

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher D. Jaime

Bankruptcy Judge

Sacramento, California

May 17, 2016 at 1:00 p.m.

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1. [12-39713](#)-B-13 DONALD FLAVEL CONTINUED OBJECTION TO NOTICE
MAC-4 Marc A. Carpenter OF MORTGAGE PAYMENT CHANGE
12-4-15 [[68](#)]

Tentative Ruling: The court issues no tentative ruling.

This matter was continued from April 19, 2016. The Objection to Notice of Mortgage Payment Change was originally set for hearing on the 28-days notice required by Local Bankruptcy Rule 9014-1(f)(1). Opposition was filed. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

The matter will be determined at the scheduled hearing.

May 17, 2016 at 1:00 p.m.

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2. [16-21514](#)-B-13 CHERRONE PETERSON
JPJ-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
4-28-16 [[17](#)]

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

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

First, the Debtor is delinquent to the Chapter 13 Trustee in the amount of \$465.00, which represents the first plan payment that feel due April 25, 2016. The Debtor does not appear to be able to make plan payments proposed and has not carried its burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Second, two plans were filed on March 11, 2016, as dkt. 5 with different plan terms and it is unclear which plan the Debtor attempts to confirm.

Third, the plan does not comply with 11 U.S.C. § 1325(b)(1)(B) because the Debtor's projected disposable income is not being applied to make payment to unsecured creditors. The Debtor includes an improper expense, specifically collateral that will be surrendered, at line 33 of the Calculation of Disposable Income (Form B22C-2). Items that a debtor intends to surrender are not necessary for his support or maintenance and cannot be included in the calculation of disposable income. Without this improper expense, the Debtor's correct monthly disposable income is \$1,247.77 and the Debtor must pay no less than \$74,862.00 to general unsecured creditors. The plan proposes to pay \$0.00 to Class 7 general unsecured creditors.

The plan filed March 11, 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 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.

3. [16-21614](#)-B-13 KEVIN/SYLIVIA EDWARDS
MDE-1 Eric John Schwab

OBJECTION TO CONFIRMATION OF
PLAN BY FIFTH THIRD BANK
4-5-16 [[12](#)]

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

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

Subsequent to the filing of the Fifth Third Bank's objection, the Debtors filed an amended plan on April 25, 2016. The confirmation hearing for the amended plan is scheduled for June 7, 2016. The earlier plan filed March 16, 2016, is not confirmed.

4. [16-21715](#)-B-13 TILLA SIORDIA
JPJ-1 Edward A. Smith

OBJECTION TO CONFIRMATION OF
PLAN BY TRUSTEE JAN P. JOHNSON
AND/OR MOTION TO DISMISS CASE
4-28-16 [[13](#)]

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).

The court's decision is to overrule the objection as moot and deny the motion to dismiss as moot.

Subsequent to the filing of the Trustee's objection, the Debtors filed an amended plan on May 10, 2016. The confirmation hearing for the amended plan is scheduled for June 21, 2016. The earlier plan filed March 19, 2016, is not confirmed.

5. [16-20118](#)-B-13 LESTHER GASTELUM AND ALMA OBJECTION TO DEBTORS' CLAIM OF
JPJ-2 SAQUELARES EXEMPTIONS
Peter G. Macaluso 4-18-16 [[46](#)]

Tentative Ruling: The Trustee's Objection to Debtor's [sic] Claim of Exemption has been set for hearing on at least 28-days the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The Debtors have filed a reply and the Trustee has filed a response.

The court's decision is to sustain the objection and the exemptions are disallowed in their entirety.

First, although the Debtors' reply concedes that they have over-exempted their bank account in the amount of \$1,125.00 under California Code of Civil Procedure § 704.070, it cannot be properly assessed whether the Debtors' proposed plan payment increase by \$10.00 per month will resolve the issue of over-exemption since no new plan has been filed and there is no plan payment from which an increase can be based.

Second, although the Debtors' reply asserts that they have not over-exempted California Code of Civil Procedure § 704.060(d)(2) since the landscaping business is part of a family business that pertains to both the Debtor and Joint Debtor, the Debtors have not provided sufficient indication that the Joint Debtor is a party to that business.

Third, the Debtors have not provided the Trustee with requested documents or amendments, which would provide clarity to the Debtors' interest in the landscaping business. The requested documents include a Profit and Loss Statement from October 2015 through December 2015, bank statements of the business bank account from July 2015 through December 2015, evidence of business licenses or permits. The requested amendments are to Schedule I and the Statement of Financial Affairs.

The Trustee's objection is sustained and the claimed exemptions are disallowed.

6. [16-21328](#)-B-13 GABRIEL GOMEZ AND OBJECTION TO DEBTOR'S CLAIM OF
JPJ-3 ANGELICA CERVANTES EXEMPTIONS
David Foyil 4-19-16 [[25](#)]

Final Ruling: No appearance at the May 17, 2016, hearing is required.

The Trustee's Objection to Debtor's [sic] Claim of Exemption has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 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 Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The court's decision is to sustain the objection and the exemption is disallowed in its entirety.

The Debtors must claim an actual amount as exempt under California Code of Civil Procedure § 703.140(b)(3) rather than list a percentage that they may exempt "100% of the fair market value" of their assets. Therefore, the items exempted under California Code of Civil Procedure § 703.140(b)(3) in the amount of "100%" are improper.

The Trustee's objection is sustained and the claimed exemption is disallowed.

7. [16-21131](#)-B-13 SALVADOR/GUADALUPE PEREZ OBJECTION TO DEBTOR'S CLAIM OF
JPJ-2 Peter L. Cianchetta EXEMPTIONS
4-19-16 [[24](#)]

Final Ruling: No appearance at the May 17, 2016, hearing is required.

The Trustee's Objection to Debtor's [sic] Claim of Exemption has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 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 Debtor and the other parties in interest are entered, the matter will be resolved without oral argument and the court shall issue its ruling from the parties' pleadings.

The court's decision is to sustain the objection and the exemption is disallowed in its entirety.

The Debtors have claimed an interest in a checking account as exempt under 42 U.S.C. § 407 in the amount of \$7,500.00. However, California has opted out of the federal exemptions and has elected state exemptions for its citizens pursuant to California Code of Civil Procedure § 703.130(a). The Debtors have not cited to any authority for the proposition that they are entitled to claim an exemption under 42 U.S.C. § 407.

The Trustee's objection is sustained and the claimed exemption is disallowed.

8. [16-21542](#)-B-13 SCOTT/KRISTI LANG
JPJ-1 Mark A. Wolff

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON
4-28-16 [[39](#)]

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.

First, the Debtors failed to appear at the duly noticed first meeting of creditors set for April 21, 2016, as required pursuant to 11 U.S.C. § 343. The Debtors must be thoroughly examined under oath.

Second, the Debtors are delinquent to the Chapter 13 Trustee in the amount of \$520.00, which represents the first plan payment that fell due April 25, 2016. The Debtors do not appear to be able to make plan payments proposed and have not carried their burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Third, the Debtors have not provided the Trustee with copies of payment advices or other evidence of income received within the 60-day period prior to the filing of the petition. The Debtors have not complied with 11 U.S.C. § 521(a)(1)(B)(iv).

Fourth, the terms for payment of the Debtors' attorney's fees are unclear. Section 2.07 of the plan specifies a monthly payment of \$0.00 for administrative expenses. It is not possible to pay the balance of the attorney's fees and any other administrative expenses through the plan with a monthly payment specified at \$0.00

Fifth, feasibility depends on the granting of motions to value collateral for GM Financial and Tidewater Motor Credit. To date, the Debtors have not filed, set for hearing, and served on the respondent creditors and the Trustee motions to value the collateral pursuant to Local Bankr. R. 3015-1(j).

The plan filed March 28, 2016, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

9. [13-25543](#)-B-13 JAMES/PATRICIA FRANKLIN MOTION TO MODIFY PLAN
PGM-1 Peter G. Macaluso 4-6-16 [[38](#)]

Tentative Ruling: The Motion to Confirm the Modified Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The Trustee has filed an objection and the Debtors have filed a response.

The court's decision is to permit the requested modification and confirm the modified plan provided that the following language is included in the order confirming:

The Debtors have paid a total of \$69,707.36 to the Trustee through March 2016. Commencing April 25, 2016, monthly plan payments shall be \$2,110.00 for 1 month, then \$1,970.00 for the remainder of the plan.

Class 1 Creditor SLS/Bank of America is owed a total of \$2,987.16 for post-petition mortgage arrears and late fees: \$1,351.93 for January 2015 disbursement, \$1,435.23 for February 2016 disbursement, \$100.00 late fee for January 2016 post-petition payment, and \$100.00 late fee for February 2016 post-petition payment.

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

10. [16-21258](#)-B-13 LONNEL WALKER
JPJ-2 Pauldeep Bains

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
4-19-16 [[20](#)]

Tentative Ruling: The Objection to Exemptions has been set for hearing on at least 28-days the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *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 overrule the objection.

The Trustee objects to the Debtor's use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140(a)(2).

In response, the Debtor states that he has elected to exempt his assets using California Code of Civil Procedure § 704 instead. The court's review of the docket reveals that the Debtor has filed an amended Schedule C on April 26, 2016, showing that he is exempting his assets under § 704.

The Trustee's objection is overruled.

11. [15-28862](#)-B-13 LUCAS/VANESSA HUEZO
RHM-1 Robert Hale McConnell

MOTION TO VACATE DISMISSAL OF
CASE AND/OR MOTION FOR LEAVE TO
FILE ANY DOCUMENTS CLAIMED TO
NOT HAVE BEEN FILED
4-27-16 [[41](#)]

DEBTOR DISMISSED:

04/19/2016

JOINT DEBTOR DISMISSED:

04/19/2016

Tentative Ruling: The Debtor's [sic] Motion to Reinstate A Previously Dismissed Case and For Leave to File Any Documents Claimed to Not Have Been Filed was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court's decision is to grant the motion to vacate dismissal.

Debtors argue that either mistake or excusable neglect justify the court vacating the order dismissing the case. The Debtors' case was dismissed on April 19, 2016, for failure to confirm an amended plan within 75 days of the date of entry of order denying confirmation of the Debtors' plan. The Debtors assert that they were unaware of the Trustee's motion to dismiss because the Debtors' counsel had sent to the Trustee an order confirming plan, Debtors' counsel believed there was no more work that needed to be done with regard to the case, and Debtors' counsel failed to notice and calendar the Trustee's motion to dismiss. Debtors' counsel did not become aware of the dismissal until the notice of dismissal was electronically received on or about April 22, 2016. The court will analyze the motion under Fed. R. Civ. P. 60(b) and 9024.

DISCUSSION

The court finds that the motion is supported by both cause and excusable neglect. Cause exists because the Debtors have attended the meeting of creditors, have made every required payment to the Trustee, and should not be punished for their counsel's inadvertence. Considering the four factors of *Pioneer Investment Services v. Brunswick Associates, Ltd.*, 507 U.S. 380 (1993), the court also finds the Debtors' request is supported by a showing of excusable neglect because their case was dismissed due to their counsel's inadvertence of failing to realize that the Trustee had filed a motion to dismiss and failing to calendar the hearing on the motion. Vacating dismissal will not result in prejudice to any party.

Given the unique circumstances of the Debtors, the court will grant the motion to reconsider and vacate the order dismissing the case.

12. [16-21574](#)-B-13 RODNEY/ANNA RATH OBJECTION TO CONFIRMATION OF
BN-1 Mohammad M. Mokarram PLAN BY THE GOLDEN 1 CREDIT
Thru #13 UNION
4-27-16 [[17](#)]

CONTINUED TO 5/24/16 AT 1:00 P.M. FOR REASONS STATED AT ITEM #13.

13. [16-21574](#)-B-13 RODNEY/ANNA RATH OBJECTION TO CONFIRMATION OF
JPJ-1 Mohammad M. Mokarram PLAN BY JAN P. JOHNSON
4-28-16 [[21](#)]

CONTINUED TO 5/24/16 AT 1:00 P.M. AFTER § 341 MEETING SET FOR 5/19/16.

14. [15-25582](#)-B-13 ASHWANI MAYER AND POOJA CONTINUED MOTION TO CONFIRM
PGM-4 VERMA PLAN
Thru #15 Peter G. Macaluso 2-19-16 [[81](#)]

Tentative Ruling: This matter was continued from April 5, 2016. No new plan or documents have been filed.

Before the court may confirm a plan the court must find that the plan is feasible. See 11 U.S.C. §§ 1325(a)(1) and (a)(6). One aspect of feasibility requires the Debtors to take into account - and the court to consider - possible contingencies that may affect payments and performance under the plan. See *In re Goodavage*, 41 B.R. 742-745 (Bankr. E.D. Va. 1984) (citations omitted); see also *In re Greer*, 60 B.R. 547, 553 (C.D. Cal. 1986) (citations omitted). The court cannot find that requirement is met in this case.

As the court stated on the record on April 5, 2016, the proposed plan does not provide for any contingency in the event of an adverse ruling in the pending adversary proceeding with Freshko Produce Services, Inc. The outcome of that adversary proceeding will impact both payments and performance under the plan because there is a likelihood that it will determine the proper classification of Freshko's claim, i.e., whether Freshko's claim is general unsecured, secured, priority, or secured priority). Absent some provision for that contingency, the court finds the plan is not feasible.

Confirmation will therefore be denied without prejudice.

15. [15-25582](#)-B-13 ASHWANI MAYER AND POOJA OBJECTION TO CLAIM OF GENERAL
PGM-5 VERMA PRODUCE CO., LTD., CLAIM NUMBER
Peter G. Macaluso 3
3-28-16 [[95](#)]

Tentative Ruling: The Objection to the Claim of General Produce Co., Ltd. (Claim #3) has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). Opposition was filed.

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

This is the Debtors' second objection to General's claim. The court overruled the Debtors' prior objection, dkt. 36, in a minute order filed on February 4, 2016. Dkt. 72. The basis for the court's earlier decision is stated in the civil minutes filed on February 3, 2016. Dkt. 66. For the reasons explained below, the court now reconsiders and sustains in part and overrules in part the Debtors' objection filed on March 28, 2016, to General's Claim #3. Dkt. 95. See 11 U.S.C. § 506(j); Fed. R. Bank. Proc. 3008.

Because the parties are familiar with the relevant facts and background, neither need be repeated here. See dkts. 36, 54, 62.

To the extent the Debtors object to General's claim on the basis there are no proceeds from the sale of PACA Trust assets, the objection is overruled. Based on the Debtors' admissions in related litigation between the Debtors and another creditor in this case filed in the district court, the court has found and concluded that "there were proceeds from the sale of PACA assets because the debtor is deemed to have admitted that he diverted proceeds from the disposition of PACA assets to himself." Dkt. 74 at 7:3-6.

To the extent the Debtors object to General's claim on the basis the claim is not a secured priority claim because General has failed to establish that the Debtors

actually (and presently) have proceeds from the disposition of PACA Trust assets in their possession, the objection will be sustained and the claim allowed as a general unsecured claim for the reasons stated on pages 5:10 - 10:18 of the Order on Objection to Claim of Freshko Produce Service, Inc. (Claim #7) filed on February 5, 2016. Dkt. 74.¹ That is, the Debtors have demonstrated they are not in possession of proceeds from the disposition of PACA Trust assets and, thus, have come forward with sufficient evidence to overcome the presumption that General's claim is a secured priority claim and General has not produced evidence to demonstrate otherwise.

Therefore, based on the foregoing, it is ordered that the Debtors' objection to General's claim, filed as Claim No. 3, is sustained, and Claim No. 7 is disallowed as a secured priority claim and allowed as a general unsecured claim.

It is further ordered that all other objections to General's claim, filed as Claim No. 3, are overruled.

¹The "no possession of proceeds" argument was raised in the Debtors' prior objection to General's claim. Dkt. 36. However, because that argument was raised in a reply, dkt. 62 at 2-3, the court noted but did not consider it in overruling the Debtors' prior objection. Dkt. 66. Because the Debtors' "no possession of proceeds" objection is now properly raised in the objection, to which General has had an opportunity to respond, the court now considers it.

16. [15-28583](#)-B-13 DRUE BROWN MOTION TO CONFIRM PLAN
WSS-2 W. Steven Shumway 4-1-16 [[81](#)]

Final Ruling: No appearance at the May 17, 2016, hearing is required.

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

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors has provided evidence in support of confirmation. No opposition to the motion has been filed by the Chapter 13 Trustee or creditors. The amended plan filed on April 1, 2016, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

17. [11-29591](#)-B-13 BRIAN SAECHAO
PLC-6 Peter L. Cianchetta

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF BACHALTER NEMER
FOR VALERIE BANTNER PEO,
CREDITORS ATTORNEY(S)
4-19-16 [[90](#)]

Tentative Ruling: Golden 1's Motion for Attorney Fees Pursuant to Settlement Agreement 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 has been filed by the Debtor and a response has been filed by Golden 1 Credit Union.

The court's decision is to deny the motion with prejudice.

This is a motion by Golden 1 Credit Union ("Creditor") for attorney's fees as the "prevailing party" on an earlier motion for contempt filed by Brian Saechao ("Debtor"). In that earlier contempt motion, the Debtor sought to hold Golden 1 in contempt for violating the discharge injunction of 11 U.S.C. § 524. Debtor maintained that Golden 1 violated the discharge injunction of § 524 by reporting credit information the Debtor perceived as inaccurate.

The court denied the Debtor's motion without prejudice in a civil minute order filed on April 13, 2015.¹ In civil minutes filed on April 5, 2016, the court found and concluded that Golden 1 did not violate the discharge injunction because the Debtor failed to produce sufficient evidence to demonstrate the credit information Golden 1 reported was inaccurate and there also was no evidence that Golden 1 engaged in any affirmative act in an attempt to collect a discharged debt. At the conclusion of the hearing on the contempt motion, Golden 1 asked the court to designate it as the "prevailing party." The court declined to do so, but authorized Golden 1 to file a motion for attorney's fees. Golden 1 filed its attorney's fees motion on April 19, 2016.

Golden 1 maintains that the denial of the Debtor's contempt motion makes it a "prevailing party" and, as such, it is entitled to recover attorney's fees under Cal. Code Civ. Proc. §§ 1717, 1021, and 1035 which permit the court to award a prevailing party attorney's fees in an action based on a contract. Golden 1 contends that the contempt motion was an action or proceeding based on a contract because it related to claims the parties resolved in the Settlement Agreement dated on or about November 24, 2015. The court disagrees.

Golden 1 relies heavily on the court's reference to the Settlement Agreement in the civil minutes of April 5, 2016. By that reference the court did not intend to suggest that the Settlement Agreement barred the contempt motion or the claim against Golden 1 alleged in that motion. And that also was not the basis for the court's decision. By its reference to the Settlement Agreement, the court meant only to convey that it found it difficult to conclude that the Debtor would believe Golden 1 would attempt to collect a discharged debt after it stated a desire to settle its disputes with the Debtor. In any event, the court finds and concludes that the contempt motion did not relate to claims that were resolved in the Settlement Agreement because the Settlement Agreement did - and could not - waive claims under § 524. And it could not waive those claims because the waiver included in the Settlement Agreement did not - and could not - include a waiver of § 524 or the discharge injunction.

A waiver of the § 524 discharge injunction is valid only if done in compliance with § 524(c). See *Bankruptcy Receivables Mgmt. v. Lopez (In re Lopez)*, 274 B.R. 854, 859-860 (9th Cir BAP 2002) (quotations and citations omitted), *aff'd*, 345 F.3d 701 (9th Cir.

¹In an order filed May 13, 2016, the court also denied with prejudice a motion by the Debtor to reconsider and vacate the April 13, 2016, order denying the contempt motion.

2003). Section 524(c), in turn, requires that any waiver of the discharge injunction occur before the discharge is entered. See 11 U.S.C. § 524(c)(1). That did not happen here. In this case, the Settlement Agreement was not effective until November 24, 2015, and the discharge was entered on November 4, 2014. Thus, the waiver in the Settlement Agreement was given over a year after the discharge was entered. That means that the release and waiver in the Settlement Agreement did not - and could not - include a release and waiver of any § 524 or discharge injunction claim.

Given that the Settlement Agreement did not - and could not - effectuate a waiver of § 524 or the discharge injunction the contempt motion did not - and could not - relate to claims by the parties that were resolved in the Settlement Agreement. And that means the contempt motion was not an action on a contract but, rather, was an action based exclusively on the Bankruptcy Code which provides no general right to recover attorney's fees. *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439, 441 (9th Cir. 1997).

Alternatively, the court finds and concludes that Golden 1 is not a "prevailing party" on the contempt motion. By Golden 1's own argument, to qualify as a prevailing party one must prevail on the merits on at least some of its claims. *Hanrahan v. Hampton*, 446 U.S. 754, 756-67 (1980). Here, the contempt motion was denied without prejudice. Judgment rendered without prejudice is typically considered not to be on the merits. *Johnson v. Eli Lilly and Co.*, 689 F. Supp. 170, 175 (W.D. N.Y. 1988); *Ungar v. Islamic Republic of Iran*, 211 F. Supp. 2d 91, 100 (D. D.C. 2001) ("The order that accompanies this memorandum denies plaintiffs' motion. Such a denial is without prejudice and is not, of course, a judgment on the merits of the plaintiffs' claims.").

Therefore, for the foregoing reasons, Golden 1's motion for attorney's fees as the prevailing party on the Debtor's contempt motion is denied with prejudice.

18. [12-22391](#)-B-13 ROBERT/FINLEY KELLER CONTINUED MOTION FOR CONTEMPT
SJS-6 Scott J. Sagaria 3-9-16 [[122](#)]

THE COURT WILL FILE A WRITTEN DECISION ON OR BEFORE 5/17/16. REMOVED FROM
CALENDAR. CONTINUED HEARING VACATED.

19. [16-21391](#)-B-13 GEORGE TOTTON
JPJ-1 Steven A. Alpert

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
4-28-16 [[17](#)]

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

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

First, the Debtor has not provided the Trustee with evidence supporting its valuation of the Debtor's residence as requested by the Trustee at the meeting of creditors held April 21, 2015. The Debtor has not complied with 11 U.S.C. § 521(a)(3).

Second, the Debtor has not amended Schedules D or E/F as requested by the Trustee to reflect the Debtor's credit card debts. The Debtor has not complied with 11 U.S.C. § 521(a)(3).

The plan filed March 21, 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 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.

20. [16-21593](#)-B-13 SENAY FRANKLIN
JPJ-1 Pro Se

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
4-28-16 [[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 Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

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

The Debtor has claimed an interest in a vehicle, household goods, clothing, cash on hand, bank accounts, pension, and rental deposit as exempt under California Code of Civil Procedure § 703.140(b). However, the Debtor is married and has failed to file a spousal waiver of right to claim exemptions pursuant to California Code of Civil Procedure § 703.140(a)(2) that includes the non-filing spouse's signature. Therefore, the spousal waiver filed May 4, 2016, is not valid.

The plan filed March 15, 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 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.

21. [16-21793](#)-B-13 ABU ALAMIN
JPJ-1 Jessica R. Galletta

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
4-28-16 [[47](#)]

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). A 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 provided that the below issues are resolved as stated in the Declaration of Jessica Galletta.

First, the Debtor has provided the Trustee with copies of payment advices or other evidence of income received within the 60-day period prior to the filing of the petition.

Second, the Debtor has amended Schedule J to remove an improper expense for mortgage payments since the mortgage is being paid through the plan as a Class 1 claim.

Third, the Declaration of Jessica Galletta states that Debtor's attorney shall seek approval of fees by complying with Local Bankr. R. 2016-1(c). This shall be included in the order confirming.

Fourth, the Rights and Responsibilities of Chapter 13 Debtors and Their Attorney was filed on April 27, 2016.

The plan complies with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled, the motion to dismiss is denied, and the plan filed March 23, 2016, is confirmed.

22. [16-21598](#)-B-13 LEONARD RATHJEN
JPJ-1 Michael Benavides

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
4-28-16 [[20](#)]

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

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

First, the Debtor is delinquent to the Chapter 13 Trustee in the amount of \$700.00, which represents the first plan payment that fell due April 25, 2016. The Debtor does not appear to be able to make plan payments proposed and has not carried its burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

Second, the plan payment in the amount of \$700.00 does not equal the aggregate of the Trustee's fees, the monthly payment for administrative expenses, and monthly dividends for Class 2 secured claims as required pursuant to Section 5.02 of the form plan. The aggregate of the monthly amounts plus the Trustee's fee is \$847.00. The plan does not comply with Section 4.02 of the mandatory form plan.

Third, the Debtor is required to complete the Calculation of Your Disposable Income (Form 122C-2) since the Debtor's median income for the year for a household size of one is greater than \$50,519.00. Without completing this form, it cannot be determined whether the plan complies with 11 U.S.C. § 1325(b)(1)(B).

The plan filed March 28, 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 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.

23. [16-21017](#)-B-13 EDDIE FROESE
JPJ-1 Bruce C. Dwigings

CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY JAN P.
JOHNSON
4-15-16 [[16](#)]

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 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 confirm the plan.

This matter was continued from May 10, 2016, to allow the Debtor to appear at the continued meeting of creditors held on May 12, 2016 and to be thoroughly examined under oath. The Debtor and counsel of record appeared, and the § 341 meeting was concluded as to the Debtor.

There being no objection to confirmation, the plan filed May 23, 2016, will be confirmed.

Tentative Ruling: This matter was continued from May 10, 2016, at 1:00 p.m., to May 17, 2016, at 1:00 p.m. The court's decision is to deny the motion with prejudice.

On May 9, 2016, the court posted the following as a final ruling in this matter:

This matter is 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.

Because language above was posted as a final ruling on May 9, 2016, the matter was not called on May 10, 2016, and on May 10, 2016, the court entered the above language into its civil minutes. Dkt. 136.

The docket also reflects that on May 9, 2016, the office of the Chapter 13 Trustee ("Trustee") filed a declaration that conforms with the court's posted ruling. Dkt. 133. In that declaration Karin Bruce, an attorney with the office of the Chapter 13 Trustee, states that she is familiar with and has reviewed the records of debtors Timothy Mansouri and Lydia Mansouri ("Debtors") in this case.

In her declaration, Ms. Bruce states that a printout of the Debtors' plan payment history filed as Exhibit A to dkt. 128 is a true and correct copy of the plan payments the Debtors made to the Trustee during the duration of their plan. That payment history reflects that the Trustee received the last plan payment from the Debtors on March 22, 2016. The declaration also includes a new Exhibit B which is a copy of the cashier's check the Trustee received from the Debtors as the last plan payment. [dkt. 134]. The check is dated March 14, 2016, and reflects that it was deposited into the Trustee's bank account on March 22, 2016.

Based on the foregoing, the court is persuaded that, at the very latest, the Debtors made their last plan payment on March 22, 2016. That is two days before the Debtors' First Amended Plan and motion to confirm it were filed on March 24, 2016.

Section 1329(a) unambiguously states that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified[.]" 11 U.S.C. § 1329(a) (emphasis added). Therefore, because the Debtors completed plan payments two days before the First Amended Plan was filed, the Debtors' Motion to Confirm First Modified Chapter 13 Plan Dated and Filed March 24, 2016, dkt. 120, and confirmation of the First Modified Chapter 13 Plan also filed on March 24, 2016, dkt. 123, are denied with prejudice.

Tentative Ruling: The motion has been set for hearing on an order shortening time by Local Bankruptcy Rule 9014-1(f)(3). Since the time for service is shortened to fewer than 14 days, no written opposition is required. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues that are necessary and appropriate to the court's resolution of the matter.

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

Debtor seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past 12 months. The Debtor's prior bankruptcy case was dismissed on March 23, 2016, after Debtor's attorney Steele Lanphier filed an ex part motion to dismiss case. 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).

Although the Debtor states that his previous case was dismissed for failure to make plan payments, the plan was actually dismissed on the Debtor's ex part motion to dismiss case. Dkt. 72, 78. The Debtor does not explain why the previous case was filed but does state that the present case was filed to prevent foreclosure of Debtor's home. Although the Debtor lost his California State Disability Insurance (SDI) in the previous case and has not gained it back, the Debtor's circumstances in this case have changed in that the Debtor now receives rent from two renters in the combined amount of \$1,200.00. The Debtor asserts that the rent substitutes the loss of California SDI income. The Debtor additionally states that the present petition has appropriate values and does not require the Debtor to pay more than is necessary into the plan, which the court interprets as the Debtor's ability to fund the present plan and that it will succeed.

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

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

26. [15-29984](#)-B-13 ANDREW/PATRICIA WRIGHT MOTION TO CONFIRM PLAN
CMO-1 Cara M. O'Neill 3-30-16 [[23](#)]

Final Ruling: No appearance at the May 17, 2016, hearing is required.

The Motion for Confirmation of Amended Plan Dated March 24, 2016, has been set for hearing on the 42-days' notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the motion has been filed by the Chapter 13 Trustee or creditors. The amended plan filed on March 30, 2016, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

27. [13-30594](#)-B-13 JICK ICASIANO AND DIX CONTINUED MOTION FOR SUGGESTION
EJS-1 SULLIVAN OF DEATH, MOTION FOR
Eric J. Schwab SUBSTITUTION AS THE
REPRESENTATIVE FOR OR SUCCESSOR
TO THE DECEASED DEBTOR AND/OR
MOTION FOR CONTINUED
ADMINISTRATION OF THE CASE
4-7-16 [[24](#)]

Final Ruling: No appearance at the May 17, 2016, hearing is required.

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 grant the motion.

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.

The Debtor has provided sufficient evidence to show that continued administration of the Chapter 13 case is possible and in the best interest of creditors. A Supplemental Declaration of Surviving Debtor Jick Icasiano was filed on May 11, 2016, stating that the Chapter 13 plan has been funded by income sources received by the Debtor and that the Joint Debtor only received a small social security benefit, its loss of which does not affect Debtor's ability to fund this Chapter 13 plan. Based on the information provided, the motion is granted.