

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

May 31, 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.	15-29611 -D-13	ANDREW/SHELLYN MOULYN	MOTION TO CONFIRM PLAN
	RS-2		4-7-16 [43]

2.	16-20617 -D-13	CHARLES/ANNA MCKINLEY	MOTION TO CONFIRM PLAN
	MC-1		4-18-16 [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.

3. [16-20826](#)-D-13 MOHAMMED ALHAJI-HUSSAINI OBJECTION TO DEBTOR'S CLAIM OF
RDG-4 EXEMPTIONS
4-11-16 [[28](#)]

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor failed to file a spousal waiver to allow him to use the exemptions provided by Cal. Code Civ. Proc. § 703.140(b). On May 5, 2016, the debtor filed a spousal waiver in the correct form that appears to be signed by the debtor and his spouse. As a result of the filing of the spousal waiver, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

4. [11-24736](#)-D-13 JOY CARDENAS MOTION TO SELL
PGM-1 5-3-16 [[59](#)]

5. [16-21147](#)-D-13 SHERON MAGSAYO OBJECTION TO DEBTOR'S CLAIM OF
RDG-2 EXEMPTIONS
4-25-16 [[30](#)]

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor improperly claimed certain exemptions under Cal. Code Civ. Proc. § 704.210. On May 16, 2016, the debtor filed an amended Schedule C on which the debtor did not claim any exemptions under § 704.210. As a result of the filing of the amended Schedule C, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

6. [16-22147](#)-D-13 ANGELO CODINACK AND MOTION TO VALUE COLLATERAL OF
MC-1 VICTORIA BRAUN BANK OF AMERICA, N.A.
5-3-16 [[16](#)]

Final ruling:

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

7. [16-21452](#)-D-13 MARIO ORTIZ OBJECTION TO DEBTOR'S CLAIM OF
RDG-3 EXEMPTIONS
4-25-16 [[28](#)]

Tentative ruling:

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor failed to file a spousal waiver to allow him to use the exemptions provided by Cal. Code Civ. Proc. § 703.140(b). On April 25, 2016, the debtor filed a spousal waiver that appears to be signed by the debtor and his spouse. However, the spousal waiver is not in the correct form. It recites that the debtor and his spouse waive the right to claim the exemptions "other than those claimed in the above entitled case." In contrast, the statute requires that they waive the right to claim the exemptions other than those under Cal. Code Civ. Proc. § 703.140(b). The distinction makes a difference because the debtor might later amend his Schedule C to claim exemptions under §§ 704.010, et seq. At that point, the meaning of the spousal waiver would be that the debtor and his spouse have waived the right to claim the exemptions other than those under §§ 704.010, et seq., which is not what is required by the statute.

Because the debtor has failed to file a valid spousal waiver, the objection will be sustained. The court will hear the matter.

8. [15-29775](#)-D-13 CLIFTON/CONCEPCION MOTION TO CONFIRM PLAN
CRG-2 GAYOTIN 4-11-16 [[47](#)]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons: (1) the moving parties failed to serve several creditors who had filed claims by the time the motion was filed at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g); and (2) the moving parties failed to serve the U.S. Dept. of Education at its address on the Roster of Governmental Agencies, as required by LBR 2002-1(b).

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

9. [16-21375](#)-D-13 ALBERTO VAZQUEZ-GARCIA OBJECTION TO DEBTOR'S CLAIM OF
RDG-2 EXEMPTIONS
4-25-16 [[13](#)]

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor failed to file a spousal waiver to allow him to use the exemptions provided by Cal. Code Civ. Proc. § 703.140(b). On April 27, 2016, the debtor filed a spousal waiver in the correct form that appears to be signed by the debtor and his spouse. As a result of the filing of the spousal waiver, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

10. [15-26176](#)-D-13 CARLTON RANDLE AND AMENDED OBJECTION TO CLAIM OF
CATHERINE DENOS WELLS FARGO, CLAIM NUMBER 17
4-26-16 [[50](#)]

Final ruling:

This matter is resolved without oral argument. This is an objection filed by the debtors to a proof of claim filed by Wells Fargo Bank (the "Bank"). The debtors signed and filed the objection and notice of objection as if they were pro se debtors, but they are not. They are represented by counsel of record in this case. This court's local rules do not provide for debtors to pick and choose certain actions to be taken by their attorney of record and other actions to be taken by the debtors in pro se. Because the motion was not signed and filed by the debtors' attorney of record, the motion will be denied without prejudice.

The Bank has filed opposition to the motion, in which it requests an award of attorney's fees. The Bank alleges the objection was not brought in good faith, that it is unsupported by admissible relevant evidence, and that it is "meritless, frivolous and was improperly noticed." As the Bank has failed to set forth a legal basis for an award of attorney's fees, the request is denied. To the extent the references to lack of good faith, frivolousness, and lack of merit are intended to suggest a violation of Fed. R. Bankr. P. 9011, the request for attorney's fees is improper as there is no evidence the Bank complied with the "safe harbor" provisions of Rule 9011(c).

The Bank requests as an alternative to an award of attorney's fees "that nothing be contained in any order that would prevent [the Bank] from including such [attorney's] fees in a Notice of Post Petition Fees." The order denying this motion will not contain any language in this regard; however, the absence of such language should not be interpreted as a license to include such fees in a Notice of Post Petition Fees. The court is making no judgment one way or the other as to whether the inclusion of attorney's fees in such a notice would be appropriate.

The motion will be denied without prejudice by minute order. No appearance is necessary.

11. [16-21276](#)-D-13 GRAYLING WILLIAMS OBJECTION TO DEBTOR'S CLAIM OF
RDG-2 EXEMPTIONS
4-25-16 [[33](#)]

Final ruling:

This is the trustee's objection to the debtor's claim of exemptions. The basis of the objection is that the debtor failed to file a spousal waiver to allow him to use the exemptions provided by Cal. Code Civ. Proc. § 703.140(b). On May 16, 2016, the debtor filed an amended Schedule C on which he did not claim exemptions under § 703.140(b). As a result of the filing of the amended Schedule C, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

12. [15-23783](#)-D-13 DES RAJ AND RAVINDER KAUR MOTION TO AVOID LIEN OF COUNTY
MC-4 OF SAN JOAQUIN - TREASURER &
TAX COLLECTOR REVENUE &
RECOVERY DIVISION
4-25-16 [[69](#)]

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. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

13. [15-23783](#)-D-13 DES RAJ AND RAVINDER KAUR MOTION TO MODIFY PLAN
MC-5 4-25-16 [[63](#)]

14. [16-20497](#)-D-13 MARY WARD
BSH-1

MOTION TO CONFIRM PLAN
4-12-16 [[30](#)]

Tentative 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 the IRS and Bank of the West, added to her Schedule E/F by amendment filed April 12, 2016. Thus, the moving party failed to serve all creditors, as required by LBR 2002(b).

As a result of this service defect, the motion will be denied by minute order. Alternatively, the court will continue the hearing to allow the debtor to cure this service defects. The court will hear the matter.

15. [16-20497](#)-D-13 MARY WARD
BSH-2

MOTION TO AVOID LIEN OF
DISCOVER BANK
4-28-16 [[43](#)]

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. The court finds the judicial lien described in the motion impairs an exemption to which the debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

16. [14-31998](#)-D-13 YOLANDA BURGIN
PGM-1

CONTINUED MOTION TO MODIFY PLAN
12-3-15 [[77](#)]

17. [16-21303](#)-D-13 JOHN/SHERRY SCHWALL
RDG-1

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY RUSSELL
D. GREER
4-25-16 [[19](#)]

18. [16-21606](#)-D-13 DIEGA RAMIREZ-REVIER OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
5-9-16 [[13](#)]
19. [16-21611](#)-D-13 GABRIEL AYALA OBJECTION TO CONFIRMATION OF
RDG-2 PLAN BY RUSSELL D. GREER
5-9-16 [[13](#)]
20. [16-21622](#)-D-13 TERRY/JACQUELINE THOMAS CONTINUED OBJECTION TO
JAA-1 CONFIRMATION OF PLAN BY U.S.
BANK, N.A.
4-14-16 [[21](#)]
21. [11-41652](#)-D-13 JOHN KILLIAN AND INEZ MOTION TO APPROVE LOAN
EGS-1 PERKINS-KILLIAN MODIFICATION
5-17-16 [[90](#)]

22. [11-29982](#)-D-13 MARK/PAMELA HOFIUS
RWF-1

MOTION TO INCUR DEBT
5-12-16 [[31](#)]

23. [11-46783](#)-D-13 GALDINA SANCHEZ
JCK-1

CONTINUED MOTION TO MODIFY PLAN
4-5-16 [[46](#)]

24. [15-29786](#)-D-13 JERROLD CLEMENS AND
LRR-2 SHAYLA TRAYLOR

CONTINUED MOTION TO VALUE
COLLATERAL OF BANK OF THE WEST
4-12-16 [[34](#)]

Tentative ruling:

This is the debtors' motion to value collateral of Bank of the West (the "Bank"); allegedly, a second position deed of trust against the debtors' residence.¹ The Bank has filed opposition and the debtors have filed a response. For the following reasons, the motion will be denied.

This is the second time the debtors have attempted to "strip off" the Bank's deed of trust. Their first motion was denied on March 8, 2016. In support of their first motion, the debtors testified that "[a]t the time of filing, [their] residence was worth \$180,000.00." Debtors' 1/28/16 Decl., DN 18, at 1:26. They added, however, that because of needed repairs, including a new roof, gutters and downspouts, and a new heating and air system, expected to cost a total of \$31,130, "the value of the property is lowered to \$148,870.00." *Id.* at 2:5-6. The court rejected the debtors' conclusion, noting they had failed to submit any evidence or argument that the value of real property is reduced by a dollar-for-dollar amount for the cost of needed repairs and that the debtors had derived the \$180,000

starting point for their valuation on their own, with no supporting facts and no showing they had the necessary qualifications to render that opinion.

The court also emphasized that on their original Schedule A, the debtors listed the value of the property as \$180,000, with no indication the value was actually lower because of needed repairs. They did indicate on their original schedule that the "[r]esidence is in need of new Heating & Air System and a new roof," but they did not mention the cost of those repairs, which by the time of filing their first motion, they estimated at \$31,130, and did not indicate that the cost of the needed repairs was not already included in their \$180,000 valuation.

Two days before filing their first motion to value, the debtors filed an amended Schedule A on which they changed the value of the property from \$180,000 to \$148,870, attributing the decrease to the cost of needed repairs "such as new Heating & Air System and a new roof." Neither the original Schedule A, the amended Schedule A, nor the first motion made any mention of an "electrical upgrade and repair" or termite remediation, which the debtors have added to the list in this second motion. They have filed as exhibits alleged estimates from contractors for these items, which would add costs of \$5,000 and \$17,695, respectively, increasing the total cost of all the alleged needed repairs from \$31,130 to \$53,825. They have also filed alleged, albeit hearsay, estimates for the cost of the repairs originally noted - the new roof and the heating and air system.

With this second motion, the debtors have also dropped the starting point for their valuation from \$180,000 to \$175,000 based on an appraisal they obtained on March 15, 2016, in which the appraiser purports to value the property at \$175,000 as of the petition date, December 23, 2015. The debtors have deducted the total cost of the alleged needed repairs, \$53,825, from \$175,000 to arrive at an alleged value of \$121,175. They conclude, "with these significant repairs needed, the value of the property is lowered to \$121,175.00. We believe we would have trouble selling this home at full appraised value without addressing these repair issues and lowering the appraisal value to accommodate." Debtors' Decl., DN 36, at 2:7-10.

The debtors' conclusion is based on an appraisal submitted in hearsay form, which is therefore inadmissible. However, even if the appraisal had been authenticated by a declaration of the appraiser who prepared it, it would not support the debtors' \$121,175 value because the cost of the repairs is already factored in to the appraiser's \$175,000 value. The debtors' appraiser attached copies of all of the debtors' cost estimates to his appraisal and adjusted each of his six comparables downward by \$48,130, stating in the addendum to his report he deducted those costs on the "functional utility line item" for each comparable. Debtors' Ex. A, Addendum, p. 1 of 1. It appears unequivocal that the debtors' further deduction of \$53,825, to arrive at a value of \$121,175, is completely without foundation.

Nevertheless, if the value of the property was \$175,000 at the petition date, the Bank's deed of trust (assuming it is in second position) is entirely underwater. (The holder of the alleged first, Bank of America, has filed a proof of claim for \$180,141.) The Bank, however, has submitted evidence that controverts the \$175,000 valuation. The Bank has filed a declaration of appraiser Barry Barrington, who testifies he has been an appraiser for 38 years. (The qualifications of the debtors' appraiser have not been presented.) Mr. Barrington authenticates a copy of his appraisal report, in which he posits the value of the property as \$230,000 as of the petition date. In their response, the debtors correctly point out that in the "Reconciliation" section of his appraisal, Mr. Barrington checked a box indicating

that "This appraisal is made . . . subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed . . . : repair estimates noted in appraisal." Bank's Ex. E, p. 2 of 6. In other words, the \$230,000 value is not an "as is" value; instead, it assumes the repairs have been completed.²

The debtors contend "[t]he appraisal does not list or specify anywhere the specific repairs provided in the Motion to Value Collateral by the debtors." Debtors' Resp., DN 46, at 2:15-16. As a result, they conclude, the appraisal is not accurate. The debtors are mistaken. In a supplemental addendum to his appraisal report, under "Improvements-Additional Features," Mr. Barrington notes the "borrower provided work repair estimates" regarding the roof, termite report, heating and air conditioning report, and electrical repair report. He listed all of the cost estimates the debtors have referred to in this motion, concluding, under "Sales Comparison Analysis" on the supplemental addendum: "'As is' value opinion with the inclusion of repairs needed estimated at \$181,500." Bank's Ex. E, Supp. Addendum.

In short, based on Mr. Barrington's testimony and appraisal, the court agrees with the debtors that his \$230,000 valuation is "subject to" the repairs being completed. However, based on that evidence, the court also finds that the "as is" value of the property as of the petition date; that is, with the repairs not having been made, was \$181,500. As against that evidence, the debtors' opinion of value carries little, if any, weight, because (1) its starting point is based on hearsay evidence, which the court will not consider; and (2) the debtors would inappropriately reduce the value further by the cost of the needed repairs, to arrive at \$121,175, when Mr. Barrington has already made deductions for those costs in arriving at his \$181,500 figure. The court concludes that Mr. Barrington's testimony and appraisal are the more credible evidence of value; thus, the court concludes the value of the property was \$181,500 as of the petition date. As that figure is greater, albeit only slightly, than the amount due on the senior lien, the motion will be denied.

The Bank has raised a second issue - it contends the court may not value the Bank's claim under § 506 at all, regardless of the value of the property, because "there exists a third party co-owner/co-obligor." Bank's Opp., DN 40, at 4:7. The Bank's note and deed of trust were signed by debtor Jerrold Clemons and his former spouse, who is not a debtor in this case. The Bank relies on In re Rodriguez, 156 B.R. 659, 660 (Bankr. E.D. Cal. 1993), in which the court, having found "[no] authority which allows a debtor who is not the sole owner of the property to be valued to extinguish all of a secured creditor's rights in its collateral through the use of 11 U.S.C. § 506," denied a debtor's motion to value. Id. The debtors have not responded to this argument; however, the Bank has not demonstrated that the debtor's former spouse still has an interest in the property. (The court's concern in Rodriguez was with the third party as co-owner, not as co-obligor. The court concluded that "section 506 permits valuation only of the estate's interest in the property" (id.), whereas the debtor in that case had only a 50% interest in the property.) In this case, the debtors' Schedule A indicates that only the debtor and the joint debtor have an interest in the property; there is no reference to the debtor's former spouse. Therefore, on the present record, the Bank's Rodriguez argument fails.

For the reasons stated, the motion will be denied. The court will hear the matter.

1 The debtors allege the Bank's deed of trust is in second position and that Bank of America holds a first position deed of trust. The Bank assumes this order of priority in its opposition. However, the copies of the deeds of trust attached to the respective proofs of claim show the Bank's deed of trust as recorded on January 30, 2003, as modified by a Modification of Deed of Trust recorded April 15, 2005, whereas Bank of America's deed of trust was recorded August 25, 2006. There is no evidence of a subordination agreement in the record.

For purposes of this ruling, the court will assume the Bank's deed of trust is in second position. If that is incorrect, however, the parties should bring the matter to the court's attention, as the debtors would be moving to strip off the wrong deed of trust.

2 On page 2 of his appraisal report, in the section labeled "Reconciliation," the form includes an "as is" box: Mr. Barrington did not check it. Instead, he checked the "subject to" box - see discussion below.

25. [12-21390](#)-D-13 LISIATE/ANA TULUA
TBK-10

CONTINUED MOTION TO INCUR DEBT
4-27-16 [[139](#)]