

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

**March 19, 2014 at 10:00 a.m.**

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1. [13-33601](#)-E-13 ANA RODRIGUEZ MOTION TO DISMISS CASE  
TSB-2 Peter Macaluso 2-13-14 [[45](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to grant the Motion to Dismiss and dismiss the case.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**Delinquent**

The Trustee seeks dismissal of the case on the basis that the Debtor is \$2,640.00 delinquent in plan payments, which represents multiple months of the \$1,280.00 plan payment. The next scheduled payment of \$Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

**Debtor's Response**

In her response, Debtor argues that she will be current under an amended plan which will have been filed, set and served prior to the hearing. A review of the docket shows no amended plan has been filed as of March 7, 2014. Debtor does not state any other reason for her failure to pay.

More significantly, the Debtor does not state how she can have an extra \$3,920.00 to cure the arrearage. The court will not blindly accept a debtor who is already funding a plan with all of his or her "projected

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disposable income" having unexplained extra income to cure a multi-month default.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

2. [13-33513-E-13](#) MARLON/REBECCA LAWAS MOTION TO DISMISS CASE  
TSB-1 Yasha Rahimzadeh 2-13-14 [[112](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on February 13, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss 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 respondent and other parties in interest are entered.

**The Motion to Dismiss is granted and the case is dismissed.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**DISGORGEMENT OF FEES**

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The court issued an order requiring counsel for the Debtors to disgorge \$875.00 in fees, which were to be paid to the Chapter 13 Trustee by March 10, 2014. The Trustee is ordered to then disburse the \$875.00 to the Debtors.

At the hearing the Trustee confirmed **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

**Delinquency**

The Trustee seeks dismissal of the case on the basis that the Debtor is \$13,932.00 delinquent in plan payments, which represents multiple months of the \$4,644.00 plan payment. The next scheduled payment of \$4,644.00 is due on February 25, 2014. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

**Plan not noticed/no motion to confirm**

The Trustee asserts that the Debtor did not properly serve the Plan on all interested parties and has yet to file a motion to confirm the Plan. The Plan was filed after the notice of the Meeting of Creditors was issued. Therefore, the Debtor must file a motion to confirm the Plan. See Local Bankr. R. 3015-1(c)(3). A review of the docket shows that no such motion has been filed as of March 7, 2014. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

Causes exist to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

3. [13-35314](#)-E-13 BORIS/ZINAIDA MURZAK ORDER TO SHOW CAUSE - FAILURE  
Mark Shmorgan TO PAY FEES  
2-6-14 [[36](#)]

**Final Ruling:** The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$70.00 due on February 3, 2014). The court docket reflects that on February 6, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

**The Order to Show Cause is discharged.** No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

4. [13-35016](#)-E-13 NAMATH KANDAHARI MOTION TO DISMISS CASE  
TSB-2 Timothy Walsh 2-18-14 [[42](#)]

**Final Ruling:** The Chapter 13 Trustee having filed a "Withdrawal of Motion" for the pending Motion to Dismiss the Bankruptcy Case, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Chapter 13 Trustee's Motion to Dismiss the Bankruptcy Case.**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

A Motion to Dismiss the Bankruptcy Case having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil

Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss the Bankruptcy Case is dismissed without prejudice.

5. [10-26819](#)-E-13 JORGE/LINDA JAIME CONTINUED MOTION TO DISMISS  
DPC-8 John Tosney CASE  
1-17-14 [[88](#)]

**CONT. FROM 2-19-14**

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 17, 2014. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss 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 respondent and other parties in interest are entered.

**The Motion to Dismiss is granted and the Chapter 13 case dismissed.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

*Delinquency*

The Trustee seeks dismissal of the case on the basis that the Debtor is \$3,300.00 delinquent in plan payments, which represents multiple months of the \$1,850.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

*No Substitution of Counsel*

The Chapter 13 case was filed in March 2010. In January 2014 the court granted a motion to value the secured claim of Citibank, N.A. In a loss to the Sacramento legal community Debtors' attorney recently passed away. No other attorney has substituted in as counsel for the Debtors in this case. The Debtors are completing the fourth year of their five year plan.

The Trustee was to serve an informational copy of the Motion on Aaron Koenig, an attorney who has substituted in on some of Debtors' former counsel's cases.

**AARON C. KOENIG'S DECLARATION**

On March 12, 2014, Aaron C. Koenig filed a declaration stating that he met with Debtor on January 9, 2014, prior to the Trustee filing the current motion to dismiss. At that time, Mr. Koenig testifies that he suggested a loan modification. On February 21, 2014, he called the Debtor, who was aware of the Trustee's motion to dismiss. Mr. Koenig states that he forwarded him a substitution of attorney and asked that Debtors sign and return it. Mr. Koenig testifies that since that date, he has not heard from the Debtor (after at least five attempts of contacting him) and has not received the signed substitution of attorney. Dckt. 93.

**REVIEW OF CASE**

The Debtors commenced this case on March 19, 2010. The latest confirmed plan, the 3<sup>rd</sup> Modified Plan (Dckt. 60) provides for 60 months of plan payments. It appears that all, or substantially all, of the plan payments were made to creditors having liens on property which the Debtors sought to retain. The major amounts being paid for the Debtors' car loan, loan secured by the senior lien on their residence and post-petition arrearage on the loan secured by the senior lien on their residence.

Cause exists to dismiss the Chapter 13 case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the bankruptcy case is dismissed.

6. [09-30220-E-13](#) KURT KRAMER MOTION TO DISMISS CASE  
NLE-2 Peter Macaluso 3-4-14 [[135](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on March 4, 2014. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss was properly set for hearing on the notice required by 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 court's tentative decision is to grant the Motion and convert the case to one under Chapter 7.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee filed the present motion to dismiss, asserting very serious grounds relating to the Debtor's post-petition conduct concerning property of the bankruptcy estate. In addition to being grounds to convert or dismiss the case, the post-petition diversion of assets raises serious issues relating to the Debtor's post-petition fiduciary duty to the estate.

**Material default by Debtor with respect to a term of the confirmed plan**

In his motion, the Chapter 13 Trustee ("Trustee") alleges that Debtor has sold a Link-Belt Excavator on September 11, 2012 for \$36,000.00 without permission of the court. Debtor's Chapter 13 Plan specifically states in § VI. Miscellaneous Provisions, 6.02 that Debtor is prohibited from disposing any personal or real property with a value of \$1,000.00 or more without first obtaining court authorization. Dckt. 71. This is material default by Debtor with respect to a term of a confirmed plan. 11 U.S.C. § 1307(c)(6).

The Debtor, safely ensconced in the protective cocoon of bankruptcy has only some very basic obligations. These include following the Bankruptcy Code and not violating his fiduciary duty with the property of the bankruptcy estate (when, as in this case, property is not revested in the debtor) and property of the plan estate (when property is revested in the debtor). Here, the Debtor has been alleged by the Trustee to have converted \$36,000.00 of bankruptcy estate assets.

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Post-petition diversion of assets raises serious civil and criminal issues for a fiduciary of the estate. These can run from simple tort claims which the estate has against the fiduciary, denial of discharge (11 U.S.C. § 727(a)(2)(A), (3)), to commission of a bankruptcy crime (18 U.S.C. §§ 152, 3284).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9<sup>th</sup> Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9<sup>th</sup> Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause....

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7<sup>th</sup> Cir. 1992). Bad faith is one of the general "for cause" grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9<sup>th</sup> Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9<sup>th</sup> Cir. 1999).

Based on the totality of the circumstances, conversion of this case to one under Chapter 7 is in the best interests of creditors. There is a \$36,000.00 asset of the estate out there under the control of the Debtor. It appears that the estate may well have claims against the Debtor for breach of fiduciary duty or conversion. The Debtor's business was generating sufficient profits to fund the plan with a \$4,000.00 a month payment.

Further, it is in the best interests of creditors that a Chapter 7 Trustee and the U.S. Trustee's Office, and all creditors be afforded the opportunity to, review the conduct of the Debtor and consider whether he should be allowed to obtain a discharge, his discharge should be denied, the case should be dismissed, or the case should be dismissed with prejudice.

Cause exists under 11 U.S.C. § 1307 to convert this case to one under Chapter 7.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court,

and upon review of the pleadings, evidence, arguments of counsel, and the court determining that conversion of the case to one under Chapter 7 is in the best interests of the creditors, and good cause appearing,

**IT IS ORDERED** that the Motion is granted and the case is converted to one under Chapter 7.

7. [13-35420-E-13](#) **LATASHIA RICHARDSON** **ORDER TO SHOW CAUSE - FAILURE**  
**Richard Jare** **TO PAY FEES**  
**2-10-14 [[26](#)]**

**Final Ruling:** The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$140.00 due on February 3, 2014). The court docket reflects that on February 14, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

**The Order to Show Cause is discharged.** No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

8. [12-35521](#)-E-13 CHRISTOPHER DEAN  
NLE-1 Peter Macaluso

CONTINUED MOTION TO DISMISS  
CASE  
12-9-13 [[148](#)]

**CONT. FROM 1-18-14**

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on December 9, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition.

**The court's tentative decision is to grant the Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

The Trustee seeks dismissal of the case on the basis that the Debtor is \$4,400.00 delinquent in plan payments, which represents multiple months of the \$2,200.00 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor responds, stating that Debtor's Chapter 13 proposes to retain the real property and an Adversary Proceeding has been commenced. Counsel states that he has sent a Stipulation to the Homeowner's Association to restore title of the residence to Debtor, cure the arrears and allow possession to the Debtor so that he can prosecute this case. Counsel states that additional negotiations are continuing as to how to handle the post-petition arrears.

The Adversary Proceeding is being actively prosecuted, and if a stipulation is achieved, a number of issues can be resolved - including the Debtor retaining the property if he can cure the arrearage which is secured by the property.

**TRUSTEE'S SUPPLEMENT**

The Chapter 13 Trustee filed a declaration, stating that the Debtor is delinquent in plan payments by \$2,200.00. Dckt. 184.

**DEBTOR'S RESPONSE**

Debtor responds, stating that the Debtor is current under the proposed plan and that the Debtor's failure to make consistent payments is

based on the loss of possession that resulted after the loan modification was approved.

However, no evidence has been submitted to the court that the Debtor is in fact current on plan payments. Therefore, grounds exist to dismiss this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

9. [12-29922-E-13](#) JUDITH DUDEK TRUSTEE'S OBJECTION TO NOTICE  
NLE-1 Timothy Walsh OF INTENT TO ENTER CHAPTER 13  
DISCHARGE  
1-27-14 [[83](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on January 27, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Objection to Notice of Intent to Enter Chapter 13 Discharge 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).

**The court's tentative decision is to sustain the Objection to Notice of Intent to Enter Chapter 13 Discharge.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee objects to the Notice of Intent to Enter Discharge in this case, on the basis that the court ruled and issued civil minutes on the Motion to Confirm that "No discharge for the Debtor shall be entered except upon further order of the court...[a]fter the Trustee files

his Notice of Completion of Plan Payments and the Final Accounting may the Debtor file a motion for entry of discharge." Civil Minutes, Dckt. 69. These terms were further stated in the Order Confirming Third Amended Chapter 13 Plan Filed December 23, 2012. Dckt. 72.

The court also noted in the Civil Minutes for the Motion to Confirm, that the Debtor filed the plan in an attempt to avoid a potential claim filed by the mortgage company (stated as "GreenTree") on any potential deficiency upon the surrender of the real property commonly known as 41092 HWY 29, Oakhurst, California. Dckt. 69. The court noted that if the creditor having the claim secured by the subject property elected to pursue a path by which its claim is fully satisfied or a deficiency barred, then the Third Amended Plan may properly provide for the claims. However, if there is an unsecured claim filed for any deficiency, then the Third Amended Plan would be underfunded. *Id.*

The court confirmed the plan, conditioned on the Notice of Completion of Plan Payments and Final Accounting for the Trustee not being filed more than 6 months after the order confirming the Third Amended Plan becomes final. The Order confirming the plan was entered March 20, 2013. Dckt. 72.

The Trustee filed the Notice of Completion of Plan Payments on October 10, 2013. Dckt. 74. The Final Report and Account was filed December 9, 2013. Dckt. 76.

As such, it appears the clerk of the court was not to enter an automatic discharge. Rather, the Debtor is to file a motion for entry of discharge seven (7) months after the order confirming the Third Amended Plan becomes a final, non-appealable order. See Order, Dckt. 72. The Order confirming the plan having been entered March 20, 2013, the requisite time has passed for the Debtor to file a motion for entry of discharge.

Based on the foregoing, the objection is sustained, and Debtor shall file a Motion for Entry of Discharge, addressing the condition set forth in the Civil Minutes and Order on the Motion to Confirm the Third Amended Plan. See Dckts. 69, 72.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to Notice of Intent to Enter Chapter 13 Discharge filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Objection is sustained and the Clerk of the Court shall not automatically enter the Debtor's discharge in this case.

10. [13-34223-E-13](#) NAOMI LEBUS  
TSB-1 Pro Se

CONTINUED MOTION TO DISMISS  
CASE  
1-22-14 [[26](#)]

**CONT. FROM 2-19-14**

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Debtor's Attorney, and Office of the United States Trustee on January 22, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss 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).

**The court's tentative decision is to xxxx the Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

*Failure to Commence Plan Payments*

The Trustee argues that the Debtor did not commence making plan payments and is \$135.80 delinquent in plan payments, which represents one month's plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. The Debtor presented no opposition to the Motion.

*Delinquency*

The Trustee seeks dismissal of the case on the basis that the Debtor is \$135.80 delinquent in plan payments, which represents one month's plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

*Failure to Appear at 341 Meeting*

Further, the Trustee alleges that while the Debtor personally appeared at the Meeting of Creditors held pursuant to 11 U.S.C. § 341, Debtor indicated that she had retained counsel; however, counsel for the Debtor was not present. A review of the docket shows that no substitution of attorney has been filed in this case on behalf of the Debtor, and that there is no counsel of record for the Debtor. Attendance at the First Meeting of Creditors is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay which is prejudicial to

creditors and cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

*Failure to Provide Tax Returns*

The Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

**CONTINUANCE**

The court continued the hearing. No documents have been filed to date.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the motion is xxxx.

11. [13-36126-E-13](#) **SALVADOR CORTEZ** **MOTION TO DISMISS CASE**  
TSB-1 **Pro Se** 2-18-14 [[30](#)]

**CASE DISMISSED 2/21/14**

**Final Ruling:** The case having previously been dismissed, the Motion is dismissed as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

12. [13-34027-E-13](#) **EILEEN MOFFITT** **MOTION TO DISMISS CASE**  
TSB-1 **Joseph Canning** 2-19-14 [[34](#)]

March 19, 2014 at 10:00 a.m.

**Final Ruling:** The Chapter 13 Trustee having filed a "Withdrawal of Motion" for the pending Motion to Dismiss the Bankruptcy Case, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Chapter 13 Trustee's Motion to Dismiss the Bankruptcy Case.**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

A Motion to Dismiss the Bankruptcy Case having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss the Bankruptcy Case is dismissed without prejudice.

13. [10-20031-E-13](#) TOMMY GARCIA MOTION TO DISMISS CASE  
DPC-1 Peter Macaluso 2-11-14 [[119](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 11, 2014. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to deny the Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

## Delinquency

The Trustee seeks dismissal of the case on the basis that the Debtor is \$1,880.00 delinquent in plan payments, which represents multiple months of the \$630.00 plan payment. Prior to the hearing in this matter, another payment of \$630.00 will come due. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

## Debtor's opposition

In his opposition, Debtor argues that on or before the hearing he will be filing an amended Chapter 13 Plan. A review of the docket shows that no such amended plan or motion have been filed as of March 12, 2014.

On March 13, 2014, the Debtor filed a First Modified Plan, Motion to Confirm, and Supporting Pleadings. Dckts. 130, 126-129. A summary review of the Motion and declaration in support appear to be consistent with the pleading requirements of Federal Rule of Bankruptcy Procedure 9013 and the declaration provides specific testimony, not merely the Debtor's personal findings and conclusions.

Based on the amended plan having been filed and the Debtor appearing got be actively prosecuting the case, the court denies the Motion without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

14. [13-35331-E-13](#) GREG/JULIE WEATHERLY  
PRO SE

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
2-6-14 [[27](#)]

CASE DISMISSED 2/24/14

**Final Ruling:** The case having previously been dismissed, the Order to Show Cause is dismissed as moot.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the

Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is dismissed as moot, the case having been dismissed.

15. [13-36233-E-13](#) MARK/EVELINA PANANGANAN MOTION TO DISMISS CASE  
TSB-2 James Bianchi 2-13-14 [[24](#)]

**Final Ruling:** The Chapter 13 Trustee having filed a Notice of Withdrawal on March 14, 2014, Dckt. 31, no prejudice to the responding party appearing by the dismissal of the Motion, the court construing the Notice of Withdrawal as an *ex parte* motion to dismiss the motion to dismiss without prejudice, the parties, having the right to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041, the dismissal consistent with the opposition filed by the Debtors, the *ex parte* motion is granted, the Trustee's motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 31, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Trustee's Motion to Dismiss the Chapter 13 case is dismissed without prejudice, and the bankruptcy case shall proceed.

16. [12-34737-E-13](#) TERESA NABER  
TSB-2 Aaron Koenig

MOTION TO DISMISS CASE  
2-14-14 [[47](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 14, 2014. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

**No Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to xxxx the Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**Material default by Debtor with respect to a term of the confirmed plan**

The Chapter 13 Trustee ("Trustee") alleges that Debtor materially breached the Chapter 13 Plan ("Plan"). § 5.03 of the Plan provides that Debtor is in default if the plan will not be completed within six months of its stated term, not to exceed 60 months. According to the Trustee, the Plan will complete in 76 months as opposed to 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). And it is also material default by Debtor with respect to a term of a confirmed plan. 11 U.S.C. § 1307(c)(6).

Debtor responds, requesting the court allow a hearing on March 19, 2014, for counsel to get more time to get sufficient documents from the creditor in order to substantiate the creditor's claim.

**At the hearing xxxx.**

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is ~~xxxx~~.

17. [14-20045](#)-E-13 TUBAYA/DEBORAH CARTER AMENDED ORDER TO SHOW CAUSE -  
Peter G. Macaluso FAILURE TO PAY FEES  
2-12-14 [[32](#)]

**Final Ruling:** The court issued an order to show cause based on Debtors' failure to pay the required fees in this case (\$70.00 due on February 3, 2014). The court docket reflects that on February 20, 2014, the Debtors paid the fees upon which the Order to Show Cause was based.

**The Order to Show Cause is discharged.** No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

18. [11-40549-E-13](#) DAVID/ALISON WISTROM  
TSB-1 Eric John Schwab

CONTINUED MOTION TO DISMISS  
CASE  
4-8-13 [[32](#)]

CONT. FROM 10-2-13, 7-31-13, 5-8-13, 12-4-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on April 8, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

**No Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to XXXX the Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### REVIEW OF CURRENT BANKRUPTCY PLAN

The Debtors confirmed Chapter 13 Plan in this case provides for monthly plan payments of \$2,585.00. Plan, Dckt. 5. From this the Debtors pay the claim of 'Chase' and the Federal and State Taxing agencies for secured and nondischargeable claims. No other creditors are paid through the Plan.

When filed the Debtors stated gross monthly income of \$10,000.00. Schedule I, Dckt. 1 at 26. After deductions the Debtors list \$7,642.00 in Average Monthly Income. Schedule I includes a footnote that the Debtor closed his dental practice which resulted in a substantially reduced income in 2011 and going forward. On Schedule J the Debtors list monthly expenses of (\$5,507.00), which includes a (\$2,080.00) for their mortgage, property taxes and insurance (which is paid as a Class 4 Claim under the Chapter 13 Plan). *Id.* at 27.

Schedule A lists the Debtor's one real property asset as having a value of \$254,000.00 and being subject to liens totaling (\$358,672.00). *Id.* at 12. The court approved a short sale of this property in 2012. Order, Dckt. 31. Schedule B does not list any assets of significant value which could be liquidated as part of a Chapter 13 Plan. *Id.* at 13-16.

As addressed below, through a Chapter 13 plan the Debtors must address the following secured and non-dischargeable claims:

- A. California Franchise Tax Board.....(\$ 29,863.17)
- B. California Employment Dev. Dept.....(\$ 16,566.29)
- C. Internal Revenue Service.....(\$213,428.04)

Proofs of Claim Nos. 6, 12-1, 13(Amended).

**CASE BACKGROUND**

The Trustee initially sought to dismiss the case on the basis that the Debtor was in material default under the terms of the confirmed Plan, as the Plan required 113 months to complete. This is in excess of the 60 month statutory maximum imposed by 11 U.S.C. §1322(d). The default was created by priority claims as filed exceeded the amount scheduled by \$127,460.03.

Debtors opposed the motion, asserting that they were in the appeals process with the Tax Court. Debtors stated that they anticipated that once their audit case is completed, their plan would be feasible and that if additional liability were to remain after the audit case is completed, then they would modify their plan.

Debtors are performing their Chapter 13 Plan in this case, which may or may not be sufficient. The Plan requires a significant monthly payment to fund substantial payments to the taxing agencies. The court noted that on July 16, 2013, Dckt. 47, the court granted the Internal Revenue Service relief from the automatic stay to continue litigation in the Tax Court, the IRS contending that it and Debtors had reached a settlement (in reality, the Internal Revenue Service is accepting the Debtors' stated position on the taxes) regarding the proposed deficiency for tax year 2008. At the October 2, 2013 hearing on this matter, the court continued the Motion to Dismiss to December 4, 2013, to allow the parties time to implement the settlement agreement.

**TRUSTEE'S SUPPLEMENTAL RESPONSE**

The Chapter 13 Trustee filed the Declaration of Ed Weedman on November 26, 2013, Dckt. No. 56, stating that the Internal Revenue Service filed an amended claim, reducing the priority amount from \$211,870.71 to \$168,052.94. The Trustee calculated the plan would now complete in 94 months. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The Debtor has not yet submitted an amended plan or a settlement agreement to date.

At the hearing on the Motion to Dismiss on December 4, 2013, counsel for the Debtors stated that the Debtors are working with a new CPA and are seeking to reduce the 2009 taxes. In light of the Debtors planning to fund the Plan with an excess of \$60,000.00 in payment, Debtors requested additional time to try and resolve the tax claim. The court granted such time and continued the hearing on the Motion to Dismiss to this date. Civil Minutes, Dckt. No. 61.

No update has been provided to the court on the status of the settlement with the Internal Revenue Service. Nothing further has been filed, indicating that Debtors have resolved the tax claim, and the Proof of

Claim of the Internal Revenue Service, Claim No. 13, has not been amended since September 25, 2013. Debtors may still be in material default under the terms of the confirmed Plan.

**MARCH 19, 2014 HEARING**

At the hearing, XXXXX

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is XXXX.

19. [13-34152](#)-E-13 ALLISON JOHNSON MOTION TO DISMISS CASE  
TSB-1 Najeeb U. Kudiya 2-18-14 [[33](#)]

**Final Ruling:** The Chapter 13 Trustee having filed a "Withdrawal of Motion" for the pending Motion to Dismiss the Bankruptcy Case, the "Withdrawal" being consistent with the opposition filed to the Motion, the court interpreting the "Withdrawal of Motion" to be an ex parte motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rule of Bankruptcy Procedure 9014 and 7041 for the court to dismiss without prejudice the Motion to Dismiss the Bankruptcy Case, and good cause appearing, **the court dismisses without prejudice the Chapter 13 Trustee's Motion to Dismiss the Bankruptcy Case.**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

A Motion to Dismiss the Bankruptcy Case having been filed by the Chapter 13 Trustee, the Chapter 13 Trustee having filed an ex parte motion to dismiss the Motion without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, dismissal of the Motion being consistent with the opposition filed, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss the Bankruptcy Case is dismissed without prejudice.

20. [09-48453-E-13](#) STEVEN/DONNA MENSER  
DPC-6 Julian C. Roberts

CONTINUED MOTION TO DISMISS  
CASE  
7-30-13 [[222](#)]

CONT. FROM 1-8-14, 11-13-13, 9-4-13

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on July 30, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to deny without prejudice the Motion to Dismiss the case.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **MARCH 10, 2014 DEBTOR STATUS REPORT**

On March 10, 2014, the Debtors filed a Status Report. Dckt. 248. In this report the Debtors chronicle how the court has several times continued the hearings on this Motion from the August 28, 2014 initial hearing to March 19, 2014. The Debtors' current status is reported as,

"Debtors' attorney is attempting and continues to try to contact the bank regarding the status of the extra payments made by the debtors."

As discussed below, it appears that the status of the case being prosecuted by the Debtors is the same as it was in August 2013 - the Debtors incorrectly asserting that "extra payments were made to Bank of America, N.A. The payments were not "extra" but the required monthly amounts paid through the plan before the Debtors obtained the loan modification by which they lowered their monthly plan payments to Bank of America, N.A. (which allowed them to amend the plan to provide for Class 4 treatment for that claim).

#### **TRUSTEE MOTION TO DISMISS**

The Trustee seeks dismissal of the case on the basis that the Debtor is delinquent in plan payments, which represents multiple months of the

\$691.40 plan payment. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Trustee states there has been some confusion in this case. Trustee asserts the confusion began with debtor's Fourth Amended Chapter 13 plan, where they moved the mortgage creditor (BAC Home Loan) from Class 1 to Class 4 as a result of successfully modifying their loan. Up to the point of the Debtors filing the Fourth Amended Plan, Trustee was paying BAC Home Loan as Class 1 with ongoing payments in the amount of \$3,002.91 per month for a total of \$18,017.46 (6 months).

The Fourth Amended Plan lowered the plan payment from \$4,826.30 to \$1,214.00, but Debtors made the new plan payment effective back to the beginning of the case and failed to account for the \$18,017.46 that was paid to BAC Home Loan by the Trustee.

The Trustee states the confusion began when the Trustee filed an objection to the Fourth Amended Plan correctly pointing out that \$18,017.46 has been paid to BAC Home Loan (as required under the then existing confirmed Chapter 13 Plan) but the objection incorrectly gave the impression that Debtors had overpaid the Trustee by \$10,627.35. The terms of the Fourth Amended Plan failed to account for the payments made by the Debtors to BAC Home Loans, but restructured the payments to that creditor as if the 2011 loan modification had been in existence from the 2009 commencement of this case.

Trustee states the word "overpaid" confused debtors' counsel who in turn filed a Fifth Amended Plan wherein Debtors correctly acknowledged the past payments into the plan, but then reduced the remaining plan payment down to \$691.40 per month. In response to the reduction in payments, Trustee objected to the plan and was left "scratching its head" over the Debtors explanation of spreading the overpayment over the remaining 18 months of the plan.

The Trustee states that the Fifth Amended Plan should have never been confirmed since it did not propose a payment stream sufficient to pay the claims it proposed to pay, but due to the confusion in this case, somehow it got confirmed. The Trustee states that he should have filed a motion to reconsider, but Lawrence Loheit was retiring and the current Trustee was stepping in.

The Trustee argues that while the debtors have paid all payments called for under the erroneously confirmed chapter 13 plan (Fifth Amended Plan), debtors have not finished payment the claims intended to be paid by their plan. Therefore, debtors have not completed their plan. The Trustee states that a priority claim of the Internal Revenue Service remains to be paid. Trustee argues that the plan is not complete and it is still possible for the debtor to modify the plan.

The Trustee filed a supplemental Declaration of Yvette Sanders, stating that the Debtor has paid a total of \$44,946.77, with the last payment received on January 23, 2013, with a total of \$49,241.75 due. The Trustee provides his own analysis, based on actual claim amounts submitted by Debtors' Class 2 and 5 creditors.

The Trustee determines that \$58,225.74 needs to be paid under the plan, when the Debtors have only paid \$44,946.77 into their plan to date. Therefore, the Debtor's remaining balance to be paid into the plan is approximately \$13,270.53.

#### **DEBTOR'S OPPOSITION**

Debtor responded in August 2013, asserting that the Trustee "advised" the court that the Debtors overpaid their plan. Further, that the Trustee made errors in his calculations. In October 2013, Debtors filed a Supplemental Opposition stating that under the Original Plan filed in this case Debtors' disposable income over the 36 month period of the Plan was \$42,837.84. That Plan provides for a 0% dividend to general unsecured claims.

On February 15, 2010, the Debtors filed an Amended Chapter 13 Plan which increased the plan payments to \$73,266.84 over the 36 months of the Plan. This was necessary to provide for the Bank of America, N.A. (also identified by the parties as BAC Home Loans) arrearage on its secured claim. While the Plan provided for a minimum dividend of 0% to creditor holding general unsecured claims, Debtors projected that there would be a 3% dividend. FN.1.

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FN.1. In the Supplemental Opposition reference the total amount of their proposed plan payments as "disposable income." Actually, it only represents the payments that the Debtors were proposing to pay. "Disposable income" is a defined term in 11 U.S.C. § 1325(b)(2) to be the current monthly income (as defined in 11 U.S.C. § 101(10A) as the average for the 6 month period prior to the commencement of the case - the Form B22C Current Monthly Income calculation) and is a static amount. It is the projected disposable income which is the forward looking calculation, which for over-median income debtors is computed using the IRS allowable expenses as provided in 11 U.S.C. § 707(b) - see 11 U.S.C. § 1325(b)(3). As the Debtor increased their plan payments, presumably they cut from their budget otherwise "necessary" expenses, electing to forgo some otherwise reasonable expenses to save their home.  
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On September 1, 2010, Debtors filed a motion to confirm the proposed Third Amended Plan in this case. Since the Debtors had not yet been granted a loan modification, the Plan did not include the anticipated modification as part of the Third Amended Plan terms. Confirmation of the Third Amended Plan was denied by the court.

On March 22, 2011 the Debtors filed their motion to approve modification of the Bank of America, N.A. loan. The modification added the arrearage to the new principal balance. The Debtors also filed their Fourth Amended Plan and motion to confirm that plan.

Though the court granted the motion and authorized the Debtors to enter into the loan modification, confirmation of the Fourth Amended Plan was denied.

The Debtors filed a Fifth Amended Plan, which the court confirmed on August 23, 2011. The court discusses the Fifth Amended Plan below.

When the issue of how the proper payments to Bank of America, N.A. should be computed, the Debtors contacted the Bank. The Debtors state in their Supplemental Opposition that Bank of America, N.A. representatives advised the Debtors that the payments from the Trustee "were being held in what appears to be a separate account."

When counsel for the Debtors contacted the attorneys for Bank of America, N.A. about getting the funds in the "separate account" released, counsel for Debtors was told that the request would have to come from the Trustee. Debtors assert that when they contacted the Trustee to make that request to look into the matter, "it was flatly refused."

## **DISCUSSION**

Cutting through the "confusion" of prior amended plans, the terms of the current confirmed plan, and the alleged errors in calculation, the pertinent question is whether the confirmed plan sufficiently provides for the payment of the claims. The confirmed Fifth Amended Plan provides for two Class 2 claims in the amounts of \$114.73 and \$495.23, \$4,000.00 in attorneys fees, two Class 5 claims of \$11,796.00 and \$6,216.00, and for Trustee Fees.

However, the Trustee was not making disbursements on the secured claim pursuant to the Fifth Amended Plan until it was confirmed in August 2011.

**Original Plan, Dckt. 13** - Under the terms of the Original Plan the payments to Bank of America, N.A. were to be made by the Debtors directly as a Class 4 claim. This drew the objection of Bank of America, N.A. (Dckt. 19) because the Plan failed to provide for curing the pre-petition arrearage.

**First Amended Plan, Dckt. 34** - Under the terms of the First Amended Plan the Debtors continued to provide for the Bank of America, N.A. secured claim as a Class 4 claim to be paid directly by the Debtor. The Chapter 13 Trustee filed an opposition to the motion to confirm (Dckt. 55), stating the failure to provide for the Bank of America, N.A. arrearage. The Debtors responded that they would pay the arrearage through the plan, but make the current monthly payments directly as a Class 4 Claim. The Eastern District of California mandatory Chapter 13 plan permits only secured claims, for which there is no pre-petition arrearage to be paid as a Class 4 Claim.

**Second (titled First) Amended Plan, Dckt. 80** - In their Second Amended Plan the Debtors provided for the Bank of America, N.A. arrearage to be paid as a Class 1 claim, with monthly payments of \$249.17 during the 36 month term of the Plan. The Debtors again attempted to make the currently monthly payments, contrary to the express requirements of the Chapter 13 Plan, as a separate Class 4 Claim.

**Third (titled First) Amended Plan, Dckt. 109** - The Third Amended Plan provided for the Bank of America, N.A. secured claim as a Class 1 Claim, with current monthly payments of \$3,002.91 and arrearage payments of \$249.17 a month for 36 months.

**Fourth Amended Plan, Dckt. 170** - The Fourth Amended Plan provided

for the Bank of America, N.A. claim to be paid directly by the Debtors as a Class 4 Claim.

**Fifth Amended Plan, Dckt. 199** - The Fifth Amended Plan, which is the only confirmed Plan in this Case, provides for the Debtors to make the following payments:

- A. \$31,265.35 for the months of January 10, 2010 through May 2011 (presuming that the Debtors intended the Fifth Modified Plan to be made effect in the month it was filed). This represents 17 months.
- B. \$691.40 per month for the remaining 19 months of the Plan, for an additional \$13,136.60. (19 x 691.40 = \$13,136.60).
- C. All prior payments made by the Chapter 13 Trustee under the four prior proposed Chapter 13 Plan was authorized. (The additional terms of the Fifth Amended Plan do not state what these payments were and to whom.)

Under the Fifth Amended Plan confirmed by this court, the Debtors are to fund the Plan with \$44,401.95.

The Payment required under the Chapter 13 Plan are:

Creditor and Claim	Monthly Payment	Number of Months	Total of Plan Payments For Claim
Commonwealth CU Ford F-150 Secured Claim	\$114.73	36	\$4,130.28
Commonwealth CU Ford Expedition	\$495.23	36	\$17,828.28
Internal Revenue Service			\$11,796.00
Internal Revenue Service			\$6,261.00
Unsecured Claims	0.00% Dividend		\$0.00
			_____
			\$40,015.56
Trustee Fees (Estimated at 8%)			\$3,201.24
		Total Projected Plan Payments	\$43,216.80

Provided as Exhibit 1 by the Trustee is a statement of the disbursements made by the Trustee in this case. Exhibit 1, Dckt. 235; Declaration of Yvette Sanders, Dckt. 234. These disbursements through January 2013, are as follows:

Internal Revenue Service	Commonwealth Central Credit Union	Bank of America, N.A.	Counsel for Debtor	Chapter 13 Trustee
\$27.47	\$8.15	\$3,002.91	\$166.59	\$1.23
\$661.33	\$32.68	\$3,002.91	\$166.67	\$29.71
\$661.33	\$1.71	\$3,002.91	\$166.67	\$29.71
\$171.85	\$455.73	\$3,002.91	\$3,500.07	\$29.71
	\$0.35	\$3,002.91		\$24.18
	\$44.28	\$3,002.91		\$24.18
	\$4.03			\$31.10
	\$618.20			\$31.10
	\$0.54			\$31.10
	\$44.06			\$27.64
	\$6.34			\$27.64
	\$615.92			\$27.64
	\$0.74			\$27.64
	\$43.36			\$27.64
	\$8.61			\$27.64
	\$607.23			\$27.64
	\$0.98			\$123.98
	\$53.03			\$18.86
	\$10.85			\$28.74
	\$595.08			\$28.74
	\$1.27			\$28.74
	\$65.00			\$28.74
	\$13.02			\$30.75
	\$580.65			\$182.16
	\$1.63			\$182.16
	\$79.10			\$182.16

	\$15.15			\$182.16
	\$567.52			\$182.16
	\$2.05			\$142.71
	\$94.68			\$24.09
	\$17.21			\$36.18
	\$549.46			\$36.18
	\$2.56			\$108.55
	\$112.20			
	\$19.20			
	\$529.44			
	\$3.11			
	\$123.45			
	\$21.13			
	\$515.21			
	\$3.52			
	\$91.49			
	\$22.55			
	\$379.25			
	\$3.94			
	\$91.36			
	\$23.97			
	\$377.46			
	\$4.35			
	\$91.33			
	\$161.79			
	\$239.26			
	\$95.89			
	\$2.58			
	\$410.13			
	\$114.73			
	\$495.23			



	\$114.73			
	\$495.23			
	\$114.73			
	\$495.23			
	\$344.19			
	\$1,485.69			
\$1,521.98	\$19,443.06	\$18,017.46	\$4,000.00	\$1,972.56
Internal Revenue Service	Commonwealth Central Credit Union	Bank of America, N.A.	Counsel for Debtor	Chapter 13 Trustee
	Total	\$42,982.50		

The Chapter 13 Trustee's Exhibit 1 shows a total of \$44,946.77. However, the court's recreation of the table in Exhibit 1 yields a total of \$42,982.50 in disbursements. It is possible that the court may have misread some of the number on Exhibit 1, as parts of it were not clearly legible.

The Loan Modification approved by the court is on the terms set forth in Exhibit A filed in support of the Debtors' motion for authorization to enter into that modification. These terms are:

- A. The modification is effective with the May 1, 2011 payment.
- B. The new principal balance is \$574,478.73 (including the delinquent interest below)
- C. The modified monthly payment is \$3,162.74, consisting of,
  - 1. Principal and Interest Payment is \$2536.34
  - 2. Escrow and Option Ins is \$89.40
- D. Delinquent Interest for the period January 1, 2011 to April 1, 2011 in the amount of \$11,454.25, which is added to the new principal balance.

Exhibit A, Dckt. 166.

The Trustee has made payments to Bank of America, N.A. its secured claim which was modified and the delinquent interest for the period January 1, 2011 to April 1, 2011 has been made part of the new principal balance. The six payments made to Bank of America, N.A. in this case by the Trustee were made on (1) September 30, 2010, (2) October 29, 2010, (3) November 30, 2010, (4) December 30, 2010, and (5) January 31, 2011, and (6) February 28, 2011. These payments were \$3002.91, for a total of \$18,017.46.

The court could not find a proof of claim for Bank of America, N.A. filed in this case. For the Original Plan the Debtors list the Bank of America, N.A. monthly Class 4 payment to be \$4,407.84. Dckt. 13.

In the First Amended Plan the Debtors stated that the Bank of America, N.A. Class 4 Claim monthly payment was \$4,409.02. Dckt. 34.

In the Second Amended Plan the Debtors list the Bank of America, N.A. Class 4 monthly payment to be \$4,389.01, and for Class 1 list the \$8,970.03 delinquency. Dckt. 80.

In the Third Amended Plan the Debtors list the Bank of America, N.A. Class 1 monthly payment to be \$3,152.74, with there being no pre-petition arrearage. Dckt. 170.

In the Fourth Amended Plan the Debtors list the Bank of America, N.A. Class 4 monthly payment to be \$3,002.91, with pre-petition arrearage of \$8,970.00. Dckt. 109. This Plan was filed in conjunction with the motion to approve the loan modification, which states that the modified monthly payment is \$3,152.74. Exhibit 1, Dckt. 166.

The Fifth Amended Plan, which has been confirmed, states that the Class 4 monthly payment to Bank of America, N.A. is \$3,152.74 (which matches to the loan modification approved with the court). Dckt. 199.

#### **PAYMENTS TO BANK OF AMERICA, N.A.**

For all of the verbal jousting over "double payments" having been, or not having been made, it is not a question of double payments, but whether under the various plans filed by the Debtors has resulted in Bank of America, N.A. receiving payments to which it is not entitled under the plan which was ultimately confirmed in this case.

The Loan Modification Agreement states that delinquent interest for the period January 1, 2011 to April 1, 2011 in the amount of \$11,454.25 is added to the principal balance. This indicates that the Debtors failed to make the \$4,489.23 mortgage payment they list on Schedule J which they use to compute their projected disposable income for the Chapter 13 Plan. Dckt. 1 at 35. On Amended Schedule J, filed on February 15, 2010, the Debtors reduce the monthly mortgage payment to \$4,409.02. Dckt. 31.

It appears that the Debtors did not make the \$13,227.06 in mortgage payments for the months of January, February, and March 2011, and therefore had that much "extra" money which was not expended as stated on Schedule J.

The Loan Modification does not provide for curing the \$8,970.03 pre-petition arrearage, just the post-petition arrearage. It appears that this pre-petition arrearage was cured by the \$18,017.46 in payments made through the Chapter 13 Trustee. Thus, it appears that Bank of America, N.A. has received, and is apparently holding, an excess of \$9,047.43 which should be recovered and disbursed to other creditors in the case.

#### **RULING**

From the Debtors Status Conference Statement it appears that the

Debtors and the Trustee have been unsuccessful in taking any action in recovering these payments. Merely telling the court that "Debtors' attorney is attempting and continues to try to contact [Bank of America, N.A.] regarding the status of the extra payments made by the debtors" does not manifest diligent prosecution of this case by the Debtors. Further, the Chapter 13 Trustee stating that there is an issue of Bank of America, N.A. having received more than it was entitled to under the plan due to the way the Debtors presented their plans, but "The Trustee is willing to assist in the recovery of any proceeds, but will not 'lead the charge,'" does little to get this case concluded and off the court's docket.

The parties being unable to conclude what should be a relatively straightforward matter of recovering excess payments, the court will break the logjam.

- A. The Debtors are ordered to file and serve on Bank of America, N.A., the Chapter 13 Trustee, and the U.S. Trustee a motion for Bank of America, N.A. to disgorge the payments of \$18,017.46 paid by the Chapter 13 Trustee in this case, and to pay such monies to the Chapter 13 Trustee.
- B. The Notice of the Motion shall expressly state that pursuant to order of the Court that any response of Bank of America, N.A. shall state what portion, if any, of the \$18,017.46 in payments from the Chapter 13 Trustee Bank of America, N.A. believes should not be disgorged. The Bank of America, N.A. response shall specifically identify the specific obligation(s) of the Debtors (such as pre-petition arrearage, post-petition payment(s), specifically identifying the months and amounts of such obligation(s)).
- C. The Motion shall be filed and served on or before March 28, 2014.
- D. No discharge for the Debtors shall be entered until the recovery of monies, if any, are made from Bank of America, N.A. and such monies are disbursed through the Chapter 13 Plan.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is denied without prejudice.

**IT IS FURTHER ORDERED** that on or before March 28,

**March 19, 2014 at 10:00 a.m.**

2014, Steven Menser and Donna Menser, the Debtors, shall file and serve on Bank of America, N.A., the Chapter 13 Trustee, and the U.S. Trustee a motion for Bank of America, N.A. to disgorge the payments of \$18,017.46 paid by the Chapter 13 Trustee in this case, and to pay such monies to the Chapter 13 Trustee.

**IT IS FURTHER ORDERED** that the Notice of the Motion to Disgorge shall expressly state that pursuant to order of the Court that any response of Bank of America, N.A. shall state what portion, if any, of the \$18,017.46 in payments from the Chapter 13 Trustee Bank of America, N.A. believes should not be disgorged. The Bank of America, N.A. response shall specifically identify the specific obligation(s) of the Debtors (such as pre-petition arrearage, post-petition payment(s), specifically identifying the months and amounts of such obligation(s)).

**IT IS FURTHER ORDERED** that discharges for the Debtors, or either of them, shall not be entered until the recovery of monies, if any as determined after a noticed hearing, are made from Bank of America, N.A. and such monies are disbursed through the Chapter 13 Plan.

21. [11-46456-E-13](#) SCOTT/MELISSA CUNNINGHAM CONTINUED MOTION TO DISMISS  
NLE-1 Justin K. Kunej CASE  
12-9-13 [[34](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on December 9, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to XXXX Motion to Dismiss.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

This matter was continued from January 8, 2014, to this hearing date to permit Debtors to continue their efforts to contact the new mortgage servicer, to determine the correct amount of arrearage on a claim originally held by CitiMortgage.

The Chapter 13 Trustee originally moved to dismiss this case pursuant to 11 U.S.C. § 1307(c) as Debtors were in material default pursuant to section 6.03 of the plan. According to the Trustee's calculations, the plan will complete in 116 months as opposed to the 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). Trustee stated that the filed mortgage arrears claim to be paid as Class 1 through the plan was \$32,716.88 greater than scheduled, and that it will take an additional 92 months to pay the claim in full.

The Trustee also argued that the Debtor cannot make the payments required under 11 U.S.C. § 1325(a)(6), as the Debtors are delinquent \$465.00 under the terms of the confirmed plan. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtors responded, stating they have been unable to contact the new mortgage servicer to determine the correct amount of arrears. On December 12, 2012, CitiMortgage filed a proof of claim, in which it claimed and arrearage in the amount of \$69,216.88. This amount was more than Debtors' estimated claim amount of \$36,500.00.

For unknown reasons, on January 3, 2013, CitiMortgage withdrew the Proof of Claim filed on December 13, 2012, and Debtors received a letter on July 18, 2013, informing them that their loan was now being serviced by Carrington Mortgage. ¶ 7, Opposition to Trustee's Motion, Dckt. No. 40. In the 3 month period that Debtor waited for additional information from the new servicer, Carrington Mortgage never filed a claim in the case, or informed Debtors of the appropriate amount of arrears.

On October 9, 2013, Debtors' attorney could no longer wait for a response from Carrington Mortgage, and filed a claim on behalf of the Christiana Trust using the information from the CitiMortgage claim filed on December 13, 2012, and the letter from CitiMortgage dated July 18, 2013. Once the claim was filed, Debtors' attorney contacted Carrington Mortgage on several occasions, and requested that the claim be amended to state the accurate amount of arrears. The only response that Debtors' attorney received would that somebody would look into the matter and contact him. ¶ 7, Opposition to Trustee's Motion, Dckt. No. 40. Debtors request more time to have the claim amended and for them to propose a modified plan.

A Transfer of Claim was filed on January 21, 2014, Dckt. No. 46. The Transfer purports that the claim asserted by Proof of Claim No. 20-1, had been transferred from Division of Wilmington Savings Fund Society FSB as Trustee for Normandy Mortgage Loan Trust to the Christiana Trust, A Division of Wilmington Savings Fund Society, FSB, as trustee for Normandy Mortgage Loan Trust, Series 2013-9.

Nothing further, however, has been filed on the issue of whether Carrington Mortgage Services has reported the correct amount of arrearage on the obligation formerly handled by CitiMortgage, and no further claims have

been filed by Carrington Mortgage identifying the amount owed by Debtors on the claim.

**MARCH 19, 2014 HEARING**

At the hearing, XXXX

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is XXXX.

22. 14-20056-E-13 THOMAS/SUSAN CLAYTON MOTION TO DISMISS CASE  
TSB-2 Peter G. Macaluso 2-27-14 [[34](#)]

**Final Ruling:** The Chapter 13 Trustee having filed a Notice of Withdrawal on March 14, 2014, Dckt. 41, no prejudice to the responding party appearing by the dismissal of the Motion, the court construing the Notice of Withdrawal as an *ex parte* motion to dismiss the motion to dismiss without prejudice, the parties, having the right to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041, the dismissal consistent with the opposition filed by the Debtors, the *ex parte* motion is granted, the Trustee's motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 41, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Trustee's Motion to Dismiss the Chapter 13 case is dismissed without prejudice, and the bankruptcy case shall proceed.

23. [12-31263-E-13](#) CURTIS FIELDS CONTINUED MOTION TO DISMISS  
NLE-1 Peter G. Macaluso CASE  
12-9-13 [[21](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on December 9, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to grant the Motion to Dismiss and dismiss the case.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The hearing on this Motion was continued from January 8, 2014, to this hearing date.

The Chapter 13 Trustee initially moved to dismiss this case on the basis that the Debtor is in material default pursuant to §5.03 of the plan. That provision of the plan provides, "If Debtor defaults under this plan, or if the plan will not be complete within six months of its stated term, not to exceed 60 months, Trustee or any other party in interest may request appropriate relief by filing a motion and setting it for hearing pursuant to Local Bankruptcy Rule 9014-1."

According to the Trustee's calculations the Plan will complete in 97 months as opposed to 60 months proposed. This exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). The filed priority claim of the Internal Revenue Service (Court claim #4) was \$24,017.28 greater than scheduled.

Debtor responded by stating that he would be current by the hearing on January 8, 2014, and at the time of his opposition, he was waiting for the Internal Revenue Service to complete their examination and amend their proof of claim. The Trustee concurred with continuing the hearing to allow Debtor to communicate with the taxing agency, and the court continued the Motion to this hearing date.

Upon a court's review of the Official Claims Register, the Internal

Revenue Service filed an Amended Proof of Claim No. 4, claiming an amount owed of \$36,076.00 on January 14, 2014. The basis for the claim, as indicated on the face of the Proof of Claim form, is for "Taxes." The amount owed is calculated by adding the total amount of unsecured priority claims under 11 U.S.C. § 507(a)(8), which appears to be delinquent income taxes from the years of 2008-2011, totaling \$30,162.45, and the amount of unsecured general claims, which appears to be a penalty on the unsecured priority claims of unpaid income tax assessments of \$5,914.15. The total amount of the claim is listed as \$36,076.60, which is still \$22,686.60 more than what the claim was scheduled in Debtor's Schedule E.

Thus, despite the Internal Revenue Service's revised figures on the amount owed on its claim, the Debtor's Plan will still be overextended as a result of Debtor's incorrectly listed value of the claim of the Internal Revenue Service. Debtor has not filed a motion to modify the plan and Debtor will remain in material default as it does not appear that Debtor cannot afford to make the payments or comply with the plan under 11 U.S.C. § 1325(a)(6).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

24. [13-31164-E-13](#) JANET LEMERE  
TSB-1 Peter G. Macaluso

MOTION TO DISMISS CASE  
2-26-14 [[31](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 26, 2014. By the court's calculation, 21 days' notice was provided. 14 days' notice is required. That requirement was met.

**Tentative Ruling:** The Motion to Dismiss was properly set for hearing on the notice required by 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 court's tentative decision is to grant the Motion to Dismiss and dismiss the case.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Chapter 13 Trustee moves the court for an order dismissing the case pursuant to 11 U.S.C. § 1307(c), on the basis that Debtor is causing unreasonably delay that is prejudicial to creditors. Debtor has failed to prosecute her case. Trustee's Objection to Confirmation, NLE-1, was heard and sustained on December 17, 2014. To date, Debtor has failed to file an Amended Plan and set it for confirmation. Debtor must be current under all payments called for by and any pending Plan, Amended Plan, or Modified Plan as of the date of the hearing on this motion or the case may be dismissed.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is granted and the case is dismissed.

25. [13-35369](#)-E-13 VASILIOS TSIGARIS  
Marc A. Caraska

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
2-7-14 [[26](#)]

**Tentative Ruling:** The Order to Show Cause was issued by the court on February 7, 2014. Dckt. 26. It was served on the Debtor, Debtor's counsel, and the Chapter 13 Trustee on February 7, 2014. Certificate of Notice, Dckt. 27. 30 days notice has been provided.

**The court's tentative decision is that the Order to Show Cause is sustained and the case is dismissed.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$70.00 due on February 3, 2014). The court docket reflects that on February 12, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

However, the court notes that a subsequent installment has come due on March 4, 2014, and that amount has not yet been paid. An additional Order to Show Cause was issued on March 10, 2014, for the Dismissal of Case or Imposition of Sanctions. Dckt. No. 41. The court docket shows that the subject installment fee has not yet been paid.

The present Order to Show Cause requires the Debtor and counsel to appear and

and show cause why this case should not be dismissed, sanctions imposed on the debtor and/or debtor's attorney, or other appropriate relief ordered for such failure to make the installment payment(s) [February 3, 2014] listed above **or any subsequent installment payment which may have come due and remains unpaid at the time of the hearing.**

Dckt. 26 (Emphasis added).

On March 3, 2014, the court denied confirmation of the Debtor's Plan. Order, Dckt. 38. In denying confirmation the court sustained the Trustee's Objection to Confirmation on multiple grounds. Civil Minutes, Dckt. 36. These included inaccurate statements concerning the Debtor's business in the Statement of Financial Affairs, the failure of the proposed plan to meet the Chapter 7 liquidation analysis, and incorrectly completing Form 22C (Statement of Current Monthly Income).

The fees not having been paid, the Order to Show Cause is sustained and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is sustained and the case is dismissed. No sanctions are ordered.

26. [09-42376](#)-E-13 TRY/LILY KHOU MOTION TO DISMISS CASE  
DPC-1 Peter L. Cianchetta 3-3-14 [[91](#)]

**Final Ruling:** The Chapter 13 Trustee having filed a Withdrawal of the Motion to Dismiss the Bankruptcy Case, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

27. [13-34181](#)-E-13 ROBERT/KRISTEN THOMAS  
TSB-1 Scott J. Sagaria

MOTION TO DISMISS CASE  
2-19-14 [[39](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, and Office of the United States Trustee on February 19, 2014. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to grant the Motion to Dismiss and dismiss the case.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Trustee's Motion argues that the Debtors did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on January 14, 2014, when Trustee's Objection to Confirmation, NLE-1 was heard and sustained. Dckt. No. 35. A review of the docket shows that Debtors have not yet filed a new plan or a motion to confirm a plan. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1). Debtors must be current under all payments called for by and any pending Plan, Amended Plan, or Modified Plan as of the date of the hearing on this motion or the case may be dismissed.

Trustee asks that the court grant an order dismissing this proceeding, unless the Debtors file and serve an Amended Plan and set it for confirmation no later than March 5, 2014; and Debtor file a response no later than March 5, 2014, explaining the reason for the delay and why it is reasonable.

#### **DEBTORS' OPPOSITION**

Debtors respond by stating that Debtors have been working with their attorney to present a feasible First Amended Chapter 13 Plan, based upon a new Schedule I and J with the proper income and expenses. Debtors state that they are "fairly close" to having a final First Amended Chapter 13 plan and amendments, and anticipate the filing of the First Amended Plan within one weeks' time. Dckt. No. 43.

As of the date of the court's consideration of this matter, however, on March 12, 2014, Debtors have still not yet filed and served a new Amended Plan, and filed an attendant Motion to Confirm. Debtors have not filed a new plan since their original Plan, filed on November 4, 2013. It has been

almost two months since Trustee's Objection was sustained, and Debtors' Plan was denied. This is unreasonable delay which is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

28. [13-33583](#)-E-13 SUE MARIANO ORDER TO SHOW CAUSE - FAILURE  
Charnel J. James TO PAY FEES  
2-24-14 [[67](#)]

**Tentative Ruling:** The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$1.00 due on February 19, 2014). The court docket reflects that the Debtor still has not paid the fees upon which the Order to Show Cause was based and fees that have subsequently become due remain unpaid.

**The court's tentative decision is to sustain the Order to Show Cause and order the case dismissed.**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is sustained, no sanctions are issued pursuant thereto, and the case is dismissed.

29. [11-31087](#)-E-13 FRED/SUSIE SANCHEZ CONTINUED MOTION TO DISMISS  
DPC-1 Stephen M. Reynolds CASE

**Final Ruling:** The Chapter 13 Trustee having filed a Notice of Dismissal on March 14, 2014, Dckt. 86, no prejudice to the responding party appearing by the dismissal of the Motion, the court construing the Notice of Dismissal as an *ex parte* motion to dismiss the motion to dismiss without prejudice (an opposition having been filed by Debtors), the Movant having the right to seek dismissal the Motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041, the dismissal consistent with the opposition filed by the Debtors, the *ex parte* motion is granted, the Trustee's motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 86, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Trustee's Motion to Dismiss the Chapter 13 case is dismissed without prejudice, and the bankruptcy case shall proceed.

30. [13-35492-E-13](#) VERONICA WHEELER  
Richard L. Jare

ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
2-12-14 [[19](#)]

**Final Ruling:** The court issued an order to show cause based on Debtor's failure to pay the required fees in this case (\$70.00 due on February 7, 2014). The court docket reflects that on February 24, 2014, the Debtor paid the fees upon which the Order to Show Cause was based.

**The Order to Show Cause is discharged.** No appearance required.

The fees having been paid, the Order to Show Cause is discharged.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged, no sanctions are ordered, and the case shall proceed.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on February 14, 2014. By the court's calculation, 37 days' notice was provided. 28 days' notice is required. That requirement was met.

**Final Ruling:** The Motion to Dismiss 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 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 Motion to Dismiss is granted and the case is dismissed.** No appearance required.

The Trustee seeks dismissal of the case on the basis that the Debtor is in material default pursuant to §5.03 of the Plan, which provides that if "Debtor defaults under this plan, or if the plan will not be complete within six months of its stated term, not to exceed 60 months, Trustee or any other party in interest may request appropriate relief by filing a motion and setting it for hearing pursuant to Local Bankruptcy Rule 9014-1."

According to Trustee's calculations, the Plan will complete in 103 months, as opposed to the proposed 60 months. This span of time exceeds the maximum amount of time allowed under 11 U.S.C. § 1322(d). In a plan paying unsecured creditors 100% with a monthly payment of \$1,124.00, filed secured, priority, and unsecured claims were \$48,685.31 greater than scheduled.

Debtor was provided a Notice of Filed Claims on March 28, 2013, Dckt. No. 28, which indicated that a motion to modify was required. Page 2, Item (f) of the Notice of Filed Claims includes allowed claims which will prevent the timely completion of the Chapter 13 Plan. Debtor must be current under all payments called for by and any pending Plan, Amended Plan, or Modified Plan as of the date of the hearing on this motion or the case may be dismissed.

Cause exists to dismiss this case. The motion is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.

32. [13-24094-E-13](#) WALTER BAKKE  
DPC-2 Aaron C. Koenig

**NOTICE OF DEFAULT AND MOTION TO  
DISMISS CASE FOR FAILURE TO  
MAKE PLAN PAYMENTS  
12-12-13 [[23](#)]**

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, the Chapter 13 Trustee, and Office of the United States Trustee on February 20, 2014. By the court's calculation, 27 days' notice was provided. The Debtor filed a response of Non-Opposition to the dismissal of this case. Dckt. 30.

**The court's Final Ruling is to grant the Application to Dismiss and dismiss the case.** No appearance at the March 19, 2014 hearing is required.

The Chapter 13 Trustee filed a Notice of Default and Application because Debtor's Chapter 13 Plan payments. The Chapter 13 Trustee filed the Declaration of Karen Crise, a representative of the Trustee, which stated that Debtors had not cured the default specified in Trustee's Notice of Default, filed in December 12, 2013, and did not file a written objection, perform a pending modified plan, or obtain approval of a motion to modify his new plan. Declaration of Karen Crise, Dckt. No. 25.

No response to the Notice was filed, and no action was taken of record to address the default. However, the court noted that Debtor's counsel recently passed away. The court set this hearing on the Notice of Default and Intent to Dismiss to provide both Debtor and counsel who has substituted in for Debtor's former counsel in other unrelated cases notice of this pending dismissal. The court ordered that this hearing on the Chapter 13 Trustee's Notice of Default and Intent to Dismiss be conducted on this hearing date.

#### **RESPONSE OF DEBTOR TO NOTICE OF DEFAULT**

Debtor responded on March 4, 2013, by stating that he has no opposition to the Trustee's Notice of Default and Application to Dismiss the Case. Dckt. No. 30 Based on Debtor's lack of opposition to the instant Notice and Application to Dismiss, Trustee's request is granted and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted and the case is dismissed.