

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil  
Bankruptcy Judge  
Modesto, California

October 31, 2017 at 10:00 a.m.

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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.

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1.	17-90601-D-13	MONICA MANRIQUEZ	MOTION TO CONFIRM PLAN
	TOG-1		9-8-17 [18]

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 referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

**Tentative ruling:**

This is the debtor's motion confirm an amended chapter 13 plan. The trustee has filed opposition. For the following reasons, the motion will be denied.

Among the trustee's four grounds for opposing the motion is that the debtor proposes to pay only \$70,000 on a claim secured by a first mortgage on 48 rental units in Albany, Georgia, whereas the debtor has failed to file a motion to value the claim. The debtor scheduled the amount due the creditor, Wallace Miller, at \$295,122. The debtor's original plan in this case would have paid Mr. Miller \$72,865; the trustee objected to confirmation on the ground, among others, that the debtor had failed to file a motion to value, and the objection was sustained. The debtor's present motion acknowledges this deficiency, stating the trustee objected to his original plan because he "had not yet obtained an order valuing the collateral of Wallace Miller." Debtor's Motion, DN 53, at 1:24-25. The debtor adds: "An appraisal will be completed within a few days and a motion to value the collateral will be heard prior to the hearing on this motion." Id. at 1:26-2:1. In other words, by the time this motion was filed, the case had been on file for four months and the debtor had failed to file a motion to value; he has still filed none.

This is part of pattern the debtor and his spouse began three years ago, when they filed a chapter 13 case with a plan providing that Mr. Miller would be paid outside the plan by KDK Homes, LLC, a management company owned by the debtors. At that time, they scheduled the value of the Georgia property at \$450,000 and Mr. Miller as being owed \$310,000. The plan was confirmed but the debtors defaulted in their plan payments and the case was dismissed after 17 months. The debtors filed a second chapter 13 case the next day, March 31, 2016, this time listing the value of the Georgia property at \$150,000 and Mr. Miller as being owed \$300,000. They proposed a plan to pay Mr. Miller \$88,181 (despite the property allegedly being worth \$150,000). The trustee opposed the motion to confirm on the ground, among others, that the debtors had failed to file a motion to value the claim. The motion to confirm was denied without a hearing on the ground that the debtors had failed to file a motion to value, as required by LBR 3015-1(j). Thus, the debtor in the current case and his spouse have known for over a year they would need to file a motion to value the claim and likely would need to obtain an appraisal.

In the second case, the debtors filed a motion to confirm a second amended plan that would have paid Mr. Miller \$100,000, up slightly from the first amended plan, but again failed to file a motion to value. The motion to confirm was denied by final ruling, issued prior to the October 25, 2016 hearing, again on the express basis that the debtors had failed to file a motion to value, and the case was dismissed shortly thereafter for failure to confirm a plan. In short, the debtors were in their second chapter 13 case, which was the first in which they sought to pay Mr. Miller less than the full amount of his claim, for seven months without filing a motion to value.

The debtors filed a third chapter 13 case six weeks later but the case was dismissed 21 days later for failure to file schedules, statements, and a plan. The debtor husband waited four and a half months before filing the present case, on May 16, 2017. The debtor scheduled the Georgia property at a value of \$100,000 and Mr.

Miller as being owed \$295,122. (Thus, the longer the delay, the more the value of the property drops, if the debtor is to be believed.) He filed a plan that would have paid Mr. Miller \$72,865 but, as in the prior case, failed to file a motion to value the claim. The trustee objected to confirmation on the ground, again among others, of failure to file a motion to value, and the court sustained the objection. The debtor's counsel stated at the hearing he had no opposition to the objection and an amended plan would be filed. That is the plan now before the court. As with the original, it proposes to pay Mr. Miller \$72,865. Also as with the original, and as with the three plans filed in the prior case, the debtor has failed to file a motion to value Mr. Miller's claim. Thus, the debtor has been in this case for five and a half months with no motion to value having been filed, and has been in chapter 13, with short gaps, for 19 months (from March 31, 2016) without filing a motion to value. The debtor has finally acknowledged the deficiency in writing, in this motion, stating an appraisal would be completed within a few days (from September 17, 2017) and a motion to value would be heard before the hearing on this motion. Yet no motion to value has been filed.

The court has no basis on which to conclude the delay resulting from the debtor's proposal of five successive plans to pay Mr. Miller much less than he is owed, without taking any steps to value his claim, is anything other than a deliberate strategy to hinder creditors, or at least Mr. Miller. The motion will be denied on the grounds that the debtor has failed to file a motion to value Mr. Miller's secured claim and that the plan has not been proposed in good faith.

The court will hear the matter.

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1 The court's ruling denying their motion to confirm for failure to file a motion to value Mr. Miller's claim was issued prior to the August 30, 2016 hearing.

3. 13-91816-D-13 OSCAR/FELICIA ACOSTA MOTION TO MODIFY PLAN  
PLG-3 9-20-17 [68]  
Final ruling:

This is the debtors' motion to confirm a second modified plan. On October 24, 2017, the debtors filed a purported withdrawal of the motion. The purported withdrawal was ineffective. Because opposition had previously been filed, the debtors did not have the right to unilaterally withdraw the motion. Fed. R. Civ. P. 41(a), incorporated herein by Fed. R. Bankr. P. 7041 and 9014(c). The court deduces from the purported withdrawal, however, that the debtors do not wish to contest the trustee's opposition to the motion. As a result, the motion will be denied by minute order. No appearance is necessary.

4. 14-90822-D-13 BRENDA GONZALEZ MOTION TO MODIFY PLAN  
TOG-2 9-19-17 [32]

**Tentative ruling:**

This is the debtor's motion for reconsideration of the court's order of September 19, 2017 dismissing this case. Because the debtor has failed to demonstrate he is entitled to the relief requested, as required by LBR 9014-1(d)(3)(D), the court intends to deny the motion.

The debtor complains, first, that the trustee's motion to dismiss the case was brought on only 14 days' notice, pursuant to LBR 9014-1(f)(2), and should not have been granted without a further hearing, or at least, that the court should have issued a conditional order setting a deadline for the debtor to obtain confirmation of a plan. The court is not required to set a further hearing on a motion set on 14 days' notice. Instead, "if opposition is presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs." LBR 9014-1(f)(2)(C). And although a conditional order was a possibility, the trustee requested dismissal on the ground (along with a minor plan delinquency) that the debtor had failed to address the issue of his unauthorized use of the cash collateral of the United States Farm Service Agency ("FSA"). The FSA joined in the trustee's request that the case be dismissed.

The debtor also contends the motion should not have been granted because he had filed a written response providing a reasonable explanation for his delay in obtaining confirmation and had, by the time of the hearing, filed an amended plan and a motion to confirm it. He adds that his counsel was not able to argue at the hearing on the motion to dismiss because of static on his telephone line, that the court mistakenly concluded the debtor was delinquent in his plan payments, and that the court should not have considered the FSA's request that the case be dismissed.

The record in this case reveals that the debtor did not promptly prosecute the case and has not demonstrated cause for vacating the dismissal order. The debtor filed his petition on May 24, 2017 and filed his schedules and proposed plan on June 22, pursuant to an order extending time, but did not file a motion to confirm the plan until July 7. The trustee opposed the motion on eight different grounds, including failure to provide profit and loss statements, bank statements, tax returns, and business and licensing permits required in the dairy industry, and using the FSA's cash collateral without its consent or a court order. The FSA filed opposition on a variety of grounds that were heavily factual in nature and unsupported by admissible evidence. It is clear from the debtor's Schedule D, however, that the FSA has a security interest in the debtor's dairy cows and clear from the FSA's opposition to the debtor's motion to confirm his original plan that the FSA did not consent to the use of its cash collateral. The debtor never sought court approval to use the FSA's cash collateral.

The debtor's motion to confirm his original plan was denied for failure to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). The court's ruling expressly advised the debtor that because he had not filed an amended master address list to add creditors listed on his schedules who were not on the address list filed with the petition, he had failed to serve - at all - a secured creditor, his largest unsecured creditor (scheduled as being owed \$50,000), and the party listed on his

Schedule G as a party to a rental of space at a dairy. In his present motion, the debtor dismisses that ruling by claiming the court denied his motion "because of a proof of service defect."

Immediately in response to that ruling, the debtor filed an amended plan and a motion to confirm it, but despite the ruling, failed to serve any of those three creditors. He also failed to serve this motion for reconsideration on any of them.<sup>1</sup> He has, to date, failed to amend his master address to add those three creditors, as required by Fed. R. Bankr. P. 1007(a)(1). Those creditors are: (1) City Loan, listed on Schedule D for a \$9,000 car loan; (2) Antonio Pulido, listed on Schedule E/F on account of a \$50,000 judgment (by far, the largest unsecured creditor in the case); and (3) Luis Bento, listed on Schedule G as the other party to a rental of space at a dairy (presumably, the debtor's lessor, as the debtor scheduled no real property). The debtor's failure to serve those creditors with his motion to confirm his original plan deprives that motion of any value in the analysis as to whether there has been an unreasonable delay that is prejudicial to creditors. In short, it is as if that motion had never been filed. Likewise, the second motion might as well never have been filed because the debtor failed to serve it on either City Loan or Luis Bento (although he served the collection agency that had filed a claim for Mr. Pulido's debt).

Finally, the original and amended plans provided for City Loan's claim, secured by the debtor's Ford truck, at \$4,698, "reduced based on value of collateral," whereas the debtor has never filed a motion to value that collateral (and, as already indicated, has never given City Loan notice of the case). Thus, the motion to confirm the original plan would likely have been denied pursuant to LBR 3015-1(j) even if service had been proper, and the motion to confirm the amended plan would likely have been denied if the case had not already been dismissed.

The court now returns to the debtor's opposition to the trustee's motion to dismiss, in which the debtor claims provided a reasonable explanation for his delay in obtaining confirmation. The explanation was as follows:

The debtor filed an amended plan on September 11, 2017 and set it for hearing on November 28, 2017. The delay was due to the fact that a creditor [the FSA] wanted to conduct an inspection of the brands on the milk cows. The Debtor allowed an inspection of the herd (See declaration of Debtor). A new plan was filed as soon as Debtor's counsel returned from vacation. There was only a lapse of 17 days from the Order disapproving the plan until a new plan was filed and served. Accordingly, there has been no "unreasonable delay".

Debtor's Opp. to Motion to Dismiss, DN 75, at 1:20-2:2. The court does not find that the FSA's request to inspect the debtor's herd constituted reasonable delay in proposing an amended plan. And although the court is ordinarily sympathetic with counsel taking vacations, here, the delay was caused not by that circumstance but by the debtor's failure to give notice of the case to all creditors (even to this date), his failure to seek to value City Loan's collateral, and his failure to seek approval to use the FSA's collateral. The court emphasized the latter at the hearing on the motion to dismiss, yet the present motion does not even mention that issue.<sup>2</sup>

For the reasons stated, the court concludes the debtor has failed to

demonstrate cause to set aside the order of dismissal, and the motion will be denied. The court will hear the matter.

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- 1 By the time the motion to confirm the amended plan was served, the agency collecting on creditor Anthony Pulido's judgment had gotten wind of the case and filed a proof of claim for \$82,426. Thus, the collection agency appeared on the PACER matrix and was served with that motion and the present motion.
- 2 The trustee referred to a minor plan delinquency, \$174, and the court mentioned that in its ruling, but it was far from the driving force for the ruling.

6. 13-91241-D-13 OSCAR DE LA O AND KATRINA MOTION TO MODIFY PLAN  
JCK-5 RODRIGUEZ 9-16-17 [69]

**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 referenced in LBR 3015-1(e). The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

7. 12-92144-D-13 JOSEPH/ELIZABETH CLAUSE MOTION FOR EXEMPTION FROM  
MLP-5 FINANCIAL MANAGEMENT COURSE  
AND/OR MOTION TO EXCUSE JOINT  
DEBTOR ELIZABETH ALITZ CLAUSE  
FROM COMPLETING THE 11 U.S.C.  
1328 CERTIFICATE  
10-6-17 [77]

8. 17-90451-D-13 MARK/SHANNON CIMOLI MOTION TO AVOID LIEN OF LOANME,  
MDA-1 INC.  
9-15-17 [45]

**Final ruling:**

This is the debtors' motion to avoid a judicial lien ostensibly held by Loanme, Inc. ("Loanme"). The motion will be denied for the following reasons: (1) the proof of service is not signed; (2) the moving papers refer to the lienholder as Loanme, whereas according to the abstract of judgment evidencing the lien and according to its proof of claim, the lien is held by PGMI Financial, LLC ("PGMI"), not Loanme; and (3) the moving parties failed to serve PGMI in strict compliance

with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served PGMI only through the law firm that obtained PGMI's abstract of judgment, whereas there is no evidence the firm is authorized to receive service of process on behalf of PGMI in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004). (The moving parties also served Loanme, but at a street address with no attention, which, even if Loanme were the lienholder, would not have complied with the service requirements of Rule 7004(b)(3).)

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

9.	17-90451-D-13	MARK/SHANNON CIMOLI	MOTION TO CONFIRM PLAN
	MDA-2		9-15-17 [39]

**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 the California Housing Finance Agency, listed on their Schedule D as holding a deed of trust against their residence, at all; (2) the moving parties failed to serve at least two creditors listed on their Schedule E/F at all; and (3) 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. As regards the California Housing Finance Agency, the debtors' declaration states that "[a]lthough it is a secured creditor, there is no payment due until the senior lien is paid off or refinanced." Debtors' Decl., DN 41, ¶ 4(a). The fact that no payment is presently due does not mean the debtors were not required to serve the Agency, as it is a creditor. The rules require service on all creditors. Fed. R. Bankr. P. 2002(b). In addition, the debtors failed to list the Agency on their master address list, as required by Fed. R. Bankr. P. 1007(a)(1), and thus, the Agency has never received notice of this case.

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

10.	12-91961-D-13	DOUGLAS/JO STRAUCH	MOTION TO MODIFY PLAN
	HWW-1		9-23-17 [33]

11. 17-90484-D-13 MAURICE/SHARRON HARDY OBJECTION TO CLAIM OF SUNLAN  
MJD-1 LDP, LLC, CLAIM NUMBER 4-1  
9-12-17 [22]

**Final ruling:**

This is the debtors' objection to the claim of Sunlan LDP, LLC ("Sunlan"), Claim No. 4 on the court's docket. The debtors challenge the aspect of the claim that asserts a security interest based on an abstract of judgment. The debtors object on the basis that as of the petition date, they owned no real property. Apparently in response to the objection, Sunlan filed, on October 6, 2017, an amended proof of claim - expressly stating that it amends the original claim - that asserts the claim is not secured.

As a result of the filing of the amended proof of claim, the objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

12. 17-90823-D-13 JOSEPH/LISA ROBERTSON MOTION TO EXTEND AUTOMATIC STAY  
PLG-1 10-16-17 [8]

13. 16-90251-D-13 SILVINO/DANAMARIE BARBOZA CONTINUED MOTION TO MODIFY PLAN  
DRJ-2 8-3-17 [30]

14. 16-90251-D-13 SILVINO/DANAMARIE BARBOZA CONTINUED MOTION TO BORROW  
DRJ-3 9-14-17 [40]



