



IT IS SO ORDERED.
Signed March 18, 2015

Arthur S. Weissbrodt
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 14-53115-ASW
]	
Ray David Romero,]	Chapter 7
]	
]	Hearing Date: March 20, 2015
]	Hearing Time: 3:00 P.M.
]	
Debtor.]	

SECOND AMENDED ORDER REGARDING SANCTIONS AND CONTINUED HEARING ON REAFFIRMATION AGREEMENT¹

The Reaffirmation Agreement ("Agreement") between Ray David Romero ("Debtor") and JP Morgan Chase ("Creditor") was filed on October 30, 2014. Debtor and Creditor both signed the Agreement. The Agreement is attachment "A" hereto. Debtor was not represented by counsel during the negotiation of the Agreement.² Accordingly, pursuant to 11 U.S.C. § 524(d), the Court **must** hold a hearing. At

¹ The hearing set on March 18, 2015 at 10:30 A.M. is now continued to March 20, 2015 at 3:00 P.M.

² Debtor was represented by attorney Deok J. Kim in the filing of the Chapter 7 Petition. However, Mr. Kim did not represent Debtor in connection with the negotiation of the Reaffirmation Agreement and did not sign Part C, the certification by Debtor's attorney.

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1 such a hearing, under 11 U.S.C. § 524(d)(2), the Court must
2 "determine whether the agreement that the debtor desires to make
3 complies with the requirements of subsection (c)(6) of this
4 section."

5 11 U.S.C. § 524(c)(6)(A) provides that a reaffirmation
6 agreement is enforceable only if, "in a case concerning an
7 individual who was not represented by an attorney during the course
8 of negotiating an agreement under this subsection, the court
9 approves such agreement as (i) not imposing an undue hardship on the
10 debtor or a dependent of the debtor; and (ii) in the best interest
11 of the debtor." In order for the Agreement filed by Creditor to be
12 enforceable, the Court must make these determinations.

13 **A. Factors the Court Should Consider in Reviewing a**
14 **Reaffirmation Agreement.**

15 In considering whether or not the Agreement poses an undue
16 hardship or is in the best interest of the debtor, this Court
17 considers various non-exclusive factors, including: [1] the debtor's
18 income and expenses; [2] debtor's ability to make the reaffirmation
19 payments; [3] the debtor's payment history; [4] the debtor's equity
20 in the collateral, if any; [5] the extent to which the vehicle is
21 secured or undersecured; [6] the debtor's need for the vehicle,
22 including the number of drivers in debtor's household; [7] whether
23 or not debtor owns other vehicles; [8] the interest rate on the loan
24 on the vehicle; [9] the number of payments remaining under the
25 reaffirmation agreement; [10] whether or not debtor is relying, in
26 whole or in part, on other persons to make the reaffirmation
27 payments and, if so, what evidence the Court has regarding such
28 persons' willingness and ability to pay; [11] and whether or not

1 debtor or someone other than the debtor has had, or will have, the
2 use of the vehicle. Additional very important factors include: [12]
3 whether or not the creditor will allow the debtor to keep the
4 collateral in the absence of a reaffirmation agreement if the debtor
5 remains current on debtor's payments ("ride-through"); [13] the
6 remaining balance on creditor's loan; [14] whether or not, according
7 to the creditor's records, debtor is current on debtor's payments;
8 [15] debtor's payment history -- specifically, according to the
9 creditor's records; and [16] whether or not creditor has offered
10 some concessions to debtor in exchange for entering into the
11 reaffirmation agreement. See *In re Claflin*, 249 B.R. 840 (B.A.P. 1st
12 Cir. 2000) (factors to be considered include: alternatives to
13 reaffirmation where a debtor can still retain property; the threat
14 of repossession; the amount of equity in the collateral; and
15 debtor's payment history on the collateral); *In re Strong*, 232 B.R.
16 921, 924 (Bankr. E.D. Tenn. 1999); see also *In re Caraballo*, 386
17 B.R. 398 (Bankr. D. Conn. 2008) (reaffirmation disapproved because
18 debtor had a ride-through).

19 **B. Creditor's Appearance at the Reaffirmation Hearing is**
20 **Critical.**

21 Typically, the creditor is the party in the best, or only,
22 position to present evidence regarding some of these factors. For
23 example, only the creditor can advise the Court and the debtor
24 whether the creditor will accept a ride-through in this case. The
25 debtor is usually unable to secure a binding promise of a ride-
26 through from the creditor until the time of the hearing. In this
27 Court's experience, many creditors, and lawyers for creditors, will
28 not promise the debtor or debtor's counsel a ride-through unless and

1 until the matter goes before the court for hearing.³ This issue of
2 whether the creditor will accept a ride-through in the absence of a
3 reaffirmation agreement is critical to a determination of whether
4 the reaffirmation agreement is in the debtor's best interest.
5 Similarly, the creditor is in the best position to report whether
6 the debtor is current to the creditor on payments and, if not, how
7 far behind the debtor is. Often, the debtor does not know that the
8 debtor is behind or how far behind debtor is. This too is critical
9 because it makes no sense for a debtor to reaffirm a debt and then
10 have that debtor's vehicle picked up by the creditor because debtor
11 is behind in payments. Then, the creditor will likely sell the
12 vehicle at an auction and can come after the debtor for the
13 difference between what the creditor received at the auction plus
14 the costs of sale and the amount debtor reaffirmed (less any
15 reaffirmation payments). The debtor is left without a vehicle and
16 with non-discharged debt, a terrible result.

17 Also, in this Court's experience, creditors will sometimes
18 offer debtors concessions at the reaffirmation hearing to reaffirm
19 that were not offered before, such as a lower interest rate, lower
20 payments, and/or reductions in principal. For these and other
21 reasons it is very important that creditors appear at reaffirmation
22 hearings - whether or not the debtor is appearing *in propria*
23 *persona*. Absent the creditor's appearance, the Court would be unable
24 to determine whether or not the Agreement complies with 11 U.S.C. §
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26 ³Creditor's lawyers will sometimes say in Court that their
27 clients decide whether to allow a ride-through on a case by case
28 basis. The undersigned Judge typically then asks the attorney to
secure a binding promise from his or her client as to whether the
creditor will accept a ride-through in this situation. In this Court's
experience the creditors usually will then make a binding commitment
to the debtor to allow a ride-through.

1 524(c)(6)(A), and the Agreement would remain unenforceable.
2 Accordingly, in this case, the Court ordered both the Debtor and the
3 Creditor to appear at the original reaffirmation hearing on January
4 14, 2015 at 10:30 A.M., so the Court could make the determinations
5 pursuant to 11 U.S.C. § 524(c)(6)(A).⁴

6 **C. The Facts of this Case**

7 The Order setting the original reaffirmation hearing was
8 entered on December 31, 2014. The December 31, 2014 Order is
9 attachment "B" hereto. The Agreement was filed by Creditor's
10 representative, Carrie Hillman; Creditor was not represented by
11 counsel at the time the Agreement was made. The December 31, 2014
12 Order required Creditor or Creditor's Counsel to appear at the
13 January 14, 2015 hearing and to be prepared to respond to the
14 Court's concerns discussed in the December 31, 2014 Order. Several
15 days prior to the hearing, the Court's staff, Maryia Yahorava,
16 contacted Creditor's bankruptcy department to ensure that Creditor's
17 representative would be available telephonically to appear at the
18 hearing. A representative from Creditor's Bankruptcy Department
19 stated that Carrie Hillman would be available to appear at the
20 hearing and that the Court could contact her directly at (877) 905-
21 0908, extension 2650017.

22 On the day of the January 14, 2015 hearing, 30 minutes before
23 the hearing started, the Courtroom Deputy, Anna Rosales, attempted
24 to contact Carrie Hillman directly, but no one answered the phone.

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26 ⁴Under this District's Local Rule 9010-1, corporations,
27 partnerships, and any entity other than a natural person may not
28 appear as a party in an adversary proceeding or contested matter
except through counsel admitted to practice in this District. This
Court normally waives that requirement for appearances at
reaffirmation hearings. Hence, the orders setting these hearings
provide that either Creditor or Creditor's counsel may appear.

1 The Courtroom Deputy attempted to leave a message; however, Carrie
2 Hillman's voice mail was full. During the January 14, 2015 hearing,
3 the Courtroom Deputy also attempted to reach a live representative
4 by calling Creditor's office at (877) 905-0908, but was put on hold.
5 The Debtor appeared at the hearing in person and stated his
6 appearance on the record.

7 The Court, by Order entered on January 14, 2015, continued the
8 hearing to February 4, 2015 at 10:30 A.M. In that Order the Court
9 cautioned the Creditor that sanctions will be imposed for failure to
10 appear again. The January 14, 2015 order is attachment "C" hereto.

11 On January 28, 2015, the Court's staff, Tri Pham, contacted the
12 Creditor days in advance of the hearing in order to ensure that the
13 Creditor's representative would be available telephonically at the
14 February 4, 2015 hearing. Mr. Pham spoke with Creditor's
15 Representative, "Doris," who identified herself as employee I.D. No.
16 v885290. Mr. Pham informed her about the Order entered on January
17 14, 2015 alerting Creditor that sanctions would be imposed if
18 Creditor failed to appear again. Doris stated that Carrie Hillman
19 would be available to appear at the February 4, 2015 hearing at
20 10:30 A.M. Pacific Time and confirmed that Carrie Hillman's direct
21 line is (877) 905-0908, extension 2650017. Moreover, Doris stated
22 that Doris would be available as Carrie Hillman's backup and that
23 Doris' direct line is (877) 905-0908 extension 2650012.

24 On the day of the February 4, 2015 hearing at approximately
25 10:30 A.M., the Courtroom Deputy, Anna Rosales, called Creditor's
26 Representative, Carrie Hillman, on her direct line, but no one
27 answered. The Courtroom Deputy then left a message for Creditor's
28 Representative to call back to the Court's direct line into the

1 courtroom at (408) 278-7533. The Courtroom Deputy then called
2 Carrie Hillman's backup, Doris, on her direct line. However, no one
3 answered, and the Courtroom Deputy left a message for Creditor's
4 representative to call back on the Court's direct line into the
5 courtroom at (408) 278-7533. The Courtroom Deputy then attempted to
6 contact each of Creditor's two representatives again, but, again, no
7 one answered. Toward the end of the reaffirmation calendar at
8 approximately 11:20 A.M., the undersigned Judge, on the record,
9 attempted to contact both representatives again by telephone to give
10 Creditor one additional chance to appear before the Court issued its
11 order. However, no one answered at either telephone number.

12 Debtor was in court and stated his appearance on the record.
13 Debtor stated that Debtor took one and a half hours off work to
14 attend the January 14, 2015 hearing and one hour off work to attend
15 the February 4, 2015 hearing. Debtor also stated that Debtor spent
16 approximately 5 to 10 minutes to travel from work to the courthouse
17 for each hearing. Therefore, the total travel time Debtor spent to
18 and from the courthouse in order to attend both hearings was 20 to
19 40 minutes. The Court concluded from Debtor's statements that Debtor
20 took a total of approximately 3 hours off work to attend both
21 hearings.

22 The Debtor also stated that he earned \$38 per hour. Therefore,
23 in accordance with the Order issued on January 14, 2015, the Court
24 sanctioned Creditor \$114 as compensation for time Debtor took off
25 work to attend both the January 14, 2015 and February 4, 2015
26 hearings. Additionally, in accordance with the Order issued on
27 January 14, 2015, the Court sanctioned Creditor \$1,000 for failure
28 to appear at the February 4, 2015 hearing, and continued the hearing

1 again to March 18, 2015 at 10:30 A.M. Pursuant to the March 6, 2015
2 Order, the hearing is now continued to March 20, 2015 at 3:00 P.M.
3 The Order is attachment "D" hereto.

4 **D. Civil Contempt Sanctions**

5 The Court has power under 11 U.S.C. § 105(a) to sanction
6 parties for civil contempt. *In re Dyer*, 322 F.3d 1178, 1190 (9th
7 Cir. 2003). The standard for civil contempt is clear and convincing
8 evidence that the contemnors violated a specific and definite order
9 of the Court. *Id.* at 1191. Here, this Court's orders required
10 Creditor or Creditor's Counsel to appear at the January 14, 2015 and
11 February 4, 2015 hearings, respectively. The Creditor's
12 representatives assured Court staff that Creditor would appear at
13 each hearing. Neither the Creditor nor Creditor's Counsel appeared
14 at either hearing despite many attempts by the Court to ensure that
15 the Creditor would appear. Additionally, the Court finds, in light
16 of the attempts by the Court's staff and the Courtroom Deputy to
17 reach Creditor and the acknowledgment of Creditor's representative
18 that Creditor would be available to appear, that Creditor's failure
19 to appear at the February 4, 2015 hearing was willful and in bad
20 faith.

21 Accordingly, the Court may issue civil sanctions to compensate
22 Debtor for time Debtor took off from work to attend the hearings.
23 *Id.* at 1192. Debtor stated on the record at the February 4, 2015
24 hearing that Debtor took off approximately 3 hours from work to
25 attend both hearings and that Debtor earned \$38 per hour. Therefore,
26 the Court awarded sanctions of \$114, to be made payable to the
27 Debtor.

1 Civil sanctions may also be issued to coerce compliance with a
2 court order. *Id.* Generally, sanctions are considered coercive civil
3 sanctions rather than criminal sanctions if the contemnor has an
4 opportunity to reduce or avoid the fine through compliance with the
5 Court's order. Moreover, civil sanctions to coerce compliance should
6 be the least coercive sanction reasonably calculated to win
7 compliance with the court's orders. *United States v. Flores*, 628
8 F.2d 521, 527 (9th Cir. 1980).

9 Here, the Court warned the Creditor by Order entered on January
10 14, 2015 that failure to appear at the February 4, 2015 hearing
11 would result in sanctions. Additionally, the Court staff, when
12 contacting the Creditor telephonically to inform the Creditor's
13 representative about the February 4, 2015 hearing, also informed the
14 Creditor's representative that an Order had been issued warning of
15 sanctions for failure to appear at the February 4, 2015 hearing.
16 Therefore, the Creditor had the opportunity to avoid or reduce
17 coercive sanctions by appearing at the February 4, 2015 hearing.

18 Moreover, as the Creditor is one of the major financial
19 institutions in this country, the Court finds that at least \$1,000
20 in sanctions is necessary to coerce future compliance with the
21 Court's orders. The Court has explained in this Order why Creditor's
22 presence is necessary for the Court to properly conduct the hearing
23 that the Court is obligated to conduct under 11 U.S.C. § 524(d).

24 Therefore, at the February 4, 2015 hearing, the Court orally
25 ordered on the record that no later than February 20, 2015, Creditor
26 shall issue a check for \$1,114 payable to Ray David Romero and send
27 it to Mr. Ray David Romero at 2856 Alwood Court, San Jose,
28 California, 95148. The Court further ordered that no later than

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Court Service List

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