

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable Jennifer E. Niemann
Hearing Date: Thursday, August 25, 2022
Place: Department A – Courtroom #11
Fresno, California

Beginning the week of June 28, 2021, and in accordance with District Court General Order No. 631, the court resumed in-person courtroom proceedings in Fresno. Parties to a case may still appear by telephone, provided they comply with the court's telephonic appearance procedures, which can be found on the court's website.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

1. [18-12801](#)-A-13 **IN RE: JEREMY/SHIRRELL COOK**
[WSL-5](#)

MOTION TO MODIFY PLAN
7-18-2022 [[134](#)]

SHIRRELL COOK/MV
GREGORY SHANFELD/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on at least 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of creditors, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires a moving party make a *prima facie* showing that they are entitled to the relief sought, which the movants have done here.

This motion is GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

2. [19-13701](#)-A-13 **IN RE: PAUL/KATHERINE MCCURRY**
[DMG-5](#)

MOTION TO SELL
8-2-2022 [[93](#)]

KATHERINE MCCURRY/MV
D. GARDNER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to permit the debtors to supplement the record.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at

the hearing, the court intends to enter the respondents' defaults and continue the motion to permit the debtors to supplement the record. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Paul McCurry and Katherine McCurry (collectively, "Debtors") initially petitioned the court for an order authorizing Debtors to sell real property located at 760 Maple Ave., Wasco, CA 93280 (the "Property") to Rosa M. Barrera Alvarez and Mauro G. Almaraz (together, "Buyers") for \$260,000.00. Doc. #93. Debtors have a fee simple ownership interest in the Property. Schedule A/B, Doc. #1. Debtors' confirmed chapter 13 plan does not revest property of the estate in Debtors upon confirmation. Plan, Doc. #48; Order, Doc. #70. On August 22, 2022, Debtors' attorney filed a declaration informing the court that Buyers have backed out of the proposed sale. Decl. of D. Max Gardner, Doc. #104.

By the motion, Debtors also petition the court that in the event the sale to Buyer falls through, Debtors be granted authority to sell the Property to any third party for no less than \$250,000. Doc. #95. The declaration filed on August 22, 2022, states that Debtors received and accepted an offer for the Property from Michelle Kerchner for \$250,000. Gardner Decl., Doc. #104. Debtors request the court to authorize this sale. Id.

LBR 3015-1(h)(1)(E) provides in relevant part that "if the debtor wishes to . . . transfer property on terms and conditions not authorized by [LBR 3015-1(h)(1)(A) through (D)], the debtor shall file the appropriate motion, serve it on the trustee, those creditors who are entitled to notice, and all persons requesting notice, and set the hearing on the Court's calendar with the notice required by Fed. R. Bankr. P. 2002 and LBR 9014-1."

A debtor proposing a sale of property of the estate outside of the ordinary course of business under § 363(b) must demonstrate, among other things, that the sale is proposed in good faith. 240 N. Brand Partners, Ltd. v. Colony GFP Partners, L.P. (In re 240 N. Brand Partners, Ltd.), 200 B.R. 653, 659 (B.A.P. 9th Cir. 1996). "Good faith encompasses fair value, and further speaks to the integrity of the transaction." Id. (quoting In re Wilde Horse Enters., Inc. 136 B.R. 830, 842 (Bankr. C.D. Cal. 1991)). To make such a determination, "the court and creditors must be provided with sufficient information to allow them to take a position on the proposed sale." Wilde Horse Enters., 136 B.R. at 842. When approving a proposed sale, the bankruptcy court should consider whether the sale is in the best interests of the estate, is for a fair and reasonable price, has been adequately marketed, and is an "arms-length" transaction. Id. at 841.

Here, no additional information was submitted regarding the terms of the sale or information about Michelle Kerchner to show that she is a qualified buyer and the proposed sale is an "arms-length" transaction. The information currently provided to creditors and the court is insufficient for the court to determine that the proposed sale is in the best interests of the estate, is for a fair and reasonable price, and is an "arms-length" transaction.

Accordingly, the court is inclined to continue this matter to permit Debtors to supplement the record with respect to the proposed sale of the Property to Michelle Kerchner.

MOTION FOR COMPENSATION FOR D. MAX GARDNER, DEBTORS ATTORNEY(S)
8-2-2022 [\[98\]](#)

D. GARDNER/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after the hearing.

This motion was filed and served on at least 21 days' notice prior to the hearing date pursuant to Federal Rule of Bankruptcy Procedure 2002 and Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

D. Max Gardner, Attorney at Law ("Movant"), counsel for Paul McCurry and Katherine McCurry (collectively, "Debtors"), the debtors in this chapter 13 case, requests interim allowance of compensation in the amount of \$2,437.50 and reimbursement for expenses in the amount of \$34.75 for services rendered from October 8, 2020 through August 22, 2022. Doc. #98. Debtors' confirmed plan provides, in addition to \$1,200.00 paid prior to filing the case, for \$4,800.00 in attorney's fees to be paid through the plan. Am. Plan, Doc. ##48, 70. One prior fee application has been approved authorizing interim compensation in the amount of \$4,566.00 and reimbursement of expenses in the amount of \$129.00. Doc. #81. Debtors consent to the amount requested in Movant's application. Doc. #102.

Section 330(a) of the Bankruptcy Code authorizes "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses" to a debtor's attorney in a chapter 13 case. 11 U.S.C. § 330(a)(1), (4)(B). The court may allow reasonable compensation to the chapter 13 debtor's attorney for representing interests of the debtor in connection with the bankruptcy case. 11 U.S.C. § 330(a)(4). In determining the amount of reasonable compensation, the court shall consider the nature, extent, and value of such services, taking into account all relevant factors. 11 U.S.C. § 330(a)(3). Here, Movant demonstrates services rendered relating to: (1) drafting and filing first and second motions to sell; (2) communicating with Debtors' creditors and the chapter 13 trustee; (3) preparing second fee application; and (4) general case administration. Ex. A, Doc. #101. The court finds that the compensation and reimbursement sought are reasonable, actual, and necessary, and the court will approve the motion.

This motion is GRANTED. The court allows on an interim basis compensation in the amount of \$2,437.50 and reimbursement for expenses in the amount of \$34.75 to be paid in a manner consistent with the terms of the confirmed plan.

4. [17-12330](#)-A-13 **IN RE: TIMOTHY/SHARON TEGTMEYER**
[EPE-2](#)

MOTION TO AVOID LIEN OF HERSHEL W. NOONKESTER AND TEDDY A. NOONKESTER
7-19-2022 [\[65\]](#)

SHARON TEGTMEYER/MV
ERIC ESCAMILLA/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

Federal Rule of Bankruptcy Procedure ("Rule") 9014(b) requires a motion to avoid a lien under 11 U.S.C. § 522(f) be served "in the manner provided for service of a summons and complaint by Rule 7004." Service of the motion on Hershel W. Noonkester and Teddy A. Noonkester ("Creditors") does not satisfy Rule 7004.

Rule 7004(b)(1) provides that service upon an individual be made "by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession." The certificate of service filed in connection with this motion shows that Creditors were served in care of their attorney at their attorney's address instead of being served at Creditors' individual dwelling, place or abode, or their place of business. See Doc. #69. A review of the docket shows no attorney has appeared for Creditors in this bankruptcy case. Based on the pleadings filed with this court, Creditors were not served properly with this motion pursuant to Rule 7004(b)(1).

Accordingly, this motion is DENIED WITHOUT PREJUDICE for improper service.

5. [22-11043](#)-A-13 **IN RE: JORGE ROACHO**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
7-28-2022 [\[14\]](#)

DAVID BOONE/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Sustained.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order after the hearing.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and sustain the objection. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to

LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Jorge Osvalado Roacho ("Debtor") filed his Chapter 13 Plan (the "Plan") on June 23, 2022. Doc. #3. Under the Plan, Debtor proposed to pay no less than a 1% dividend to general unsecured claims estimated to total \$319,189.18. Id.

Michael Meyer, Chapter 13 trustee ("Trustee"), objects to confirmation of the Plan on the grounds that: (1) Debtor is unemployed and does not have a regular income; (2) Debtor seeks to pay secured expenses for a travel trailer and Harley motorcycle and has not shown that those expenses are reasonably necessary debts; and (3) Debtor's attorney is not entitled to a "no-look" fee because (a) Debtor's attorney has not filed Form EDC 3-096, *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys* ("Form EDC 3-096"), required by LBR 2016-1(c)(2), and (b) the Federal Rule of Bankruptcy Procedure 2016(b) statement deletes from representation duties that are required by Form EDC 3-096. Tr.'s Obj., Doc. #14.

To be a debtor under Chapter 13, 11 U.S.C. § 109(e) requires, among other things, that the debtor be an individual with regular income. The Bankruptcy Code defines "individual with regular income" to mean an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or commodity broker." 11 U.S.C. § 101(30).

"The debtor, as the chapter 13 plan proponent, has the burden of proof on all elements of plan confirmation." Meyer v. Hill (In re Hill), 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001). According to Debtor's Schedule I, Debtor's occupation is listed as "[p]rojected income[.]" Schedule I, Doc. #1. Additional sources of Debtor's income include a co-owner mortgage contribution and projected part-time job. Id. Based on the evidence before the court, Debtor has not met his burden to establish that Debtor has regular income to make payments under a plan. Trustee's objection to confirmation on this ground will be sustained.

With respect to the payment of secured expenses for a travel trailer and Harley motorcycle, section 1325(b)(1)(B) provides that if a trustee objects to confirmation of a Chapter 13 plan, the court may not confirm the plan unless all of the debtor's "projected disposable income" to be received during the term of the plan will be applied to make payments to unsecured creditors. 11 U.S.C. § 1325(b)(1)(B). Here, because Debtor has an income that is below the median, Debtor "must prove on a case-by-case basis that each claimed expense is reasonably necessary. See [11 U.S.C.] §§ 1325(b)(2) and (3)." Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 71 n.5. Debtor, who has the burden of proof on all elements of plan confirmation, has not established that retention of the Harley motorcycle or the travel trailer are reasonably necessary for Debtor's maintenance or support. Schedule A/B shows that Debtor has two vehicles in addition to the Harley motorcycle and travel trailer. Schedule A/B, Doc. #1. As noted above, Debtor does not list an employer, so neither the Harley motorcycle nor the travel trailer are essential for Debtor's employment. Schedule I, Doc. #1. Based on the evidence before the court, Trustee's objection to confirmation on this ground will be sustained.

LBR 2016-1(c) governs the requirements for a chapter 13 debtor's attorney to request "no-look" fees. One of those requirements is that the attorney "must file an executed copy of Form EDC 3-096, *Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys*." LBR 2016-1(c)(2). A review of the docket shows that Debtor's counsel has not filed the required Form EDC 3-096. In addition, the Disclosure of Compensation of Attorney for Debtor(s) ("2016(b) Statement") filed in this case excludes services that are required to

be provided by counsel under Form EDC 3-096. Doc. #1. For example, paragraph 7 of the 2016(b) Statement excludes services for amendments to schedules and applications to sell, borrow or refinance property, but Form EDC 3-096 specifically requires counsel for a debtor to provide these services. Based on the evidence before the court, Trustee's objection to confirmation on this ground will be sustained.

Accordingly, pending any opposition at hearing, the objection will be SUSTAINED.

6. [21-10856](#)-A-13 **IN RE: MARK/AMELIA CAVE**
[MHM-1](#)

CONTINUED MOTION TO DISMISS CASE
6-13-2022 [\[85\]](#)

MICHAEL MEYER/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Continued to permit the debtors to file a new motion to modify a plan.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue the order.

On June 13, 2022, the chapter 13 trustee ("Trustee") moved to dismiss under 11 U.S.C. § 1307(c)(1) and (c)(6) for failure to make all payments due under the plan. Doc. #85. Plan payments are delinquent in the amount of \$18,841.04 as of June 13, 2022, with an additional \$10,763.68 due on June 25, 2022. Id. The debtors responded on June 23, 2022, stating that the debtors intended to cure the plan payment default by filing and serving a second modified plan. Doc. #89. On July 12, 2022, the debtors filed and served a motion to confirm the debtors' second modified plan and set that motion for hearing on August 25, 2022. Doc. ##91-96, 99. That motion has been denied without prejudice for improper notice, matter #7 below.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). It appears that confirmation of the debtors' second modified plan would satisfy all outstanding grounds for Trustee's motion to dismiss, so there would be no "cause" for dismissal under 11 U.S.C. § 1307(c)(1) or (c)(6). However, the motion to confirm the debtors' second amended plan has been denied without prejudice for improper notice.

Accordingly, unless withdrawn prior to the hearing, this motion will be continued to a date to be determined at the hearing to permit the debtors to file and serve a new motion to confirm the debtors' second amended plan.

7. [21-10856](#)-A-13 **IN RE: MARK/AMELIA CAVE**
[SL-6](#)

MOTION TO MODIFY PLAN
7-12-2022 [\[91\]](#)

AMELIA CAVE/MV
SCOTT LYONS/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This matter is DENIED WITHOUT PREJUDICE for improper notice.

The Clerk's Matrix of Creditors used by the moving party to serve the motion does not comply with Local Rule of Practice ("LBR") 7005-1(c), which requires that the Clerk's Matrix of Creditors used to serve a pleading be downloaded not more than 7 days prior to the date the pleading is served. Here, the moving party served the motion on July 12, 2022 using a Clerk's Matrix of Creditors that was generated on March 10, 2022. Doc. #99. Accordingly, service of the motion does not comply LBR 7005-1(c).

8. [22-10777](#)-A-13 **IN RE: STEVENS/CONSTANCE RYAN**
[MHM-4](#)

CHAPTER 13 TRUSTEE'S FORBEARANCE STATUS CONFERENCE
8-10-2022 [\[54\]](#)

TIMOTHY SPRINGER/ATTY. FOR DBT.

NO RULING.

On August 2, 2022, secured creditor Federal Home Loan Mortgage Corporation as Trustee for Seasoned Credit Risk Transfer Trust, Series 2017-1, its assignees and/or successors, by and through its servicing agent Select Portfolio Servicing, Inc. ("Creditor") filed a Notice of Debtor's Request for Forbearance Due to the COVID-19 Pandemic ("Notice"). According to the Notice, the debtors have elected not to tender mortgage payments to Creditor that would come due for a period of 6 months starting February 1, 2022 through July 1, 2022, with payments to resume beginning August 1, 2022.

Pursuant to General Order 20-03, the chapter 13 trustee ("Trustee") set this forbearance status conference because Trustee issued a check to Creditor on July 29, 2022 for the June and July 2022 mortgage payments. Doc. #54. Trustee requests that the forbearance period be modified to be for the 4-month period starting February 1, 2022 through May 1, 2022, with payments to resume June 1, 2022, since the June and July 2022 ongoing mortgage payments already have been paid to Creditor by Trustee's office.

9. [21-10679](#)-A-13 **IN RE: SYLVIA NICOLE**
[SN-12](#)

OBJECTION TO CLAIM OF MERCED COUNTY, CLAIM NUMBER 4
7-18-2022 [\[422\]](#)

SYLVIA NICOLE/MV

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped from calendar.

NO ORDER REQUIRED.

Movant withdrew the motion on August 24, 2022 Doc. #438.

11:00 AM

1. [17-12389](#)-A-7 IN RE: DON ROSE OIL CO., INC.
[17-1086](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [[131](#)]

KODIAK MINING & MINERALS II LLC ET AL V. DON ROSE OIL CO., INC.
VONN CHRISTENSON/ATTY. FOR PL.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Dropped as moot.

NO ORDER REQUIRED.

A consent judgement completely resolving this adversary proceeding was entered on August 23, 2022. Doc. #631.