UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

May 10, 2016 at 1:00 p.m.

1.	15-24706-B-13 JPJ-1	JANICE POYTHRESS Douglas B. Jacobs	CONTINUED MOTION TO DISMISS CASE 2-26-16 [18]

Tentative Ruling: The Trustee's Motion to Dismiss Case 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to grant the motion to dismiss.

This matter was continued from March 30, 2016. At that hearing, the Chapter 13 Trustee stated he was missing 2 plan payments (there was no record of receipt). Debtor stated that money orders were mailed but may have been lost. The Trustee withdrew its motion to convert on the record in open court because there are no unsecured creditors, and only the motion to dismiss was continued.

The court's docket reflects that nothing new has been filed as of May 9, 2016. Therefore, based on statements made by the parties at the prior hearing and the record in this matter, the motion will be granted.

2. 15-28906-B-13 SHELLY CLARK MOTION TO CONFIRM PLAN
SJS-2 Scott J. Sagaria 3-28-16 [63]

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

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

The plan does not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive a higher distribution in a Chapter 7 proceeding. The total value of non-exempt property in the estate is $46,182.88 and the total amount that will be paid to priority and non-priority unsecured creditors is only $23,313.15

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

3.	16-21017-B-13 JPJ-1	EDDIE FROESE Bruce Charles Dwiggins	OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON 4-15-16 [16]

CONTINUED TO 5/17/16 AT 1:00 P.M. TO BE HEARD AFTER THE CONTINUED MEETING OF CREDITORS SET FOR 5/12/16.

Final Ruling: No appearance at the May 10, 2016, hearing is required.

4. 14-31623-B-13 JAMES/NANCY LOCKWOOD
APN-1 Stephen N. Murphy

MOTION FOR RELIEF FROM AUTOMATIC STAY
4-8-16 [87]

HYUNDAI LEASE TITLING TRUST
VS.

Tentative Ruling: The 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 respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition was filed.

The court's decision is to deny the motion as moot.

Hyundai Lease Titling Trust ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2014 Kia Cadenza, VIN ending in 6922 (the "Vehicle"). The moving party has provided the Declaration of Efrain Navarro to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtors.

The Navarro Declaration provides testimony that Debtors have not made post-petition payments, with a total of $457.16 in post-petition payments past due.

From the evidence provided to the court, the remaining sums due and owing under the prevailing lease agreement, including the purchase option to be paid by the Debtors, are $27,339.05.

Opposition

Debtors have filed an opposition asserting the underlying obligation is a lease and not a loan and that the creditor has not explained how an unsecured debt arises from the lease contract.

Discussion

As a lease, Movant's lease is classified in "Section 3. Executory Contracts and Unexpired Leases" of the Debtor's Third Amended Chapter 13 Plan filed on December 3, 2015. Section 3.02 of the Third Amended Plan states:

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

The Third Amended Plan was confirmed on February 3, 2016, and the confirmation order was entered on February 12, 2016. Therefore, stay having already been modified upon confirmation of the Third Amended Plan, Movant's request for relief from the stay based on the Debtors' default under its lease agreement is moot as the stay has already been modified to permit Movant to exercise its rights and remedies under applicable non-bankruptcy law.

The motion is therefore denied as moot.

5. 11-49835-B-13 RICK/SHERRI BERRY — CONTINUED MOTION TO DISMISS CASE
JPJ-1 W. Steven Shumway — 3-22-16 [32]
Thru #6

Final Ruling: No appearance at the May 10, 2016, hearing is required.

This matter was continued from April 26, 2016, to be heard in conjunction with the motion to modify plan at Item #6. The Trustee's Motion to Dismiss Case was originally 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). Opposition was filed.

The court's decision is to deny the motion without prejudice. The Debtors filed a modified plan that resolves the Trustee's objection by increasing payments to allow the plan to complete in 60 months.

6. 11-49835-B-13 RICK/SHERRI BERRY — MOTION TO MODIFY PLAN
WSS-2 W. Steven Shumway — 4-1-16 [37]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

The Motion for Confirmation of Modified Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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's decision is to permit the requested modification and confirm the modified plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan filed on April 1, 2016, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

7.	15-20441-B-13 PGM-1	TIMOTHY/CAROL PHELPS Peter G. Macaluso	MOTION FOR OMNIBUS RELIEF UPON DEATH OF DEBTOR 4-8-16 [67]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

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

The court's decision is to substitute the surviving Joint-Debtor who is appointed representative of the estate, continue administration of the case, and waive the deceased Co-Debtor's certification otherwise required for entry of a discharge.

Joint-Debtor Carol Phelps gives notice of death of her husband and Debtor Timothy Phelps and requests the court substitute Carol Phelps in place of her deceased spouse for all purposes within this Chapter 13 proceeding.

Discussion

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under Chapter 11, Chapter 12, or Chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, § 7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of

> death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also Hawkins v. Eads, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate the case, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, Joint-Debtor has provided sufficient evidence to show that continued administration of the Chapter 13 case is possible and in the best interest of creditors. The surviving Joint-Debtor was the beneficiary to a life insurance policy which paid approximately $101,00.00. The Debtors have paid $2,450.00 to the Chapter 13 Trustee and Joint-Debtor has asserted that she has the ability and desire to complete the plan payments. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties. The court grants the motion.

8. 11-27847-B-13 TIMOTHY/LYDIA MANSOURI MOTION TO MODIFY PLAN
JHH-5 Judson H. Henry 3-24-16 [120]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

This matter will be continued to May 17, 2016, at 1:00 p.m. The Chapter 13 Trustee is directed to file a declaration by no later than May 13, 2016, at 5:00 p.m., confirming that the Debtors' payment records in this case have been reviewed and identifying the date those records reflect the last payment due under the plan filed June 3, 2011, and confirmed on August 12, 2011, was received.

Regardless of when plan payments are due, i.e., the 25th day of each month, if the Chapter 13 Trustee confirms that it received the Debtors' last plan payment on March 22, 2016, plan payments will have been completed two days before the First Amended Plan was filed on March 24, 2016. Under those circumstances, the Debtors' confirmed plan cannot be modified as a matter of law, 11 U.S.C. § 1329(a), and the motion to modify will be denied on May 17, 2016. If the payment was received on some other date, the court will entertain further argument at the continued hearing.

9. 11-28062-B-13 FRANK/LISA EMANUEL — MOTION FOR SUGGESTION OF DEATH AND MOTION FOR SUBSTITUTION
RAC-2 Richard A. Chan — 4-12-16 [37]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

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

The court's decision is to substitute the surviving Debtor Frank Emanuel who is appointed representative of the estate, continue administration of the case, and waive the deceased Co-Debtor's certification otherwise required for entry of a discharge.

Debtor Frank Emanuel gives notice of death of his wife and Joint-Debtor Lisa Emanuel and requests the court substitute Frank Emanuel in place of his deceased spouse for all purposes within this Chapter 13 proceeding.

Discussion

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under Chapter 11, Chapter 12, or Chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, § 7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of

> death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also Hawkins v. Eads, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate the case, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Here, Debtor has provided sufficient evidence to show that continued administration of the Chapter 13 case is possible and in the best interest of creditors. Despite Joint-Debtor's death in 2012, the Debtor continued to abide by the terms of the plan and the Trustee filed a Notice of Completion of Plan Payments and Obligation to File Documents on April 4, 2016. The Debtor is the successor of his wife's estate and received $25,000.00 upon her death that was used to pay for funeral arrangements, living expenses, and educational expenses for their children. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties. The court grants the motion.

10. 16-20564-B-13 KATRINA NOPEL
PLC-2 Peter L. Cianchetta

MOTION TO VALUE COLLATERAL OF HSBC BANK USA, N.A.
4-11-16 [20]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

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

The court's decision is to value the secured claim of HSBC Bank USA, National Association at $0.00.

The motion to value filed by Debtor to value the secured claim of HSBC Bank USA, National Association ("Creditor") is accompanied by the Debtor's declaration. Debtor is the owner of the subject real property commonly known as 6408 Trajan Drive, Orangevale, California ("Property"). Debtor seeks to value the Property at a fair market value of $238,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is some evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

No Proof of Claim Filed

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

Discussion

The first deed of trust secures a claim with a balance of approximately $289,707.63. Creditor's second deed of trust secures a claim with a balance of approximately $31,286.65. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

11. 12-30166-B-13 ALEXANDER MILLER — MOTION TO MODIFY PLAN
PGM-3 Peter G. Macaluso — 3-30-16 [56]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

The Motion to Modify Chapter 13 Plan After Confirmation Filed on March 30, 2016, has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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's decision is to permit the requested modification and confirm the modified plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan filed on March 30, 2016, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

12. 14-22173-B-13 YOLANDA SWARTOUT
JPJ-2 Eamonn Foster
Thru #13

CONTINUED MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS
2-26-16 [68]

Tentative Ruling: The Trustee's Notice of Default and Application 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

This matter was continued from April 12, 2016. The motion to dismiss filed by the Chapter 13 Trustee ("Trustee") pertained to the delinquency in plan payments by Debtor Yolanda Swartout ("Debtor"). The Debtor disputed she was delinquent.

According to the Civil Minutes from the hearing held on April 12, 2016, the court instructed the Debtor to resolve the delinquency issue by filing a modified plan by April 22, 2016. [dkt. 75]. The Debtor's attorney also confirmed on the record that a modified plan would be filed. A modified plan was not filed. Instead, on April 20, 2016, the Debtor filed a motion to compel the Trustee to recognize she is current on plan payments. Item #13. That is precisely what the court ordered the debtor to resolve through a modified plan and which the Debtor's attorney stated would be resolved through a modified plan.

By filing the motion to compel instead of a modified plan the court finds that the Debtor has wilfully disregarded the court's order of April 12, 2016. Based on the Debtor's wilful disregard of the court's order of April 12, 2016, the court will deny the motion to compel (at Item #13) and grant the motion to dismiss.

The court may dismiss an action when a party fails to comply with a court order. *See* Fed. R. Civ. Pro. 41(b) as made applicable by Fed. R. Bankr. Proc. 7041 and 9014. In reaching its decision to dismiss based on the Debtor's failure to comply with the court's order of April 12, 2016, the court has considered the factors cited in *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999). Specifically, the court has considered the need to manage its calendar and the waste of judicial resources caused by the Debtor's motion to compel that requests relief the Debtor requested in opposition to the Trustee's motion to dismiss which the court ordered the Debtor to resolve through a modified plan. The court also finds that the Debtor's disregard of its order of April 12, 2016, is prejudicial to the Chapter 13 Trustee's administration of this case and payments to creditors adversely affected by the Debtor's plan payments. The court has further considered the availability of lesser sanctions which the court finds would be ineffective insofar as it provided the Debtor with a means to avoid dismissal in response to the Chapter 13 Trustee's motion which the Debtor has exhibited an unwillingness to accept by filing the motion to compel instead of a modified plan as ordered. And the court has considered the public's interest in expeditious resolution of litigation which weighs in favor of dismissal.

Therefore, for the foregoing reasons, this case is ordered dismissed.

13. 14-22173-B-13 YOLANDA SWARTOUT
NBC-3 Eamonn Foster

MOTION TO COMPEL
4-20-16 [76]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Debtor's Motion to Compel Trustee to Acknowledge Debtor's October 2014 Payment is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion,

the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The motion is denied with prejudice for reasons stated in the ruling at Item #12.

14. 16-20573-B-13 FELICIANO RIOS
MET-2 Mary Ellen Terranella
MOTION TO CONFIRM PLAN
3-24-16 [27]
Thru #15

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

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

Chapter 13 Trustee opposes confirmation of the plan on the ground that Section 6 Additional Provisions does not state what the plan payments will be should Bank of America, N.A. decline the Debtor a permanent loan modification. Based on the court's review of the plan dated March 24, 2016, the Additional Provisions does state that should Bank of America, N.A. decline to give the Debtor a permanent loan modification, it's claim shall be treated as a Class 1 claim with on-going payments in the amount of $1,699.00 paid through the plan, as well as the pre-petition arrears claim of $33,217.69 payable in the monthly amount of $200.00 for the first 30 months of the plan, $800.00 per month for the next 18 months of the plan, and $1,070.00 per month for the final 12 months of the plan.

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

15. 16-20573-B-13 FELICIANO RIOS
MET-3 Mary Ellen Terranella
MOTION TO APPROVE LOAN MODIFICATION
4-3-16 [33]

Final Ruling: No appearance at the May 10, 2016, hearing is required.

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

The court's decision is to permit the trial loan modification requested.

Debtor seeks court approval to a trial loan modification of his mortgage on his residence. Bank of America, N.A. ("Creditor"), whose claim the plan provides for in Section 6 Additional Provisions, has agreed to a trial loan modification which will reduce Debtor's mortgage payment by $70.13 per month and cure the pre-petition delinquency. The Debtor asserts that the savings from the loan modification will help him retain his home and maintain a livable budget for his family, including his 1-year-old son who is in the Debtor's primary physical custody. The Debtor will provide direct monthly mortgage payments to the Creditor, as required by the Trial Period Plan Agreement.

The motion is supported by the Declaration of Feliciano Rios. The Declaration affirms

the Debtors' desire to obtain the post-petition financing. Although the Declaration does not state the Debtor's ability to pay this claim on the modified terms, the court finds that the Debtor will be able to pay this claim since it is a reduction from the Debtor's current monthly mortgage payments.

This post-petition financing is consistent with the Chapter 13 plan in this case and Debtor's ability to fund that plan. There being no objection from the Trustee or other parties in interest, and the motion complying with the provisions of 11 U.S.C. § 364(d), the motion is granted.

16. 16-21088-B-13 DESMONN/TAMRA MCGEE — OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
JPJ-1 Nikki Farris — 4-20-16 [16]

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

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

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

Second, pursuant to Local Bankr. R. 2016-1, the maximum fee that may be charged is $4,000.00 in nonbusiness cases. Section 2.06 of the plan states that the Debtors' attorney was paid $1,000.00 prior to the filing of the case and that additional fees of $3,500.00 will be paid through the plan. Debtors' attorney's fees exceed the maximum permitted.

The plan filed February 26, 2016, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

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

17. 11-29591-B-13 BRIAN SAECHAO MOTION TO RECONSIDER
PLC-7 Peter L. Cianchetta 4-20-16 [97]
Thru #19

Tentative Ruling: The court's decision is to deny with prejudice the motion for reconsideration and to vacate.

Presently before the court is a Motion for Reconsideration filed on April 20, 2016, by Debtor Brian Saechao ("Debtor"). Debtor asks the court to reconsider and vacate its order entered on April 13, 2016, denying his motion to hold Golden 1 Credit Union ("Creditor") in contempt for an alleged violation of the discharge injunction of 11 U.S.C. § 524. The basis for the court's order denying the Debtor's contempt motion is stated in the civil minutes filed on April 5, 2016; generally, the court concluded that Golden 1's truthful report of credit information in the absence of evidence of any overt act to collect a discharged debt did not violate § 524. For the reasons explained below, the Debtor's motion for reconsideration and to vacate will be denied with prejudice.

Federal Rule of Civil Procedure 59(e), made applicable by Federal Rule of Bankruptcy Procedure 9023, allows the court to alter or amend a judgment. If a court makes a substantive change to a decision, it must be done under Rule 59(e). *Tattersalls, Ltd. v. DeHaven*, 745 F.3d 1294, 1299 (9th Cir. 2014).

Amending a judgment under Rule 59(e)/9023 is "an extraordinary remedy which should be used sparingly." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A Rule 59(e)/9023 motion may not be used to raise arguments or present evidence for the first time that could have been raised or presented earlier in the litigation. *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted). There are four grounds on which a Rule 59(e) motion may be granted:

> (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

Allstate, 634 F.3d at 1111. None of these grounds apply.

The Debtor's motion to reconsider and vacate is based on a purported defect in service of the Creditor's opposition to the Debtor's contempt motion. The Debtor maintains that defective service deprived him of due process. More precisely, the Debtor maintains that neither he nor his attorney, Peter L. Cianchetta, were served with the opposition in the manner required by applicable federal and local rules and that deprived him of an opportunity to file and argue a reply he is certain would have overcome the opposition and resulted in the granting of his motion. The court is not persuaded.

When a document is e-filed in a case or an adversary proceeding, the court's ECF system generates an electronic receipt called a Notice of Filing Management. The Notice of Filing Management is sent to all registered emails of attorneys and other parties in interest associated with the particular case or adversary proceeding in which the document is filed. Essentially, the Notice of Filing Management notifies the attorneys at their registered emails that a document has been filed. It also identifies the document filed, the party that filed it, and provides a link for free access to the filed document. All the recipient need do to access the document is click on the hyperlink of the docket number highlighted on the notice.

In this case, the court's ECF system generated a Notice of File Management when Creditor filed its opposition to the Debtor's contempt motion. A copy of that Notice of File Management is attached as Exhibits 1-A and 1-B to this order. It was sent to four email addresses associated with Mr. Cianchetta's e-filing account: plc@eglaw.net;

david@eglaw.net; jesse@eglaw.net; michelle@eglaw.net.[1] It informed the recipients at those email addresses that Creditor filed an opposition to the contempt motion at 3:17 p.m. on March 22, 2016, and the opposition was docketed at 11:48 a.m. on March 23, 2016. And it provides a hyperlink of the docket number of the opposition that allows the recipients to obtain a free copy.

Assuming that Mr. Cianchetta is correct and Creditor did not formally serve the opposition in the precise manner required by the applicable federal and local rules, the Notice of File Management sent to four email addresses associated with Mr. Cianchetta provided Mr. Cianchetta with actual notice of the opposition and, based on that actual notice, more than sufficient time to prepare and file a reply.[2] And as the U.S. Supreme Court held in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), actual notice more than satisfies due process and the failure to comply with service rules does not violate due process when there is actual notice. *Id.* at 272. Therefore, with actual notice of the opposition to the contempt motion, the court concludes that the Debtor was not deprived of due process when the court considered Creditor's opposition and denied the contempt motion, even in the absence of formal service of the opposition by the Creditor.

The court also notes that it posted a tentative ruling denying the Debtor's contempt motion the day before the hearing on the motion, as it routinely does. The tentative ruling calendar for April 5, 2016, stated that an opposition to the contempt motion was filed. Mr. Cianchetta had four other matters in different cases on the same tentative ruling calendar.[3] It is not unreasonable to conclude that Mr. Cianchetta reviewed the court's tentative rulings and, having done so, was aware of the opposition and the court's tentative ruling on the contempt motion in this case. Yet, for whatever reason, neither Mr. Cianchetta nor the Debtor appeared at the hearing on their own motion even if only to state that an opposition was not properly served and to request a continuance.[4] That would not have been an unreasonable request and, in fact, it is relief that Mr. Cianchetta himself recently agreed to with another creditor in an adversary proceeding filed in this case. *See Saechao v. Federal National Mortgage Association, et al.*, Adv. No. 16-02030, dkt. 14.

Finally, the court finds the Debtor's "new" argument based on *In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio 1991), raised in the motion for reconsideration improper and without merit. That argument could (and should) have been raised before the court entered its decision. Nevertheless, even if that "new" argument were considered, it would not alter the court's prior ruling. The court does not find *Sommersdorf* persuasive for several reasons and would decline to follow it for several reasons. First, *Sommersdorf* involved a violation of the automatic stay whereas this case involves an accusation by the Debtor that the Creditor violated the discharge injunction. Second, *Sommersdorf* involved reporting of inaccurate information on a

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[1]The court notes that "eglaw.net" is the address for a website of the "Law Office of Peter Cianchetta."

[2]In his declaration, Mr. Cianchetta is careful not to state that he did not receive the opposition and very carefully states only that he was not properly served with it. That distinction is crucial because if Mr. Cianchetta stated he did not receive the opposition, he might be before the court in a different capacity.

[3]Three matters in Case No. 16-20634, and one in 16-20564.

[4]Mr. Cianchetta states he did not appear because of a calendaring error. The court is hard-pressed to believe that for at least two reasons. First, as noted, it is not unreasonable to expect that an attorney would review tentative rulings in his cases. Second, Mr. Cianchetta appears to contradict himself. Although he states he did not appear due to a calendaring error, he also states that an "11th hour preparation to address a response" that was never served would have been futile thereby suggesting that, at a minimum, he was aware of a response at "the 11th hour" but chose to do nothing about it.

co-debtor's credit report, *i.e.*, reporting an account as "charged off" when it was paid in full by the debtor, whereas this court has already found that the information the Debtor complains that Creditor reported was not inaccurate. And third, *Sommersdorf* failed to consider that through 15 U.S.C. § 1681c(a)(1), Congress has expressly authorized credit reporting from and after an order for relief is entered. *See Mahoney v. Washington Mutual, Inc. (In re Mahoney)*, 368 B.R. 579, 586 at n.3 (Bankr. W.D. Tex. 2007).

In sum, the court concludes that the Debtor was not deprived of due process with regards to Creditor's opposition or the hearing on the contempt motion. Mr. Cianchetta received actual notice of the opposition or, alternatively, he was aware of the opposition before the contempt motion (his own motion) was heard and, thus, with sufficient time to appear and request a continuance which he failed to do. Therefore, even if the opposition was not formally served in the manner required by the applicable federal and local rules of procedure, for the reasons stated above, the motion to reconsider and vacate the order denying the contempt motion filed on April 13, 2016, is denied with prejudice.

NOTICE OF FILING MANAGEMENT

Subject Line: Brian Kao Saechao 2011-29591 Opposition/Objection

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U.S. Bankruptcy Court

Eastern District of California

Notice of Electronic Filing

The following transaction was filed by Valerie B Peo on 3/22/2016 at 3:17 PM and docketed by the court on 3/23/2016 at 11:48 AM.

Case Name: Brian Kao Saechao
Case Number: 2011-29591
Document Number: 84
Document Type: answer_motion
Document SubType: rel

Docket Text: Opposition/Objection Filed by Creditor The Golden 1 Credit Union Re: [72] Motion/Application For Contempt [PLC-6] (msam)

The following document(s) are associated with this transaction:

Document Description: Main Document
Original filename: Opp to Contempt.pdf
Electronic document Stamp: 54069d09-b462-4d6c-8db2-531bc291ef9c

2011-29591 Notice will be electronically mailed to:

Peter L. Cianchetta on behalf of Debtor Brian Kao Saechao
plc@eglaw.net; david@eglaw.net; jesse@eglaw.net; michelle@eglaw.net

Jan P. Johnson
ctfiling@jpj13trustee.com

Office of the U.S. Trustee
ustpregion17.sc.ecf@usdoj.gov

Brett P. Ryan on behalf of Creditor BAC Home Loans Servicing, LP
bknotice@rcolegal.com; bryan@rcolegal.com

Valerie B. Peo on behalf of Creditor The Golden 1 Credit Union
vbantnerpeo@buchalter.com

2011-29591 Notice will not be electronically mailed to:

Federal National Mortgage Association

NOTICE OF FILING MANAGEMENT

Case Number: 11-29591 Document Number: 84 Search

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2011-29591	84	DOC	Click Here to View Notice Email

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Peter L Cianchetta	plc@eglaw.net; david@eglaw.net; jesse@eglaw.net; michelle@eglaw.net	3/23/2016 12:02:48 PM	Reset FreeLook	Resend Email
Jan P. Johnson	ctfiling@jpj13trustee....	3/24/2016 10:05:02 AM	Reset FreeLook	Resend Email
Office of the U.S. Trustee Sacramento	ustpregion17.sc.ecf@...	3/23/2016 12:02:49 PM	Reset FreeLook	Resend Email
Brett P Ryan	bknotice@rcolegal.co... bryan@rcolegal.com	3/23/2016 12:02:51 PM	Reset FreeLook	Resend Email
Valerie B Peo	vbantnerpeo@buchal...	3/23/2016 12:02:52 PM	Reset FreeLook	Resend Email

18. 11-29591-B-13 BRIAN SAECHAO
16-2030
SAECHAO V. FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-16-16 [1]

CONTINUED TO 6/07/16 TO BE HEARD WITH MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT.

Final Ruling: No appearance at the May 10, 2016, hearing is required.

19. 11-29591-B-13 BRIAN SAECHAO
16-2030 TRF-1
SAECHAO V. FEDERAL NATIONAL MORTGAGE ASSOCIATION ET AL

MOTION TO DISMISS CAUSE(S) OF ACTION FROM COMPLAINT
4-1-16 [7]

CONTINUED TO 6/07/16 BY ORDER APPROVING STIPULATION FILED 5/05/16.

Final Ruling: No appearance at the May 10, 2016, hearing is required.

20.	13-30594-B-13 EJS-1	JICK ICASIANO AND DIX SULLIVAN Eric John Schwab	MOTION FOR SUGGESTION OF DEATH, MOTION FOR SUBSTITUTION AS THE REPRESENTATIVE FOR OR SUCCESSOR TO THE DECEASED DEBTOR AND/OR MOTION FOR CONTINUED ADMINISTRATION OF THE CASE 4-7-16 [24]

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

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

Debtor Jick Icasiano gives notice of death of his wife and Joint-Debtor Dix Sullivan and requests the court substitute Jick Icasiano in place of his deceased spouse for all purposes within this Chapter 13 proceeding.

Discussion

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the case pending under Chapter 11, Chapter 12, or Chapter 13 "the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in chapter 13 dies. *Id.*

Federal Rule of Bankruptcy Procedure 7025 provides "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representation. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16TH EDITION, § 7025.02, which states [emphasis added],

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on**

> **the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. 5 The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004...**

See also Hawkins v. Eads, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate the case, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

In this case, Debtor has not provided sufficient evidence to show that continued administration of the Chapter 13 case is possible and in the best interest of creditors. Although the court recognizes that the Debtor is the deceased Joint-Debtor's spouse and that the Debtor would be a proper representative, the Debtor has stated nothing in his Declaration to indicate his ability to abide by the terms of the confirmed plan. Based on the insufficient information provided, the motion is denied without prejudice.

21. 16-20799-B-13 JOHN SHAFER
MET-1 Mary Ellen Terranella

MOTION TO VALUE COLLATERAL OF THE CREDIT UNION LOAN SOURCE, LLC
4-24-16 [19]

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

The court's decision is to value the secured claim of Credit Union Loan Source, LLC at $30,575.00.

The motion filed by Debtor to value the secured claim of Credit Union Loan Source, LLC ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2010 BMW 750 Li ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $30,575.00 as of the petition filing date. As the owner, Debtor's opinion of value is some evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Claim No. 3 filed by Credit Union Loan Source, LLC is the claim which may be the subject of the present motion.

Discussion

The lien on the Vehicle's title secures a purchase-money loan incurred on June 27, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $47,121.73. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $30,575.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Fed. R. Civ. P. 3012 and 11 U.S.C. § 506(a) is granted.

22.	16-21328-B-13 JPJ-2	GABRIEL GOMEZ AND ANGELICA CERVANTES David Foyil	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON 4-13-16 [22]

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

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

First, as stated on the record in open court, the § 341 meeting was continued to May 5, 2016, at 1:00 p.m. to provide the Debtors the opportunity to appear and be examined as required pursuant to 11 U.S.C. § 343. The Debtors appeared at the continued § 341 meeting.

Second, the Debtors have provided the Trustee at the initial hearing with certificates of completion from an approved nonprofit budget and credit counseling agency. The Debtors have complied with 11 U.S.C. § 521(b)(1) and are eligible for relief under the United States Bankruptcy Code pursuant to 11 U.S.C. § 109(h).

Third, the Debtors have provided the Trustee at the initial hearing with a copy of their tax return for the most recent tax year a return was filed.

Fourth, the Debtors have provided the Trustee at the initial hearing with copies of their payment advices or other evidence of income received within the 60-day period prior to the filing of the petition.

Fifth, feasibility of the plan depends on the granting of a motion to value collateral of GMAC for a second deed of trust on the Debtors' residence. To date, the Debtors have not filed, set for hearing, and served on the respondent creditor and the Trustee a stand-alone motion to value the collateral.

Sixth, the plan does not comply with 11 U.S.C. § 1325(a)(4) as the unsecured creditors would receive a higher distribution in a chapter 7 proceeding.

For the fifth and sixth reasons stated above, the plan filed March 3, 2016, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

23. 16-22377-B-13 PRISCILLA MCMANUS — CONTINUED MOTION TO EXTEND AUTOMATIC STAY
MDA-1 Mary D. Anderson — 4-18-16 [8]

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

The court's decision is to grant the motion to extend automatic stay based on the Declaration filed May 6, 2016.

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past 12 months. The Debtor's prior bankruptcy case was dismissed on November 25, 2015, after Debtor failed to appear at the first meeting of creditors, failed to provide required documents to the Chapter 13 Trustee, and failed to cure delinquency in plan payments (case no. 15-29202, Dkt. 30, 32). Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor 30 days after filing of the petition.

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

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

The Debtor filed a Declaration on May 6, 2016, explaining that the previous case was filed in order to pay the arrearage on her mortgage and keep her home. The Debtor states that she originally believed that she could file a chapter 13 case without an attorney but later realized that it was more difficult than she thought. The Debtor asserts that making payments on the plan was never a problem and that the problem instead was preparing the petition properly, reading and understanding court notices, preparing and filing a motion to value collateral, and preparing the plan properly. The Debtor states that her circumstances have changed because she has hired an attorney to file a new case with a plan that will address all the objections that the Chapter 13 Trustee raised in the earlier case. The Debtor further states that the plan will provide for all secured and unsecured creditors and priority debts.

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

The motion is granted and the automatic stay is extended for all purposes and parties.

24. 16-21299-B-13 LUCIEN WILLIAM
JPJ-1 Mohammad M. Mokarram

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
4-13-16 [23]

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

The court's decision is to overrule the objection and deny without prejudice the motion to dismiss, subject to the Debtor providing the Trustee with a Class 1 Checklist and Authorization to Release Information as required pursuant to Local Bankr. R. 3015-1(b)(6).

The Debtor appeared at the continued § 341 meeting scheduled on May 5, 2016.

Subject to verification by the Trustee that the Debtor has provided the Class 1 Checklist, the plan filed March 8, 2016, complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled, the motion to dismiss denied without prejudice, and the plan is confirmed.