

**Motion Practice in the United States Bankruptcy Court
for the Western District of Missouri**

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I. Generally

A. Form of Motions

1. Must be in writing unless made orally at hearing. Local Rule 9013-1.A.
2. Documents Supporting Motion
 - a. If relying on facts not of record, affidavit or documents must be attached.
 - b. May be attached unless they exceed five pages, in which case a summary of the documents must be provided.
 - c. Copies must be provided to opposing counsel. Local Rule 9013-1.B.
3. Proposed Orders – recent amendments to Fed. R. Bankr. Proc. 4001 notwithstanding, proposed orders need not be submitted on motions for relief from stay, for use of cash collateral or to borrow in cases under Chapter 7 or Chapter 13.
4. Responses
 - a. Unless another time period is specified by statute, the Federal Rules of Bankruptcy Procedure, local rules or court order, responses are due within 21 days. Local Rule 9013-1.C.
 - b. Responses must address the merits of the motion and, if appropriate, offer remedies. Failure to do so may result in the motion being granted with no hearing. Local Rule 9013-1.D.
 - c. Responses should not contain separate requests for relief. All such requests should be contained in a separate motion.

B. Service of Motions

1. By Whom – most motions must be served by the movant. Local Rule 2002-1.A., B.

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2. On Whom Served
 - a. Must be served on all parties in interest as specified on the most current version of the mailing matrix maintained for the case. Local Rule 2002-1.C.
 - b. Certain specified motions must also be served upon the United States Trustee (e.g., employment and compensation of professional persons; use, sale or lease of property outside the ordinary course of business; approvals of compromises). Local Rule 2002-2.A.
 3. What Must be Served – must serve request for relief; court may order the hearing notice to be served by the movant as well. Local Rule 9060-1.B.
 - a. If the movant has been directed to serve the notice of hearing, failure to promptly serve the notice or to file a certificate of such service may result in denial of or delay in granting the motion.
 - b. If directed to serve a notice of objection deadline, use the format suggested on the court's website.
 4. Certificate of Service – each pleading must be accompanied by a certificate of service endorsed on the pleading or on a separate document and indicating the manner in which the document was served, the date of service and the persons upon whom the document was served. Local Rule 9013-3.A.
- C. Processing of Motions – motions are processed in one of the following four ways.
1. Notice with Opportunity for Hearing – Local Rule 9060-1.G.
 - a. These motions are scheduled for hearing only if a response is filed within the time set in a notice issued by the court (e.g., relief from automatic stay, redemption, lien avoidance).
 2. Set for Hearing – Local Rule 9060-1.H.
 - a. Motions described in this subparagraph of the rule are set for hearing regardless of whether a response is filed (e.g., motions to extend or impose stay, objections to confirmation, objections to secured claims).
 - b. The movant is required to serve notice of the scheduled hearing.

3. Held for Response – Local Rule 9060-1.I. These motions are held for the appropriate period of time (in most instances 21 days) to determine if a response is filed (e.g., borrowing, debtor’s motion to convert or dismiss, Chapter 13 trustee’s motion to dismiss).
 - a. If a response is filed, a hearing will be scheduled; the movant will be directed to serve notice of the hearing.
 - b. If no response, an order will be entered granting the motion.
4. Ruled Sua Sponte – Local Rule 9060-1.J.
 - a. The motions identified in this subparagraph of the rule may be ruled by the court upon the motion papers with or without awaiting a response. No hearing will be set unless the court determines that one is necessary (e.g., application to pay filing fee in installments, application to waive the filing fee, motions for extension of time, motions to reinstate dismissed cases).

D. Practical Tips on Motion Practice

1. Check the local rules for any specific requirements of form, content or procedure.
2. Make the motion as self-contained as possible, including all relevant facts. Do not make the judge search the file for information relevant to the motion.
3. Include all grounds for the relief requested. The court may find some persuasive and others not. Cite the applicable law.
4. Remember, this is your opportunity to convince the court that the relief requested is appropriate. The more detailed and persuasive the motion, the greater the chance it may be granted without the need for a hearing. Even if a response is filed and a hearing is set, a detailed and persuasive motion may incline the court to your side of the dispute as the court reviews the motion papers prior to the hearing.

II. Specific Motions

A. Procedural Motions

1. Extension of Time
 - a. Make certain that the deadline you seek to extend can be extended

by the court and is not subject to limitations on the court's power to extend. Fed. R. Bankr. P. 9006(b)(2), (3).

- b. Extension of time requires a demonstration of cause. Do not assume that you will receive the requested extension even if it is the first one that has been requested. If you seek to extend the deadline for the second time or more, describe why the first extension was insufficient, what progress has been made and why additional time is necessary. If the motion is filed after the expiration of the relevant time period, the movant must demonstrate excusable neglect.
- c. Assert all grounds for the requested extension. The court may agree with some of the reasons offered and disagree with others.
- d. If possible, advise the court of the position of the opposing party with respect to the motion, particularly if the opposing party does not oppose the requested extension. Providing the court with this information will facilitate a prompt resolution of the motion and, if unopposed, virtually assure a successful one.

2. Shorten Time or Expedite

- a. Some time periods may not be shortened. Make certain that the relief you request can be granted by the court. Fed. R. Bankr. P. 9006(c)(2).
- b. Cause must be demonstrated in order to shorten the time otherwise provided for response. Be specific in your assertion of reasons for shortening the time or expediting the hearing. State all grounds in support of the request as some may be more persuasive than others.
- c. If requesting that the court take action on the face of the motion without a hearing and without awaiting expiration of the ordinarily prescribed time for response, be clear in your request.

3. Continuances

- a. Local rules require that such requests be filed within two days of the hearing, except for cause arising within that two-day period. Local Rule 9006-1.C. If you make a later request for postponement, because the reason arose within the two-day period, make sure to bring the motion to the attention of the courtroom deputy. You must appear unless you have been notified that the motion was granted.

- b. Cause must be shown for the requested continuance. Be specific as to the reasons why the hearing should be postponed and indicate the period of time requested. State all available grounds for the requested postponement as the court may find some more persuasive than others. If requesting a continuance for the second time or more, state precisely why the previous postponement was not sufficient, what has taken place in the meantime and why the additional time is necessary.
- c. You must provide the court with a statement of the position of the opposing side or state the efforts made to contact opposing counsel. Unopposed motions for continuance are certainly more likely to be granted.

4. Vacating Orders

- a. Technically, such a motion is either a motion to alter or amend an order pursuant to Rule 9023 (which incorporates Rule 59 of the Federal Rules of Civil Procedure) or a motion for relief from a judgment or order pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure (incorporating Rule 60 of the Federal Rules of Civil Procedure). You must state one of the grounds for relief available under one of those rules.
- b. Time limits – a motion to alter or amend must be filed within 14 days of the order you seek to amend; a motion for relief from judgment or order must be filed within a reasonable period of time and, for some requests, no later than one year from the date of the order.
- c. If you seek to vacate an order of dismissal, it is wise to solve the problem giving rise to the dismissal or state a definitive proposal for resolving the problem; otherwise, the court may deny the motion.

5. Reopening Cases

- a. Reopening a closed case is done by motion, most often to accord certain relief to the debtor such as avoiding a lien on real property or seeking a determination of dischargeability of a student loan indebtedness. Such motions can also be filed to permit the filing of a certificate of obtaining the personal financial management course and facilitate the entry of an order of discharge in a case closed without a discharge order.

- b. The motion to reopen must be accompanied by an appropriate filing fee unless it is waived or deferred. Local Rule 1017-1.E.; Local Rule 5010-1.B. The fee is not required if relief is sought with regard to a violation of the discharge injunction, a determination of dischargeability or to correct an administrative error. Local Rule 5010-1.C.
- c. A motion to reopen must be served on all creditors, along with notice of a 21-day objection deadline. Local Rule 1017-1.E.
- d. A motion to reopen to add a creditor must be served upon the affected creditor along with a notice advising the creditor of the 30-day deadline for objecting to reopening or filing a complaint to determine dischargeability of the debt to be added to the schedules. Local Rule 5010-1.D., F.

B. Substantive Motions

1. Extension or Imposition of Automatic Stay

- a. Contents of motion – the motion should advise the court of the number of previous cases filed by the debtor and pending within the one-year period which were dismissed, identify those cases by jurisdiction and case number, state the reason for dismissal of the prior cases and assert all facts relied upon to rebut any presumption of lack of good faith in filing. Local Rule 4001-2.B.
- b. Service of motion and notice of hearing
 - (1) Must be served on all parties to be bound. Local Rule 4001-2.C.
 - (2) Case will be set for hearing on first motion docket after 14 days from the date of the filing of the motion. The movant must serve the hearing notice generated by the court. If an expedited hearing is sought, it must be requested by the movant. Local Rule 4001-2.D.
 - (3) Responses must be filed within 14 days of service.
- c. Hearing
 - (1) Will be held regardless of whether an opposition to the motion is filed, unless an affidavit is filed and found to be satisfactory.

- (2) Debtor or debtors should attend the hearing and be prepared to answer the court's questions or testify.
- (3) Should be prepared to demonstrate that the problem causing the dismissal of the prior case has been resolved and provide any other facts indicating that the case is otherwise filed in good faith (e.g., substantial payment offered to creditors; plan payments assured by wage order).
- (4) The court may grant the motion without a hearing if no opposition is timely filed, the debtor files an affidavit containing the facts upon which debtor relies to rebut any presumption for lack of good faith and the court determines the affidavit is satisfactory. If no order is entered within 48 hours of the scheduled hearing, the parties should appear as scheduled. If on a document separate from the motion, the affidavit must contain all of the facts relied upon to rebut the presumption rather than a mere incorporation by reference of the allegations contained in the motion.

2. Relief from Automatic Stay – Local Rule 4001-1.

a. Contents of motion. Local Rule 4001-1.B.

- (1) Motions should indicate the balance due on the claim of the creditor as of the date of the filing of the petition.
- (2) In a Chapter 7 case, if the motion is filed before the meeting of creditors, it must assert the value of the collateral securing the claim.
- (3) In a Chapter 13 case, motions for relief based upon a payment default on a claim secured by real property must be accompanied by a detailed payment history on a form prescribed by the local rules.

b. Service of the motion and accompanying papers

- (1) The movant must serve the notice of hearing and certify such service. Failure to do so may result in denial of the motion. Local Rule 4001-1.A.
- (2) The trustee must be served with all documents supporting the motion. Local Rule 4001-1.F.

- (3) Debtor's counsel and the trustee must be served with all documents evidencing perfection of the claimed security interest.
 - (4) With respect to deeds of trust, the movant may serve only that page or pages showing the recording information and the signature of the debtors. Full copies of the exhibits must be made available on request to interested parties.
3. Objections to Claims – Local Rule 3084-1.H., I., J.
 - a. It is the debtor's obligation to object to claims in Chapter 13 cases. Claims filed will be allowed unless objected to.
 - b. Form of objection
 - (1) Use of Local Forms 3007-1.1 and 3007-1.2 is encouraged, but not required.
 - (2) The objection must state some factual or legal basis for disallowance of the claim. Merely stating that appropriate documentation has not been attached or that the claimant has failed to respond to a request for itemization does not state a basis for disallowance of the claim.
 - (3) The objection must refer to the court's claim register number.
 - c. Service – the objection must be served upon the claimant, the claimant's attorney and the trustee.
 - d. Omnibus objections may be filed subject to the limitations of Fed. R. Bankr. Proc. 3007(d) and (e).
4. Motions for Payoff – Local Rule 3093-1.
 - a. Contents of motion – a motion requesting a payoff figure from the Chapter 13 trustee must be accompanied by the following information: the reason for the request for payoff; the source of funds to be used to payoff the Chapter 13 plan; the claims to be included in the payoff figure; the proposed percentage payment to unsecured claims and basis for any proposed payoff less than in full.
5. Motions to Borrow – Local Rule 3088-1.D.

- a. Request to borrow must be made to the court if debtor seeks to borrow more than \$2,500.00.
- b. Contents of the motion – a motion to borrow must contain the following information: the identity of the lender; the amount of the borrowing; the precise terms of the borrowing, including the periodic payment and interest rate; the purpose of the borrowing; and the impact of the repayment obligations on the debtor's ability to make payments under the Chapter 13 plan.

6. Motions to Suspend

- a. Motions to suspend should contain the following: (1) the precise number and amount of payments to be suspended; (2) the reason for the payment default; (3) a confirmation that the debtor is able to continue to make the payments going forward.
- b. The Court may be reluctant to grant a motion to suspend if it has granted numerous such suspensions in the past or if there have been multiple dismissals for failure to make plan payments and reinstatements.
- c. Anticipate the problems the motion to suspend may create. Be prepared to take necessary corrective action, such as amending the plan or increasing plan payments.

7. Motions to Retain Tax Refund

- a. If possible, the anticipated tax refund should be built in to the debtor's income as reflected on Schedule I and the Form 22C. In addition, expense amounts based on the debtor's experience in using tax refunds for deferred or extraordinary expenses should be reflected on Schedule J.
- b. A motion to retain tax refunds should include the following: (1) the source and amount of the anticipated refund; (2) a specific itemization of the proposed disposition of the funds, including the purpose and the amount of each expenditure and a detailed explanation as to why the expense is necessary and reasonable.
- c. The Court will ordinarily approve expenditures for unanticipated and out of the ordinary vehicle repairs and medical expenses and repairs to real property that affect the structural integrity of the property or the health and welfare of the occupants. Requests for

other kinds of proposed expenditures should be accompanied by a brief explanation of the circumstances. Failure to do so will likely cause your motion to be set for hearing.

8. Lien Avoidance

- a. Motions to avoid liens as impairing exemptions under § 522(f) should contain the following information: description of the property subject to the lien and its value; the identity of the lienholder and the amount of the claim; basis for the claim of exemption; a demonstration as to why the lien impairs an exemption claim in accordance with the formula set forth in § 522(f)(2).
- b. Responses in opposition to motions to avoid liens should state specifically the reason why the lien is not subject to avoidance. If the respondent contends that the property is not exempt, the response should state why the exemption should not be allowed. If the respondent contends that the property is of a value sufficient that the lien may be retained without impairing the exemption, then the amount and basis for an alternative valuation should be stated. If the respondent contends that for some other reason the lien does not impair the exemption and is therefore not avoidable, it should be stated specifically.

9. Motions to Sell

- a. Motion to sell property outside the ordinary course of business should contain the following information: (1) a description of the property to be sold; (2) the reason for the sale; (3) the identity of the purchaser and the relationship, if any, between the purchaser and the debtor; (4) sale price with some indication of the reasonableness of that price, particularly in relation to any previously scheduled value; and (5) the proposed disposition of the proceeds, including the payment of any commission, closing costs, debts and amounts to be retained by the debtor.

10. Dismissal or Conversion – Local Rule 1017-1.

- a. Dismissal of cases under Chapter 7 or 11. Local Rule 1017-1.A.
 - (1) Must state reasons for dismissal, including the existence of any agreement between the debtor and any creditor or party in interest.
 - (2) Must serve notice of the motion on all creditors with 21-day

objection period.

b. Conversion – Local Rule 1017-1.C.

- (1) Must state reasons for conversion and state if case was previously converted from another chapter.
- (2) Notice of motion must be served by the debtor on the trustee, the United States Trustee and parties requesting notice. Creditors have 21 days to object to the motion.
- (3) The above procedure is not applicable to requests to convert cases from Chapter 13 to Chapter 7. Such conversions are done by notice. The filing of the notice is the effective date of the conversion. Fed. R. Civ. P. 1017(f)(3).

11. Discharge – Local Rule 4004-4.

- a. After completion of payments in a Chapter 13 case, the debtor must file a motion requesting the entry of an order of discharge, using Local Form 4004-4.1.
- b. If no such request is filed, the case will, upon the filing of a final report, be closed without the entry of an order of discharge. The case must then be reopened and an appropriate reopening fee paid in order to obtain a discharge order.

C. Motions in Adversary Proceedings

1. Motions for Default Judgment

- a. Contents – motions for default judgment should demonstrate the following: the plaintiff's entitlement to the relief requested; that proper service has been effectuated as required by Fed. R. Bankr. P. 7004; and that no timely response to the complaint has been filed.
- b. Procedure – the motion must be filed with the court and served on the parties against whom default judgment is to be rendered. A proposed order must be submitted to the court. If damages are sought in an unliquidated amount, the court will enter an interlocutory judgment of default and set a hearing on determination of damages.

2. Motions for Summary Judgment – Local Rule 9013-1.H.

- a. Contents of motion – by rule, a motion for summary judgment must contain an itemized statement of the alleged undisputed facts supporting the request for relief set forth in separately numbered paragraphs with references to the factual record supporting those assertions.
- b. Contents of response – likewise, the response must identify in separately numbered paragraphs with references to the factual record, the facts allegedly in dispute. Facts in the motion will be deemed admitted unless controverted in the response.
- c. Facts asserted in the motion or response must be supported by affidavits or documents or references to the record.
- d. Schedule – a response to the motion for summary judgment may be filed within 21 days; 14 days thereafter a reply may be filed by the movant.
- e. Timing – if possible, file the motion sufficiently in advance of the scheduled trial date to permit the briefing schedule to expire prior to trial. Otherwise, the court may decline to rule on the motion in advance of trial.

D. Replies to Motions

1. General Principles

- a. Replies must respond to the substance of the allegations contained in the motion. Local Rule 9013-1.D. Failure to do so may result in the motion being granted without a hearing. This requires that factual assertions made in the motion be admitted or denied and that affirmative defenses be specifically pled.
- b. Be as specific as possible about proposed solutions to problems raised in the motion. If possible, effectuate the proposed plan for resolving the issues raised by the motion prior to the hearing.

2. Motions for Relief From Automatic Stay

- a. With respect to allegations of default, if the movant has complied with the rule requiring the submission of a post-petition payment history, the burden shifts to the debtor to demonstrate that payments have been made which are not reflected on the schedule. Be as specific as possible about such payments, including details such as dates and amounts.

b. If the debtor wishes to offer adequate protection, such proposal must be contained in the response to the motion. Local Rule 4001-1.E. If offering to cure defaults, be as specific as possible in the cure proposal with respect to both dates and amounts.

3. Motions to Dismiss for Default in Payment

- a. A response to a motion to dismiss for default in plan payments should indicate why the payments are in default, demonstrate that the problem creating the default has been resolved and that the debtor is now in a position to continue the required plan payments, make a specific proposal for a cure of the default and demonstrate that the proposal is both reasonable and feasible.
- b. If certain action is to be taken in response to the motion (such as suspension of plan payments), file the appropriate pleadings or take the appropriate action in advance of the hearing date on the motion to dismiss.

III. Small Business Chapter 11

A. Application for Retention

1. Counsel should file an application for retention immediately as the Court may not compensate counsel for time spent prior to the filing of such an application without extraordinary circumstances. The Court may not, pursuant to Rule 6003, enter an order any sooner than 21 days after the filing of the petition, but the Court will enter an order retroactive to the date of the filing of the application.
2. The Court will ordinarily authorize counsel to be paid on an ongoing monthly basis 80% of fees earned and 100% of expenses incurred, but a separate motion authorizing these monthly filings must be filed.

B. Use of Cash Collateral

1. A debtor may not use cash collateral without consent of every entity that has an interest in the collateral or an order from the Court. Unauthorized use of cash collateral may result in appointment of a trustee or a dismissal of the case.
2. Motions for authorization to use cash collateral should contain the following: (a) how much cash collateral the debtor proposes to use; (b) for what period of time the debtor proposes to use the creditor's cash collateral;

(c) for what purposes the debtor proposes to use cash collateral (commonly reflected in a proposed budget attached to the motion); (d) the identity of any entities that have a claim to cash collateral; (e) any proposals for adequate protection of those entities' interest in the cash collateral.

Common elements of adequate protection in cash collateral are limitations on amount, time and purpose, as reflected above, as well as the granting of a replacement lien in cash collateral used and a requirement for monthly reporting.

3. The Court may permit the interim use of cash collateral on short notice, but may not conduct a final hearing on the use of cash collateral sooner than 15 days after the filing of the motion. Accordingly, final approval of the use of cash collateral requires two orders and possibly two hearings. Debtor's counsel must serve the persons identified in Rule 4001 and the motion must contain the information required by that rule.
4. Attached is an order approved by the Court and entered in a Chapter 11 proceeding which provides a good model for a proposed cash collateral order.

C. Bar Date

1. The Court does not ordinarily enter a bar date in a Chapter 11 proceeding unless requested to do so.
2. Requesting a bar date early in a Chapter 11 case is good practice so that the number and amount of claims can be identified. This may be essential for demonstrating feasibility if the plan proposes to pay a certain percentage of the filed and allowed amount of unsecured claims.
3. Attached is an order entered by the Court in another Chapter 11 proceeding which provides a good model of a bar date order.

D. Plan Formulation

1. Only the debtor may file a plan in the first 180 days after the filing of the case. Debtor must file a plan within 300 days of the filing of the case. Failure to do so can result in dismissal of the proceeding.
2. In a small business case, the debtor may file a combined plan and disclosure statement. A form of such combined plan and disclosure statement has been approved by the Court and is available on the Court's website. *See* Local Rule 3016-3.D. and MOW 3016-3.1.
3. The disclosure statement portion of the form should, among other things,

contain historical income and expense information, a description of the financial results of the debtor while operating in Chapter 11, projections of income and expenses for the period of time over which plan payments are to be made, the amount of payments proposed to be made to classes under the plan, a balance sheet and an analysis of the value of the debtor's assets upon liquidation and the likely distribution to creditors in the event of such a liquidation.

E. Plan Confirmation

1. The Court will ordinarily combine hearings on the disclosure statement and plan of reorganization and will issue an order upon the filing of those documents preliminarily approving the disclosure statement, setting a hearing on confirmation of the plan and establishing deadlines for the filing of ballots and objections.
2. Small business debtors are now subject to a deadline for obtaining confirmation. The Court must confirm a plan within 45 days of the date on which it was filed. Although this deadline may be extended, extensions are subject to strict limitations. *See* 11 U.S.C. § 1129(e).
3. Confirmation Hearing
 - a. Immediately before the confirmation hearing, debtor's counsel should file a summary of the ballots indicating the number and amount of claims accepting or rejecting in each class and identifying those classes which have accepted or rejected. Copies of the ballots should be available for inspection at the confirmation hearing.
 - b. Debtor's counsel should be prepared to submit evidence necessary to permit the Court to make the findings required by § 1129(a). In particular, if any individual creditor has voted against the plan, the proponent of the plan must demonstrate that that creditor would receive more under the plan than it would receive if the debtor were liquidated under Chapter 7 of the Bankruptcy Code. In addition, with respect to each class which has rejected the plan, a proponent must demonstrate the plan is fair and equitable in accordance with the requirement set forth in § 1129(b). Even in a case in which there have been no objections, the Court will require some evidence indicating that the debtor is capable of making the payments proposed under the plan and that the plan is therefore feasible and may be confirmed in accordance with § 1129(a)(11).
 - c. Be prepared to tender to the Court a proposed confirmation order.

Any last minute agreements may be embodied in amendments to the plan made by interlineation in the confirmation order, assuming they are not material and do not require resolicitation.