UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 16, 2018 at 1:30 p.m.

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

THE COURT FIRST WILL HEAR ITEMS 1 THROUGH 16. A TENTATIVE RULING FOLLOWS EACH OF THESE ITEMS. THE COURT MAY AMEND OR CHANGE A TENTATIVE RULING BASED ON THE PARTIES' ORAL ARGUMENT. IF ALL PARTIES AGREE TO A TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING PURSUANT TO LOCAL BANKRUPTCY RULE 3015-1(c), (d) [eff. May 1, 2012], GENERAL ORDER 05-03, ¶ 3(c), LOCAL BANKRUPTCY RULE 3007-1(c)(2)[eff. through April 30, 2012], OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED TO DEVELOP THE WRITTEN RECORD FURTHER. IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE MAY 21, 2018 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY MAY 7, 2018, AND ANY REPLY MUST BE FILED AND SERVED BY MAY 14, 2018. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THE DATE AND TIME OF THE CONTINUED HEARING DATE AND OF THESE DEADLINES.

THERE WILL BE NO HEARING ON ITEMS 17 THROUGH 24 IN THE SECOND PART OF THE CALENDAR. INSTEAD, THESE ITEMS HAVE BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS; IF IT IS, IT INCLUDES THE COURT'S FINDINGS AND CONCLUSIONS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

IF THE COURT CONCLUDES THAT FED. R. BANKR. P. 9014(d) REQUIRES AN EVIDENTIARY HEARING, UNLESS OTHERWISE ORDERED, IT WILL BE SET ON APRIL 23, 2018, AT 2:30 P.M.

Matters to be Called for Argument

1. 17-20701-A-13 KEVIN/COREN TRIGALES — OBJECTION TO NOTICE OF POST-PETITION MORTGAGE FEES, EXPENSES, AND CHARGES 2-21-18 [42]
ALF-2

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The objection will be sustained in part.

On July 27, 2017, U.S. Bank, etc., filed Notice of Postpetition Mortgage Fees, Expenses and Charges. The creditor demands in the Notice $650 in fees for attorney's fees incurred in preparing the proof of claim and responding to the bankruptcy case, as well as $1.84 in costs associated with mailing documents and $529 in publication costs.

The court will disallow the publication costs. The Notice indicates that these costs were incurred in January 2017, before this case was filed on February 2, 2017. Consequently, these costs should be demanded in the proof of claim. The Notice is reserved for post-petition fees and costs. This disallowance is without prejudice to amending a timely filed proof of claim to demand the publication costs.

The debtor complains that the Notice does not contain any billing records, accounting, or other evidence substantiating the reasonableness of the $650 in fees.

Under Fed. R. Bankr. P. 3002.1(d), the Notice does not constitute prima facie evidence of the validity and amount of the fees demanded in the Notice. See Fed. R. Bankr. P. 3001(f) and 3002.1(d).

The objection, however, is not accompanied by any evidence that the fees are unreasonable. Rather, the debtor merely argues the creditor has not proven the fees are reasonable.

While the court agrees that the creditor has the ultimate burden of proving the fees are reasonable, it is not required to do so unless there is an objection. And, when an objection is filed, it would be a good idea for the objecting party to come forward with at least a suggestion as why they are unreasonable.

And, in this case, a perusal of the proof of claim and the loan history indicates the fees are reasonable.

First, over the last several years, the national rules have been amended to require home lenders to provide a great deal of information in the proof of claim and in the attachments and supplements to it.

For instance, in 2011 Rule 3001(c) was amended to require secured creditors include in a proof of claim the amount to cure a pre-petition default in the proof of claim, attach an itemized statement of the interest, fees, expenses, and charges, and attach an escrow account statement showing the account balance and any amount owed.

Once a proof of claim is filed, the creditor must file two different notices. When the contract installment changes after a bankruptcy case is filed, whether because of an interest rate change, a escrow account adjustment, or any other reason, the Notice required by Fed. R. Bankr. P. 3002.1(b) must be filed.

Also, when a home lender incurs any post-petition fees, expenses, or charges that are chargeable to the debtor under the loan, the notice required by Fed. R. Bankr. P. 3002.1(c) must be filed. This is the type of notice at issue in this case.

Finally, at the conclusion of a chapter 13 case, when the trustee reports that the debtor has cured a home lender's claim and maintained contract installment payments, the lender is required to object if it disputes that a default has been cured or that all post-petition amounts have been paid. See Fed. R. Bankr. P. 3002.1(f)-(h).

If a lender fails to provide the information required by the proof of claim or these notices, it can be precluded from demanding payment of amounts otherwise due. See Fed. R. Bankr. P. 3001(c)(2)(D) and 3002.1(h).

Here, the note and deed of trust indicate that the creditor is entitled to reasonable fees and costs when necessary to protect its collateral and right to payment.

The loan history appended to the proof of claim begins in 2015 and runs through the petition date. That history together with the other historical financial information in the proof of claim obviously required significant time to prepare. For that time, the creditor has charged a flat rate of $650 to prepare the proof of claim and monitor the case for 60 months. On its face, the charge is reasonable, at least in the absence of something suggesting the contrary. And, considering the additional information in the response to the objection concerning the experience of counsel for the creditor, and the services provided and to be provided, the fees is reasonable.

No fees and costs are awarded to the debtor. While the court has disallowed a portion of the costs in the Notice, the disallowance was without prejudice to their inclusion in the proof of claim. Basically, everything demanded by the creditor in the Notice is due to the creditor.

2. 17-25404-A-13 MARIA AZTIAZARAIN — MOTION TO MODIFY PLAN 3-12-18 [72]
HLG-3

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The debtor has not met the burden of proving the plan's feasibility as required by 11 U.S.C. § 1325(a)(6). The debtor has not made a plan payment since October 2017 and she has made only two monthly plan payments since this case was filed in August 2017. She has not explained this failure or inability to make plan payments.

3. 17-22513-A-13 CHARLIE/CHRISTINA BOGGS — MOTION TO MODIFY PLAN 3-6-18 [33]
MS-2

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted and the objection overruled on the condition that the plan is further modified in the confirmation order to account for the arrearage dividend paid to the holder of the home loan while it was treated in Class 1 and to increase prospectively the monthly plan payment

from $615 to $626.

4. 17-23129-A-13 TIMOTHY NEHER — MOTION FOR RELIEF FROM AUTOMATIC STAY
KJS-2 — 3-28-18 [272]
SIERRA CENTRAL CREDIT UNION VS.

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to repossess its collateral, to dispose of it pursuant to applicable law, and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded. The plan classifies the movant's claim as a Class 4 secured claim. It requires the debtor to make direct installment payments to the movant according to the terms of the underlying contract whether or not the plan has been confirmed. The claim is not impaired in any respect by the plan.

The debtor has failed to make nine monthly installment payments since the case was filed. This is a breach of the confirmed plan and is cause to terminate the stay.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived due to the fact that the movant's collateral is being used by the debtor without compensation and is depreciating in value.

Because the movant has not established that the value of its collateral exceeds the amount of its claim, the court awards no fees and costs. 11 U.S.C. § 506(b).

5. 17-23129-A-13 TIMOTHY NEHER — MOTION TO MODIFY PLAN
TLN-31 — 2-20-18 [248]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied and the objections sustained in part.

First, the debtor has failed to make $615.36 of the payments required by the plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

Second, even if the plan payments were current, the plan would not be feasible because the monthly plan payment of $2,244.19 beginning in May 2018 is less than the $2,370.96 in dividends and expenses the plan requires the trustee to

pay each month.

Third, and there yet another more basic feasibility issue. As noted by the trustee, this case has been pending for 10 months. Yet, the debtor has made only two monthly plan payments. The remainder either or delinquent or the debtor has amended his plan to eliminate the requirement that he make a payment. While not necessarily fatal, the fact that Schedule I/J reports a negative monthly net income indicates a systemic problem. And, even if Schedule J is adjusted to eliminate the $7,600 monthly mortgage expense, the resulting net income of $1,138 obviously is not a sum the debtor receives each month. If he did receive it, he would not have made a plan payment only 20% of the time.

Fourth, the plan impermissibly caps the trustee's fees at $92.52 per month. The amount of the trustee's compensation is set by statute and the U.S. Trustee. Whatever the rate required must be paid as payments are made.

Fifth, the debtor is surrendering no collateral yet the plan fails to provide for the secured claims of Marc Noble and Winn Law Group. See 11 U.S.C. § 1325(a)(5).

Sixth, the plan will not pay unsecured creditors what they will receive in a chapter 7 liquidation as required by 11 U.S.C. § 1325(a)(4). The plan proposes to pay these creditor's nothing. While not listed in the schedules, the debtor is a plaintiff in a suit which he informed the trustee has a value of $230,000. The suit has not been claimed exempt. Therefore, in a chapter 7 case, unsecured creditors would receive the net recovery from the suit. Because the plan will not pay the present value of such recovery to unsecured creditors, it cannot be confirmed.

Seventh, the plan proposes to pay all secured claims listed in the plan at variable monthly amounts. None are being paid with equal monthly installments as required by 11 U.S.C. § 1325(a)(5)(B)(iii)(I).

Eighth, the ability to pay secured claims as proposed in the plan depends on the debtor's ability to sell or refinance real property. There are two issues with this. The plan will pay interest only to the creditor secured by this property. Given that the property is fully encumbered, this shifts a great deal of risk to that creditor is the debtor cannot sell or refinance. Also, there is no convincing evidence in the record that the debtor has the ability to sell or refinance the property by the deadline in the plan and at a price sufficient to complete the plan.

6. 18-21033-A-13 DANIEL/CARMEN CARSON — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 3-26-18 [12]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The objection will be sustained and the motion to dismiss the case conditionally denied.

In one document, the debtor has proposed two plans with differing monthly plan payments and differing dividends to Class 7 unsecured creditors. The debtor must file, and the court must confirm, a plan, not multiple plans. See 11 U.S.C. §§ 1321 and 1325(a).

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

7. 18-21640-A-13 DZMITRY/NATALLIA UHLIK — MOTION TO EXTEND AUTOMATIC STAY
EJS-1 — 3-26-18 [10]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The motion will be granted.

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

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

Section 362(c)(3)(B) allows a debtor to file a motion requesting the continuation of the stay. A review of the docket reveals that the debtor has filed this motion to extend the automatic stay before the 30th day after the filing of the petition. The motion will be adjudicated before the 30-day period expires.

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

chapters 11 or 13, there must be some substantial change."

Here, it appears that the debtor was unable to maintain plan payments due a fluctuating income during the first case. The debtor has surrendered one vehicle, thereby reducing secured debt, and has increased employment hours and is able to maintain plan payments. This is a sufficient change in circumstances rebut the presumption of bad faith.

8. 15-21845-A-13 JOSEPH BARNES — MOTION TO MODIFY PLAN
SS-9 — 3-6-18 [183]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The plan does not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive a 100% in a chapter 7 liquidation as of the effective date of the plan. This plan will pay nothing to unsecured creditors.

9. 17-27350-A-13 RICCY/TESSIE LABITORIA — MOTION TO VALUE COLLATERAL
TAG-3 — 2-23-18 [33]
VS. FLAGSHIP CREDIT

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

The debtor seeks to value a vehicle that serves as the collateral for the claim of Flagship Credit. According to the debtor's declaration, the vehicle, a 2006 Chevrolet Colorado, has a value of $2,500. This value is based on the debtor's opinion and Schedule A/B and takes into account the vehicle's age, mileage (150,000 miles) and condition (the timing belt and engine had to be replaced at a cost of $2,800). While the debtor maintains that the vehicle has other cosmetic issues, there is no evidence of the costs to correct those issues.

The motion is accompanied by evidence that the engine was recently replaced at a cost of $2,800.

When a creditor holds a purchase money security interest in a motor vehicle used by a debtor for nonbusiness purposes, the court is required to value the vehicle at the price a retail merchant would charge for it considering its age and condition at the time value is determined. See 11 U.S.C. § 506(a).

The debtor has not provided evidence of the value a retail merchant would charge for the vehicle. The debtor is merely giving the debtor's opinion about the value of the vehicle. There is no foundation of the debtor's ability to state the value a retail merchant would charge for the vehicle. The debtor is not a retail merchant nor a vehicle appraiser. See Fed. R. Evid. 702 & 703. The declaration does not qualify the debtor as anything other than a lay witness. See Fed. R. Evid. 701.

The respondent, however, has produced evidence that the a merchant would sell the vehicle for $9,625, but this amount does not into account the condition of the vehicle. Therefore, the respondent deducts the cost of replacing the engine, $2,800, and deducts a further $1,000 for any other more cosmetic repairs. This leaves a value of $5,825.

Based on this record, the court must conclude that the debtor has not satisfied the burden of proving a retail value of $2,500 for purposes of section 506(a).

10. 17-27350-A-13 RICCY/TESSIE LABITORIA — MOTION TO CONFIRM PLAN
TAG-2 — 2-23-18 [38]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the plan is not feasible as required by 11 U.S.C. § 1325(a)(6) because the monthly plan payment of $2,480 is less than the $2,482.15 in dividends and expenses the plan requires the trustee to pay each month.

Second, the debtor has failed to make $170 of payments required by the plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

Third, the plan's feasibility depends on the debtor successfully prosecuting a motion to value the collateral of Flagship Credit in order to strip down or strip off its secured claim from its collateral. No such motion has been filed, served, and granted. Absent a successful motion the debtor cannot establish that the plan will pay secured claims in full as required by 11 U.S.C. § 1325(a)(5)(B) or that the plan is feasible as required by 11 U.S.C. § 1325(a)(6). Local Bankruptcy Rule 3015-1(j) provides: "If a proposed plan will reduce or eliminate a secured claim based on the value of its collateral or the avoidability of a lien pursuant to 11 U.S.C. § 522(f), the debtor must file, serve, and set for hearing a valuation motion and/or a lien avoidance motion. The hearing must be concluded before or in conjunction with the confirmation of the plan. If a motion is not filed, or it is unsuccessful, the Court may deny confirmation of the plan."

11. 18-20571-A-13 MARK ENOS — MOTION FOR CONTEMPT
PLC-3 — 3-16-18 [30]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

Before filing this case, the debtor borrowed money from the respondent. As part of the transaction, the debtor gave the respondent a post-dated check to repay all or a portion of the loan. Prior to the date of that check, this case was filed. The debtor's attorney gave the respondent notice that this case was filed by having his employee contact the respondent by phone, by faxing a copy of the petition to the respondent, and by listing the respondent as a creditor in this case. Thereafter, and despite notice and knowledge of the case, the respondent presented the post-dated check to the debtor's bank. The bank honored the check.

The debtor asserts that presenting and negotiating the check were willful acts that violated the automatic stay entitling him to damages pursuant to 11 U.S.C. § 362(k) and the court's contempt power.

The automatic stay is a fundamental protection given to bankruptcy debtors. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1214 (9th Cir. 2002). The filing of a bankruptcy case "operates as a stay, applicable to all entities, of

the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . .; the enforcement . . . of a judgment . . .; any act to obtain possession of property of the estate . . .; [and] any act to create, perfect, or enforce any lien. . . ."

The respondent's conduct in cashing the debtor's post-dated check was an act to collect a debt. Arguably, this violated the automatic stay. However, the respondent's fell within an exception to the automatic stay. Section 362(b)(11) provides:

"(b) The filing of a petition under section 301 . . . does not operate as a stay —

. . .

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument[.]"

California law defines a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following: (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder. (2) Is payable on demand or at a definite time. (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . . ." Cal. Com. Code § 3104(a).

Checks generally constitute negotiable instruments and the debtor makes no argument here that this check was not. Roy Supply, Inc. v. Wells Fargo Bank N.A., 39 Cal.App.4th 1051, 1059 n. 6 (1995).

"Presentment," as defined in the California Commercial Code is "a demand made by or on behalf of a person entitled to enforce an instrument. . . ." Cal. Com. Code § 3501(a). As the payee named in the check, the respondent was entitled to present the check for payment. And, while a payee of a check may not present it for payment when the obligor/debtor has discharged the underlyuing debt in bankruptcy, the debtor has not yet received a discharge in this case. The fact that the debtor's debt to the respondent may be dischargeable in the future does not make it, for purposes of presentment, a "discharged" debt. Accord Thomas v. Money Mart Fin. Servs., Inc. (In re Thomas), 317 B.R. 776, 779 (8th Cir. B.A.P. 2004), aff'd, 428 F.3d 735 (8th Cir. 2005); In re Snowden, 422 B.R. 737, 744 (Bankr. W.D. Wash. 2009); In re Kearns, 432 B.R. 276, 280-81 (Bankr. D. Id. 2010).

Therefore, the respondent did not violate the automatic stay when it presented, post-petition, the check it received before the case was filed for payment.

This is not to say, however, that the debtor has no remedy. Excepting the presentment of negotiable instruments from the automatic stay and permitting the transfer of money that is property of a bankruptcy estate does not insulate the transfer from avoidance. See Franklin v. Kwik Cash of Martin (In re Franklin), 254 B.R. 718 (Bankr. W.D. Tenn. 2000); Wittman v. State Farm Life Insurance Co., Inc., (In re Mills), 167 B.R. 663, 664 (Bankr. D. Kan. 1994) aff'd., 176 B.R. 924 (D. Kan. 1994).

Section 549(a) of the Bankruptcy Code provides that the trustee may avoid unauthorized post-petition transfers of property of the estate. 11 U.S.C § 549(a)(1) and (2)(B). Checking account balances become "property of the estate" once a bankruptcy petition is filed. 11 U.S.C. § 541(a). In the case of

Barnhill v. Johnson, 503 U.S. 393 (1992), the Supreme Court held that "[f]or the purposes of payment by ordinary check, . . . a 'transfer' as defined by 101(54) [of the Bankruptcy Code] occurs on the date of honor, and not before." Id. at 400, 112 S.Ct. 1386. "[T]he payment of checks presented post-petition constitutes a 'transfer' of property of the estate and if this transfer is not authorized by the Bankruptcy Code it may be set aside pursuant to 11 U.S.C. § 549." In re Hoffman, 51 B.R. 42, 46 (Bankr. W.D. Ark. 1985).

Of course, while the debtor has this potential remedy, it must be exercised in an adversary proceeding. Fed. R. Bankr. P. 7001.

12. 18-20571-A-13 MARK ENOS — MOTION FOR CONTEMPT
PLC-4 — 3-16-18 [39]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be denied.

Before filing this case, the debtor borrowed money from the respondent. As part of the transaction, the debtor gave the respondent a post-dated check to repay all or a portion of the loan. Prior to the date of that check, this case was filed. The debtor's attorney gave the respondent notice that this case was filed by having his employee contact the respondent by phone, by faxing a copy of the petition to the respondent, and by listing the respondent as a creditor in this case. Thereafter, and despite notice and knowledge of the case, the respondent presented the post-dated check to the debtor's bank. The bank honored the check.

The debtor asserts that presenting and negotiating the check were willful acts that violated the automatic stay entitling him to damages pursuant to 11 U.S.C. § 362(k) and the court's contempt power.

The automatic stay is a fundamental protection given to bankruptcy debtors. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1214 (9th Cir. 2002). The filing of a bankruptcy case "operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . .; the enforcement . . . of a judgment . . .; any act to obtain possession of property of the estate . . .; [and] any act to create, perfect, or enforce any lien. . . ."

The respondent's conduct in cashing the debtor's post-dated check was an act to collect a debt. Arguably, this violated the automatic stay. However, the respondent's fell within an exception to the automatic stay. Section 362(b)(11) provides:

"(b) The filing of a petition under section 301 . . . does not operate as a stay —

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(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument[.]"

California law defines a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following: (1) Is payable to bearer or to order at the time it is issued or first comes into

possession of a holder. (2) Is payable on demand or at a definite time. (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . . ." Cal. Com. Code § 3104(a).

Checks generally constitute negotiable instruments and the debtor makes no argument here that this check was not. Roy Supply, Inc. v. Wells Fargo Bank N.A., 39 Cal.App.4th 1051, 1059 n. 6 (1995).

"Presentment," as defined in the California Commercial Code is "a demand made by or on behalf of a person entitled to enforce an instrument. . . ." Cal. Com. Code § 3501(a). As the payee named in the check, the respondent was entitled to present the check for payment. And, while a payee of a check may not present it for payment when the obligor/debtor has discharged the underlyuing debt in bankruptcy, the debtor has not yet received a discharge in this case. The fact that the debtor's debt to the respondent may be dischargeable in the future does not make it, for purposes of presentment, a "discharged" debt. Accord Thomas v. Money Mart Fin. Servs., Inc. (In re Thomas), 317 B.R. 776, 779 (8th Cir. B.A.P. 2004), aff'd, 428 F.3d 735 (8th Cir. 2005); In re Snowden, 422 B.R. 737, 744 (Bankr. W.D. Wash. 2009); In re Kearns, 432 B.R. 276, 280-81 (Bankr. D. Id. 2010).

Therefore, the respondent did not violate the automatic stay when it presented, post-petition, the check it received before the case was filed for payment.

This is not to say, however, that the debtor has no remedy. Excepting the presentment of negotiable instruments from the automatic stay and permitting the transfer of money that is property of a bankruptcy estate does not insulate the transfer from avoidance. See Franklin v. Kwik Cash of Martin (In re Franklin), 254 B.R. 718 (Bankr. W.D. Tenn. 2000); Wittman v. State Farm Life Insurance Co., Inc., (In re Mills), 167 B.R. 663, 664 (Bankr. D. Kan. 1994) aff'd., 176 B.R. 924 (D. Kan. 1994).

Section 549(a) of the Bankruptcy Code provides that the trustee may avoid unauthorized post-petition transfers of property of the estate. 11 U.S.C § 549(a)(1) and (2)(B). Checking account balances become "property of the estate" once a bankruptcy petition is filed. 11 U.S.C. § 541(a). In the case of Barnhill v. Johnson, 503 U.S. 393 (1992), the Supreme Court held that "[f]or the purposes of payment by ordinary check, . . . a 'transfer' as defined by 101(54) [of the Bankruptcy Code] occurs on the date of honor, and not before." Id. at 400, 112 S.Ct. 1386. "[T]he payment of checks presented post-petition constitutes a 'transfer' of property of the estate and if this transfer is not authorized by the Bankruptcy Code it may be set aside pursuant to 11 U.S.C. § 549." In re Hoffman, 51 B.R. 42, 46 (Bankr. W.D. Ark. 1985).

Of course, while the debtor has this potential remedy, it must be exercised in an adversary proceeding. Fed. R. Bankr. P. 7001.

13. 18-21585-A-13 ELMER/CARLEEN MOORE — MOTION FOR RELIEF FROM AUTOMATIC STAY
CCR-1
RELIANT VENTURES, L.L.C. VS.
3-26-18 [10]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, 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 movant leased real property to the debtor. Prior to the filing of the petition, the movant successfully prosecuted an unlawful detainer action in state court and was awarded possession of the subject property.

Given the filing of the unlawful detainer judgment and the notice to quit that necessarily preceded it, the debtor's right to possession has terminated and there is cause to terminate the automatic stay. In re Windmill Farms, Inc., 841 F.2d 1467 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989). The debtor no longer has an interest in the subject property which can be considered either property of the estate or an interest deserving of protection by section 362(a). This is cause to terminate the automatic stay to permit the movant to take possession of the real property.

No fees and costs are awarded. The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) is ordered waived.

14. 18-20591-A-13 SUSAN RIGGS — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 3-26-18 [22]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The objection will be sustained and the case dismissed.

First, the debtor failed to appear at the meeting of creditors. Appearance is mandatory. See 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the trustee and any creditors who appear, the debtor is also failing to cooperate with the trustee. See 11 U.S.C. § 521(a)(3). Under these circumstances, attempting to confirm a plan is the epitome of bad faith. See 11 U.S.C. § 1325(a)(3). The failure to appear also is cause for the dismissal of the case. See 11 U.S.C. § 1307(c)(6).

Second, the debtor has failed to commence making plan payments and has not paid approximately $365 to the trustee as required by the proposed plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. This is cause to deny confirmation of the plan and for dismissal of the case. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

15. 17-23793-A-13 RANJIT SINGH
PLC-4

MOTION TO CONFIRM PLAN
3-2-18 [77]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

First, the plan does not provide for the ongoing installment due on an home mortgage nor for the cure of the pre-petition arrears. The plan does not comply with 11 U.S.C. §§ 1322(b)(2) & (b)(5) and 1325(a)(5)(B).

Second, the plan does not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive approximately $63,712 in a chapter 7 liquidation as of the effective date of the plan. This plan will pay nothing to unsecured creditors.

Third, the plan proposes a duration of 15 months. However, because the debtor is an over-median income debtor, the duration must be 60 months even though the debtor has no projected disposable income reported on Form !22C. See Danielson v. Flores (In re Flores), 2013 WL 4566428 (Aug. 29, 2013). The plan does not comply with 11 U.S.C. § 1325(b)(4).

Fourth, the debtor has not satisfied the burden of proving the proposed plan's feasibility. There is no convincing proof that the Fiji property can be sold for the amount necessary to fund the plan.

16. 17-23793-A-13 RANJIT SINGH
JPJ-2

MOTION TO CONVERT OR TO DISMISS CASE
10-31-17 [44]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted and the case converted to one under chapter 7.

This case was filed on June 5, 2017. The debtor proposed a plan within the time required by Fed. R. Bankr. P. 3015(b) but was unable to confirm it. The debtor thereafter failed to promptly propose a modified plan and set it for a confirmation hearing. This fact suggests to the court that the debtor either does not intend to confirm a plan or does not have the ability to do so. This is cause for dismissal. See 11 U.S.C. § 1307(c)(1) & (c)(5).

Also, the debtor has failed to pay to the trustee approximately $1,563 as required by the last proposed plan. The inability of the debtor to confirm and a plan and make plan payments is prejudicial to creditors and suggests that no plan will be feasible. This is cause for dismissal. See 11 U.S.C. § 1307(c)(1).

After a review of the schedules, the court concludes that conversion rather than dismissal is in the best interests of creditors because there is in excess of $63,000 of equity in unencumbered, nonexempt assets that will benefit creditors if liquidated by a trustee.

FINAL RULINGS BEGIN HERE

17. 17-22513-A-13 CHARLIE/CHRISTINA BOGGS — MOTION TO APPROVE LOAN MODIFICATION
MS-1 — 3-6-18 [28]

Final Ruling: This motion to modify a home loan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(b) and 9014-1(f)(1), and Fed. R. Bankr. R. 2002(b). The failure of the trustee, the U.S. Trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the debtor, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

The motion will be granted. The debtor is authorized but not required to enter into the proposed modification. To the extent the modification is inconsistent with the confirmed plan, the debtor shall continue to perform the plan as confirmed until it is modified.

18. 18-21226-A-13 KEKOA SINGSON AND LESLIE SINGSON VILLAGRANA — MOTION TO VALUE COLLATERAL
SDB-1
VS. NISSAN MOTOR ACCEPTANCE — 3-5-18 [8]

Final Ruling: This valuation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the trustee and the respondent creditor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the trustee and the respondent creditor are entered and the matter will be resolved without oral argument.

The valuation motion pursuant to Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a) will be granted. The debtor is the owner of the subject property. The debtor's evidence indicates that the replacement value of the subject property is $13,282 as of the effective date of the plan. Given the absence of contrary evidence, the debtor's evidence of value is conclusive. See Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165 (9th Cir. 2004). Therefore, $13,282 of the respondent's claim is an allowed secured claim. When the respondent is paid $13,282 and subject to the completion of the plan, its secured claim shall be satisfied in full and the collateral free of the respondent's lien. Provided a timely proof of claim is filed, the remainder of its claim is allowed as a general unsecured claim unless previously paid by the trustee as a secured claim.

19. 17-23129-A-13 TIMOTHY NEHER — MOTION TO VALUE COLLATERAL
TLN-33
VS. SIERRA CENTRAL CREDIT UNION — 3-19-18 [263]

Final Ruling: The motion has been resolved by stipulation. The parties have agreed to a valuation of $13,000.

20. 14-22339-A-13 CRISELDA SARIO
JMC-4

MOTION TO MODIFY PLAN
2-28-18 [54]

Final Ruling: This motion to confirm a modified plan proposed after confirmation of a plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2) and 9014-1(f)(1) and Fed. R. Bankr. R. 3015(g). The failure of the debtor, the U.S. Trustee, creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the trustee, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the respondents' defaults are entered and the matter will be resolved without oral argument.

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

21. 18-21039-A-13 RICKIE RYAN
SNM-1
MICHAEL BRINKERHOFF VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
3-14-18 [12]

Final Ruling: This motion for relief from the automatic stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor and the trustee to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The movant leased residential real property to the debtor. Prior to the filing of the petition, the lease expired but the debtor held over as a month-to-month tenant. The debtor allegedly defaulted in the payment of rent and the movant served the debtor with a 3-day notice to pay or quit the premises. The debtor neither paid nor quit the premises. The movant then filed and served an unlawful detainer action in state court. This bankruptcy case was filed the day prior to the trial.

Given the notice to quit that was served and expired before the case was filed, the debtor's right to possession has terminated and there is cause to terminate the automatic stay. In re Windmill Farms, Inc., 841 F.2d 1467 (9th Cir. 1988); In re Smith, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989). The debtor no longer has an interest in the subject property which can be considered either property of the estate or an interest deserving of protection by section 362(a).

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

22. 17-27947-A-13 MICHELLE EDWARDS
MOH-2

MOTION TO CONFIRM PLAN
3-5-18 [40]

Final Ruling: The court concludes that a hearing will not be helpful to its consideration and resolution of this matter. The court will not materially alter the relief requested and the issue raised by the trustee can be resolved by a nonmaterial modification to the plan. Accordingly, an actual hearing is unnecessary and this matter is removed from calendar for resolution without oral argument. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006).

The motion will be granted and the objection overruled on the condition that the plan is modified in the confirmation order to increase the monthly plan payment to $816. The $801 proposed monthly plan payment is less than the $816 in dividends and expenses the plan requires the trustee to pay each month.

23. 18-20571-A-13 MARK ENOS — MOTION FOR CONTEMPT
PLC-2 — 3-16-18 [23]

Final Ruling: The motion has been voluntarily dismissed.

24. 18-20686-A-13 MARCUS ZARRA — OBJECTION TO EXEMPTIONS
JPJ-2 — 3-14-18 [13]

Final Ruling: This objection to the debtor's exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the debtor to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the sustaining of the objection. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the debtor's default is entered and the matter will be resolved without oral argument.

The objection will be sustained.

The trustee objects to all of the debtor's Cal. Civ. Pro. Code § 703.140(b) exemptions claimed on Schedule C. The trustee argues that because the debtor is married and because the debtor's spouse has not joined in the chapter 13 petition, the debtor must file his spouse's waiver of right to claim exemptions. See Cal. Civ. Pro. Code § 703.140(a)(2). This was not done.

A debtor's exemptions are determined as of the date the bankruptcy petition is filed. Owen v. Owen, 500 U.S. 305, 314 (1991); see also In re Chappell, 373 B.R. 73, 77 (B.A.P. 9th Cir. 2007) (holding that "critical date for determining exemption rights is the petition date"). Thus, the court applies the facts and law existing on the date the case was commenced to determine the nature and extent of the debtor's exemptions.

11 U.S.C. § 522(b)(1) permits the states to opt out of the federal exemption statutory scheme set forth in section 522(d). In enacting Cal. Civ. Pro. Code § 703.130, the State of California opted out of the federal exemption scheme relegating a debtor to whatever exemptions are provided under state law. Thus, substantive issues regarding the allowance or disallowance of a claimed exemption are governed by state law in California.

California state law gives debtors filing for bankruptcy the right to choose (1) a set of state law exemptions similar but not identical to the Bankruptcy Code exemptions; or (2) California's regular non-bankruptcy exemptions. See Cal. Civ. Pro. Code §§ 703.130, 703.140. In the case of a married debtor, if either spouse files for bankruptcy individually, California's regular non-bankruptcy exemptions apply unless, while the bankruptcy case is pending, both spouses waive in writing the right to claim the regular non-bankruptcy state exemptions in any bankruptcy proceeding filed by the other spouse. See Cal. Civ. Pro. Code § 703.140(a)(2).

Here, the debtor is asserting the exemptions of Cal. Civ. Pro. Code § 703.140(b), which require a spousal waiver. That waiver was not filed with the

petition.