UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 19, 2018 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 9. 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 APRIL 16, 2018 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY APRIL 2, 2018, AND ANY REPLY MUST BE FILED AND SERVED BY APRIL 9, 2018. 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 ITEM 10 IN THE SECOND PART OF THE CALENDAR. INSTEAD, THIS ITEM HAS 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 MARCH 26, 2018, AT 2:30 P.M.

Matters to be Called for Argument

1. 17-25600-A-13 REBECCA ROBINSON — MOTION TO CONFIRM PLAN
PGM-2 — 2-5-18 [52]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

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 unsecured creditors $4,158.03 but Form 122C shows that the debtor will have $8,976.60 over the next five years.

2. 17-25518-A-13 RONALD/RHONDA SHUMAN — MOTION TO CONFIRM PLAN
RLC-3 — 1-30-18 [43]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the debtor failed to utilize the court's mandatory form plan as required by Local Bankruptcy Rule 3015-1(a) (effective on and after December 1, 2017, in all cases regardless when filed).

Second, 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.

Third, 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.

Fourth, 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 $14,859.80 unsecured creditors but Form 122C-1 and 2 shows that the debtor will have $114,859.80 over the plan's duration. The problem is even more significant than this indicates because the debtor has not accurately completed Form 122C 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).

3. 18-20748-A-13 KAREN BLAKLEY — ORDER TO SHOW CAUSE 2-26-18 [10]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The case will be dismissed.

The debtor did not pay the petition filing fee of $310, as required by Fed. R. Bankr. P. 1006(a), when the petition was filed. Nor did the debtor request permission to pay the fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The failure to pay the filing fee or to arrange for its payment in installments is cause for dismissal. See 11 U.S.C. § 1307(c)(2).

4. 17-27670-A-13 DONNETTE DESANTIS — ORDER TO SHOW CAUSE 2-26-18 [37]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The case will be dismissed.

The debtor was given permission to pay the filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment in the amount of $77 due on

February 20 was not paid. This is cause for dismissal. See 11 U.S.C. § 1307(c)(2).

5. 18-21084-A-13 ELIZABETH GOMEZ — MOTION TO IMPOSE AUTOMATIC STAY
HLG-1 — 3-2-18 [12]

- ☐ 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 denied.

The court's electronic case files show that the debtor has filed five other unsuccessful chapter 13 cases. They are summarized in the table below.

Case No.	Filed	Dismissed
2018-21084	2/27/2018	Case pending
2017-26714	10/10/2017	12/20/2017 for failing to pay installment filing fee
2017-22736	4/25/2017	5/25/2017 for failing to timely file schedules/statements
2015-21258	2/19/2015	5/23/2016 voluntarily dismissed
2010-31725	5/4/2010	7/30/2010 for failing to file delinquent tax returns
2009-46097	11/30/2009	5/3/2010 for failing to commence plan payments

Because the two cases filed immediately preceding the latest case were dismissed within the last year, 11 U.S.C. § 362(c)(4) is applicable. There will be no automatic stay in this case unless one is imposed pursuant to this motion.

A party in interest, including the debtor, may request that the court impose the automatic stay despite the filing and dismissal of multiple prior petitions. See 11 U.S.C. § 362(c)(4)(B). Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition. To obtain the automatic stay, the party in interest must demonstrate that the latest case has been filed in good faith. If shown, the court may impose conditions on the imposition of the automatic stay.

This motion was made within 30 days of the filing of the current case. The issue is whether the case was filed in good faith. Section 362(c)(4)(D)

invokes a presumption that the case was "filed not in good faith."

The debtor asserts in her motion that this case has been filed in good faith because, unlike her prior cases, she is represented by counsel and because family members are willing to financially assist her with this case.

As to the family assistance, the motion includes no specifics or evidence from family members of their willingness and ability to help the debtor.

And, while it is true that the debtor is now represented by an attorney and was not represented in the last two cases, she was represented in the case filed in 2015. That case was not successful. The fact that the debtor has filed multiple cases over a protracted period knowing she was unable to prosecute them without an attorney does not convince the court that having an attorney will result in this case being any more successful than the prior four cases.

6. 17-20287-A-13 BRANDI DECHAINE — MOTION TO MODIFY PLAN
RS-3 — 2-12-18 [44]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the debtor has failed to make $1,740.45 of 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).

Second, the plan does not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive $26,631 in a chapter 7 liquidation as of the effective date of the plan. This plan will pay only $223 to unsecured creditors.

7. 17-26591-A-13 MARGARET ROBINSON — MOTION TO CONFIRM PLAN
PGM-3 — 1-31-18 [51]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the trustee's objection will be sustained but the objection by E*Trade will be overruled.

The debtor has failed to make $3,140 of 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).

E*Trade maintains that the plan impermissibly modifies its claim by reducing the interest rate from 8.75% to 4%. It believes that because its claim is secured only by the debtor's home, the anti-modification provision in 11 U.S.C. § 1322(b)(2) prevents this modification.

E*Trade's proof of claim indicates that its loan is all due and payable. If that is incorrect, the promissory note appended to the proof of claim indicates the claim will mature in 2021, before the proposed plan will be completed.

Because this claim has matured or will mature before the plan is completed, section 1322(b)(2) is no longer applicable. 11 U.S.C. § 1322(c)(2).

Parenthetically, E*Trade's objection was incorrectly filed as a separate motion rather than as opposition to the debtor's motion to confirm a plan. This is the reason it will not appear as a separate matter on the calendar.

8. 18-20792-A-13 YELENA MARKEVICH — MOTION FOR RELIEF FROM AUTOMATIC STAY
U.S. BANK, N.A. VS. — 3-2-18 [16]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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 and the automatic stay annulled.

The movant held a deed of trust encumbering the debtor's home property in Rio Linda. The movant or its agents conducted a nonjudicial foreclosure of that property on February 13, 2018 at approximately 2:02 PM. This case was filed at 1:49 PM that same day. Before conducting the sale, at approximately 10:00 AM on February 13, the movant or its agent conducted a search of the bankruptcy courts' electronic record to determine whether or not a case had been filed. The case filed on February 13 was not uncovered by that search nor did the debtor convey notice prior to sale to the movant sale or its agent that the bankruptcy case had been filed.

According to the debtor's schedules, the subject property has a value of $486,000. According to the evidence with the motion, the movant is owed in excess of $860,000 and it is secured by the subject property.

According to the motion, the debtor has not made payments on this obligation for approximately 10 years. During that 10 year period, the debtor has filed four bankruptcy cases which are summarized in the table below.

Case No.	Chap	Filed	Status
2018-20792	13	2/13/2018	pending
2014-30434	13	10/22/2014	12/22/2015 dismissed for failing to pay installment filing fee
2012-26036	7	3/28/2012	5/7/2012 closed but no discharge entered
2011-41768	13	9/8/2011	9/26/2011 dismissed for failing to file schedules and statements

The court will annul the automatic stay. In determining whether to grant retroactive relief from stay, the court must engage in a case-by-case analysis and balance the equities between the parties. Some of the factors courts have considered are whether the creditor knew of the bankruptcy filing, whether the debtor was involved in unreasonable or inequitable conduct, whether prejudice would result to the creditor, and whether the court could have granted relief from the automatic stay had the creditor applied in time. Nat'l Envtl. Water Corp. v. City of Riverside (In re Nat'l Envtl. Water Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997); In re Fjeldsted, 293 B.R. 12 (9th Cir. B.A.P. 2003).

Here, the movant did not know of the bankruptcy case when it conducted a foreclosure sale. Given the failure of the original borrower to make mortgage payments over a protracted period, given the multiple cases filed while the movant's loan was delinquent, and given the lack of equity in the property, there is little doubt that had the movant asked for relief from the automatic stay before its foreclosure sale, it would have received it. These facts are sufficient to warrant annulment. See In re Schwartz, 954 F.2d at 572); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1425 (9th Cir. 1985); Jewett v. Shabahangi (In re Jewett), 146 B.R. 250, 252 (B.A.P. 9th Cir. 1992).

FINAL RULINGS BEGIN HERE

9. 18-20752-A-13 MONICA OLSON
GME-1
NADIA FOSTER VS.

MOTION FOR
RELIEF FROM AUTOMATIC STAY
2-19-18 [11]

Final Ruling: The motion will be dismissed as moot. This case was dismissed on March 2. As a result, the automatic stay has expired as a matter of law. See 11 U.S.C. § 362(c)(1)&(2). There is no stay to modify or terminate.