UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

September 12, 2017 at 1:00 p.m.

1.	17-24505-B-13 EGS-1 **Thru #2**	SUSAN HARRIS Thomas L. Amberg	OBJECTION TO CONFIRMATION OF PLAN BY BAYVIEW LOAN SERVICING, LLC 8-24-17 [24]

Tentative Ruling: The 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, deny the motion to dismiss, and deny confirmation for reasons stated at Item #2.

Objecting creditor Bayview Loan Servicing, LLC holds a deed of trust secured by the Debtor's residence. The creditor asserts $7,165.45 in pre-petition arrearages but has not yet filed a proof of claim. Although the creditor states that it will file a proof of claim prior to the claims bar deadline, the creditor provides no evidence to support the amount of claimed pre-petition arrears. The Declaration of Samantha Smith simply restates the assertions made in the motion but no exhibits of accounting are provided. Without a proof of claim or evidence to support its assertion, the creditor's objection is overruled.

The creditor also reiterates the objections made by Chapter 13 Trustee. Those objections are addressed at Item #2.

Although requested in the objection, Bayview Loan Servicing, LLC has not stated either a contractual or statutory basis for the award of attorneys' fees in connection with its objection. Creditor is not awarded any attorneys' fees.

Creditor's request for dismissal of the case under §1307(c)(5) is denied without prejudice.

The court finds that the plan filed July 24, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a) for reasons stated at Item #2. The objection is overruled, the motion to dismiss is denied without prejudice, and the plan is not confirmed.

The court will enter an appropriate minute order.

2.	17-24505-B-13 JPJ-1	SUSAN HARRIS Thomas L. Amberg	OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON 8-22-17 [21]

Tentative Ruling: The Trustee's Objection to Confirmation of Debtor's Proposed Chapter 13 Plan and Confirmation Thereof 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 deny confirmation of the plan.

First, feasibility depends on the Debtor selling or refinancing property within 6 months of the petition date. Debtor testified at the August 17, 2017, meeting of creditors that she does not have a real estate agent but that her next-door neighbor is in the process of purchasing the property. However, no evidence of the proposed sale has been presented and a motion to sell property has not been filed. The Debtor has not carried her burden of showing that the plan complies with 11 U.S.C. § 1325(a)(b).

Second, the plan cannot be effectively administered. The proposed plan provides for treatment of Bayview Loan, LLC and Parktree Investments in Class 1. These creditors hold the first and second deed of trust, respectively, against Debtor's residence. Section 2.08 of the standard plan does not specify an arrearage dividend for the Class 1 arrears and does not specify a monthly contract installment amount for the post-petition arrears. Also the Additional Provisions portion of the plan states, generally, that the Debtor shall actively market her property for sale and if no sale occurs within 6 months of the filing of the case, then the Debtor shall modify the Chapter 13 plan to repay the arrears on her mortgages. However, this is an impermissible modification to Class 1 creditors Bayview Loan, LLC and Parktree Investments pursuant to 11 U.S.C. § 1322(b)(2) and § 1325(a)(1).

The plan filed July 24, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

3. 14-21111-B-13 BARBARA STELTER
JPJ-3 Mary D. Anderson

MOTION TO RECONVERT CASE TO CHAPTER 7 AND/OR MOTION TO DISMISS CASE
8-8-17 [109]

Tentative Ruling: Trustee's Motion to Re-Convert Case to a Chapter 7 Proceeding or in the Alternative 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 re-convert this Chapter 13 case to a Chapter 7.

This motion has been filed by Chapter 13 Trustee Jan Johnson ("Movant"). Movant asserts that the case should be re-converted based on the following grounds.

First, the Debtor is $36,768.93 delinquent in plan payments, which represents 11 plan payments. By the time this motion is heard, an additional plan payment in the amount of $3,320.00 will also be due. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Second, re-conversion is in the best interest of creditors and the estate pursuant to 11 U.S.C. § 1307(c) because the total non-exempt equity in Debtor's residence is approximately $90,104.00. This is based on the listing price of Debtor's residence at $499,000.00 by Chapter 7 Trustee Douglas Whatley in the prior Chapter 7 proceeding, the first deed of trust and only lien on the property held by El Dorado Savings Bank in the amount of $233,895.92, the total amount of equity in the property at approximately $265,104.08, and the Debtor's exemption of $175,000.00.

Response by Debtor

In opposition to the motion, Debtor asserts that the case should not be re-converted because Debtor intends to file a new plan which will address the arrearage owed to the Trustee and payment necessary to satisfy obligations to creditors. However, no such plan has been filed and the opposition was filed two weeks ago on August 29, 2017. Debtor further contends that there is no non-exempt equity in her residence given the value of the property at $435,000.00 and after accounting for deduction of cost of sale and payment of the first deed of trust. Debtor states that the amount left would be $166,304.08, which is less than the exemption of $175,000.00.

Debtor's $435,000.00 valuation of her residence is based off an appraisal performed in November 2016 by J. Dutra Appraisal Service. However, Debtor has not filed any exhibits or declaration supporting this valuation.

Discussion

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

The Bankruptcy Code Provides:

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

11 U.S.C. § 1307(c). The court engages in a "totality-of circumstances" test, weighing facts on a case by case basis in determining whether cause exists, and if so, whether conversion or dismissal is proper. *In re Love*, 957 F.2d 1350 (7th Cir. 1992). Bad faith is not one of the enumerated grounds under 11 U.S.C. § 1307, but it is "cause" for dismissal or conversion. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 113 FN.4, (B.A.P. 9th Cir. 2011), citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999).

Cause exists to re-convert this case pursuant to 11 U.S.C. § 1307(c) since there is non-exempt equity for creditors based on the listing price of Debtor's residence at $499,000.00 by the Chapter 7 Trustee in the prior Chapter 7 case. Debtor's contention that the property is valued at $435,000.00 is unsupported. The motion is granted and the case is re-converted to a case under Chapter 7.

The court will enter an appropriate minute order.

4. 17-25411-B-13 JAMES/LILLIE JOHNSON
MET-1 Mary Ellen Terranella

MOTION TO EXTEND AUTOMATIC STAY AND/OR MOTION TO REINSTATE AUTOMATIC STAY
8-22-17 [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 Debtors, 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.

Debtors seek 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 Debtor James Johnson's second bankruptcy petition pending in the past 12 months. The Debtor's prior bankruptcy case was voluntarily dismissed on August 27, 2017, when Debtor fell behind in Class 4 payments on the mortgage for his rental property (case no. 15-21419, dkts. 39, 40). Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtors 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 Debtors assert that Mr. Johnson unknowingly fell behind on the mortgage for the rental property because their daughter is the tenant there and she directly pays the lender. Mr. Johnson was unaware that the rental property was scheduled for a foreclosure on August 17, 2017. Upon learning of the imminent foreclosure sale, he filed a motion to dismiss case so that he could file the instant case to protect the rental property. Debtors assert that circumstances have changed because their daughter has now resolved her financial issues and is able to contribute to the Debtors' plan so that ongoing mortgage payments and an amount sufficient to cure pre-petition arrears will be paid over the term of the new Chapter 13 plan. Debtors state in their declaration that they have stable and steady retirement income and that the new plan will pay 100% to all allowed unsecured claims.

The Debtors have 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.

The court will enter an appropriate minute order.

5. 17-22712-B-13 DENISE DOXIE
Pro Se

MOTION TO VACATE DISMISSAL OF CASE
8-29-17 [51]

DEBTOR DISMISSED: 08/07/2017

Tentative Ruling: The Motion to Reinstate Voluntary Dismissed Case 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 deny without prejudice the motion to vacate dismissal.

Debtor requests an order vacating dismissal of case on grounds that her loan modification with M&T Bank Mortgage was unsuccessful and that her primary residence is scheduled for a trustee's sale on September 25, 2017.

DISCUSSION

Rule 60(b) sets forth the circumstances which a court may relieve a party from an order dismissing the case. These circumstances include "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason that justifies relief." The Debtor does not analyze these circumstances. A loan modification that fails to work out in Debtor's preferred way does not, in itself, justify vacating dismissal of a case that the Debtor voluntarily sought.

The court finds that the motion is not supported by cause or excusable neglect. The motion is denied without prejudice.

The court will enter an appropriate minute order.

6. 17-24614-B-13 ALFONSO/CAMMIE MACIEL
JPJ-1 Peter L. Cianchetta

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
8-22-17 [14]

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, although the Debtors did not appear at the first meeting of creditors, they did appear at the continued meeting of creditors set for August 31, 2017, as required pursuant to 11 U.S.C. § 343.

Second, feasibility depends on the granting of motions to value collateral for A-L Financial and Wheels Financial Group. To date, Debtors have not filed, set for hearing, or served on the respondent creditor and Trustee a stand-alone motion to value the collateral. *See* Local Bankr. R. 3015-1(j).

Third, the plan does not comply with 11 U.S.C. § 1325(b)(1)(B) since the Debtor's projected disposable income is not being applied to make payments to unsecured creditors. Debtors use the same expenses that they used on their previous Form 122C-2 filed in case no. 16-27552 on November 14, 2016. The expenses are overstated or contradicts their current schedules and plan. When the overstated expenses are added, Line #45 of Form 122C-2 changes from ($438.71) to $928.28. This means that Debtors must pay no less than $55,696.80 to their unsecured non-priority creditors. Debtors' plan pays only approximately $1,730.89 or 4% to their unsecured, non-priority creditors.

Fourth, the Debtors have listed a debt owed to North Dakota Office of State Tax Commissioner on Schedule E/F in the amount of $26,578.55. However, their plan fails to provide treatment for this priority debt. The plan does not comply with 11 U.S.C. § 1322(a)(2).

The plan filed July 13, 2017, 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.

The court will enter an appropriate minute order.

7. 17-23817-B-13 RAFAEL/VILLA REYES
Leslie Richards

MOTION TO VACATE DISMISSAL OF CASE, MOTION TO REINSTATE MOTION TO REVERSE FORECLOSURE SALE
8-24-17 [37]

DEBTOR DISMISSED:
07/26/2017
JOINT DEBTOR DISMISSED:
07/26/2017

Tentative Ruling: The motion was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtors, 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 intends to enter a memorandum decision substantially in the form below.

Before the court is a motion by debtors Rafael A. Reyes and Villa Reyes ("Debtors") to vacate the order dismissing this chapter 13 case, impose the automatic stay, and reinstate an *ex parte* application that seeks to reverse a postpetition foreclosure sale and hold the foreclosing secured creditors in contempt for purportedly violating the automatic stay by conducting the foreclosure sale after being notified of this case. For the reasons below, the motion will be denied.

Introduction

This case was filed on June 6, 2017, dkt. 1, and dismissed on July 26, 2017, for failure to timely file documents. Dkts. 26, 27. This is also the Debtors' third bankruptcy case filed within one year. The Debtors' first case, no. 17-20282, was filed on January 17, 2017, and dismissed on March 1, 2017, for failure to timely file documents. The Debtors' second case, no. 17-22413, was filed on April 11, 2017, and dismissed on May 1, 2017, again, for failure to timely file documents. The same attorney represented the Debtors in all three dismissed cases.

Background

On June 9, 2017, the Debtors were notified that all required documents were not filed with the petition and they were given until June 20, 2017, to file missing documents. Dkt. 7. Missing documents were not timely filed. Instead, on June 21, 2017, the Debtors filed an *ex parte* application to extend the deadline to file missing documents. Dkt. 10. The court granted that *ex parte* application on June 26, 2017, and ordered all missing documents to be filed by July 5, 2017. Dkt. 12.

Missing documents were not filed on July 5, 2017. Instead, late that night the Debtors filed a second *ex parte* application to further extend the July 5, 2017, deadline.[1] Dkt. 18. The court granted that second request in an order entered on July 11, 2017, and extended the deadline to file all missing documents to July 19, 2017. Dkt. 20. In relevant part, the order granting the Debtors' second request for an extension stated as follows:

> **IT IS FURTHER ORDERED** (chapter 13 only) that the Debtor(s) is (are) also responsible to serve the Chapter 13 plan with a motion for confirmation and set

[1]On July 5, 2017, the Debtors also filed an *ex parte* application to invalidate a June 7, 2017, foreclosure sale and to hold the foreclosing secured creditors in contempt for violating the automatic stay by proceeding with that sale the day after this case was filed on June 6, 2017, and after they were informed on June 6, 2017, this case was filed. Dkt. 17.

> that matter for hearing in compliance with Local Rule 3015-1(c)(3) by 7/19/17. If the Debtor(s) does (do) not file the Chapter 13 plan, or fails to timely serve and set for hearing a motion to confirm, by the extended date, the case will be dismissed without further notice of hearing on the ex parte request of the trustee.

(Emphasis in original).

Some missing documents were timely filed on July 19, 2017. However, several critical documents were not. Missing from the documents filed on July 19, 2017, were a chapter 13 plan and a properly filed, set, and served plan confirmation motion. That caused the Chapter 13 Trustee to file an *ex parte* motion to dismiss on July 21, 2017. Dkt. 25. The court granted the Trustee's *ex parte* motion and dismissed this case in an order filed on July 26, 2017.[2] Dkts. 26, 27.

On August 8, 2017, nearly two weeks after this case was dismissed, the Debtors filed an *ex parte* application to vacate the dismissal order, impose the automatic stay, and reinstate the *ex parte* application previously filed at docket no. 17. Dkt. 35. The court denied that *ex parte* application without prejudice on August 10, 2017, and ordered the Debtors to notice and set any re-filed motion for hearing in accordance with the local rules. Dkt. 36. Two weeks later, and one month after this case was dismissed, on August 24, 2017, the Debtors filed the present motion.[3] Dkt. 37.

Discussion

Relief Under Rule 60(b)(1) Will be Denied.

Debtors seek relief from the order dismissing this chapter 13 case under Federal Rule of Civil Procedure 60(b)(1) (made applicable by Federal Rule of Bankruptcy Procedure 9024). Rule 60(b)(1) permits the court to grant relief from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1); Fed. R. Bankr. P. 9024. The court's treatment of a Rule 60(b)(1) motion is not rigid, but requires the court to equitably consider all relevant circumstances surrounding a party's, or its lawyer's, error or omission. *Pincay v. Andrews*, 389 F.3d 853, 855-56 & 860 (9th Cir. 2004) (en banc), *cert. denied.*, 544 U.S. 961 (2005) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Moreover, the party moving for Rule 60(b) relief bears the burden of establishing a basis for relief under the rule. *Martinelli v. Valley Bank of Nevada (In re Martinelli)*, 96 B.R. 1011, 1013 (9th Cir. BAP 1988); *see also South Shore Ranches, LLC v. Lakelands Co., LLC*, 2009 WL 2019858, *2 (E.D. Cal. 2009). Here, that's the Debtors and they have not met their burden.

Debtors attribute their failure to timely file all required documents, specifically a chapter 13 plan and a properly filed, set, and served plan confirmation motion, to counsel's excusable neglect and mistake. "Evidence," if it can be called that, of counsel's negligence and mistake is limited to the following three conclusory statements in counsel's self-serving declaration filed in support of the present

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[2] An opposition to the Trustee's *ex parte* motion to dismiss was filed on July 26, 2017. Dkt. 28. That opposition stated only that the failure to timely file a chapter 13 plan by July 19, 2017, "ha[d] just been discovered[,]" was the result of a clerical mistake by Debtors' counsel, and a chapter 13 plan was "immediately being filed." *Id.* A declaration was not filed with the opposition. And although a chapter 13 plan was also filed on July 26, 2017, dkt. 29, a properly filed, noticed, and set plan confirmation motion was not.

[3] The motion, memorandum of points and authorities, declarations, and exhibits are all filed as one large .pdf document. In that regard, the motion fails to comply with one of the basic pleading requirements in this district, *i.e.*, the motion, points and authorities, each declaration, and the exhibits are to be filed as separate pleadings. LBR 9014-1(d)(1); Revised Guidelines for Preparation of Documents. Not following that basic rule of pleading is grounds for denying the motion. *See* LBR 9014-1(l).

motion:

> (1) "The Chapter 13 Plan was not filed with the other documents on July 19, 2017 because of the mistake and inexcusable [sic] neglect of Debtors' attorney." Dkt. 37 at 3:17-18.
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> (2) "Th[e] mistake was not realized by Debtors' attorney[.]" *Id.* at 3:18-19.
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> (3) "I take full responsibility for the mistake and excusable negligence in not filing the remaining documents for Debtors by July 19, 2017." *Id.* at 3:22-24.

Although counsel's declaration uses terms from the text of Rule 60(b)(1), it fails to establish that Rule 60(b)(1) relief is warranted. Counsel's conclusory and self-serving statements are not facts and they do not address any of the four *Pioneer-Briones* factors, *i.e.*, (1) the danger of prejudice to any non-moving party if the dismissal is vacated, (2) the length of delay and the potential impact of that delay on judicial proceedings, (3) the reason for the delay, including whether the delay was within the reasonable control of the movant, and (4) whether the Debtors' conduct was in good faith. *Pioneer*, 507 U.S. at 395; *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997). Those factors are also not addressed in the motion or in the memorandum of points and authorities. For that reason alone, Rule 60(b)(1) relief is not warranted. *See Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1224 (9th Cir. 2000) ("The court would have been within its discretion [to deny relief] if it spelled out the equitable test and then concluded that [counsel] had failed to present any evidence relevant to the four factors.").

Nevertheless, the court has independently reviewed the *Pioneer-Briones* factors in the context of the record before it. *See Lemoge v. U.S.*, 587 F.3d 1188, 1192 (9th Cir. 2009). None of those factors weigh in favor of Rule 60(b)(1) relief on the basis of excusable neglect or mistake.

First, this was the Debtors' third bankruptcy case filed within one year, which means the automatic stay of § 362(a) did not go into effect when the case was filed. *See* 11 U.S.C. § 362(c)(4)(A)(i). It was incumbent on the Debtors to request the imposition of the automatic stay within 30 days of the date the case was filed and also to set that request for hearing. *See* 11 U.S.C. § 362(c)(4)(B). The Debtors did not do either.

The court is aware that on July 5, 2017, the Debtors filed an *ex parte* application to reverse the June 7, 2017, foreclosure sale and hold the foreclosing secured creditors in contempt for purportedly violating the automatic stay by conducting a postpetition foreclosure sale after being notified the day before the sale that this case was filed. However, even if that *ex parte* application could be construed as a request to impose the automatic stay under § 362(c)(4)(B), it was filed *ex parte* which means it was not set for a noticed hearing as also is required by § 362(c)(4)(B). So even assuming the Debtors passed the first step by filing a request to impose the stay they flunked the second step by not setting that request for a hearing.

Moreover, the *ex parte* application did not request, but merely assumed, that the automatic stay went into effect when this case was filed. That assumption was based on a second assumption that § 362(c)(4)(D)(i)(II) automatically applied when the case was filed. Not so. Section 362(c)(4)(D)(i)(II) applies only if there is a showing by clear and convincing evidence that a debtor's prior cases were dismissed because of counsel's negligence. *See* 11 U.S.C. § 362(c)(4)(D). That showing was not made here because the declaration that counsel submitted with the *ex parte* application, like the one submitted with the present motion, included only counsel's conclusory and self-serving assertions that the Debtors' two prior cases were dismissed because of her negligence. Those assertions are not facts and they certainly are not the clear and convincing evidence that § 362(c)(4)(D) requires in order to trigger

§ 362(c)(4)(D)(i)(II).[4]

But even assuming counsel's conclusory and self-serving statements met the clear and convincing standard, in a third bankruptcy case like this one, if at all, the automatic stay only goes into effect on the date an order allowing it to go into effect is entered. *See* 11 U.S.C. § 362(c)(4)(C). That means even if the *ex parte* application was granted on the same day it was filed the automatic stay would be imposed and effective only as of July 5, 2017, in which case it would have no impact on the

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[4]In addition to the Debtors' two prior cases which were dismissed because counsel failed to timely file required documents, counsel engaged in similar conduct in two other cases recently filed in this district which were also dismissed for the same reason. *In re Tyler*, no. 17-10177, was filed on January 20, 2017. Not all required documents were filed with the petition in that case. An order entered on February 16, 2017, extended the deadline to file the missing documents to March 3, 2017. Some missing documents were filed two days late on March 5, 2017. That caused the case to be dismissed on March 6, 2017. Counsel then re-filed another chapter 13 case for the same debtors on April 23, 2017, *In re Tyler*, no. 17-11558, and on April 26, 2017, counsel was again notified that documents were missing. Some missing documents were to be filed by April 30, 2017, and some by May 7, 2017. Again, not all missing documents were timely filed resulting in yet another dismissal of the second chapter 13 case on May 12, 2017. Counsel filed a third case for these debtors on September 10, 2017, *In re Tyler*, no. 17-13464, and was again notified on September 11, 2017, that numerous required documents were missing and not filed with the petition.

Nearly every other case that counsel has filed in this district has been dismissed for failure to timely file documents, including some in which an extension to file missing documents had been granted and some filed multiple times. These include the following: *In re Hyatt*, 16-10139 (filed 1/12/16, dismissed 2/19/17, motion to vacate dismissal denied 3/14/17 & 4/8/17); *In re Starr*, 15-14857 (filed 12/20/15, dismissed 4/8/16); *In re Starr*, 16-10088 (filed 11/19/16, dismissed 3/3/16); *In re Tracy*, 16-20084 (filed 11/18/15, dismissed 1/3/16); In re Tracy, 15-22785 (filed 4/6/15, dismissed 4/24/15); *In re Dynowski*, 14-31822 (filed 12/4/14, dismissed 12/14/15); *In re Rodriguez*, 13-31031 (filed 8/22/13, dismissed 9/3/13); *In re Manzo*, 13-30462 (filed 8/8/13, dismissed 8/19/13); *In re Ascencion*, 11-24004 (filed 2/17/11, dismissed 3/8/11); *In re Ascencion*, 11, 21249 (filed 1/8/11, dismissed 2/8/11).

An order entered earlier this year in one of the *Dynowski* cases sheds light on counsel's motivation behind what appears to be deliberate conduct and an established part of counsel's practice. Referring to counsel's other cases filed in this district, the court stated:

> These cases show a remarkably consistent pattern of abuse – failing to file fee disclosures, failing to file required documents, and failing to attend meetings of creditors. **The court concludes from the record in the case now before it, as well as these prior cases, that Ms. Richards is aiding debtors in an abuse of the bankruptcy process that is calculated to hinder, delay, and defraud lenders in their efforts to foreclose and/or repossess their real property collateral.**

In re Dynowski, 15-28574, Dkt. 115 (emphasis added).

And the court also notes that out of approximately 227 cases that counsel filed in the Central District of California bankruptcy court since 2010, only about 43 have been discharged, and an inordinate number of the remaining cases were dismissed for failure to file documents timely.

foreclosure sale completed a month earlier on June 7, 2017.

The point is there was no automatic stay in effect when this case was filed on June 6, 2017, which means the postpetition foreclosure sale on June 7, 2017, did not and could not have violated § 362(a) even if the foreclosing secured creditors knew about this case. That also means granting the Rule 60(b)(1) relief that the Debtors now request so that they may attempt to invalidate that June 7, 2017, foreclosure sale on the basis it violated the automatic stay would only cause substantial prejudice to the foreclosing secured creditors as non-moving parties. Accordingly, this first factor weighs heavily against Rule 60(b)(1) relief.

So does the second factor, *i.e.*, delay and the effects of that delay on the chapter 13 proceeding caused by the untimely filing of a chapter 13 plan and the absence of a timely-filed, set, and served plan confirmation motion.

The § 341 meeting of creditors was set, convened, and concluded on July 20, 2017. Dkt. 15. That triggered § 1324(b) which requires a plan confirmation hearing to be held within 45 days of that date. *See* 11 U.S.C. § 1324(b). That 45-day time period may not be extended. *In re Butcher*, 459 B.R. 115, 119 (Bankr. D. Colo. 2011). And it expired on September 5, 2017.[5] That is a problem.

A chapter 13 plan confirmation hearing in this district requires at least 42-days' notice. *See* LBR 9014-1(f)(1), & Fed. R. Bankr. P. 2002(b). So even if a plan confirmation motion was filed, set, and served with the untimely-filed chapter 13 plan on July 26, 2017, the earliest date on which a confirmation hearing could have been held would have been September 6, 2017, *i.e.*, the day after the § 1324(b) deadline expired.[6] Thus, by not timely filing the chapter 13 plan on July 19, 2017, and by not filing, setting, and serving a plan confirmation motion with the plan on the same date, the Debtors made it impossible to hold a confirmation hearing within the 45-day period required by § 1324(b).[7] An inability to satisfy § 1324(b) leaves conversion, or more likely dismissal in this case due to the absence of nonexempt assets, as the only viable options. *See In re Donnell*, 2012 WL 8255546, *2 (Bankr. E.D. Cal. 2012). And because it makes no sense to vacate the order dismissing this case so that the case can again be dismissed due to an inability to satisfy § 1324(b), this second factor also weighs heavily against Rule 60(b)(1) relief.

Third, nothing is said about the reason for the delay in filing a chapter 13 plan and the absence of a plan confirmation motion and whether the failure to timely file both was within or outside the control of Debtors' counsel. Consequently, this factor weighs against Rule 60(b)(1) relief.

Fourth, as explained above, bad faith is presumed in this third bankruptcy case and that presumption was not timely or substantively rebutted. This also weighs against Rule 60(b)(1) relief.

In sum, the Debtors have not established any basis for relief under Rule 60(b)(1) and the court's independent evaluation of the *Pioneer-Briones* factors based on the record before it confirms that such relief is not warranted in any event. Therefore, the

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[5]It actually expired on September 3, 2017, which was a Sunday and the following Monday, September 4, 2017, was a federal holiday.

[6]Based on the court's calendar and when chapter 13 matters are heard, September 12, 2017, would have been the next available, and therefore a more accurate, date.

[7]Had the Debtors timely filed a chapter 13 plan on July 19, 2017, and filed, set, and served a plan confirmation motion with it on the same date as the second extension order required the 42-day notice period would have run on August 30, 2017, and a confirmation hearing could have been "held" on the court's next available calendar date which then was September 5, 2017. That would have satisfied § 1324(b) even if a plan was not confirmed on that date. *See In re Hegeduis*, 525 B.R. 74, 82 (Bankr. N.D. Ind. 2015); *In re Tiliiakos*, 2013 WL 3943502 at *3 (Bankr. M.D. Fla. 2013).

Debtors' request for relief under Rule 60(b)(1) will be denied.

Relief Under Rule 60(b)(6) Will be Denied.

Debtors also seek relief under Rule 60(b)(6). A court may grant relief from a judgment or order under Rule 60(b)(6) (applicable by Federal Rule of Bankruptcy Procedure 9024) for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); Fed. R. Bankr. P. 9024. Relief under Rule 60(b)(6) is limited to errors or actions beyond the party's control. *See Cmty. Dental Serv. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 1996). In other words, to qualify for relief under Rule 60(b)(6) a moving party must show injury and that circumstances beyond its control prevented timely action to protect its interests. *Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1103 (9th Cir. 2006). "Neglect or lack of diligence is not to be remedied through Rule 60(b)(6)." *In re Shingleton*, 2007 WL 2743503, *3 (Bankr. D. Idaho) (internal quotations omitted) (citing *Lehman v. U.S.*, 154 F.3d 1010, 1017 (9th Cir. 1998)).

In order for the Debtors to establish that circumstances beyond their control prevented the timely filing of a chapter 13 plan and a properly filed, set, and served plan confirmation motion the Debtors would first need to explain why they were unable to, and did not comply with, the second extension order and file both documents on July 19, 2017. As noted above, the Debtors have not done that. Therefore, the Debtors' request for relief under Rule 60(b)(6) will be denied.

Conclusion

The court is sympathetic to the Debtors' plight and the representation they received in this and their two prior bankruptcy cases. However, based on the record before it, the court is not persuaded that counsel's conduct in this case rises to the level of mistake or excusable neglect. Unfortunately, that leaves the Debtors in a position where they are bound by the consequences flowing from the negligent acts and omissions of their bankruptcy attorney. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) ("As a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1)."). Fortunately, with counsel's admitted negligence and omissions in this case and her willingness to accept responsibility for both, perhaps the Debtors may find financial relief through a state law civil remedy. But as for the request for relief under Rule 60(b) in this case,

IT IS HEREBY ORDERED that the Debtors' motion filed at Dkt. 37 is **DENIED.**

IT IS FURTHER ORDERED that the court shall enter a separate order for counsel to show cause why she should not be further sanctioned, including notification to the State Bar of California, by filing this bankruptcy case on June 6, 2017, and an adversary proceeding in this bankruptcy case on July 17, 2017, in violation of the order filed on March 1, 2017, in case no. 15-28574, which prohibits counsel from filing any new case or proceeding after April 15, 2017, without first completing 4 hours of continuing legal education in ethics and certifying her completion of that continuing legal education with the clerk of the court.

8.	17-24418-B-13 JPJ-1	CARLOS/KELLY SMITH William F. McLaughlin	OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE 8-22-17 [38]

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 filed a certificate of completion from an approved nonprofit budget and credit counseling agency. The Debtors have not complied with 11 U.S.C. § 521(b)(1) and are not eligible for relief under 11 U.S.C. § 190(h).

Second, the Debtors have not served upon the Trustee a Class 1 Checklist and Authorization to Release Information. The Debtors have not complied with 11 U.S.C. § 521(a)(3) and Local Bankr. R. 3015-1(b)(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 plan payment in the amount of $4,105.00 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the Trustee's fee is $4,166.19. The plan does not comply with Section 4.02 of the mandatory form plan.

The plan filed July 11, 2017, 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.

The court will enter an appropriate minute order.

9. 17-24426-B-13 BALTASAR MARTINEZ
EGS-1 Pro Se
Thru #10

OBJECTION TO CONFIRMATION OF PLAN BY BAYVIEW LOAN SERVICING, LLC
8-23-17 [32]

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.

The court's decision is to continue the matter to September 26, 2017, at 1:00 p.m. for reasons stated at Item #10.

The court will enter an appropriate minute order.

10. 17-24426-B-13 BALTASAR MARTINEZ
JPJ-1 Pro Se

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
8-22-17 [29]

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.

The court's decision is to continue the matter to September 26, 2017, at 1:00 p.m. for reasons stated below.

This is pro se debtor's fifth bankruptcy filed within the last two years.

The first case (no. 15-27215) was a chapter 7 filed September 14, 2015. Debtor received a discharge on December 16, 2015.

The second case (no. 16-22901), a chapter 7 filed May 4, 2016, was dismissed for failure to file documents timely. Dkt. 32.

The third case (no. 16-23797), a chapter 13 filed June 13, 2016, was dismissed for failure to appear at the § 341 meeting, failure to commence plan payments, failure to provide Trustee with tax return, failure to provide Trustee with financial records for business, and failure to provide Trustee with Class 1 checklist. Dkt. 28

The fourth case (no. 17-23645), a chapter 13 filed May 31, 2017, was dismissed for failure to file documents. Dkt. 19.

Finally, the present case was filed on July 5, 2017. Opposition to confirmation was filed by the Trustee and creditor Bayview Loan Servicing, LLC.

The Trustee objects on multiple grounds, but generally that the Debtor has filed incomplete schedules and an incomplete plan, and failed to submit proof of social security and file other required documents. Additionally, a review of the docket shows that the Debtor did not appear at the continued § 341 meeting held August 31, 2017. The Trustee also requests conditional dismissal of case.

Creditor Bayview Loan Servicing raises the same objections as those raised by the Trustee but also objects on grounds that the Debtor does not provide for full payment of creditor's pre-petition arrears. The creditor also requests that the court *sua sponte* dismiss the case under 11 U.S.C. § 1307(c)(1) for unreasonable delay that is prejudicial to creditors.

It appears to the court that the Debtor has been filing repeated bankruptcies in an effort to prevent Bayview's foreclosure on real property. Bayview is Debtor's only secured creditor and there are no unsecured creditors.

The court intends to dismiss this case. However, this matter and the objection by Bayview Loan Servicing at Item #10 will be continued to September 25, 2017, at 1:00 p.m. at which time the court will consider whether this case should be dismissed pursuant to 11 U.S.C. § 109(g)(1) based on the Debtor's failure to appear in proper prosecution of this case. Debtor and any other parties in interest may file a response in support of or opposition to § 109(g)(1) dismissal by September 19, 2017.

The court will enter an appropriate minute order.

11. 17-25134-B-13 DAVID/SAMANTHA HEATON — MOTION TO VALUE COLLATERAL OF SCHOOLS FINANCIAL CREDIT UNION
MRL-1 Mikalah R. Liviakis — 8-11-17 [8]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Motion to Value 2008 Toyota Tundra, Collateral of Schools Financial Credit Union 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 deny the motion to value without prejudice.

Debtors' motion to value the secured claim of Schools Financial Credit Union ("Creditor") is accompanied by Debtors' declaration. Debtors are the owners of a 2008 Toyota Tundra ("Vehicle"). The Debtors seek to value the Vehicle at a replacement value of $8,500.00 as of the petition filing date. As the owners, Debtors' opinion of value is 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).

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 Debtors provide no evidence as to the date the purchase-money loan was incurred and state only generally that the "debt was not originally incurred within one year preceding the filing of the bankruptcy petition . . . ." The court cannot determine whether the Vehicle was incurred more than 910 days prior to filing of the petition. The purchase money debt on a motor vehicle acquired for a debtor's personal use cannot be lien stripped if the debt was incurred within 910 days before the bankruptcy filing. 11 U.S.C. § 1325(a)(9). Where the § 1325 lien stripping prohibition applies, the entire amount of the debt on the motor vehicle must be paid under a plan and not just the collateral's replacement value. Accordingly, the Debtors' motion is denied without prejudice.

The court will enter an appropriate minute order.

12. 17-25540-B-13 ALPHONSO BARBER — MOTION TO EXTEND AUTOMATIC STAY
SDB-1 W. Scott de Bie — 8-25-17 [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.

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 August 18, 2017, by ex parte motion of the Debtor (case no. 17-20969, dkts. 43, 44). 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 asserts that the had voluntarily dismissed the case because he had insufficient retirement income to support the plan. Debtor had obtained employment in July 2017, which increased his disposable monthly income by approximately $1,473.00, but that this was too late for him to seek an amendment to his plan. As a result, Debtor moved to voluntarily dismissed his case, which the court granted. Debtor contends that with his new income, he is no able to adequately fund a Chapter 13 plan and is confident 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.

The court will enter an appropriate minute order.

13. 17-24541-B-13 ARTHUR POMPA
JPJ-1 Peter G. Macaluso

OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
8-22-17 [28]

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 failed to submit proof of his social security number to the Trustee at the meeting of creditors as required pursuant to Fed. R. Bankr. P. 4002(b)(1)(B). The meeting of creditors was subsequently continued to September 1, 2017, at which Debtor and Debtor's counsel appeared.

Second, the Debtor has not provided copies of his 2016 income tax return, which was the most recent tax return filed. The Debtor has not complied with 11 U.S.C. § 521(e)(2)(A)(1).

Third, the Debtor has not provided the Trustee with a declaration from Debtor's mother regarding her $800.00 per month contributions to Debtor and has not amended Schedule A/B to show his correct real property address. A review of the docket shows that the Debtor has filed an amended petition on August 23, 2017, to add his prior bankruptcy. Nonetheless, the Debtor has failed to comply with 11 U.S.C. § 521(a)(3).

The plan filed July 11, 2017, 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.

The court will enter an appropriate minute order.

14. 16-20848-B-13 SCOTT/LORI ARNOLD MOTION TO MODIFY PLAN
JPJ-3 Peter G. Macaluso 7-31-17 [47]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Trustee's Motion for Post-Confirmation Modification of the Chapter 13 Plan 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 the trustee to modify a plan after confirmation. The Trustee 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 July 31, 2017, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

15. 17-22556-B-13 LOUIS/HELEN GARCIA MOTION TO CONFIRM PLAN
PGM-1 Peter G. Macaluso 7-31-17 [26]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Motion to Confirm Debtors' Second Amended Plan Filed on July 31, 2017, 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 second 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 July 31, 2017, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court will enter an appropriate minute order.

16. 12-40376-B-13 LONNIE HILLYARD
RAC-2 Richard A. Chan
Thru #17

MOTION FOR WAIVER OF SECTION 1328 REQUIREMENT
8-14-17 [55]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Notice of Death and Motion for Waiver of Debtor's Section 1328 Requirements 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.

The Debtor passed away on September 26, 2016. Prior to his death, the Debtor completed and filed a certification of completion of a post-petition course on personal financial management. The Debtor is unable to file the remaining documents required by Local Bankruptcy Rule 5009-1. It appears from the electronic record that the Debtor has not received a prior discharge with the time periods specified in 11 U.S.C. § 1328(f), the Debtor had no outstanding domestic support obligations, and the Debtor did not owe obligations of the type described in 11 U.S.C. § 522(q).

However, the Debtor has not completed plan payments. The Declaration of Jessica Hillyard states that Ms. Hillyard has been making payments for the last 10 months using her own funds and that she is no longer able to do so since she is expecting a baby and has incurred significant costs related to her father's death. Because of this, Debtor's counsel has concurrently filed a motion for hardship discharge pursuant to 11 U.S.C. § 1328(b), which was granted at Item #17.

For the reasons stated above, a discharge shall be issued.

The court will enter an appropriate minute order.

17. 12-40376-B-13 LONNIE HILLYARD
RAC-3 Richard A. Chan

MOTION FOR HARDSHIP DISCHARGE
8-14-17 [60]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Motion of Chapter 13 Hardship Discharge 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.

Richard A. Chan, Jr. ("Movant"), as attorney for Debtor Lonnie J. Hillyard ("Debtor"), applies for a court order of hardship discharge pursuant to 11 U.S.C. § 1328(b). The Debtor passed away on September 26, 2016. At the time of his death, he was living alone and funding his plan with his wages and the help of his daughter, Jessica Hillyard. Ms. Hillyard no longer has the ability to fund the Chapter 13 plan since she is expecting a baby and has incurred significant costs related to her father's death.

The plan is currently in month 57 of a 60-month plan. The remaining payments would go to unsecured creditors who have already received more than they would have in a Chapter 7 liquidation. The plan called for 0% paid to unsecured creditors but they have already been paid 9.12%. All secured and priority claims have been paid in full.

Discussion

After confirmation of a plan, circumstances may arise that prevent a debtor from completing a plan of reorganization. In such situations, the debtor may ask the court to grant a "hardship discharge." 11 U.S.C. § 1328(b). Generally, such a discharge is available only if : (b)(1) the debtor's failure to complete plan payments is due to circumstances beyond the debtor's control and through no fault of the debtor; (b)(2) creditors have receive at least as much as they would have received in a chapter 7 liquidation case; and (b)(3) modification of the plan is not possible under 11 U.S.C. § 1329. 11 U.S.C. § 1328(b)(1)-(3).

Here, the Debtor has satisfied 11 U.S.C. § 1328(b)(1)-(3). First, the Debtor's failure to complete plan payments is due to his death and his daughter is under no obligation to pay them. Second, creditors have already received more than they would have received in a Chapter 7 case. Third, modification of the plan is not possible given the Debtor's death.

There is no reasonable cause to believe that 11 U.S.C. § 522(q)(1) may be applicable to the Debtor and also there is no reasonable cause to believe that there is a pending proceeding that would render the Debtor suject to 11 U.S.C. § 522(q)(1)(A) or (B).

Therefore, the court grants the motion as follows:

(1) The Debtor shall be granted a discharge under 11 U.S.C. § 1328(b).

(2) The Debtor shall be discharged from all unsecured debts provided for by the modified plan confirmed by the order entered on December 30, 2013, dkt. 50, or disallowed under 11 U.S.C. § 502, except any debt provided for under 11 U.S.C. § 1322(b)(5), or of a kind specified in 11 U.S.C. § 523(a).

(3) Within seven days of entry of this order, the Debtor's attorney shall (a) serve the order granting the hardship discharge, the related civil minutes, and a notice on all creditors and parties in interest in the manner provided in Federal Rule of Bankruptcy Procedure 2002 and (b) file a certificate of service that service has been effected.

(4) As stated in Federal Rule of Bankruptcy Procedure 4007(d), subject to any further appropriate extensions, creditors and parties in interest shall have thirty (30) days from the date of service of the order granting the hardship discharge, the related civil minutes, and the notice to file a complaint to determine the dischargeability of any debt under 11 U.S.C. § 523(a)(6).

The court will enter an appropriate minute order.

18. 17-24479-B-13 TERRY SMITH
JPJ-2 Peter G. Macaluso

OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS
8-11-17 [16]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Chapter 13 Trustee having filed a Notice of Withdrawal of the its Objection to Debtor's Claim of Exemption, the objection is dismissed without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041. The matter is removed from the calendar.

The court will enter an appropriate minute order.

19.	16-27481-B-13 JPJ-1	ARMANDA CASIAS Mary Ellen Terranella	OBJECTION TO CLAIM OF BANK OF AMERICA, N.A., CLAIM NUMBER 2-1 7-7-17 [45]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Trustee's Objection to Allowance of Claim of Bank of America, N.A. has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9 Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The court's decision is to sustain the objection to Claim No. 2-1 of Bank of America, N.A. and disallow the claim in its entirety.

Trustee ("Objector") requests that the court disallow the claim of Bank of America, N.A. ("Creditor"), Claim No. 2-1. The claim is asserted to be in the amount of $13,140.19. Objector asserts that the claim should be disallowed because the statute of limitations has run pursuant to California Code of Civil Procedure § 337(1).

According to the proof of claim, the underlying debt is a contract claim, most likely based on a written contract. California law provides a four-year statute of limitations to file actions for breach of written contracts. *See* Cal. Civ. Pro. Code § 337. This statute begins to run from the date of the contract's breach. According to the Objector's exhibits, the last payment was received on or about May 21, 2011, which is more than four years prior to the filing of this case. Hence, when the case was filed on November 10, 2016, this debt was time barred under applicable nonbankruptcy law, i.e., Cal. Civ. Pro. Code § 337(1), and must be disallowed. *See* 11 U.S.C. § 502(b)(1).

Based on the evidence before the court, the Creditor's claim is disallowed in its entirety.

The court will enter an appropriate minute order.

20. 17-25083-B-13 MICHAEL SEEGER
MC-1 Muoi Chea

MOTION TO AVOID LIEN OF DISCOVER BANK
8-14-17 [13]

Final Ruling: No appearance at the September 12, 2017, hearing is required.

The Motion to Avoid Judicial Lien of Discover Bank Pursuant to 11 USC 522(f) 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 to avoid judicial lien.

This is a request for an order avoiding the judicial lien of Discover Bank ("Creditor") against the Debtor's property commonly known as 3115 Alder Way, West Sacramento, California ("Property").

A judgment was entered against Debtor in favor of Creditor in the amount of $9,971.32. An abstract of judgment was recorded with Yolo County on April 8, 2014, which encumbers the Property. All other liens recorded against the Property total $376,963.00.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of $375,000.00 as of the date of the petition.

Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of $1.00 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

The court will enter an appropriate minute order.

21. 17-20792-B-13 MICHAEL WARREN MOTION TO MODIFY PLAN
DPR-1 David P. Ritzinger 7-26-17 [24]

Tentative Ruling: The Motion to Confirm First Modified Chapter 13 Plan Post Confirmation 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). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to permit the requested modification and confirm the modified plan provided that the order confirming resolve the issue raised by the Trustee by stating the following:

2.07. Administrative expenses. In accordance with sections 4.02 and 4.03 below, $152.33 of each monthly plan payment shall be paid on account of: (a) compensation owed to former chapter 7 trustee; (b) approved administrative expenses; and (c) approved additional attorney's fees. Approved administrative expenses shall be paid in full through this plan except to the extent a claimant agrees otherwise or 11 U.S.C. § 1326(b)(3)(B) is applicable..

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

The court will enter an appropriate minute order.