

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

December 12, 2017 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. | 17-90400-D-13
PLG-1 | JAMELIA ROBINSON | MOTION TO MODIFY PLAN
11-7-17 [17] |
|
 | | | |
| 2. | 16-90304-D-13
DCJ-9 | JOHN DEMING | AMENDED MOTION TO CONFIRM FIFTH
AMENDED PLAN
10-30-17 [206] |

3. 17-90409-D-13 JOHNATHAN MOHR MOTION TO CONFIRM PLAN
DCJ-1 10-30-17 [34]

4. 13-91816-D-13 OSCAR/FELICIA ACOSTA MOTION TO MODIFY PLAN
PLG-4 10-26-17 [78]

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.

5. 15-91047-D-13 GEORGE VENTURA MOTION TO AVOID LIEN OF EGC
MJH-1 FINANCIAL, LLC
11-1-17 [37]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by EGC Financial, LLC ("EGC"). The motion will be denied because, although there is a proof of service on file of the amended notice of hearing, there is no proof of service of the motion and supporting declarations and exhibits. In the alternative, the court will continue the hearing and allow the debtor to file a notice of continued hearing and to serve it, along with the motion and supporting documents, and to address the following substantive issue. Because the trustee has issued his final report and account and the debtor has, apparently, stopped making plan payments, the granting of the motion at this late stage would allow the debtor to achieve a result in direct contravention of his confirmed chapter 13 plan, such that he would not be entitled to a chapter 13 discharge.

The debtor filed his petition commencing this case on November 2, 2015. At the same time, he filed a proposed chapter 13 plan calling for plan payments of \$870 per month to pay a car loan of \$8,714 in full, with interest, and 100% of general unsecured claims estimated in the plan at \$28,569.53. The trustee objected to confirmation because the plan did not include a plan term. The debtor then filed an amended plan identical to the original one except that it included a plan term of 60 months. The amended plan was confirmed on the debtor's motion by order filed March 4, 2016.

The estimated amount of general unsecured claims, as listed in the confirmed plan, was exactly the same as the total of the debts listed on the debtor's Schedule F - \$28,569.53. That total included a debt listed on Schedule F at \$13,555.53 (not contingent, not unliquidated, and not disputed) as being owed to the Law Offices of Kenosian & Miele LLP on account of a "JUDGMENT ENTERED 1/06/12." Debtor's Sch. D, filed Nov. 2, 2015. Kenosian & Miele was the law firm that obtained EGC's judgment and abstract of judgment, the recording of which resulted in the judgment lien the debtor now seeks to avoid. EGC's judgment, as shown by the copy attached to its proof of claim, was entered January 6, 2012 - the date reported by the debtor on Schedule F. Thus, the debt underlying the judicial lien was considered by the debtor to be an unsecured debt and it was included in the \$28,569.53 the debtor agreed, by the terms of his confirmed plan, to pay at 100%.

The claims bar date in this case, for non-governmental units, was March 15, 2016. EGC filed a proof of claim on January 25, 2016 in the amount of \$15,475.56, the full amount of which was claimed as secured. The proof of claim was filed by Kenosian & Miele on behalf of EGC. Copies of the judgment and the recorded abstract of judgment were attached to the proof of claim. The local rules of this court required and still require that

[i]f a proposed plan will reduce or eliminate a secured claim based on the value of its collateral or the avoidability of a lien pursuant to 11 U.S.C. § 522(f), the debtor must file, serve, and set for hearing a valuation motion and/or a lien avoidance motion. The hearing must be concluded before or in conjunction with the confirmation of the plan. If a motion is not filed, or it is unsuccessful, the Court may deny confirmation of the plan.

Rule 3015-1(j) of the Local Rules of Practice effective May 1, 2015 (since re-numbered LBR 3015-1(i)). The debtor did not comply with the rule, although his plan did not provide for EGC's claim as a secured claim but instead included it in the estimated total of general unsecured claims he proposed to pay through the plan at 100%.

The trustee issued his Notice of Filed Claims on May 11, 2016, which advised the debtor and his counsel that EGC, through Kenosian & Miele, had filed a proof of secured claim in the amount of \$15,475.56 which was not provided for in the plan. The only other claims filed were for the car loan provided for by the plan and the debtor's mortgage, which was apparently current when the case was filed and was to be paid directly by the debtor rather than through the plan. The debtor still did not file a motion to avoid EGC's judicial lien.

On August 16, 2017, the trustee issued a notice to debtor of completed plan payments and on November 9, 2017, the trustee filed his final report and account. The report shows the debtor made plan payments for a total of 14 months (of the 60 months of the confirmed plan) and the trustee received a total of \$11,999.82, which was disbursed on the car loan (\$8,475.93), to the debtor's attorney (\$2,800), and as trustee compensation (\$723.89). EGC's secured claim was listed in the final report as an allowed claim but was paid nothing. It is possible the trustee issued his final report based on sections 2.04 and 2.12 of the plan, despite the fact that the debtor had not filed a motion to avoid EGC's lien and had paid nothing on its claim. The former section provided that the proof of claim, not the plan or the schedules, would determine the amount and classification of a claim absent a claim objection, valuation motion, or lien avoidance motion. The latter provided that secured claims

not listed as Class 1, 2, 3, or 4 claims were not provided for by the plan. In other words, it appears the trustee views EGC's claim as a secured claim not provided for by the plan.

If the debtor had moved to avoid EGC's judicial lien before the plan was confirmed, as required by the local rule, or at any time before the trustee issued his notice of completed plan payments, and if the motion had been granted, the claim would have become a general unsecured claim and the debtor would have been required to make plan payments long enough to pay the claim in full. It would have taken the debtor an additional 20 months (bringing the plan term to a total of only 34 months) to pay EGC's claim in full, including trustee compensation. If the debtor properly serves a renewed motion with the stated intention to pay the claim in full as a general unsecured claim if the motion is granted, the court will consider it, so long as the trustee will rescind his notice of completed plan payments and final report and account. If, on the other hand, it is the debtor's intention to avoid EGC's judicial lien and pay it nothing on what would become a general unsecured claim, the granting of the motion would permit the debtor to avoid the binding terms of his confirmed plan and to receive a chapter 13 discharge without completing the plan; that is, without paying in full the filed allowed claims he provided for in the plan.

In the court's view, by including the approximate amount of EGC's claim in the total of estimated general unsecured claims to be paid in full through the plan, the debtor did "provide for" EGC's claim in the plan. If a motion to avoid EGC's lien were granted at this stage and the discharge were entered, as it presumably will be now that the trustee has filed his final report, the debtor would in effect obtain a discharge of a debt he provided for in his confirmed plan at 100%, without paying anything on that debt. The foregoing would be a breach of the confirmed plan in that the debtor would have breached (1) his duty to pay filed allowed unsecured claims in full and (2) his duty under the court's local rule to file a timely motion to avoid the lien. (Section 5.02 of the plan states that the court's local rules impose additional duties on the debtor, thereby, essentially, incorporating LBR 3015-1(j) into the plan.) The debtor's failure to file a motion to avoid the lien until after the trustee issued his notice of completed plan payments and final report strongly suggests the debtor intends precisely that result.

If the debtor receives a chapter 13 discharge without paying EGC's claim in full, the court will consider the plan to have been not proposed in good faith, will determine the plan should therefore not have been confirmed, and will seriously consider vacating the discharge if it has been entered by the time the court hears the matter, which the court has the power to do. Cisneros v. United States (In re Cisneros), 994 F.2d 1462, 1467 (9th Cir. 1993) [affirming bankruptcy court's sua sponte order vacating chapter 13 discharge where trustee issued final report and debtors received discharge although IRS's filed allowed claim had not been paid, as required by the plan].

The court will hear the matter and will, if EGC makes no appearance, either deny the motion or continue the hearing and require the debtor to file and serve a notice of continued hearing, along with the motion and supporting documents.

6. 17-90649-D-13 ARTIE RAZO
DCJ-1

MOTION TO CONFIRM PLAN
10-31-17 [17]

7. 17-90652-D-13 MERCEDES HOLLOWAY
RDG-1

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY RUSSELL
D. GREER
10-16-17 [26]

Final ruling:

This case was dismissed on November 28, 2017. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

8. 17-90554-D-13 JASPAL SINGH
TOG-5

MOTION TO CONFIRM PLAN
10-20-17 [70]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The plan will be denied for the following reasons: (1) the plan provides for the claim of BMO Harris Bank secured by a 2014 Kenworth tractor at less than the full amount of the claim, whereas the court has not entered an order valuing the Bank's collateral, as required by LBR 3015-1(i); and (2) the moving party failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(b). The moving party served Citi Bank, scheduled as holding a \$15,750 claim, at an address shown on the PACER matrix attached to the proof of service as being undeliverable (possibly for lack of a state or zip code designation). The debtor has not provided an accurate address for this creditor, and as a result, this creditor has never been notified of this case (see proof of service by the Bankruptcy Noticing Center of the Notice of Chapter 13 Bankruptcy Case, DN 22) and was not served with this motion.

When creditors do not receive notice of a case, questions may arise down the line about the dischargeability of the debt. Thus, it is not only required by applicable rules, it is also to the debtor's benefit that all creditors receive notice. The creditor here is Citi Bank (or Citibank), a creditor the court often sees on bankruptcy schedules; thus, it should be an easy matter for the debtor to obtain a valid address.

For the reasons stated, the motion will be denied and the court need not reach the other issues raised by the trustee or the issues raised by Lakeview Loan Servicing at this time. The motion will be denied by minute order. No appearance is necessary.

9. 17-90460-D-13 SANTIAGO/GODELEVA
TOG-3 GUTIERREZ

MOTION TO CONFIRM PLAN
10-19-17 [61]

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 plan provides for the secured claim of Toyota Motor Credit at less than the full amount of the claim, whereas the debtors have failed to obtain an order valuing Toyota's collateral, as required by LBR 3015-1(i); and (2) the moving parties failed to serve Brenda Gutierrez, listed on their Schedule H as a co-debtor on the debtors' car loan - that is, on the Toyota Motor Credit debt the debtors seek to pay at less than its full amount. 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 parties who are co-debtors on debts of the debtor. In addition, the debtors have failed to comply with Fed. R. Bankr. P. 1007(a)(1), which requires debtors to include on their master address the names and addresses of all parties included or to be included on their schedules, including Schedule H.

For the reasons stated, the motion will be denied and the court need not reach the other issues raised by the trustee or the issues raised by Toyota Motor Credit at this time. The motion will be denied by minute order. No appearance is necessary.

10. 16-90968-D-13 PAUL DYKES
DEF-2

MOTION TO MODIFY PLAN
10-20-17 [60]

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.

11. 15-90869-D-13 LEONARDO/MELISSA JOSEF
PLG-2

MOTION TO MODIFY PLAN
11-2-17 [37]

12. 17-90484-D-13 MAURICE/SHARRON HARDY
RMD-1
CONSUMER PORTFOLIO SERVICES,
INC. VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR RELIEF FROM CO-DEBTOR STAY
11-9-17 [50]

Final ruling:

This matter is resolved without oral argument. This is Consumer Portfolio Services, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtor is not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). Accordingly, the court will grant relief from stay and waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

13. 17-90585-D-13 JOHN/FELICE CIZMICH
DCJ-1

MOTION TO CONFIRM PLAN
10-31-17 [27]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied because the plan provides for the secured claim of O'Reilly Automotive Stores as a Class 2 claim in the amount of \$0 based on the allegation that O'Reilly holds a lien that is avoidable under § 522(f) of the Bankruptcy Code, whereas the debtors have failed to obtain an order avoiding the lien, as required by LBR 3015-1(i).

For this reason, the motion will be denied and the court need not reach the other issues raised by the trustee at this time. The motion will be denied by minute order. No appearance is necessary.

14. 17-90898-D-13 LEONARD/DEVA CHAPMAN
RKW-1

MOTION TO VALUE COLLATERAL OF
WELLS FARGO FINANCIAL SERVICES
11-10-17 [20]

Final ruling:

This is the debtors' motion to value collateral of Wells Fargo Dealer Services ("Dealer Services"). The motion will be denied because it fails to name the correct lienholder and the moving parties failed to serve the correct lienholder in strict compliance with the applicable subsection of Fed. R. Bankr. P. 7004, as required by Fed. R. Bankr. P. 9014(b), or at all. The moving parties served Dealer Services through two different corporate agents for service of process, whereas the Secretary of State's website, as indicated on a printout attached to the proof of service, shows Dealer Services as a merged out corporation. The website includes, in a business search for Dealer Services, a copy of an Agreement and Plan of Merger pursuant to which Dealer Services was merged into Wells Fargo Bank, N.A. (the "Bank"), which is an FDIC-insured institution. Indeed, the proof of claim for the claim secured by the vehicle was filed by the Bank. Accordingly, the motion should

have been served on the Bank, by certified mail to the attention of an officer (and only an officer, not an agent for service of process), as required by Fed. R. Bankr. P. 7004(h). Service on a former agent for service of process for Dealer Services was insufficient.

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

15. 17-90901-D-13 KRISTI LOPEZ
MC-1

MOTION TO AVOID LIEN OF
SPRINGLEAF FINANCIAL SERVICES,
INC.
11-27-17 [15]

16. 17-90804-D-13 ELAINE ANCHETA
RDG-2

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
11-20-17 [18]

17. 17-90812-D-13 PAMELA LOOPER
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
11-20-17 [20]

18. 17-90732-D-13 NITA GUNNARSON CONTINUED OBJECTION TO
RDG-1 CONFIRMATION OF PLAN BY RUSSELL
D. GREER
11-6-17 [18]

19. 17-90475-D-13 BRIAN BRECKENRIDGE CONTINUED MOTION TO CONFIRM
DCJ-2 PLAN
8-6-17 [25]

20. 17-90783-D-13 TERRY KRONHOLM OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
11-20-17 [41]

Final ruling:

This is the objection of the Chapter 13 Trustee to confirmation of the debtor's chapter 13 plan. On December 6, 2017, the debtor filed a first amended plan and a motion to confirm it, set for hearing on January 23, 2018. As a result of the filing of the first amended plan, this objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

21. 17-90784-D-13 KENNETH KELLEY OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
11-20-17 [16]

22. 17-90794-D-13 RUBEN ALVAREZ
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
11-20-17 [16]

Final ruling:

This is the trustee's objection to confirmation of the debtor's chapter 13 plan. On November 21, 2017, the debtor filed an amended plan and a motion to confirm it. As a result of the filing of the amended plan, this objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.