UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

February 3, 2016 at 10:00 a.m.

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1. 15-28407-B-13 WILTON ALSANDOR — MOTION TO CONFIRM PLAN
BMV-5 Bert M. Vega — 12-11-15 [38]

Tentative Ruling: The Motion to Confirm First Amended Chapter 13 Plan has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to confirm the first amended plan provided that the order properly account for all payments made to date by the Debtor by stating the following: The Debtor has paid a total of $7,517.54 to the Trustee through December 2015. Commencing January 25, 2016, monthly plan payments shall be $3,629.68 for the remainder of the plan.

The amended plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

2. 15-28707-B-13 IDA FOSTER
JPJ-1 Mary Ellen Terranella

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
12-23-15 [27]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

This matter was continued from January 13, 2016, in order to allow time to run on service of notice of related cases filed on January 13, 2016. The Debtor filed an amended petition on January 1, 2016. No creditors have filed an objection to confirmation and no response to the notice of related cases has been filed.

The court's decision is to overrule the Chapter 13 Trustee's objection and deny the motion.

The plan filed November 9, 2015, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

3.	15-29215-B-13	SONJA REYNOLDS Christian J. Younger	HEARING RE: CONFIRMATION OF PLAN 11-25-15 [5]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

4. 16-20016-B-13 CYNTHIA PAYSINGER MOTION TO EXTEND AUTOMATIC STAY
PGM-1 Peter G. Macaluso 1-19-16 [9]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. If there is opposition, the court may reconsider this tentative ruling.

The court's decision is to deny the motion without prejudice.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past 12 months. The Debtor's prior bankruptcy case was dismissed on February 18, 2015, after Debtor failed to make plan payments, notice all interested parties of a Chapter 13 plan, and set a confirmation hearing (Case No. 14-32109, Dkt. 29). Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor 30 days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond 30 days if the filing of the subsequent petition was in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008).

The Debtor states in her Declaration that her circumstances have changed because she has a new job with Garden of Eden Senior Care and receives social security, food stamps, and financial contributions from her son (dkt. 9). Although the motion states that the Debtor receives unemployment compensation, Schedule I of the petition does not reflect this (dkt. 1). The Debtor's reason for filing this bankruptcy case was to retain her primary residence. Although the Debtor has explained her changed circumstances and reasons for filing a new bankruptcy case, the Debtor has failed to explain why she became delinquent in the prior bankruptcy case (no. 14-32109) when Schedule I and Form 22C of that case show she was able to fund the proposed Chapter 13 plan.

This is the Debtor's fourth bankruptcy case in the last three years. The first, a Chapter 7 case filed on October 9, 2012, ended with the Debtor's discharge entered on March 12, 2013 (case no. 12-38018). The second, a Chapter case 13 filed on August 13, 2014, was dismissed two weeks later on August 27, 2014, when the Debtor failed to timely file schedules, a statement of financial affairs, means test documents, and a Chapter 13 plan (case no. 14-28235). The third and last-filed case, a Chapter 13 filed on December 15, 2014, survived a little longer and was dismissed on February 18, 2015, after the debtor paid $0.00 into the plan and failed to file and notice a plan for confirmation (case no. 14-32109).

Schedules I and J filed in the last dismissed Chapter 13 case (no. 14-32109) reflect monthly income of $2,431.00, monthly expenses of $841.00, and monthly net income of $1,500.00.

Schedules I and J in the current case reflect monthly income of $2,977.54, monthly expenses of $1,777.54, and monthly net income of $1,800.00.

At first glance, it would appear that while the Debtor's expenses have increased she nevertheless has $300.00 more this time around than the last. However, $500.00 of the Debtor's monthly income is a purported monthly contribution from the Debtor's son. The son has provided no declaration that he will commit to provide $500 per month for the life of a plan. *See In re Deutsch*, 529 B.R. 308 (Bankr. C.D. Cal. 2015). In the absence of such evidence, the court consider's the Debtor's monthly income to be $1,300.00, which is actually $200.00 less than her monthly income in her last-filed Chapter 13 case in which she made no plan payments and less than the proposed plan payment in this case.

If the Debtor was unable to make plan payments when she had $200.00 per month more in the last-dismissed Chapter 13 case, the court is not persuaded, much less persuaded by clear and convincing evidence, that the Debtor's circumstances have changed such that she has the ability to make timely and regular monthly plan payments in this case, even if the court were to consider her son's monthly contribution.[1]

The Debtor has not sufficiently rebutted, by clear and convincing evidence, the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is denied without prejudice and the automatic stay is not extended.

The court shall enter an appropriate civil minute order consistent with this ruling.

[1] The court also notes that the Debtor reportedly received $400.00 per month from her son in the last-filed Chapter 13 case.

5. 15-29417-B-13 NORMA GUTIERREZ
Mikalah R. Liviakis

HEARING RE: CONFIRMATION OF PLAN
12-2-15 [5]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

6. 16-20018-B-13 JOJIE GOOSELAW MOTION TO EXTEND AUTOMATIC STAY
PGM-1 Peter G. Macaluso 1-19-16 [9]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. If there is opposition, the court may reconsider this tentative ruling.

The court's decision is to grant the motion to extend automatic stay.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past 12 months. The Debtor's prior bankruptcy case was dismissed on October 20, 2015, after Debtor failed to become current under all payments (Case No. 12-24180, Dkt. 167). Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor 30 days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond 30 days if the filing of the subsequent petition was in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008).

The Debtor states in her Declaration that she failed to make plan payments in the previous case because she lost her job. However, her circumstances have now changed since she has gained permanent employment as a nurse at Sutter Health. The Debtor asserts that she will be able to make plan payments and has not acquired any new debt since her previous case was dismissed. Debtor states that she filed the instant bankruptcy case in order to retain her vehicle, satisfy tax debt, and keep her home.

The Debtor has sufficiently rebutted, by clear and convincing evidence, the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The motion is granted and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

The court shall enter an appropriate civil minute order consistent with this ruling.

7. 15-29322-B-13 JAMES/TRACEE LEWIS
JPJ-1 Ashley R. Amerio

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
1-14-16 [50]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

Feasibility of the plan depends on the granting of motions to value collateral and motions to avoid liens for Forest Capital, Portfolio, Gloria Brandy, H S A Fannie Mae, and Ocwen. The Debtors' motions to value collateral and lien avoidances for all these creditors were heard and denied on January 20, 2016.

The plan filed November 30, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtors will be given a further opportunity to confirm a plan. But, if the Debtors are unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtors have not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court shall enter an appropriate civil minute order consistent with this ruling.

8. 14-31623-B-13 JAMES/NANCY LOCKWOOD MOTION TO MODIFY PLAN
SNM-5 Stephen N. Murphy 12-3-15 [67]

Tentative Ruling: The Motion to Modify Chapter 13 Plan After Confirmation & Confirm Third Amended Chapter 13 Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to permit the requested modification and confirm the modified plan provided that the order properly account for all payments made by the Debtors to date by stating the following: The Debtors have paid a total of $24,200.00 to the Trustee through October 2015. Commencing November 25, 2015, the plan payment shall be $1,714.00 for one month, then in December 2015 the plan payment shall be $1,875.00 for one month, and then beginning January 2016 and continuing for the remainder of the plan payments shall be $1,785.00 per month.

The modified plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

9. 15-29424-B-13 ALISHA WING
Peter G. Macaluso

HEARING RE: CONFIRMATION OF PLAN
12-2-15 [5]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

10. 15-29325-B-13 MENEN/MARIA ZARATE
Mikalah R. Liviakis

HEARING RE: CONFIRMATION OF PLAN
11-30-15 [7]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

11. 15-29226-B-13 GERALD/AMANDA SKIBBY
Mikalah R. Liviakis

HEARING RE: CONFIRMATION OF PLAN
11-25-15 [7]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

12. 16-20127-B-13 JESUS AVILA
JWC-1 Michael O'Dowd Hays

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-19-16 [11]

BBCN BANK VS.

Tentative Ruling: Because less than 28 days' notice of the hearing was given, Motion for Relief From the Automatic Stay is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the creditors, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling. If there is opposition offered at the hearing, the court may reconsider this tentative ruling.

The court's decision is to render the motion for relief from stay as moot.

BBCN Bank ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2599 through 2601 Esplanade, Chico, California (the "Property"). Movant has provided the Declaration of Kelly Cho to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

This is Debtor's fourth bankruptcy case. The Cho Declaration states that Movant obtained an order granting relief from stay in the Debtor's third bankruptcy case (no. 15-26969, dkt. 44). The Movant states that it scheduled a trustee sale of the Property for January 11, 2016. However, on that same day the Debtor filed this present case, which is Debtor's fourth bankruptcy case. At the time, Debtor's previous bankruptcy case was still open and was not dismissed until January 13, 2015.

From the evidence provided to the court, and only for purposes of this motion, the total debt secured by this Property is determined to be $1,143,854.58 (including $983,715.58 secured by Movant's deed of trust), as stated in the Cho Declaration. The value of the Property is determined to be $750,000.00, as stated in Schedules A and D from the Debtor's previous bankruptcy case (case no. 15-26969, dkt. 9).

Discussion

Based on the court's review of its docket, it appears the Debtor had two (2) cases pending within the year prior to the date the petition in this case was filed on January 11, 2016. The most recent is case no. 15-26969 filed on September 2, 2015, and dismissed on January 13, 2016.[2] The one before that is case no. 14-30950 filed on November 5, 2014, and dismissed on May 6, 2015. That means the automatic stay of 11 U.S.C. § 362(a)(1) did not go into effect upon the filing of this case. *See* 11 U.S.C. § 362(c)(4)(A)(i). Therefore, the court confirms there is no stay in effect. *See* 11 U.S.C. § 362(c)(4)(A)(ii).[3] That renders Creditors' request for relief under §§ 362(d)(1), (d)(2), and (d)(4) moot.

By this order the court also provides the Debtor notice and an opportunity to show cause why the court should not sua sponte convert this case to a Chapter 7 case pursuant to § 1307(c) as a bad faith filing. A hearing on this order to show cause is

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[2] This last-filed case was actually still pending when this case was filed. The Debtor voluntarily dismissed the last-filed case immediately after the automatic stay was terminated and a creditor in the case allowed to proceed with foreclosure. Hence, the court's order to show cause, *infra*.

[3] The Debtor has made no timely request for the stay to go into effect. *See* 11 U.S.C. § 362(c)(4)(B). And, in any event, the debtor has made no showing by clear an convincing evidence of circumstances that would warrant the court imposing the stay in this case. *See* 11 U.S.C. § 362(c)(4)(D).

set for April 6, 2016, at 10:00 a.m. The Debtor shall have until March 11, 2016, to respond in writing to this court's order. Any other party may reply to the Debtor's response by March 26, 2016.

No other or additional relief is granted by the court.

The court shall enter an appropriate civil minute order consistent with this ruling.

13. 15-28829-B-13 WAGMA SAFI MOTION TO CONFIRM PLAN
MLA-3 Mitchell L. Abdallah 12-11-15 [32]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Motion to Confirm Chapter 13 Plan has been set for hearing on the 42-days' notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to confirm the plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors has provided evidence in support of confirmation. No opposition to the motion has been filed by the Chapter 13 Trustee or creditors. The amended plan filed on December 11, 2015, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

14. 15-29129-B-13 SUZANNE RYAN-BEEDY
MDE-1 Lucas B. Garcia
Thru #15

OBJECTION TO CONFIRMATION OF PLAN BY THE BANK OF NEW YORK MELLON
1-14-16 [19]

Tentative Ruling: The Objection to Confirmation of Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and deny confirmation of the plan.

The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor has filed a timely proof of claim in which it asserts $149,144.22 in pre-petition arrearages (Claim No. 1). The plan does not propose to cure these arrearages. Because the plan does not provide for the surrender of the collateral for this claim, the plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

The plan filed November 24, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

15. 15-29129-B-13 SUZANNE RYAN-BEEDY
PPR-1 Lucas B. Garcia

OBJECTION TO CONFIRMATION OF PLAN BY BANK OF AMERICA, N.A.
12-31-15 [15]

Tentative Ruling: The Objections to Proposed Chapter 13 Plan and Confirmation Thereof was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). The Debtor has filed a written reply to the objection.

The court's decision is to overrule the objection. However, the plan is not confirmed for reasons stated at Item #14.

The objecting creditor holds a deed of trust secured by the Debtor's residence. The creditor asserts $2,807.60 in pre-petition arrearages but has not yet filed a proof of claim. Although the creditor states that it will file a proof of claim prior to the claims bar deadline, the creditor provides no evidence to support the basis for the claimed pre-petition arrears. The creditor does not provide a Declaration from any individual who maintains or controls the bank's loan records or any other supporting evidence. Without a proof of claim or evidence to support its assertion, the creditor's objection is overruled.

Additionally, the Debtor has filed a response asserting that she and the creditor entered into a settlement agreement that directly correlates with the creditor's objection. Although the Debtor states that she has attached a dismissal of the state court proceeding as agreed upon in the settlement agreement, no dismissal is filed.

Nonetheless, because the creditor has not provided evidence supporting the basis for the claimed pre-petition arrears, the creditor's objection is overruled. Since the

plan filed November 24, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a) for reasons stated at Item #14, the plan is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

16. 15-29232-B-13 MARISTELA VILLEZAR
Mikalah R. Liviakis

HEARING RE: CONFIRMATION OF PLAN
11-26-15 [5]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

17. 15-25141-B-13 FRED/SAUNDRA WILLIAMS MOTION TO CONFIRM PLAN
RAC-4 Richard A. Chan 12-15-15 [44]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Motion to Confirm the Amended Plan has been set for hearing on the 42-days' notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to confirm the second amended plan.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the motion has been filed by the Chapter 13 Trustee or creditors. The amended plan filed on December 15, 2015, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

18. 15-26244-B-13 DOUGLAS GONZALES
PGM-1 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM PLAN
11-16-15 [32]

Tentative Ruling: The Motion to Confirm Debtors' [sic] First Amended Plan Filed on November 16, 2015, has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not confirm the first amended plan.

First, feasibility of the plan depends on the granting of the motion to value collateral for Bank of America, N.A. That motion was heard on January 6, 2016, and denied without prejudice (dkt. 64).

Second, the Debtor has not filed an amended petition to reflect that he had filed a Chapter 13 bankruptcy in 2011, case number 11-40420. The Debtor has not complied with 11 U.S.C. § 521(a)(3).

The amended plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

19. 15-29445-B-13 KEVIN MITCHELL
JPJ-1 Scott J. Sagaria

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON
1-13-16 [21]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C).

The court's decision is to overrule the objection as moot.

Subsequent to the filing of the Trustee's objection, the Debtor filed an amended plan on January 18, 2016. The confirmation hearing for the amended plan is scheduled for March 2, 2016. The earlier plan filed December 3, 2015, is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

20.	15-28948-B-13 JSO-1 **Thru #21**	RICHARD/GERINE CAYLOR Jeffrey S. Ogilvie	MOTION TO VALUE COLLATERAL OF C.C. CAYLOR AND BETTY JO CAYLOR, AS TRUSTEES OF THE C.C. CAYLOR AND BETTY JO CAYLOR REVOCABLE TRUST 12-30-15 [12]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Motion to Value Collateral of C.C. Caylor and Betty Jo Caylor, As Trustee's of the C.C. Caylor and Betty Jo Caylor Revocable Trust Under Agreement Dated 2/18/92, 11 U.S.C. § 506 has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to value the secured claim of C.C. Caylor and Betty Jo Caylor, as Trustee's of the C.C. Caylor and Betty Jo Caylor Revocable Trust, at $0.00.

The motion to value filed by Debtors to value the secured claim of C.C. Caylor and Betty Jo Caylor, as Trustee's of the C.C. Caylor and Betty Jo Caylor Revocable Trust, ("Creditor") is accompanied by Debtor's declaration. Debtors are the owners of the subject real property commonly known as 14945 Caylor Lane, Red Bluff, California ("Property"). Debtor seeks to value the Property at a fair market value of $375,000.00 as of the petition filing date. As the owners, Debtors' opinion of value is some evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The valuation of property which secures a claim is the first step, not the end, result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine the creditor's secured claim (rights and interest in collateral), the creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2; case or controversy requirement for the parties seeking relief from a federal court.

No Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. No proof of claim has been filed by Creditor for the claim to be valued.

Discussion

The first deed of trust secures a claim with a balance of approximately $454,461.55. Creditor's second deed of trust secures a claim with a balance of approximately $102,000.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

The court shall enter an appropriate civil minute order consistent with this ruling.

21. 15-28948-B-13 JSO-2 — RICHARD/GERINE CAYLOR — Jeffrey S. Ogilvie — MOTION TO VALUE COLLATERAL OF FORD CREDIT — 12-30-15 [18]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Motion to Value Collateral of Ford Credit has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to value the secured claim of Ford Credit at $9,961.00.

The motion filed by Debtors to value the secured claim of Ford Credit ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of a 2012 Ford Fusion ("Vehicle"). The Debtors seek to value the Vehicle at a replacement value of $9,961.00 as of the petition filing date. As the owners, Debtors' opinion of value is some evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Proof of Claim No. 10 filed by Ford Motor Credit Company LLC is the claim which may be the subject of the present motion.

Discussion

The lien on the Vehicle's title secures a purchase-money loan incurred on August 20, 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of $13,528.60 (Claim No. 10). Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $9,961.00. *See* 11 U.S.C.

§ 506(a). The valuation motion pursuant to Fed. R. Civ. P. 3012 and 11 U.S.C. § 506(a) is granted.

The court shall enter an appropriate civil minute order consistent with this ruling.

22. 15-29451-B-13 SUSAN RAMBERT CAMPBELL
Mary Ellen Terranella

HEARING RE: CONFIRMATION OF PLAN
12-3-15 [5]

Tentative Ruling: The court issues no tentative ruling. The matter will be determined at the scheduled hearing.

23.	15-27752-B-13 JPJ-1	JOSE CURIEL Michael O'Dowd Hays	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE 12-15-15 [28]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the Debtor did not appear at the continued meeting of creditors held on January 14, 2016. The meeting was continued again to February 11, 2015, in order for the Trustee to thoroughly examine the Debtor under oath.

Second, the plan payment in the amount of $228.00 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $232.00. The plan does not comply with Section 4.02 of the mandatory form plan.

The plan filed October 1, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court shall enter an appropriate civil minute order consistent with this ruling.

24. 15-29452-B-13 KEVIN/ALICE BOOTH
JPJ-1 Mary Ellen Terranella

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
1-13-16 [14]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

The plan payment in the amount of $50.00 does not equal the aggregate of the Trustee's fees and the monthly payment for monthly dividend payable on account of Class 2 secured claims. The aggregate of the monthly amounts plus the Trustee's fee is $295.00. The plan does not comply with Section 4.02 of the mandatory form plan.

The plan filed December 3, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtors will be given a further opportunity to confirm a plan. But, if the Debtors are unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtors have not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court shall enter an appropriate civil minute order consistent with this ruling.

25. 15-29155-B-13 SHAMEKA BATTE
Pro Se

MOTION FOR RELIEF FROM AUTOMATIC STAY OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY
1-6-16 [27]

MAX HOSEIT VS.

DISMISSED: 1/28/16

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The case having previously been dismissed, the motion for relief from automatic stay is dismissed as moot.

The court shall enter an appropriate civil minute order consistent with this ruling.

26. 15-28163-B-13 JPJ-1 — JOHN LEIJA AND SYLVIA REYES — Catherine King — MOTION TO CONFIRM PLAN 12-18-15 [20]

Tentative Ruling: The Motion to Confirm Amended Chapter 13 Plan Dated December 18, 2015, has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not confirm the first amended plan.

First, the terms for the payment of the Debtors' attorney's fees are unclear. At Section 2.06, the plan does not specify a selection as to whether counsel shall seek approval of fees by either complying with Local Bankr. R. 2016-1(c) or by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016 and 2017.

Second, the Debtors are delinquent to the Chapter 13 Trustee in the amount of $11.00, which represents approximately 1 partial plan payment. By the time this matter is heard, an additional plan payment in the amount of $447.10 will also be due. The Debtors do not appear to be able to make plan payments proposed and have not carried their burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Third, the plan payment in the amount of $447.10 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $654.00. The plan does not comply with Section 4.02 of the mandatory form plan.

The amended plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.

27. 15-24767-B-13 SUE WILLIAMSON
SJS-2 Scott J. Sagaria

MOTION TO VACATE DISMISSAL OF CASE
1-14-16 [74]

DEBTOR DISMISSED: 01/07/2016

Tentative Ruling: The Debtor's Motion to Vacate Dismissal of Chapter 13 Bankruptcy Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court's decision is to deny without prejudice the motion to vacate dismissal.

Debtor argues that excusable neglect justifies the court vacating the order dismissing the Debtor's case. The Debtor's bankruptcy case was dismissed on January 7, 2016, for failure to confirm a Chapter 13 plan within 75 days from the date of the court's order conditionally denying the Trustee's motion to dismiss. Debtor's counsel states that the reason a plan was not confirmed by the 75-day deadline, or approximately December 14, 2015, was due to the fact that the Debtor was traveling in and out of state during December 2015 and was not always accessible via e-mail or telephone, thus causing delay in obtaining the Debtor's signatures on the amended plan and motion to confirm. Additionally, Debtor's counsel states that there is cause to vacate the dismissal because there has already been extensive litigation in the case, including an objection to confirmation filed by creditor Wells Fargo Bank, N.A. and a motion to value collateral filed by Debtor that was opposed by Wells Fargo Bank, N.A. The court will analyze the motion under Fed. R. Civ. P. 60(b) and 9024.

DISCUSSION

The court finds that the motion is not supported by both cause and excusable neglect. While there appears to be cause to vacate the dismissal since the Debtor has litigated an objection to confirmation and a motion to value collateral, there does not appear to be excusable neglect. Considering the four factors of *Pioneer Investment Services v. Brunswick Associates, Ltd.*, 507 U.S. 380 (1993), the court finds the Debtor's request is not supported by a showing of excusable neglect because the Debtor had 75 days from October 7, 2015, to confirm a plan and does not explain why the plan could not have been confirmed, or necessary documents prepared and signed, in either months October or November, prior to the Debtor traveling in December.

Based on the reasons stated above, the motion to vacate dismissal is denied without prejudice.

The court shall enter an appropriate civil minute order consistent with this ruling.

28.	15-25582-B-13 PGM-1 **Thru #30**	ASHWANI MAYER AND POOJA VERMA Peter G. Macaluso	OBJECTION TO CLAIM OF GENERAL PRODUCE COMPANY, LTD., CLAIM NUMBER 3 12-15-15 [36]

Tentative Ruling: The Objection to the Claim of General Produce Co., Ltd. (Claim #3) has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). Opposition was filed. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

The court's decision is to overrule and deny without prejudice the objection to Claim No. 3 of General Produce Co., Ltd.

Introduction

This is an objection by Debtors Ashwani Mayer and Pooja Verma ("Debtors") to the claim of General Produce Co., Ltd. ("General"), filed on August 10, 2015, in the amount of $12,013.13 as Claim No. 3. Claim No. 3 was filed as a secured PACA Trust claim under 7 U.S.C. § 499(e), et seq.

The Debtors object to General's secured claim on two grounds: (1) General has not demonstrated that all sales proceeds are - or that there are even sales proceeds - subject to a PACA trust; and (2) General has not established that it provided the notice required by § 499e(c)(4) to preserve its PACA trust rights.

Applicable Standard

A proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Federal Rule of Bankruptcy Procedure 3001(f) creates an evidentiary presumption of validity for a proof of claim executed and filed in accordance with [the] rules. Fed. R. Bankr. P. 3001(f); *see also Litton Loan Servicing, LP v. Garvida (In re Garvida)*, 347 B.R. 697, 706-07 (B.A.P. 9th Cir. 2006). This presumption is rebuttable. *See Id.* at 706. "The proof of claim is more than some evidence; it is, unless rebutted, prima facie evidence. One rebuts evidence with counter-evidence." *Id.* at 707 (citation omitted) (internal quotation marks omitted). "[T]o rebut the prima facie evidence a proper proof of claim provides, the objecting party must produce 'substantial evidence' in opposition to it." *Am. Express Bank, FSB v. Askenaizer (In re Plourde)*, 418 B.R. 495, 504 (1st Cir. BAP 2009)).

The evidentiary presumption created by Rule 3001(f) "operates to shift the burden of going forward but not the burden of proof." *Litton*, 347 B.R. at 706 (citing *Garner v. Shier (In re Garner)*, 246 B.R. 617, 622 (B.A.P. 9th Cir. 2000). The burden of proof always remains on the party who carries the burden under applicable nonbankruptcy law. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000); *see also In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal. 2015). "That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh*, 530 U.S. at 21.

Discussion

General has met its initial burden by filing a properly completed and supported proof of claim. Its proof of claim is presumptively valid. That shifts the burden to the Debtors to produce substantial evidence that (1) there are no PACA trust proceeds (or the Debtor has no proceeds subject to a PACA trust) and (2) General failed to preserve its PACA rights by providing the notice required by the PACA statute. The Debtors have failed to carry their burden.

The Debtors' "substantial evidence" consists of statements and argument by counsel in the objection itself. Statements and argument are not evidence, let alone substantial evidence. At best, they are an assertion by the Debtors that General's proof of claim is invalid or the debt stated in the proof of claim is not owed. Such statements are

"not sufficient to overcome the presumptive validity of the proof of claim." Local Bankr. R. 3007-1(a).

In short, the Debtors have failed to carry their burden which means the court need not go beyond the objection itself because the objection is insufficient as a matter of law to overcome the presumptive validity of General's proof of claim.

Therefore, for the foregoing reasons, it is ordered that the Debtors' objections to General's proof of claim filed as Claim No. 3 is overruled and denied without prejudice. It is further ordered that this order is subject to reconsideration for cause under 11 U.S.C. § 502(j) and Federal Rule of Bankruptcy Procedure 3008.

The court shall enter an appropriate civil minute order consistent with this ruling.

29.	15-25582-B-13 PGM-2	ASHWANI MAYER AND POOJA VERMA Peter G. Macaluso	OBJECTION TO CLAIM OF GENERAL PRODUCE COMPANY, LTD, CLAIM NUMBER 4 12-15-15 [41]

Tentative Ruling: The Objection to the Duplicate Claim of General Produce Co., Ltd. (Claim #4) has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). Opposition was filed. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

The court's decision is to sustain the objection to duplicative Claim No. 4 of General Produce Co., Ltd.

The Debtors object to Claim No. 4 filed by General Produce Co., Ltd. on the basis that Claim No. 4 is duplicative of Claim No. 3. The court has reviewed both Claims and concludes that Claim No. 4 is duplicative of Claim No. 3. General filed a response to this objection stating that if Claim No. 3 is upheld it will withdraw Claim No. 4. Claim No. 3 has been upheld in Item #28.

Therefore, it is ordered that Debtors' objection to Claim No. 4 as being duplicative of Claim No. 3 is sustained and Claim No. 4 is disallowed in its entirety. The disallowance of Claim No. 4 does not affect Claim No. 3 which is the surviving proof of claim.

The court shall enter an appropriate civil minute order consistent with this ruling.

30.	15-25582-B-13 PGM-3	ASHWANI MAYER AND POOJA VERMA Peter G. Macaluso	OBJECTION TO CLAIM OF FRESHKO PRODUCE SERVICES, INC., CLAIM NUMBER 7 12-15-15 [45]

Tentative Ruling: The Objection to the Claim of Freshko Produce Services, Inc. (Claim #7) has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). Opposition was filed. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

The court's decision is to overrule in part and sustain in part the objection to Claim No. 7 of Freshko Produce Services, Inc.

Introduction

This is an objection by Debtors Ashwan K. Mayer and Pooja Verma to Freshko Produce Services, Inc.'s secured proof of claim in the amount of $49,979.54.[1] That secured proof of claim was filed as Claim No. 7 on August 13, 2015. An amended secured proof of claim in the same amount was filed on November 12, 2015.

Freshko's secured claim is based on rights asserted under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a, et seq. Freshko opposes the Debtors' objection and the Debtors have replied to Freshko's opposition. For the reasons explained below, the objection will be overruled in part and sustained in part.

Debtors object to Freshko's claim on two grounds: (1) Freshko has not demonstrated that all sales proceeds are - or that there are even sales proceeds - subject to a PACA trust; and (2) Freshko has not established that it provided the notice required by § 499e(c)(4) to preserve its PACA trust rights. The second objection will be overruled and the first objection will be sustained. And because the court now has evidence before it that it did not have when this matter was last before it on October 12, 2015, the court also takes this opportunity to address and clarify the extent of Freshko's priority claim in this chapter 13 case.

Applicable Standard

A proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Federal Rule of Bankruptcy Procedure 3001(f) creates an evidentiary presumption of validity for a proof of claim executed and filed in accordance with [the] rules. Fed. R. Bankr. P. 3001(f); *see also Litton Loan Servicing, LP v. Garvida (In re Garvida)*, 347 B.R. 697, 706–07 (B.A.P. 9th Cir. 2006). This presumption is rebuttable. *See Id.* at 706. "The proof of claim is more than some evidence; it is, unless rebutted, prima facie evidence. One rebuts evidence with counter-evidence." *Id.* at 707 (citation omitted) (internal quotation marks omitted). "[T]o rebut the prima facie evidence a proper proof of claim provides, the objecting party must produce 'substantial evidence' in opposition to it." *Am. Express Bank, FSB v. Askenaizer (In re Plourde)*, 418 B.R. 495, 504 (1st Cir. BAP 2009)).

The evidentiary presumption created by Rule 3001(f) "operates to shift the burden of going forward but not the burden of proof." *Litton*, 347 B.R. at 706 (citing *Garner v. Shier (In re Garner)*, 246 B.R. 617, 622 (B.A.P. 9th Cir. 2000). The burden of proof always remains on the party who carries the burden under applicable nonbankruptcy law. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20-21 (2000); *see also In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal. 2015). "That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh*, 530 U.S. at 21.

Discussion

The Debtor's objection to Freshko's proof of claim suffers from the same problem as the objection to the proof of claim filed by General Produce Co., Ltd. addressed in Item #28, i.e., with the objection the Debtors have submitted no evidence that rebuts the prima facie validity of Freshko's proof of claim. Normally, this would result in the objection being overruled based on a failure to overcome the presumptive validity of the proof of claim itself. However, unlike the General claim, Freshko consents to disposition of the objection to its claim under Federal Rule of Civil Procedure 43(c) made applicable by Federal Rule of Bankruptcy Procedure 9017 and has referred the court to related proceedings between it and the Debtor.

The court takes judicial notice of dockets in this case, in the adversary proceeding Freshko filed in this case (discussed, *infra*), and in Freshko's action against the Debtor pending but stayed in the United States District Court for the Eastern District

[1] To avoid confusion, "Debtors" refers to both Ashwan K. Mayer and Pooja Verma and "Debtor" refers to Ashwan K. Mayer.

of California to which Freshko refers the court in its opposition (also discussed, *infra*). *See* Fed. R. Evid. 201(c)(1). Taking judicial notice of those matters permits the court to conclude there is sufficient evidence to rebut the prima facie validity of Freshko's proof of claim and that Freshko has not carried its ultimate burden of proving that its claim is a secured priority claim against the Debtor.

Objection Based on Lack of Notice Overruled Because Debtors Admit that Statutorily-Compliant Notice Was Provided

The court takes judicial notice of the docket in the adversary proceeding that Freshko filed on September 23, 2015, captioned *Freshko Produce Services, Inc. v. Ashwani Kumar Mayer*, Adv. No. 15-02188. *See In re Hertigage Bond Litg.*, 546 F.3d 667, 670 n. 1 (9th Cir. 2008); *see also Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n. 3 (9th Cir. 2005). Paragraph 21 of the complaint filed in that adversary proceeding alleges that Freshko provided the Debtors with notices required by § 499e(c)(4) and those notices were sufficient to preserve Freshko's rights under the PACA statutes. Paragraph 3 of the Debtor's answer in that adversary proceeding admits ¶ 21 of Freshko's complaint.

The Debtor has not amended the answer or otherwise explained away his admission to the allegations in ¶ 21 in any subsequently-filed pleading which means the Debtor's admission in the answer is a judicial admission. *See Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 859-60 (9th Cir.), *cert. denied*, 516 U.S. 861 (1995); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). That judicial admission conclusively establishes that Freshko provided notice of its PACA rights and the notice of its PACA rights it provided was sufficient to preserve Freshko's rights under the PACA statutes. *See In re Rolland*, 317 B.R. 402, 421-422 (Bankr. C.D. Cal. 2004) (citations omitted). Therefore, Debtors' second objection to Freshko's secured claim will be overruled.

Objection Based on PACA Proceeds is Sustained

The Debtors also object to Freshko's secured claim on the basis that Freshko has not demonstrated the existence of sales proceeds subject to its PACA trust. As explained below, the court finds merit in this objection.

PACA liability attaches first to the PACA-licensed commission merchant, dealer, or broker of produce. *Golman-Hayden Co. v Fresh Source Produce, Inc.*, 217 F.3d348, 351 (5th Cir. 2000) (citing *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997). If, however, the assets of the licensed commission merchant, dealer, or broker are insufficient to satisfy the PACA debt, the officers, directors, or shareholders of the commission merchant, dealer or broker will generally be found secondarily (and personally) liable if they had some role in not preserving the PACA trust res for the benefit of the vendor, or they had the ability to cause or prevent dissipation of trust assets. *Id*.

The Debtors' admission of ¶¶ 13-24 of Freshko's adversary complaint is sufficient to establish the Debtor's secondary liability for Freshko's PACA trust claim.[2] That is - the complaint filed in the adversary proceeding alleges - and the Debtor admits - at all relevant times the Debtor was a principal of A.L.L. Group dba Vicks, A.L.L. Group dba Vick's was subject to PACA and received produce deliveries from Freshko, that in his capacity as a principal and/or director of A.L.L. dba Vick's the Debtor controlled or was in a position to control the disposition of PACA trust assets, and that the Debtor failed to preserve the PACA trust assets for Freshko's benefit. But the inquiry does not end there.

The court also takes judicial notice of the docket in a related action Freshko filed against the Debtor in the United States District Court for the Eastern District of California entitled *Freshko Produce Services, Inc. v. A.L.L. Groups, Inc.; J & S*

[2] This is consistent with the Debtors' objection. Debtors do not ask that the claim be disallowed; rather, they ask that the claim be allowed as an unsecured claim.

Partners, Jagjit Singh Saini, Sukhpreet Kaur Saini, and Ashwani Kumar Mayer, Case No. 2:15-cv-00234-KJM-AC. *See Heritage Bond Litg., supra*. The complaint in that action alleges that the Debtor diverted proceeds from the sale of PACA trust assets to himself. [USDCT Dkt. 1 at ¶¶ 29, 30, and 33]. The Debtor failed to answer or plead in response to that district court complaint and his default was entered. [USDCT Dkt. 9]. That means the well-pleaded allegations in the district court complaint are deemed to be true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam) (citation omitted); *see also Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002); *In re Singh*, 2013 WL 5934299 at *4 (Bankr. E.D. Cal. 2013). Based on that admission, the court concludes there were proceeds from the sale of PACA assets because the Debtor is deemed to have admitted that he diverted proceeds from the disposition of PACA assets to himself.

The more important question, however, is the one that Freshko has not answered: How much of the proceeds from the disposition of PACA assets did the Debtor divert to himself? The answer to that question is critical because it determines the extent of Freshko's secured or priority claim against the Debtor individually in this chapter 13 case. In other words, Freshko's claim is secured and entitled to priority in this chapter 13 case only to the extent of proceeds actually diverted to and in possession of the Debtor. *See e.g., In re Ozcelik*, 267 B.R. 485(Bankr. D. Mass. 2001).[3]

The facts of *Ozcelick* are strikingly similar to this case. In *Ozcelick*, the debtor and his wife were the sole officers and directors of an entity that was a dealer and/or commission merchant as defined in PACA. *Id*. at 488. The debtor was responsible for the day to day operations of the entity. *Id*. In that capacity the debtor entered into several agreements with, and subsequently received shipments of produce from, a PACA seller. *Id*. The PACA seller provided appropriate notice to retain its PACA rights. *Id*. And, when the debtor failed to pay PACA seller in full, PACA seller sued the debtor and his entity, and obtained a judgment against the debtor. *Id*.

After judgment was entered, the debtor filed a chapter 13 petition and listed PACA seller's claim in the schedules and plan as an unsecured nonpriority claim. *Id*. at 488-489. PACA seller moved for a superpriority claim and objected to confirmation. *Id*. at 489. The PACA seller claimed it was entitled to payment before all other creditors in the case pursuant to protections provided by PACA. *Id*. It also maintained it perfected its interest in the statutory trust by notifying the debtor of its intent to preserve the PACA trust benefits and that the debtor was personally liable for the PACA debt as the controlling person of his entity. *Id*. Therefore - not unlike here - the PACA seller argued it was entitled to a secured superpriority status in the debtor's chapter 13 case. *Id*. And like here, the debtor opposed.

Following a detailed discussion of PACA, the protections it affords seller of agricultural products, the extent of a PACA trust, and primary and secondary liability under the statute, the court began its analysis by noting the debtor did not dispute the dissipated PACA asset proceeds by spending them on other business expenses or that as a person in control of the PACA entity he was secondarily liable for the PACA debt. *Id*. at 489-491. And while the court noted there was ample authority to support a priority claim in the bankruptcy case of an entity that was primarily liable, the court concluded that was not so in a chapter 13 case of a secondarily liable debtor. *Id*. at 491.

In denying PACA seller's motion for a super-priory secured claim and overruling its objection to confirmation, the court explained that when liability is not grounded on proceeds actually in the possession of the secondarily-liable debtor but, rather, is premised on liability based on the debtor's status as a trustee of PACA asset proceeds

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[3] Neither party cited *Ozcelik* either in the context of this claim objection, the opposition to the claim objection, or the prior confirmation hearing. Nevertheless, the court discusses the case at length because the court considers the opinion extremely persuasive and dispositive of the Debtors' objection.

the PACA claim is entitled to no priority simply because the Debtor is secondarily liable under PACA. It stated: "This Court is not aware of any case law that supports priority treatment for a PACA creditor in the bankruptcy case of a debtor simply because the debtor is secondarily liable under PACA." *Id*. The court then elaborated:

> Nevertheless, the intended purpose of Congress in enacting the PACA's trust provision was to provide unpaid produce sellers with greater protection from the risk of default by buyers, by placing them ahead of other creditors in priority to collect from the PACA trust. There is no indication that Congress intended to go further by providing PACA suppliers with a superpriority claim in the bankruptcy cases of a debtor secondarily liable, in the absence of any evidence that the debtor obtained possession of the trust assets or proceeds in his or her individual capacity.

Id. at 492(internal citation omitted).[4]

This court finds *Ozeclik* persuasive and will follow it. Freshko's claim against the Debtor in this case is based on the premise that the Debtor is secondarily liable as a trustee of proceeds received from the dissipation of PACA assets and not because the Debtor has proceeds from the disposition of PACA trust assets in its possession. In fact, Freshko identifies no such proceeds that are in the Debtor's possession. And while it need not trace proceeds received from the disposition of PACA trust assets, in order to have a priority secured claim it nevertheless bears the burden of proving that the Debtor has such proceeds in his possession. *See First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 699 F.2d 1000, 1011 (5th Cir. 1982). And that is because under *Ozeclik*, any secured priority claim extends only so far as the amount of PACA asset proceeds actually in the debtor's possession.

In short, Freshko has not carried its ultimate burden of proving that its claim against the Debtor in this chapter 13 case is a secured priority claim.

Therefore, it is ordered that the Debtors' objection to Freshko's claim filed as Claim No. 7 is sustained and Claim No. 7 is disallowed as a secured priority claim against the Debtor.

It is further ordered that Freshko's claim filed as Claim No. 7 shall be allowed as a nonprioirty general unsecured claim in the amount $49,979.54.

It is further ordered that Freshko's request for attorney's fees on its nonpriority general unsecured claim is denied with prejudice.

The court shall enter an appropriate civil minute order consistent with this ruling.

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[4] In reaching its conclusion, the court rejected two arguments advanced by the PACA seller. First, it noted that *In re Fresh Approach*, 51 B.R. 412 (Bankr. N.D. Tex. 1985), did not require a different result because in *Fresh Approach* the debtor sought to retain and use identifiable proceedings pending plan confirmation. *Ozcelik*, 267 B.R. at 492. Second, the court rejected PACA seller's argument that the remedial nature of the PACA statues compelled a different result. *Id*. To the extent Freshko also makes those arguments, the court follows *Ozcelik* and rejects those arguments here.

31. 15-29383-B-13 KHASHAYAR ELMI
JPJ-1 Richard L. Jare

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
1-13-16 [18]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. *See* Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the Debtor has not provided proof of his social security number to the Trustee as required pursuant to Fed. R. Bankr. P. 4002(b)(1)(B).

Second, the meeting of creditors was continued to February 11, 2016, to allow the Debtor to file tax returns and provide the Trustee with copies.

Third, the Debtor has not provided the Trustee with a Class 1 Checklist and Authorization to Release. The Debtor has not complied with 11 U.S.C. § 521(a)(3) and Local Bankr. R. 3015-(1)(b)(6).

Fourth, the plan impermissibly modifies the claim of Caliber Homes Loans as a Class 1 claim. 11 U.S.C. §§ 1322(b)(2) and 1325(a)(1). The Additional Provisions specifically state that the creditor will receive "adequate protection" payments pending the approval of a loan modification instead of ongoing monthly contractual payments.

The plan filed December 1, 2015, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court shall enter an appropriate civil minute order consistent with this ruling.

32. 13-30892-B-13 JOHN/CHRISTINA HENRICH MOTION TO REFINANCE
PGM-1 Peter G. Macaluso 1-6-16 [27]

Final Ruling: No appearance at the February 3, 2016, hearing is required.

The Motion for Order Approving Refinance of Loan has been set for hearing on the 28-days' notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The court's decision is to grant the motion.

The Debtors are owners to real property commonly known as 7111 Pine Cone Drive, Pollock Pines, California. Debtors' current mortgage payment is $1,789.55 per month and they have been offered a reduced refinanced mortgage payment of $1,358.00 per month by Quicken Loans. This reduced payment includes escrow payments, property insurance, and taxes. The term of the loan is 30 years at 4.25% fixed interest. The Debtors assert that the agreement will not have any direct impact on the estate, Trustee, or any other secured creditor in this case.

The motion is supported by the Declaration of John Henrich and Christina Henrich. The Declaration affirms Debtors' desire to obtain the post-petition financing.

The repayment of the new loan does not appear to unduly jeopardize the Debtors' performance of the plan dated August 19, 2013. The court finds that the Debtors will be able to pay this claim on the modified terms since the new mortgage payment is a reduction from their current monthly mortgage payment. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the motion will be granted.

The court shall enter an appropriate civil minute order consistent with this ruling. is granted.

33. 14-21394-B-13 ASH-3 — PATRICK/SUZANNE CLARK — Arthur Samuel Humphrey — CONTINUED APPLICATION FOR 2004 EXAMINATION OF JUDY MENA — 12-9-15 [228]

Thru #35

Final Ruling: Order entered February 2, 2016. No appearance at the February 3, 2016, hearing is required.

34. 14-21394-B-13 ASH-3 — PATRICK/SUZANNE CLARK — Arthur Samuel Humphrey — CONTINUED ORDER TO SHOW CAUSE RE: 2004 EXAMINATION — 12-15-15 [237]

Final Ruling: Order entered February 2, 2016. No appearance at the February 3, 2016, hearing is required.

35. 14-21394-B-13 PP-7 — PATRICK/SUZANNE CLARK — Arthur Samuel Humphrey — CONTINUED MOTION TO CONVERT CASE FROM CHAPTER 13 TO CHAPTER 7 — 12-23-15 [244]

Final Ruling: Order entered February 2, 2016. No appearance at the February 3, 2016, hearing is required.

36. 15-20697-B-13 JULIA/LORELEI CARROLL MOTION TO MODIFY PLAN
ULC-3 Ronald W. Holland 12-29-15 [41]

Tentative Ruling: The Motion to Confirm First Modified Plan Dated December 28 [sic], 2015, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

The plan payment in the amount of $683.00 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $980.74. The plan does not comply with Section 4.02 of the mandatory form plan.

Although the Debtors have proposed reducing their administrative expense in paragraph 2.07 from $400.00 to $125.00, this reduction by $275.00 does not cover the shortage of $297.74.

The modified plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

The court shall enter an appropriate civil minute order consistent with this ruling.