CHAMBER GUIDELINES: HON. MARGARET M. MANN
UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
EFFECTIVE JANUARY 6, 2020

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(1) Introduction

These guidelines supplement the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of California ("LBR"), the Bankruptcy Code sections referenced below, the Federal Rules of Civil Procedure ("FRCP"), and the Federal Rules of Bankruptcy Procedure ("FRBP"). To the extent that these guidelines

contradict the LBR, these guidelines control under LBR 1001-3, which provides the court authority to deviate from the local rules where appropriate.

(2) Appearance Issues

(a) Appearance counsel appearing for debtors are not excused from compliance with procedural requirements regarding disclosure of fees received and the prohibition against fee sharing. They must be generally familiar with the matter at issue, be prepared to discuss all issues relevant to the matter in question with the court and the opposing party, and have authority to consent to any procedural issues that arise.

(b) Parties requesting telephonic attendance at a hearing should contact the court's Courtroom Deputy at (619) 557-7407, no less than 24 business hours before the hearing. The court will advise whether a telephonic appearance is appropriate as soon as reasonable. Failure to timely request a telephonic appearance may result in the request being denied. The Court will connect the parties appearing telephonically a few minutes before the hearing.

(c) Parties appearing telephonically must use a phone that is free of static and must call from a location that is free of disruptive background noise. Otherwise, the telephonic appearance may be terminated. Telephonic appearances for evidentiary hearings are not permitted.

(d) Parties appearing telephonically must call 15 minutes before the scheduled hearing time and must remain available throughout the court's hearing calendar regardless of the length of the hearings.

(e) Where numerous parties seek to appear telephonically, a participant may need to provide a bridge line for the conference call to be directly connected to the courtroom.

(3) Chambers Copies

Unless a specific request is made, parties must refrain from providing chambers copies of any pleading or document filed in a case pending before Judge Mann. They are unnecessary and a waste of resources.

(4) Pre-Trial Status Reports

A status report should be submitted 7 days in advanced of all status conferences unless ordered otherwise.

(5) Calendar Priority

Parties seeking priority on the court's calendar must inform the Courtroom Deputy before the hearing begins or priority will not be granted. Priority hearing accommodation will not be granted absent a complete resolution of the issue, unanticipated emergencies, or unavoidable scheduling conflicts.

(6) Tentative Rulings

The court frequently posts tentative rulings, which are made available on the court's website and each case's electronic case file (accessible through PACER and this court's CM/ECF case file system). Tentative rulings should be carefully reviewed since they provide the court's preliminary analysis based upon the papers filed. These rulings may also pose questions to be answered at the hearing, cite authority that should be discussed at the hearing, or otherwise identify areas for particular emphasis in argument. The court invites argument from any party not satisfied with a tentative.

Appearances of the parties at all scheduled hearings are required unless (1) the tentative expressly waives appearances or (2) the parties give notice to the Courtroom Deputy before the hearing that they will all submit on the tentative ruling. If the parties agree to submit on the tentative ruling or a tentative waives appearances, the prevailing party must prepare the order on the matter unless otherwise agreed.

This court welcomes appearances and argument from younger lawyers. Even if the court has otherwise excused appearances in a matter, upon notice to the Courtroom Deputy (and with the consent of the opposing party), the court will allow appearances and argument to assist a younger attorney's professional development. However, no party will be penalized for a declining a request for oral argument to accommodate the professional development of a younger attorney.

If the parties believe that: (1) settlement prospects would be advanced by the court refraining from issuing a tentative ruling or (2) a younger attorney would benefit from arguing a matter without the guidance of a tentative, upon notice to the Courtroom Deputy (preferably not less than one week before the scheduled hearing), the court will refrain from issuing a tentative. Parties must advise the Courtroom Deputy of the opposing party's position on whether a tentative ruling should be issued at the time of the request.

(7) Service of Motions

The FRBP, FRCP, and the LBRs create a complicated system of service requirements for the various procedural actions permitted under the Bankruptcy Code. LBR 9013-2 sets forth four types of motions, applications, and notices of intended actions.

Department 1 also recognizes two others: (1) papers served after appearances in adversary proceedings, which are served on the attorneys in accordance with FRBP 7005, incorporating FRCP 5 and (2) subpoenas, which are served in accordance with FRBP 9016, incorporating FRCP 45(b).

Unless otherwise provided for in the Bankruptcy Code, FRBP, FRCP, or the LBRs, all noticed motions and applications generally identified by LBR 9013-2(b) and governed by LBR 9013-4 require service in accordance with FRBP 7004. Most of the service problems the court has observed arise from the failure to properly serve motions in accordance with FRBP 7004. Electronic service by CM/ECF is adequate for applications and the service of papers in adversary proceedings under FRCP 7005. Electronic service by CM/ECF is not compliant with service requirements under FRBP 7004, unless a notice of appearance of counsel clearly authorizing such service has been filed in the case.[1] Parties must also be careful that the client has clearly authorized counsel to accept service on their behalf. *See Rubin v. Pringle (In re Focus Media Inc.),* 387 F.3d 1077, 1081, 1083 (9th Cir. 2004) (the critical inquiry in determining whether an attorney is authorized to accept service of process is whether the client acted in a manner that expressly or impliedly indicated the grant of such authority).

In contrast, applications and notices of intended action identified in LBR 9013-2(c) and governed by LBRs 2002-2, 2002-3, and 9013-4(b)(1) require service in accordance with FRBP 2002. Department 1 also permits the following to be brought by way of an application served in accordance with FRBP 2002 without noticing a hearing:

1. Applications for appointment of creditors' committee organized before order for relief (FRBP 2007(a));
2. Application for employment of professional persons (FRBP 2014(a));
3. Application for entry of final decree on consummation of a Chapter 11 plan (FRBP 2015(a)(6));
4. Application by U.S. attorney or attorney appointed by the court for notice as to criminal contempt (FRBP 9020(a)(2));
5. Application for removal (FRBP 9027(a)).

Since proper service is necessary for the court to have jurisdiction over the responding party, failure to serve a motion properly can result denial of the motion, or a future

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[1] While registered users of the court's CM/ECF system are, generally, deemed to have consented to electronic service, this defacto consent does not apply where FRBP 7004 service is required. *See* LBR 5005-5(b).

challenge to the order granting the relief requested. *See Mason v. Genisco Tech. Corp.,* 960 F.2d 849, 851 (9th Cir. 1992).

Attorneys must carefully review the applicable service requirements imposed by the Bankruptcy Code, FRBPs, FRCP, and the LBRs each time a motion is brought to ensure service fully complies with jurisdictional mandates.

(8) ***Ex Parte* Communications**

FRBP 9003 prohibits *ex parte* communications with the Court concerning matters affecting a particular case or proceeding. Cal. R. Prof. Conduct 5-300(C) specifies that contact with a judge's law clerk constitutes contact with the judge. No attorney or party may contact Judge Mann or her law clerk in violation of these rules. Attorneys or parties having questions, including concerns about a calendar date, the status of an order, or expedited hearings, should instead contact Judge Mann's Courtroom Deputy at (619) 557-7407.

(9) **Pre-trial Procedures**

The following procedures apply to all adversary proceedings and contested matters scheduled for trial unless otherwise ordered by the court. They are designed to narrow the issues of fact and law to be resolved at trial as required under FRCP 16(c)(2)(A), applicable to adversary proceedings and contested matters pursuant to FRBP 7016 and 9014. Failure to abide by the pre-trial requirements and deadlines may result in the court vacating pre-trial hearings or trials, issuing an Order to Show Cause regarding dismissal, or entering other appropriate sanctions.

(a) Pre-Trial Conferences

The court will generally hold at least one initial pre-trial conference and one final pre-trial conference for all adversary proceedings and contested matters. At the initial pre-trial conference, the court will evaluate the matter and set relevant deadlines in light of the facts and circumstances of the case. After presentation of each party's case-in-chief as required by these guidelines, the court will hold a final pre-trial conference to enter any necessary orders "formulating and simplifying the issues, and eliminating frivolous claims or defenses." *See also Malone v. United States Postal Service*, 833 F.2d 128, 133 (9th Cir. 1987) (affirmed dismissal because appellant refused to comply with a pre-trial order because the court has the ultimate responsibility for determining the terms of the pre-trial order).

Unless otherwise ordered, parties are not excused from filing the "Certificate of Compliance with Early Conference of Counsel" (CSD 3018) required under LBR 7016-1(c) or from their obligation to meet and confer as provided for in LBR 7016-1(a)(3) and

(b). Parties are, however, excused from complying with the pre-trial conference requirements of LBR 7016-5 and the pre-trial order requirements of LBR 7016-6 unless otherwise stated below.

(b) Presentation of Evidence

Unless otherwise ordered by the court, all trials in Department 1 will be trial by declaration conducted in accordance with the following procedures:

(1) All witnesses testifying as part of the affirmative or defensive case must present their direct testimony by declaration.

(2) Each party must submit a trial brief in lieu of opening statements. Trial briefs should not exceed 25 pages without prior court approval.

(3) Any witness signing a declaration must be present in person at the trial to adopt his or her declaration testimony as direct testimony and for cross-examination. If a declarant is not present at the trial, his or her testimony will not be admitted into evidence unless the opposing party indicates that no cross-examination is needed.

(4) Any witness testimony proffered at the evidentiary hearing, other than that offered solely for impeachment or rebuttal purposes, by a witness who does not submit a declaration as required, will not be admitted.

(5) All exhibits to be submitted on direct must be attached to and authenticated by a declaration or other proper evidentiary basis, such as a request for judicial notice. Failure to authenticate an exhibit will result in its exclusion from evidence, unless the exhibit may be admitted solely as rebuttal or impeachment.

(c) Scheduling Requirements

The parties must adhere to the following pre-trial schedule unless otherwise ordered by the court:

(1) The final pre-trial conference will typically be scheduled 7 days before trial.

(2) The plaintiff must arrange for a meeting of counsel at least 28 days before the final pre-trial conference in accordance with LBR 7016-5. The purpose of this meeting should be to reach agreements resulting in the simplification of the triable issues and to coordinate the preparation of a joint exhibit list and statement of undisputed issues of law and fact to be filed with the parties trial briefs and declarations in lieu of testimony on direct.

(3) At the meeting of counsel identified above, parties are required to exchange the information identified by LBR 7016-5(b) and (c). As is set forth in LBR 7016-5(d), where a party fails to exchange exhibits at this meeting of counsel, those exhibits may not be admitted into evidence.

(4) Each party's trial briefs, declarations in lieu of testimony on direct, and exhibits must be filed not less than 14 days before the final pre-trial conference along with the parties' joint exhibit list, separate exhibit list, and statement of undisputed issues of law and fact. A hard copy of these documents, including each exhibit, must be provided to chambers at this time in a tabbed and labeled binder delivered to the front counter of the Clerk's Office, located on the first floor of the United States Bankruptcy Court for the Southern District of California, 325 W. F Street, San Diego, CA 92101.

(5) Any objections to exhibits must be filed 7 days before the final pre-trial conference.

(6) If any party seeks to introduce any rebuttal or impeachment exhibit, they must bring the original and two copies of the exhibit to trial in order to introduce it into evidence.

(10) Expedited Discovery Motions

The following procedures apply to discovery disputes arising in connection with adversary proceedings, contested matters, and authorized examinations under FBRP 2004.

Requests for sanctions, including attorneys' fees and costs, must be by a written motion. The court may consider discovery disputes by an expedited telephonic hearing, however. After meeting and conferring as required by LBR 7026-2, parties seeking to have their discovery dispute heard by an expedited telephonic hearing should send a *joint* email to Department 1's Courtroom Deputy and Judge Mann's law clerk at lisa_cruz@casb.uscourts.gov and shelby_poteet@casb.uscourts.gov. This email must include the parties' names, the case number, a brief description of the dispute, and the parties' efforts to meet and confer in accordance with LBR 7026-2. The email will be placed on the docket.

If the matter is approved for an expedited telephonic hearing, a hearing date will be set and noticed by the court. In this event, each party must file a two-page report no less than 24 hours before the scheduled hearing. This report must identify the discovery issue(s) in dispute and the relief requested. To the extent a dispute arises regarding the sufficiency of a written response, the moving party must attach a complete copy of the

discovery request and the alleged deficient response. Otherwise, the party requesting relief may be required to file a formal motion.

If a dispute arises during a deposition or Rule 2004 examination, counsel may call Courtroom Deputy at (619) 557-7407 to request an immediate telephonic hearing, which may be granted subject to the availability of the court.

(11) Motions to Value Real Property, Treat Claims as Unsecured, and Avoid Junior Liens Under §§ 506(a) and 1322 and Motions to Avoid Liens Under § 522(f)

(a) Service

Motions to value real property, treat claims as unsecured, and avoid junior liens filed under 11 U.S.C. §§ 506(a) and 1322 ("1322 Motions") and motions to avoid liens under 11 U.S.C. § 522(f) ("522(f) Motions") are contested matters which requires both reasonable notice and opportunity for hearing under FRBP 9014(a) and service compliant with FRBP 7004. Local Form CSD 1171.1 for 1322 Motions and Local Form CSD 1181 for 522(f) Motions should be used.

(b) Evidence

Both 522(f) and 1322 Motions must include the evidence required under LBR 4003-1. Specifically, the court must have competent evidence of the value of the property by a declaration of an expert or the debtor, and evidence of the value of the senior consensual liens encumbering it. A debtor's own opinions of the value of the property must be based on their personal recognized valuation expertise or familiarity with the property and its market, rather than reliance on an expert report. Otherwise, a declaration from an expert such as an appraiser or broker is necessary.

Evidence of the senior consensual liens encumbering the property must be supported by exhibits such as a proof of claim filed by the creditor or a recent statement from the lender.

(c) Orders

(i) Time for Submission

Orders on non-contested 1322 and 522(f) Motions may be entered after expiration of the last date for serving and filing any objection, if no objection is filed pursuant to LBR 9013-7(b)(2). This is made clear in Local Form CSD 1171.1 (used to notice 1322 Motions) but not in Local Form CSD 1181 (used to notice 522(f) Motions).

(ii) *Contents*

Parties uploading an order on any 1322 Motion must use Local Form CSD 1171.2. *See* LBR 3015-8(d)(5).

522(f) Motions have no mandatory form available. Orders on these motions should substantially conform with Local Form CSD 1171.2 and include the following findings: (1) the value of the property in question; (2) the value of the senior debt on the property; (3) the value of the debtor's exemption that the lien impairs; (4) the manner of service made in accordance with FRBP 7004; and (5) the name of the affected creditor and document number of the lien avoided. The order should also attach as Exhibit A a legal description of the property in question as required by LBR 9013-10(a)(4).

After entry of the order, the party obtaining relief should serve the entered order on the persons affected and file a proof of service with the court in accordance with LBR 9013-10(c).

(12) The Chapter 13 Liquidation Analysis

To assist parties in applying the liquidation analysis necessitated by the best-interests-of-creditors test required by 11 U.S.C. §§ 1129(a)(7) and 1325(a)(4), the court provides an informational analysis of relevant factors for parties to consider. This analysis does not provide legal advice or comment on the merits of any matter pending before the court. Applicable law and the circumstances of a particular case might dictate a different outcome in a particular matter.

The liquidation analysis seeks to determine whether a creditor would receive a greater distribution under a Chapter 11 or Chapter 13 plan than in a hypothetical liquidation of a debtor's estate under Chapter 7. This analysis typically requires a comparison of the value of the payments unsecured creditors receive under the Chapter 13 plan as of the effective date against what would be available for distribution to unsecured creditors in a hypothetical Chapter 7 case on the same date. *See Schoenmann v. Bank of the W. (In re Tenderloin Health, FKA)*, 849 F.3d 1231, 1238 (9th Cir. 2017); *see also Messer v. Maney (In re Messer)*, No. AZ-13-1215-PaKuD, 2014 Bankr. LEXIS 675 at *10-*11 (B.A.P. 9th Cir. Feb. 19, 2014) (citing *Jensen v. Dunivent (In re Dewey)*, 237 B.R. 783, 788 (10th Cir. BAP 1999)); Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, § 160.1, at ¶ 2, Rev. Apr. 14, 2009, www.Ch13online.com. to calculate these two factors, parties should consider the following.

(a) The Value of Payments Under the Chapter 13 Plan

In determining the value unsecured creditors can expect to receive under a Chapter 13 plan as of the effective date, debtors must discount the income stream the creditors can

expect to receive under the plan to its present dollar value. *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 n. 10 (2004).

The appropriate discount rate for each case depends on factors such as the circumstances of the estate and the duration and feasibility of the reorganization. *Till*, 547 U.S. at 479. In *Till*, without endorsing any particular discount rate, the Supreme Court generally approved adjustments of between 1% to 3%. *Id.*; *see also In re Engle*, 496 B.R. 456, 468 (Bankr. S.D. Ohio 2013) (debtor requested application of a discount rate of .88% based on the interest rate on short-term treasury notes as of the effective date of the plan while the trustee requested application of a discount rate of 5.25%, which was 2 points over the Wall Street Journal prime rate and the court found the trustee's interest rate was more appropriate under the circumstances of the case because using a rate lower that the rates authorized by *Till* is generally only appropriate in cases involving solvent debtors).

Thus, for example, applying a 3% discount rate to payments of $60,000, that a Chapter 13 plan anticipates making to unsecured creditors at rate of $1,000 per month, the present value of the payments would be $55,652.36 using the formula PV=FV/(1.03n) where "n" represents the number of periods.

For more information, see Kahn Academy, Present Value Tutorial (2017), https://www.khanacademy.org/economics-finance-domain/core-finance/interest-tutorial#present-value and Financial Mentor, Present Value Calculator (2000-2017), https://financialmentor.com/calculator/present-value-calculator.

(b) Amounts Creditors Would Receive in a Hypothetical Chapter 7

The amount creditors would receive in a hypothetical Chapter 7 generally requires parties to take the following steps:

(1) Identify the non-exempt property that would belong to the hypothetical estate under 11 U.S.C. § 541 based on the debtor's schedules;

(2) Deduct the costs of sale, including broker fees, and amounts payable to any co-owner or holder of a community property interest (assuming the estate does not hold any community property debts);

(3) Deduct any amount payable to any priority creditors; and

(4) Deduct anticipated administrative costs (such as the Chapter 7 trustee's fees and any legal fees the trustee could expect to incur).

See, e.g., *In re Dixon*, 140 B.R. 945, 947 (Bankr. W.D.N.Y. 1992) (for purposes of the best-interests-of-creditors test it was appropriate to deduct trustee’s commissions and

other costs of administration from the value of real property, a 10% cost of sale figure was appropriate, and debtor could deduct capital gains taxes because in a Chapter 7 case the trustee would not be able to compel the nondebtor spouse to exclude proceeds from the house from capital gains taxes) ("Congress adopted the words 'the amount that would be paid on such claim if the estate were liquidated under Chapter 7.' Congress could not possibly have rendered a clearer statement of its intent that the focus be upon a figure that is net of all normal administrative costs and expenses.").

For example, where a debtor owns a residence valued at $500,000 subject to a $250,000 lien and a homestead exemption of $75,000, a vehicle valued at $15,000 subject to a $5,000 lien and a $5,000 exemption, $1,000 in nonexempt cash, and $1,000 in administrative and priority claims, from the $175,000 of nonexempt equity in the residence, the debtor would need to deduct a brokers' commission of $30,000 (6% of the gross value) and costs of sale of $10,000 (2% of the gross value). And from the $5,000 in equity in the vehicle, the debtor would need to deduct costs of sale of $1,500 (10% of the gross value). With the non-exempt cash, this would leave $139,500 in non-exempt equity from which the debtor would need to deduct the $1,000 of administrative and priority claims and administrative costs of $5,000 (a reasonable estimation of the imagined costs) and trustee's fees of $25,050,[2] leaving $108,450 for distribution to

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[2] Section 326(a) provides a schedule for calculating the maximum compensation allowed to trustees for services to the estate based on "all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims." This includes monies disbursed to secured creditors by an escrow company in the course of the sale of estate property pursuant to § 363. *In re Blair*, 313 B.R. 865, 866 (Bankr. E.D. Cal. 2004), *aff'd*, 329 B.R. 358 (B.A.P. 9th Cir. 2005); *see also Law v. Siegel (In re Law)*, No. CC-10-1499-MkLaPa, 2012 Bankr. LEXIS 682, at *19 (B.A.P. 9th Cir. Feb. 1, 2012); Collier on Bankruptcy ¶ 326.02 Limitations on the Compensation of Trustees (16th 2019). It does not include property disbursed or transferred by the trustee pursuant to a credit bid transaction. *Tamm v. United States Tr. (In re Hokulani Square, Inc.)*, 776 F.3d 1083, 1088 (9th Cir. 2015). The trustee's fees in the above example are based on the following calculation.

MONIES DISBURSED = $436,000 ($516,000-$80,000)
25% of the first $5,000 = $1,250
10% on the next $45,000 = $4,500
5% on the next $950,000 ($386,000) = $19,3000
3% of remaining ($ 0.00) = $0
TOTAL: $25,050

creditors in a hypothetical Chapter 7. *See also In re Gatton*, 197 B.R. 331, 332–33 (Bankr. D. Colo. 1996).

An excel spreadsheet showing a hypothetical calculation of the liquidation analysis can be found here: ***LiquidationAnalysis.xlsx*.** These numbers can be replaced with the information in your case to calculate the liquidation analysis.