiding the lien, period. That is, she requests the lien be avoided in its entirety. The problem is that the judgment underlying the lien is against the debtor and Phillip Balli, who is not a debtor in this case. The court takes judicial notice that the debtor and Phillip Balli were both debtors in a chapter 7 case filed in this district in 2010. Thus, the court concludes that Phillip Balli is the debtor's spouse.¹ In an adversary proceeding filed in the chapter 7 case, the debtor and Phillip Balli stipulated to a judgment in favor of HLC and stipulated the judgment would be nondischargeable. It is that judgment that underlies the lien the debtor now seeks to avoid.

In the present case, the debtor indicated on her Schedule A that the real property is owned "Jointly with Spouse and Father." Thus, it is clear the debtor's spouse, who is obligated with her on the judgment underlying the judgment lien, is a co-owner of the property. Under § 522(f)(1) of the Code, the debtor may avoid the fixing of a judicial lien on "an interest of the debtor" in property to the extent the lien impairs an exemption to which the debtor would have been entitled in the absence of the lien. Further, in applying the mathematical formula set forth in § 522(f)(2)(A), the court is to consider the value that "the debtor's interest in the property" would have in the absence of any liens.

According to the motion and the debtor's schedules, the value of the property is \$560,000 and there is a deed of trust against it in the amount of \$529,435, leaving \$30,565 in equity. The debtor has claimed an exemption in the amount of \$34,000 in the property. Thus, it appears there is at present no value in the property over and above the amount of the deed of trust and the amount of the debtor's exemption. However, of the \$30,565 in equity over and above the amount owing on the deed of trust, Phillip Balli apparently has some interest in it as a "joint" owner with the debtor and her father (or his father - the schedule is not clear). The debtor is not entitled under § 522(f)(1) to an order avoiding HLC's lien as it affects the interest of Phillip Balli in the property.²

HLC raises two issues.³ First, HLC contends "Debtor fails to properly plead an exemption under California Code of Civil Procedure section 704.730" (HLC's Opp., filed March 1, 2016, at 2:22-23) because she "fails to attest that she resides at the Property." Id. at 3:8. HLC misunderstands the procedure for a debtor to claim an exemption. The debtor is required only to list the property he or she claims as exempt. § 522(l) of the Bankruptcy Code. If no one objects, the property on the list is exempt. Id. True, HLC has objected to the claim of exemption in its opposition to this motion;⁴ however, this particular aspect of its opposition is unfounded, as the debtor did follow the proper procedure for claiming the exemption. Nothing in the rules required the debtor to separately attest to the facts underlying the claim of exemption.⁵

Second, HLC challenges the debtor's valuation of the property. The debtor scheduled the property at a value of \$560,000, whereas HLC claims the property was listed for sale in September of 2015, two months before the debtor filed this case, at \$599,000 but was withdrawn from the market. HLC's evidence of the listing is hearsay, but in any event, the court is not persuaded that a listing price represents the value of the property or that an owner's decision to list property at a particular price is evidence of misconduct when the owner later lists the property at a lower value on a bankruptcy schedule, especially where, as here, the figures are not dramatically different from one another. Further, HLC had the opportunity to obtain an appraisal of the property, but it chose not to.

For the reasons stated, the motion will be granted in part and the court will issue an order avoiding HLC's judicial lien as it affects the interest of the debtor in the property. The order will make clear that the order has no effect on the lien as the lien affects the interest of Phillip Balli in the property. The court will hear the matter.

1 The debtor did not list Phillip Balli's name where required to do so in answer to question 16 of her Statement of Financial Affairs.

2 Even if there were no equity in the property at present, there would still need

to be clarification that the avoidance of the lien extends only to the debtor's interest in the property because at some time in the future, the property could appreciate to the point where there is equity over and above the amount of the deed of trust.

- 3 The debtor objects on technical grounds to the court considering the opposition. In the interest of completeness, the court will exercise its discretion to consider the opposition. However, as discussed below, the court disagrees with the grounds advanced by HLC. Thus, the opposition has not affected the court's ruling; instead, the ruling is simply based on what the debtor is and is not entitled to under § 522(f)(1)(A).
- 4 "Notwithstanding the [expiration of the usual 30-day deadline], a creditor may object to a motion filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien." Fed. R. Bankr. P. 4003(d).
- 5 "Whenever a debtor asserts a claim of exemption, the debtor implicitly represents that the facts support that claim." Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli), 542 B.R. 245, 256 (9th Cir. BAP 2015). This includes, when the claim is of a homestead exemption, the fact that the property is her principal dwelling. Id.

5. 15-91106-D-13 BARBARA BALLI MOTION TO CONFIRM PLAN
MLP-2 1-27-16 [29]

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 Norman Danny Pruett and Phillip Balli, listed on the debtor's Schedule H as co-debtors. 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 an individual who is a co-debtor with the debtor. Pursuant to Fed. R. Bankr. P. 1007(a)(1), the moving party was required to include those parties on her master address list, which she did not do, and pursuant to Fed. R. Bankr. P. 2002(b), was required to give those parties notice of this motion.

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

6. 15-90908-D-13 ROBERT HARDING MOTION TO CONFIRM PLAN
CJY-2 1-19-16 [45]

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. 15-91210-D-13 JUAN CHACON AND ROSA OBJECTION TO CONFIRMATION OF
RDG-2 GONZALEZ PLAN BY RUSSELL D. GREER
2-12-16 [34]

Final ruling:

This case was dismissed on February 16, 2016. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

8. 11-94412-D-13 EDUARDO/LINDA GONZALEZ MOTION TO MODIFY PLAN
MSN-1 2-2-16 [50]

9. 15-91214-D-13 IRENA JASPAR OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
2-12-16 [14]

Final ruling:

Objection withdrawn by moving party. Matter removed from calendar.

10. 15-90916-D-13 BRUCE/MARY BRUMMEL AMENDED MOTION TO VALUE
AAM-2 COLLATERAL AND TO AVOID LIEN OF
OCWEN LOAN SERVICING
1-18-16 [29]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of OCWEN Loan Servicing 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 OCWEN Loan Servicing's secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

11. 15-91217-D-13 HEATH/TIFFANY GRIGSBY
MSM-1

MOTION TO VALUE COLLATERAL OF
WARREN FEDERAL CREDIT UNION
2-4-16 [12]

Final ruling:

This is the debtors' motion to value collateral of Warren Federal Credit Union. The motion will be denied because the moving parties failed to serve the Credit Union in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served the Credit Union (1) at a post-office box address with no attention line; and (2) by certified mail to the attention of a "President, Officer & CEO." The second method was insufficient because the Credit Union is not an FDIC-insured institution, and whereas service on an FDIC-insured institution is to be by certified mail (Fed. R. Bankr. P. 7004(h)), service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, such as the Credit Union, must be by first-class mail (Fed. R. Bankr. P. 7004(b)(3)). The first method was insufficient because service on a corporation, partnership, or other unincorporated institution that is not an FDIC-insured institution must be to the attention of an officer, managing or general agent, or agent for service of process, whereas here, there was no attention line.¹

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

1 The court also has a concern about the form of proof of service consistently utilized by the debtors' counsel's law firm, and utilized here. The proof of service states in bold type, "In accordance with Bankruptcy Rule 7004(h) service of process was made by certified mail to an officer of the institution as identified below." This language suggests that all of the institutions identified later in the proof of service were served by certified mail, whereas it appears in some instances that is not the case. The blanket language quoted above renders the proof of service confusing in many instances, and the distinction between certified mail and first-class mail should be made with respect to each addressee that is an institution rather than in blanket form.

12. 12-93223-D-13 DOUG/GINA GONZALES
CJY-2

MOTION TO MODIFY PLAN
2-4-16 [44]

13. 15-91225-D-13 MARIANNE MAGATHEN
RDG-2
OBJECTION TO CONFIRMATION OF
PLAN BY TRUSTEE RUSSELL D.
GREER
2-12-16 [22]
14. 14-90529-D-13 GREGG/KIANDRA WALKER
WFM-1
CITIMORTGAGE, INC. VS.
MOTION FOR RELIEF FROM
AUTOMATIC STAY
2-11-16 [57]
15. 15-91234-D-13 LYNLEE/SHERON JAMES
RDG-1
OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
2-12-16 [17]
16. 13-91241-D-13 OSCAR DE LA O AND KATRINA
JCK-2 RODRIGUEZ
MOTION TO MODIFY PLAN
2-1-16 [31]

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.

17. 15-90248-D-13 JOHN DELAO AND MOTION TO CONFIRM PLAN
MSN-3 ALEXANDRINA BARRERA 1-20-16 [66]

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.

18. 12-92857-D-13 SHAWNA COPLEN MOTION TO MODIFY PLAN
JAD-1 2-1-16 [32]

19. 12-92857-D-13 SHAWNA COPLEN OBJECTION TO DEBTOR'S CLAIM OF
RDG-1 EXEMPTIONS
2-12-16 [37]

20. 11-90769-D-13 HENRY/VICKI HOUDA MOTION FOR RELIEF FROM
BN-1 AUTOMATIC STAY
THE GOLDEN 1 CREDIT UNION 2-16-16 [58]
VS.

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

21. 10-94775-D-13 ROLANDO VAZQUEZ
JDP-2

MOTION TO SUBSTITUTE MARTHA
VAZQUEZ AS THE REPRESENTATIVE
FOR ROLANDO F. VAZQUEZ, SR.
2-4-16 [72]

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 substitute Martha Vazquez as the representative for Rolando F. Vazquez, Sr. 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.

22. 12-90082-D-13 DONALD/RENEE KAPPLER
EAT-00

MOTION TO MODIFY PLAN
1-30-16 [71]

Final ruling:

The relief requested in the motion is supported by the record, the trustee has withdrawn his opposition, and no other 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.

23. 12-91983-D-13 DEEPESH/KRISTEN CHAND
CJY-5

MOTION TO SELL
2-16-16 [85]

24. 15-91191-D-13 OLIVIA SIMS
RDG-3

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
2-1-16 [23]

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 the debtor's claim of exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

Tentative ruling:

This is the debtor's motion to value collateral of WestAmerica Bank (the "Bank"); namely, the debtor's 2007 Cadillac Escalade. The Bank has filed opposition. For the following reasons, the motion will be denied.

The debtor testifies it is her opinion that the retail value of the vehicle as of the date of filing (December 14, 2015) is \$5,000. She states she has personal knowledge of the vehicle because she drives it regularly; the vehicle has about 103,500 miles on it, is in poor condition, and is presently inoperable. She adds that the throttle body, coolant system, water pump gasket, camshaft sensor, brake lights, and control light module all need work; the brake system needs replacement; the control modules for the transmission are inoperable; the ABS door system is damaged, indicating the traction control system is inoperable; the tires need replacement; and there is body damage to the front bumper, tail lights, bracket for plates, and rear cover bumper. The debtor has concluded it would cost between \$5,000 and \$7,000 to make the needed repairs.

The Bank has submitted the declaration of Scott Brown, who is employed by Auto Inspection Service ("AIS"), a personal property appraisal company. Mr. Brown testifies he has been employed by AIS as a personal property appraiser for over 24 years and has appraised 24,000 motor vehicles. Mr. Brown states he was retained by the Bank to "make a determination as to what a retail merchant would likely charge for a vehicle in like condition." Brown Decl., at 2:2-3. Mr. Brown states he inspected the debtor's vehicle on February 16, 2016 and evaluated its overall condition, including interior and exterior. He adds: "[I]n regards to the mechanical condition of the subject Vehicle, for purposes of the Valuation, I concluded that the Vehicle was of sound mechanical condition since the registered owner of the Vehicle did not bring to my attention any issues." Id. at 2:11-15.1 Mr. Brown states he made certain deductions and added value for certain accessories; he concluded that the price a retail merchant would charge for the vehicle is \$24,695.

The Bank has filed a copy of Mr. Brown's Vehicle Valuation as an exhibit. In the evaluation, Mr. Brown provides a complete list of the equipment on the vehicle and a detailed description of its interior and exterior. He states the vehicle's owner was present at the inspection and "report[ed] that recent maintenance work was done," but "was unspecific as to the work done." Bank's Ex. C, p. 1. He adds: "The owner did not inform us of any mechanical or drivability problems." Id. The valuation report includes a number of photos of the vehicle, as well as KBB and NADA reports and printouts of online listings of apparently similar vehicles by different sellers, including Own A Car in Fresno, AMC Auto Sales in Fremont, Golden Star Auto Sales in Sacramento, Stockton Motors, and Stockton Auto World. (The debtor lives in Patterson.) As indicated in the report, the KBB retail value is \$25,054; the NADA clean retail value is \$23,775; and the average listing price of the listings chosen by Mr. Brown is \$25,695. Mr. Brown made a \$1,000 downward adjustment for the condition of the vehicle and arrived at a value of \$24,695.

The Bank points out that, on her original Schedule B, filed December 28, 2015, the debtor listed the "current value" of the vehicle as \$17,000. She added: "Vehicle not running[,] repairs are over \$5000." She did not indicate that the cost

of the necessary repairs was not already factored into the \$17,000 "current value." Before the debtor hired counsel to represent her in this case, she filed her own motion to value the vehicle, DN 79, in which she asserted the value was \$4,951.22 as of January 16, 2016. She attached a printout from edmunds.com, along with two repair estimates indicating repairs would cost a total of \$6,030. (She did not submit any repair estimates with the present motion.) Both of the repair estimates are hearsay and one is a year old. Further, the court cannot determine how those figures led the debtor to conclude that the value of the vehicle was \$4,951.22.

Pursuant to § 506(a)(2) of the Bankruptcy Code, a secured claim is to be valued based on the replacement value of the collateral securing the claim. For property acquired for personal, family, or household purposes, "replacement value" means the price a retail merchant would charge for property of the same kind considering the age and condition of the debtor's property. Here, the debtor testifies to what she believes the retail value to be. However, first, that opinion is a factual allegation of a type generally requiring specialized knowledge in the field of vehicle appraisal, whereas the debtor has not shown she is qualified as an expert. For this reason, although the debtor's opinion is admissible, the court assigns it little weight. Second, the debtor bases her opinion of value in part on her estimate of the cost of needed repairs: on that subject, her testimony is conclusory and without foundation. Third, her testimony carries even less weight because it is contradicted by the testimony on her Schedule B, filed just five weeks earlier, and the contradiction is unexplained. Finally, the debtor's amended Schedule B, filed five days after this motion was filed, on which she valued the vehicle at \$5,000, does nothing to enhance the debtor's credibility on this issue.

Mr. Brown's testimony carries significantly more weight. As between the evidence of both parties, the court accepts the Bank's evidence as the more persuasive. Therefore, the court concludes the debtor has failed to satisfy her burden of proof, and the motion will be denied. The court will hear the matter.

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- 1 The court does not fault the debtor for this, although at first glance, it raises some doubt. The debtor may have thought Mr. Brown had seen her declaration, and in fact, the Bank's attorney's email to him indicates she forwarded a copy to him. As Mr. Brown apparently did not ask the debtor about the mechanical issues described in her declaration, it is possible he had not read it.