UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

March 9, 2015 at 1:30 p.m.

THIS CALENDAR IS DIVIDED INTO TWO PARTS. THEREFORE, TO FIND ALL MOTIONS AND OBJECTIONS SET FOR HEARING IN A PARTICULAR CASE, YOU MAY HAVE TO LOOK IN BOTH PARTS OF THE CALENDAR. WITHIN EACH PART, CASES ARE ARRANGED BY THE LAST TWO DIGITS OF THE CASE NUMBER.

THE COURT FIRST WILL HEAR ITEMS 1 THROUGH 13. A TENTATIVE RULING FOLLOWS EACH OF THESE ITEMS. THE COURT MAY AMEND OR CHANGE A TENTATIVE RULING BASED ON THE PARTIES' ORAL ARGUMENT. IF ALL PARTIES AGREE TO A TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING PURSUANT TO LOCAL BANKRUPTCY RULE 3015-1(c), (d) [eff. May 1, 2012], GENERAL ORDER 05-03, ¶ 3(c), LOCAL BANKRUPTCY RULE 3007-1(c)(2)[eff. through April 30, 2012], OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED TO DEVELOP THE WRITTEN RECORD FURTHER. IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE ON APRIL 6, 2015 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY MARCH 23, 2015, AND ANY REPLY MUST BE FILED AND SERVED BY MARCH 30, 2015. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THE DATE AND TIME OF THE CONTINUED HEARING DATE AND OF THESE DEADLINES.

THERE WILL BE NO HEARING ON ITEMS 14 THROUGH 34 IN THE SECOND PART OF THE CALENDAR. INSTEAD, THESE ITEMS HAVE BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS; IF IT IS, IT INCLUDES THE COURT'S FINDINGS AND CONCLUSIONS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

IF THE COURT CONCLUDES THAT FED. R. BANKR. P. 9014(d) REQUIRES AN EVIDENTIARY HEARING, UNLESS OTHERWISE ORDERED, IT WILL BE SET ON MARCH 16, 2015, AT 2:30 P.M.

Matters to be Called for Argument

1. 15-20901-A-13 SHARISSE LANAUX — ORDER TO SHOW CAUSE 2-19-15 [11]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The case will be dismissed.

The debtor did not pay the petition filing fee of $310, as required by Fed. R. Bankr. P. 1006(a), when the petition was filed. Nor did the debtor request permission to pay the fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The failure to pay the filing fee or to arrange for its payment in installments is cause for dismissal. See 11 U.S.C. § 1307(c)(2).

2. 15-20907-A-13 CATHERINE/MARK FALLON — MOTION TO VALUE COLLATERAL 2-23-15 [16]
MOH-1
VS. GMAC MORTGAGE

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion 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, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The debtor seeks to value the debtor's residence at a fair market value of $130,000 as of the date the petition was filed. It is encumbered by a first deed of trust held by Ocwen Loan Servicing. The first deed of trust secures a loan with a balance of approximately $139,392.75 as of the petition date. Therefore, GMAC Mortgage's claim secured by a junior deed of trust is completely under-collateralized. No portion of this claim will be allowed as a secured claim. See 11 U.S.C. § 506(a).

Any assertion that the respondent's claim cannot be modified because it is secured only by a security interest in real property that is the debtor's principal residence is disposed of by In re Zimmer, 313 F.3d 1220 (9th Cir. 2002) and In re Lam, 211 B.R. 36 (B.A.P. 9th Cir. 1997). See also In re Bartee, 212 F.3d 277 (5th Cir. 2000); In re Tanner, 217 F.3d 1357 (11th Cir. 2000); McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 611-13 (3rd Cir. 2000); and Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 840 (B.A.P. 1st Cir. 2000).

Because the claim is completely under-secured, no interest need be paid on the claim except to the extent otherwise required by 11 U.S.C. § 1325(a)(4). If

the secured claim is $0, because the value of the respondent's collateral is $0, no interest need be paid pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii).

Any argument that the plan, by valuing the respondent's security and providing the above treatment, violates In re Hobdy, 130 B.R. 318 (B.A.P. 9th Cir. 1991), will be overruled. The plan is not an objection to the respondent's proof of claim pursuant to Fed. R. Bankr. P. 3007 and 11 U.S.C. § 502. The plan makes provision for the treatment of the claim and all other claims, and a separate valuation motion has been filed and served as permitted by Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a). The plan was served by the trustee on all creditors, and the motion to value collateral was served by the debtor with a notice that the collateral for the respondent's claim would be valued. That motion is supported by a declaration of the debtor as to the value of the real property. There is nothing about the process for considering the valuation motion which amounts to a denial of due process.

To the extent the respondent objects to valuation of its collateral in a contested matter rather than an adversary proceeding, the objection is overruled. Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. Further, even if considered in the nature of a claim objection, an adversary proceeding is not required. Fed. R. Bankr. P. 3007. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's deed of trust will remain of record until the plan is completed. This is required by 11 U.S.C. § 1325(a)(5)(B)(I). Once the plan is completed, if the respondent will not reconvey its deed of trust, the court will entertain an adversary proceeding. See also 11 U.S.C. § 1325(a)(5)(B)(I).

In the meantime, the court is merely valuing the respondent's collateral. Rule 3012 specifies that this is done by motion. Rule 3012 motions can be filed and heard any time during the case. It is particularly appropriate that such motions be heard in connection with the confirmation of a plan. The value of collateral will set the upper bounds of the amount of the secured claim. 11 U.S.C. § 506(a). Knowing the amount and character of claims is vital to assessing the feasibility of a plan, 11 U.S.C. § 1325(a)(6), and determining whether the treatment accorded to secured claims complies with 11 U.S.C. § 1325(a)(5).

To the extent the creditor objects to the debtor's opinion of value, that objection is also overruled, particularly in light of its failure to file any contrary evidence of value. According to the debtor, the residence has a fair market value of $130,000. Evidence in the form of the debtor's declaration supports the valuation motion. The debtor may testify regarding the value of property owned by the debtor. Fed. R. Evid. 701; So. Central Livestock Dealers, Inc., v. Security State Bank, 614 F.2d 1056, 1061 (5th Cir. 1980).

3. 15-20114-A-13 LEANOR AMADO — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 2-19-15 [15]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because this hearing on an objection to the confirmation of the proposed chapter 13 plan and a motion to dismiss the case was set pursuant to the procedure required by Local Bankruptcy Rule 3015-1(c)(4), the debtor was not required to file a written response. If no opposition is offered at the hearing, the court will take up the merits of the objection. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The objection will be sustained and the case will be dismissed.

First, 11 U.S.C. § 521(e)(2)(B) & (C) requires the court to dismiss a petition if an individual chapter 7 or 13 debtor fails to provide to the case trustee a copy of the debtor's federal income tax return for the most recent tax year ending before the filing of the petition. This return must be produced seven days prior to the date first set for the meeting of creditors. The failure to provide the return to the trustee justifies dismissal and denial of confirmation. In addition to the requirement of section 521(e)(2) that the petition be dismissed, an uncodified provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 found at section 1228(a) of BAPCPA provides that in chapter 11 and 13 cases the court shall not confirm a plan of an individual debtor unless requested tax documents have been turned over. This has not been done.

Second, if requested by the U.S. Trustee or the chapter 13 trustee, a debtor must produce evidence of a social security number or a written statement that such documentation does not exist. See Fed. R. Bankr. P. 4002(b)(1)(B). In this case, the debtor has breached the foregoing duty by failing to provide evidence of the debtor's social security number. This is cause for dismissal.

Third, the debtor is not eligible for chapter 13 relief. 11 U.S.C. § 109(h) prohibits an individual from being a debtor under any chapter unless that individual received a credit counseling briefing from an approved non-profit budget and credit counseling agency during the 180-day period immediately preceding the filing of the petition. In this case, the debtor has not filed a certificate evidencing that briefing was completed during the 180-day period prior to the filing of the petition. Hence, the debtor was not eligible for bankruptcy relief when this petition was filed.

4. 15-20144-A-13 MORGAN FAY — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 2-19-15 [16]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because this hearing on an objection to the confirmation of the proposed chapter 13 plan and a motion to dismiss the case was set pursuant to the procedure required by Local Bankruptcy Rule 3015-1(c)(4), the debtor was not required to file a written response. If no opposition is offered at the hearing, the court will take up the merits of the objection. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The objection will be sustained and the motion to dismiss the case will be

conditionally denied.

The plan's payment terms, as stated in the additional provisions, are vague and incomplete. The plan will be funded in part from the sale property. The additional provisions fails to specify a date by which the sale and the payment from the sale proceeds will be made.

Because the plan proposed by the debtor 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.

5. 15-21053-A-13 MATTHEW/MAYRA SPINKS — MOTION TO EXTEND AUTOMATIC STAY
PGM-1 — 2-19-15 [8]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion 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, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be denied.

This is the third chapter 13 case filed by the debtor since 2012. While the first was dismissed more than one year ago and 11 U.S.C. § 362(c)(3) is applicable, the court will consider the facts and circumstances surrounding the dismissal of that case because they are relevant to a prediction of the outcome of this case.

The immediately prior case was dismissed within one year of the filing of the current case. That case, 13-25147 was dismissed nine days prior to the filing of the most recent case. It was dismissed after the trustee issued a notice of default and the debtor failed to cure the default either by paying it or modifying the plan.

11 U.S.C. § 362(c)(3)(A) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, the automatic stay with respect to a debt, property securing such debt, or any lease terminates on the 30th day after the filing of the new case.

Section 362(c)(3)(B) allows a debtor to file a motion requesting the continuation of the stay. A review of the docket reveals that the debtor has filed this motion to extend the automatic stay before the 30th day after the

filing of the petition. The motion will be adjudicated before the 30-day period expires.

In order to extend the automatic stay, the party seeking the relief must demonstrate that the filing of the new case was in good faith as to the creditors to be stayed. For example, in In re Whitaker, 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006), the court held: "[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful. If the instant case is one under chapter 7, a discharge must now be permissible. If it is a case under chapters 11 or 13, there must be some substantial change."

Here, it appears that the debtor maintains that while the debtor's income has been affected by an on-the-job injury, the debtor will soon return to work and the other debtor is working two jobs that will net less than $1,600 a month.

This is remarkably similar to what was told to the court in the second case when the debtor asked to impose the automatic stay after the dismissal of the first case, 12-36605. The debtor was unable to maintain payments in the first case because of work related injury but the other debtor had obtain employment. Given that this did not permit the debtor to successfully prosecute the second case, it is difficult to believe anything will change.

6. 15-20968-A-13 MICHAEL/ARLENE MUNOZ — MOTION TO EXTEND AUTOMATIC STAY
BLG-1 — 2-13-15 [8]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the debtor, this motion 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, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

This is the second chapter 13 case filed by the debtor. A prior case chapter 13 case was dismissed within one year of the most recent petition.

11 U.S.C. § 362(c)(3)(A) provides that if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, the automatic stay with respect to a debt, property securing such debt, or any lease terminates on the 30th day after the filing of the new case.

Section 362(c)(3)(B) allows a debtor to file a motion requesting the continuation of the stay. A review of the docket reveals that the debtor has

filed this motion to extend the automatic stay before the 30th day after the filing of the petition. The motion will be adjudicated before the 30-day period expires.

In order to extend the automatic stay, the party seeking the relief must demonstrate that the filing of the new case was in good faith as to the creditors to be stayed. For example, in In re Whitaker, 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006), the court held: "[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful. If the instant case is one under chapter 7, a discharge must now be permissible. If it is a case under chapters 11 or 13, there must be some substantial change."

Here, it appears that the debtor was unable to maintain plan payments in the first case due to serious health condition that the failure to receive disability income timely. That income is now being received. This is a sufficient change in circumstances rebut the presumption of bad faith.

7. 15-20072-A-13 MARYLOUISE PADLO — OBJECTION TO CONFIRMATION OF PLAN
MWP-1
PACIFIC CAPITAL INVESTMENT, L.L.C. VS. — 2-19-15 [30]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because this hearing on an objection to the confirmation of the proposed chapter 13 plan was set pursuant to the procedure required by Local Bankruptcy Rule 3015-1(c)(4), the debtor was not required to file a written response. If no opposition is offered at the hearing, the court will take up the merits of the objection. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The objection will be sustained in part.

Because the objecting creditor's claim has matured, it must be paid in full as a Class 2 claim. The plan proposes to pay the claim as a Class 1 claim. Class 1 is reserved for long term claims that will not be paid in full during the chapter 13 case. Instead, the debtor makes the ongoing contract installment and cures the pre-petition arrearage. Because the loan here is not a long term claim, this treatment is not appropriate.

8. 14-30273-A-13 ZEDOLION MILTON — MOTION TO CONFIRM PLAN
CAH-3 — 1-26-15 [48]

Tentative Ruling: The motion will be denied and the objection will be sustained.

First, Local Bankruptcy Rule 3015-1(b)(6) provides: "*Documents Required by Trustee*. The debtor shall provide to the trustee, not later than the fourteen (14) days after the filing of the petition, Form EDC 3-088, *Domestic Support Obligation Checklist*, or other written notice of the name and address of each person to whom the debtor owes a domestic support obligation together with the name and address of the relevant state child support enforcement agency (see 42 U.S.C. §§ 464 & 466), Form EDC 3-086, *Class 1 Checklist*, for each Class 1

claim, and Form EDC 3-087, *Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By The Trustee*." Because the plan includes a class 1 claim, the debtor was required to provide the trustee with a Class 1 checklist. The debtor failed to do so.

Second, the debtor has failed to give the trustee financial records for a closely held business. This is a breach of the duties imposed by 11 U.S.C. § 521(a)(3) & (a)(4). To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Third, in violation of 11 U.S.C. § 521(a)(1)(B)(iv) and Local Bankruptcy Rule 1007-1(c) the debtor has failed to provide the trustee with employer payment advices for the 60-day period preceding the filing of the petition. The withholding of this financial information from the trustee is a breach of the duties imposed upon the debtor by 11 U.S.C. § 521(a)(3) & (a)(4) and the attempt to confirm a plan while withholding this relevant financial information is bad faith. See 11 U.S.C. § 1325(a)(3).

9. 15-20379-A-13 ALBERTO/KATHARINE OBREGON — MOTION TO VALUE COLLATERAL
PGM-1 — 2-5-15 [16]
VS. SIERRA CENTRAL CREDIT UNION

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

The debtor has filed a valuation motion in connection with a proposed chapter 13 plan. The valuation motion addresses the value of a 2012 Ford Escape that secures Sierra Central Credit Union's Class 2 claim. While the debtor has opined that the vehicle has a value of $15,000 based on the vehicle's model year, 31,000 miles, and minor condition problems (such as cracked windshield, old tires, dirty seats, noisy side windows), no specific information is given in the motion regarding equipment and accessories. No evidence has been presented by the debtor indicating the extent to which these conditions problems affect value.

The credit union counters that the value of the vehicle is $19,557 based on a retail evaluation by the Kelley Blue Book.

To the extent the objection urges the court to reject the debtor's opinion of value because the debtor's opinion is not admissible, the court instead rejects the objection. As the owner of the vehicle, the debtor is entitled to express an opinion as to the vehicle's value. See Fed. R. Evid. 701; So. Central Livestock Dealers, Inc., v. Security State Bank, 614 F.2d 1056, 1061 (5th Cir. 1980).

Any opinion of value by the owner must be expressed without giving a reason for the valuation. Barry Russell, Bankruptcy Evidence Manual, § 701.2, p. 1278-79 (2007-08). Indeed, unless the owner also qualifies as an expert, it is improper for the owner to give a detailed recitation of the basis for the opinion. Only an expert qualified under Fed. R. Evid. 702 may rely on and testify as to facts "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. . . ." Fed. R. Evid. 703. "For example, the average debtor-homeowner who testifies in opposition to a motion for relief from the § 362 automatic stay, should be

limited to giving his opinion as to the value of his home, but should not be allowed to testify concerning what others have told him concerning the value of his or comparable properties unless, the debtor truly qualifies as an expert under Rule 702 such as being a real estate broker, etc." Barry Russell, Bankruptcy Evidence Manual, § 701.2, p. 1278-79 (2007-08).

The creditor has come forward with evidence that the replacement value of the vehicle, based on its retail value as reported by the Kelley Blue Book, is $19,557. This valuation, however, presumes the condition of the vehicle is excellent. See http://www.kbb.com (indicating that retail "value assumes the vehicle has received the cosmetic and/or mechanical reconditioning needed to qualify it as 'Excellent'" and that "this is not a transaction value; it is representative of a dealer's asking price and the starting point for negotiation").

The vehicle must be valued at its replacement value. In the chapter 13 context, the replacement value of personal property used by a debtor for personal, household or family purposes is "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." See 11 U.S.C. § 506(a)(2).

The retail value suggested by the creditor cannot be relied upon by the court to establish the vehicle's replacement value. First, the creditor's retail value assumes that the vehicle is in excellent condition. This is not based on any facts, at least facts proven to the court. 11 U.S.C. § 506(a)(2) asks for "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." That is, what would a retailer charge for the vehicle as it is?

Nor has the debtor proven to the court's satisfaction the replacement value of the vehicle. There is no evidence from the debtor on this point. The debtor's opinion of value, at best is what they could sell it for. To the extent the debtor is asserting that $15,000 is the retail value the debtor has not been qualified as an expert on this issue. Thus, the debtor's opinion of value is an inadmissible lay opinion. See Fed. R. Evid. 701(c) (prohibiting lay witnesses from testifying in the form of opinions based on scientific, technical or other specialized knowledge). The court does not have any other evidence of value.

While neither party has persuaded the court as to the replacement value of the vehicle under section 506(a)(2), it is the debtor who has the burden of proof. Accordingly, the valuation motion must be denied.

Accordingly, the motion will be denied.

10. 12-25483-A-13 BRIAN ELLIOTT — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1 — 2-5-15 [70]
DAIMLER TRUST VS.

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be dismissed as moot.

The movant leases a vehicle to the debtor. The plan provides for the assumption of that lease as well as the payment by the debtor of all contract installment payments to the movant. The plan further provides:

"Upon confirmation of the plan, all bankruptcy stays are modified to allow the nondebtor party to an unexpired lease to obtain possession of leased property, to dispose of it under applicable law, and to exercise its rights against any nondebtor in the event of a default under applicable law or contract."

Hence, because the plan has been confirmed, if there has been a payment default the movant needs no relief from this court to proceed against the vehicle.

11. 15-20484-A-13 CHRISTOPHER WEBB — MOTION FOR RELIEF FROM AUTOMATIC STAY
CJO-1 — 2-17-15 [18]
DEUTSCHE BANK NATIONAL TRUST CO. VS.

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted in part.

The movant held a senior deed of trust on the debtor's Culver City rental property. While this case was filed on January 23, the movant caused a nonjudicial foreclosure sale to be completed on January 26 at 10:26 AM. Prior to the sale it had not be served with notice of the case and the debtor had not notified it of the bankruptcy. It was not until January 26 at 11:50 AM that it learned to the sale. There is no evidence in the opposition disputing these facts.

This is the third bankruptcy affecting the movant's effort to obtain its collateral. The first case was a chapter 7 case, 10-60614, in which the debtor received a discharge. Before the case was closed, the movant's agent or predecessor received relief from the automatic stay to foreclose on the property.

The second case, 11-14165, was filed under chapter 13. Because the debtor's chapter 7 discharge had been received in a case filed within 4 years of the chapter 13 petition, the debtor was not eligible for a discharge. See 11 U.S.C. § 1328(f)(1). The debtor, however, was eligible for relief under chapter 13 with the proviso that whatever any debt not paid in the chapter 13 case was potentially enforceable against the debtor or the debtor's property. As to the movant's claim, the plan provided for the direct payment of monthly installment payments. The case was completed and closed on October 19, 2014.

This chapter 13 case followed on January 23, 2015. Given that the motion establishes that the debtor has failed to make 25 monthly installment payments before the current case was filed, and given that the plan confirmed in the second case indicated the movant's claim was not in default and that ongoing installments would be paid by the debtor directly to the movant or its predecessor, it is a fair inference that the debtor breached the payment terms of the plan in the second case. It appears that this case has been filed to pay those arrears.

To the extent relief is requested under 11 U.S.C. § 362(d)(4), the motion will be denied. The court is unconvinced that the cases were filed as part of a scheme to hinder and delay the movant. In fact, given that the plan in the second case required the debtor to make direct payments to the movant, if those payments were not made, it was free to foreclose on the subject property. The plan provided: "Upon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under

applicable law or contract."

Also, a review of the dockets for the first two cases indicates that the debtor timely prosecuted both of them to conclusion. At most, the debtor failed to make direct payments to the movant during the second case, but as just indicated, the plan permitted the movant to foreclose but it failed to do so.

There is cause to terminate the automatic stay. See 11 U.S.C. § 362(d)(1). The opposition to the motion concedes that the liens against the subject property total $825,516.69. And while the debtor maintains that the value of the property is $850,000, this is difficult to believe given that in the second case the debtor testified in 2013 that it was worth $550,000. But, even if it is worth $850,000, the equity is minor and could not be realized if the property were sold – transactional costs surely would exceed $25,000. And, there is no evidence that the cash from the rental of the property can both support the service of the encumbrances, maintain the property, and produce any net rents for use by the debtor.

The court also will annul the automatic stay. In determining whether to grant retroactive relief from stay, the court must engage in a case-by-case analysis and balance the equities between the parties. Some of the factors courts have considered are whether the creditor knew of the bankruptcy filing, whether the debtor was involved in unreasonable or inequitable conduct, whether prejudice would result to the creditor, and whether the court could have granted relief from the automatic stay had the creditor applied in time. Nat'l Envtl. Water Corp. v. City of Riverside (In re Nat'l Envtl. Water Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).

The Bankruptcy Appellate Panel approved additional factors for consideration in In re Fjeldsted, 293 B.R. 12 (9th Cir. B.A.P. 2003). The Fjeldsted factors are employed to further examine the debtor's and creditor's good faith, the prejudice to the parties, and the judicial or practical efficacy of annulling the stay.

Here, the movant did not know of the bankruptcy case when it conducted a foreclosure sale. Further, the debtor admittedly has minimal equity in the property, and failed to make payments to the movant in the second case. These facts are sufficient to warrant annulment.

The loan documentation contains an attorney's fee provision and the movant is an over-secured creditor. The motion demands payment of fees and costs. The court concludes that a similarly situated creditor would have filed this motion. Under these circumstances, the movant is entitled to recover reasonable fees and costs incurred in connection with prosecuting this motion. See 11 U.S.C. § 506(b). See also Kord Enterprises II v. California Commerce Bank (In re Kord Enterprises II), 139 F.3d 684, 689 (9th Cir. 1998).

Therefore, the movant shall file and serve a separate motion seeking an award of fees and costs. The motion for fees and costs must be filed and served no later than 14 days after the conclusion of the hearing on the underlying motion. If not filed and served within this deadline, or if the movant does not intend to seek fees and costs, the court denies all fees and costs. The order granting the underlying motion shall provide that fees and costs are denied. If denied, the movant and its agents are barred in all events from recovering any fees and costs incurred in connection with the prosecution of the motion.

If a motion for fees and costs is filed, it shall be set for hearing pursuant to Local Bankruptcy Rule 9014-1(f)(1) or (f)(2). It shall be served on the debtor, the debtor's attorney, the trustee, and the United States Trustee. Any motion shall be supported by a declaration explaining the work performed in connection with the motion, the name of the person performing the services and a brief description of that person's relevant professional background, the amount of time billed for the work, the rate charged, and the costs incurred. If fees or costs are being shared, split, or otherwise paid to any person who is not a member, partner, or regular associate of counsel of record for the movant, the declaration shall identify those person(s) and disclose the terms of the arrangement with them.

Alternatively, if the debtor will stipulate to an award of fees and costs not to exceed $750, the court will award such amount. The stipulation of the debtor may be indicated by the debtor's signature, or the debtor's attorney's signature, on the order granting the motion and providing for an award of $750.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

12. 14-24088-A-13 HUGO/ALICIA CERVANTES — MOTION TO MODIFY PLAN
WW-4 — 2-2-15 [50]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objection will be sustained.

When this case was filed on April 21, 2014, the debtor leased nonresidential real property from the objecting party. The plan filed on May 1, 2014 and confirmed on January 29, 2015, however, did not assume that unexpired lease and provide for the cure of the substantial monetary defaults under the lease. On the contrary, the plan rejected the lease. The confirmed plan provides:

"3.01. Debtor assumes the executory contracts and unexpired leases listed below. Debtor shall pay directly to the other party to the executory contract or unexpired lease, before and after confirmation, all post-petition payments. Unless a different treatment is required by 11 U.S.C. § 365(b)(1) and is set out in the Additional Provisions, pre-petition arrears shall be paid in full. The monthly dividend payable on account of those arrears is specified in the table below.

"3.02. Any executory contract or unexpired lease not listed in the table below is rejected. Upon confirmation of the plan, all bankruptcy stays are modified to allow the nondebtor party to an unexpired lease to obtain possession of leased property, to dispose of it under applicable law, and to exercise its rights against any nondebtor in the event of a default under applicable law or contract."

The debtor did not list the lease with the movant. Hence, section 3.02 of the plan is relevant. The lease was rejected upon confirmation of the plan. And, upon confirmation and rejection, the automatic stay as well as the codebtor stay of 11 U.S.C. § 1301 were modified to permit the lessor to obtain possession and enforce rights against nondebtors.

However, the debtor now proposes an amended plan that in effect provides for

the assumption of the lease. Given that it was previously rejected, this is not possible.

First, if a rejected lease could later be assumed, any assumption of a nonresidential real property lease would have to occur no later than 120 days after the order for relief. The modified plan was filed more than 120 days after the order for relief. See 11 U.S.C. § 365(d)(4)(A).

Second, the rejection of the lease was a breach of the lease that permits the objecting party to enforce its rights to the property. See 11 U.S.C. § 365(g).

13. 13-36092-A-13 WOODROW POYNTER — MOTION TO MODIFY PLAN
GW-3 — 10-17-14 [47]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: None.

THE FINAL RULINGS BEGIN HERE

14. 10-24702-A-13 VERNON/JAMIE JIMMERSON — MOTION TO MODIFY PLAN 1-30-15 [95]
FF-6

Final Ruling: This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2) and 9014-1(f)(1) and Fed. R. Bankr. R. 3015(g). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the granting of the motion. 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 debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The modified plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

15. 15-20003-A-13 ANDREA LARA — OBJECTION TO CONFIRMATION OF PLAN 2-19-15 [41]
JPJ-1

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

At the request of the trustee, the hearing on the objection is continued to March 30, 2015 at 1:30 p.m.

16. 15-20003-A-13 ANDREA LARA — OBJECTION TO CONFIRMATION OF PLAN 2-18-15 [37]
PENNYMAC HOLDINGS, L.L.C. VS.

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

Because the meeting of creditors has not been concluded, the hearing on the objection is continued to March 30, 2015 at 1:30 p.m.

17. 14-30206-A-13 STANLEY WOO — ORDER TO SHOW CAUSE 2-17-15 [83]

Final Ruling: The order to show cause will be discharged and the case shall remain pending.

The court granted the debtor permission to pay the filing fee in installments. The debtor failed to pay the $79 installment when due on February 11. However, after the issuance of the order to show cause, the delinquent installment was paid. No prejudice was caused by the late payment.

18. 14-30613-B-13 DONALD/BROOKE HOBART — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 12-11-14 [22]

Final Ruling: The hearing is continued by the court so the hearing will coincide with a hearing on related valuation motion. The debtor shall file opposition to the objection and the related dismissal motion no later than April 6, 2014. Any reply shall be filed by April 13 and a final hearing will be held on April 27 at 1:30 p.m.

19. 14-30613-B-13 DONALD/BROOKE HOBART — OBJECTION TO CONFIRMATION OF PLAN
MDE-1 — 12-11-14 [25]
WELLS FARGO BANK, N.A. VS.

Final Ruling: The hearing is continued by the court so the hearing will coincide with a hearing on related valuation motion. The debtor shall file opposition to the objection and the related dismissal motion no later than April 6, 2014. Any reply shall be filed by April 13 and a final hearing will be held on April 27 at 1:30 p.m.

20. 14-30613-B-13 DONALD/BROOKE HOBART — MOTION TO VALUE COLLATERAL
JGD-1 — 12-11-14 [18]
VS. SPECIALIZED LOAN SERVICING

Final Ruling: The hearing is continued by the court at the request of the respondent so that it may obtain an appraisal of the property. Should the debtor wish to supplement the record with an appraisal or other expert opinion, it shall be filed and served no later than April 6, 2014 together with admissible evidence concerning the existence and amount of the alleged senior lien. Opposition to the motion shall be filed and served no later than April 13. Any reply shall be filed by April 20 and a final hearing will be held on April 27 at 1:30 p.m.

21. 14-27217-A-13 MICHAEL POWELL AND DEBORAH SENNECA — OBJECTION TO CONFIRMATION OF PLAN
BF-5 — 2-20-15 [70]
BANK OF AMERICA, N.A. VS.

Final Ruling: The objection will be dismissed as moot. The objection should have been filed as opposition to the debtor's motion to confirm an amended plan which the court considered at a hearing on February 23. At any rate, the court denied confirmation based on the trustee's timely and correctly filed objection.

22. 12-31122-A-13 WILLIE JOHNSON AND MARY KNIGHT-JOHNSON — MOTION TO SUBSTITUTE PARTY
PGM-4 — 2-6-15 [59]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted in part. There is no need to substitute a party for a deceased debtor because death does not necessarily cause the dismissal of the case. See Fed. R. Bankr. P. 1016. Nonetheless, given the evidence with the motion, the court concludes that further administration of the case is possible given the willingness of the joint debtor to make the plan payments. Upon plan

completion, and upon compliance with Local Bankruptcy Rule 5009-1 by the surviving debtor, the court will waive compliance with that Local Rule upon as to the deceased debtor, the debtors shall receive a discharge.

23. 14-25345-A-13 FRANK ESPINOZA — MOTION TO MODIFY PLAN
NUU-2 — 1-23-15 [28]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted on the condition that the plan is further modified in the confirmation order to account for all prior payments made by the debtor under the terms of the prior plan, to provide for a plan payment of $203.04 beginning February 25, 2015, and to provide for the Class 2B claim of One Main Financial to the extent of disbursements previously made to it. As further modified, the plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

24. 14-31447-A-13 NANNETTE SMITH — OBJECTION TO EXEMPTIONS
JPJ-2 — 2-3-15 [29]

Final Ruling: This objection to the debtor's exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor 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 as consent to the granting of the motion. 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 objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the debtor's default is entered and the matter will be resolved without oral argument.

The objection will be sustained and the exemption of clothing under a statute providing for the exemption of furs and jewelry is disallowed.

25. 14-31748-A-13 PEDRO BARRIOS — OBJECTION TO EXEMPTIONS
JPJ-2 — 1-30-15 [32]

Final Ruling: The objection will be dismissed as moot. The case was dismissed on February 26.

26. 15-20157-A-13 REGINALD/TERRA HILLIARD — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 2-19-15 [14]

Final Ruling: The objection and the related dismissal motion will be dismissed as moot. The case was converted to one under chapter 7 on February 27.

27. 14-32561-A-13 JONATHAN GARCIA
JPJ-1

OBJECTION TO CONFIRMATION OF PLAN AND REQUEST FOR CONTINUANCE
2-19-15 [27]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

At the request of the trustee, the hearing on the objection is continued to March 30, 2015 at 1:30 p.m.

28. 14-27963-A-13 JAMES/KATHRYN BAGGARLY
HDR-3

MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY
2-9-15 [68]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Fed. R. Bankr. R. 2002(a)(6). The failure of the trustee, the debtor, the United States Trustee, the creditors, and any other party 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 as consent to the granting of the motion. 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 Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted. The fees of $2,028 represent reasonable compensation for actual, necessary, and beneficial services rendered to the debtor. Any retainer may be drawn upon and the balance of the approved compensation is to be paid through the plan in a manner consistent with the plan and the Local Bankruptcy Rule 2016-1, if applicable.

29. 15-20064-A-13 KEVIN/COLLEEN SCHROEDER
JPJ-1

OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
2-19-15 [15]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The objection will be sustained be dismissed as moot but the motion to dismiss the case will be conditionally denied. The debtor in effect has voluntarily dismissed the plan to which the trustee objects by proposing a modified plan which is set for hearing on April 13. If the trustee has any objection to the modified plan, it should be raised as opposition to the debtor's motion. Nonetheless, because the plan initially proposed by the debtor is not confirmable, the debtor will be given the opportunity to confirm the modified 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 by April 13, the case will be dismissed on the trustee's ex parte application.

30. 09-46172-A-13 JAMES/MILDRED RUSS
EJS-5

MOTION FOR SUBSTITUTION OF PARTY TO EXECUTE 1328 CERTIFICATE
2-4-15 [105]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be granted in part. There is no need to substitute a party for a deceased debtor because death does not necessarily cause the dismissal of the case. See Fed. R. Bankr. P. 1016. Nonetheless, given the evidence with the motion, the court concludes that further administration of the case is possible given the willingness of the joint debtor to make the plan payments. Upon plan completion, and upon compliance with Local Bankruptcy Rule 5009-1 by the surviving debtor, the court will waive compliance with that Local Rule upon as to the deceased debtor, the debtors shall receive a discharge.

31. 13-35475-A-13 JOSE JIMENEZ AND MARIA GONZALEZ
TOG-16

MOTION TO CONFIRM PLAN
1-16-15 [217]

Final Ruling: This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(c)(3) & (d)(1) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the granting of the motion. 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 debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

The former chapter 7 trustee's response does not object to confirmation. Rather, he asks only that if confirmation is denied that the case be reconverted to one under chapter 7.

32. 14-31090-A-13 STEVEN/LEYNA IRWIN
SDB-2

MOTION TO CONFIRM PLAN
1-20-15 [34]

Final Ruling: This motion to confirm a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(c)(3) & (d)(1) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party 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 as consent to the granting of the motion. 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 debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

33. 14-32393-A-13 RALPH CROSBY
JPJ-1

OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
2-18-15 [29]

Final Ruling: The objection and motion will be dismissed as moot. The case was dismissed on February 26.

34. 14-32393-A-13 RALPH CROSBY
NL-1
GEORGE BOEGER VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
2-8-15 [22]

Final Ruling: The motion will be dismissed without prejudice.

Fed. R. Bankr. P. 9013 and 9014(a) provide that a request for an order shall be made by motion. Fed. R. Bankr. P. 9014(b) further provides that a motion must be served in the manner provided for service of a summons and a complaint. Fed. R. Bankr. P. 7004(b) permits service of a summons and a complaint by first class mail. When the person served is the debtor, the debtor and the debtor's attorney both must be mailed the summons and complaint. See Fed. R. Bankr. P. 7004(b)(9) & (g). Here, the motion was served only on the debtor's attorney. Nothing has been filed by or on behalf of the debtor that might be considered a waiver of this service defect. Therefore, service is defective and the motion must be dismissed without prejudice.