UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 12, 2016 at 1:30 p.m.

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

THE COURT FIRST WILL HEAR ITEMS 1 THROUGH 17. A TENTATIVE RULING FOLLOWS EACH OF THESE ITEMS. THE COURT MAY AMEND OR CHANGE A TENTATIVE RULING BASED ON THE PARTIES' ORAL ARGUMENT. IF ALL PARTIES AGREE TO A TENTATIVE RULING, THERE IS NO NEED TO APPEAR FOR ARGUMENT. HOWEVER, IT IS INCUMBENT ON EACH PARTY TO ASCERTAIN WHETHER ALL OTHER PARTIES WILL ACCEPT A RULING AND FOREGO ORAL ARGUMENT. IF A PARTY APPEARS, THE HEARING WILL PROCEED WHETHER OR NOT ALL PARTIES ARE PRESENT. AT THE CONCLUSION OF THE HEARING, THE COURT WILL ANNOUNCE ITS DISPOSITION OF THE ITEM AND IT MAY DIRECT THAT THE TENTATIVE RULING, AS ORIGINALLY WRITTEN OR AS AMENDED BY THE COURT, BE APPENDED TO THE MINUTES OF THE HEARING AS THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IF A MOTION OR AN OBJECTION IS SET FOR HEARING PURSUANT TO LOCAL BANKRUPTCY RULE 3015-1(c), (d) [eff. May 1, 2012], GENERAL ORDER 05-03, ¶ 3(c), LOCAL BANKRUPTCY RULE 3007-1(c)(2)[eff. through April 30, 2012], OR LOCAL BANKRUPTCY RULE 9014-1(f)(2), RESPONDENTS WERE NOT REQUIRED TO FILE WRITTEN OPPOSITION TO THE RELIEF REQUESTED. RESPONDENTS MAY APPEAR AT THE HEARING AND RAISE OPPOSITION ORALLY. IF THAT OPPOSITION RAISES A POTENTIALLY MERITORIOUS DEFENSE OR ISSUE, THE COURT WILL GIVE THE RESPONDENT AN OPPORTUNITY TO FILE WRITTEN OPPOSITION AND SET A FINAL HEARING UNLESS THERE IS NO NEED TO DEVELOP THE WRITTEN RECORD FURTHER. IF THE COURT SETS A FINAL HEARING, UNLESS THE PARTIES REQUEST A DIFFERENT SCHEDULE THAT IS APPROVED BY THE COURT, THE FINAL HEARING WILL TAKE PLACE OCTOBER 10, 2016 AT 1:30 P.M. OPPOSITION MUST BE FILED AND SERVED BY SEPTEMBER 26, 2016, AND ANY REPLY MUST BE FILED AND SERVED BY OCTOBER 3, 2016. THE MOVING/OBJECTING PARTY IS TO GIVE NOTICE OF THE DATE AND TIME OF THE CONTINUED HEARING DATE AND OF THESE DEADLINES.

THERE WILL BE NO HEARING ON ITEMS 18 THROUGH 27 IN THE SECOND PART OF THE CALENDAR. INSTEAD, THESE ITEMS HAVE BEEN DISPOSED OF AS INDICATED IN THE FINAL RULING BELOW. THAT RULING WILL BE APPENDED TO THE MINUTES. THIS FINAL RULING MAY OR MAY NOT BE A FINAL ADJUDICATION ON THE MERITS; IF IT IS, IT INCLUDES THE COURT'S FINDINGS AND CONCLUSIONS. IF ALL PARTIES HAVE AGREED TO A CONTINUANCE OR HAVE RESOLVED THE MATTER BY STIPULATION, THEY MUST ADVISE THE COURTROOM DEPUTY CLERK PRIOR TO HEARING IN ORDER TO DETERMINE WHETHER THE COURT VACATE THE FINAL RULING IN FAVOR OF THE CONTINUANCE OR THE STIPULATED DISPOSITION.

IF THE COURT CONCLUDES THAT FED. R. BANKR. P. 9014(d) REQUIRES AN EVIDENTIARY HEARING, UNLESS OTHERWISE ORDERED, IT WILL BE SET ON SEPTEMBER 19, 2016, AT 2:30 P.M.

Matters to be Called for Argument

1. 16-25520-A-13 DONIA WILLIAMS — MOTION TO EXTEND AUTOMATIC STAY
MET-1 — 8-27-16 [8]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The motion will be granted.

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

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

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

In order to extend the automatic stay, the party seeking the relief must demonstrate that the filing of the new case was in good faith as to the creditors to be stayed. For example, in In re Whitaker, 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006), the court held: "[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful. If the instant case is one under chapter 7, a discharge must now be permissible. If it is a case under chapters 11 or 13, there must be some substantial change."

Here, it appears that the debtor's employment income was reduced during the prior case causing her inability to make plan payments. While that income remains reduced, two adult children now reside with her and are contributing $1670 to the household. With the debtor's employment income, the debtor's total income is greater than in the prior case. This is a sufficient change in circumstances rebut the presumption of bad faith.

2. 16-25232-A-13 GREGORY WALLACE
BLG-1

COUNTER MOTION FOR RELIEF FROM AUTOMATIC STAY
8-22-16 [22]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted in part.

The movant financed the purchase of a vehicle, a 2007 Range Rover, in May 2016. The vehicle was sold in Arizona while the debtor was a resident of Arizona. The debtor made a $5,000 down payment. After the initial financing arranged by the car dealer fell through because the debtor was not employed, the movant provided financing for the remaining $14,182.60 of the purchase price. Under its terms of this purchase money loan, the debtor agreed to 36 monthly payments of $563.15. The loan carried an interest rate of 24.90%.

The debtor immediately defaulted under the loan by making only a partial payment in June and failing to insure the vehicle, and he removed the vehicle to California where he had accepted new employment.

While the debtor claims that the partial payment was agreed to by the movant as compensation for repairs the debtor was required to make, the court finds no convincing proof of any such agreement.

The vehicle is now insured and when its possession is returned to the debtor, it will be registered in California.

The plan proposed by the debtor does not attempt to strip down the vehicle to its value, no doubt because the "hanging paragraph" following 11 U.S.C. § 1325(a)(9) prohibits such because the purchase of the vehicle was financed on the eve of the bankruptcy case. However, the proposed plan will reduce the interest rate for 24.90% to 4.5% and requires that the movant be paid an equal monthly installment of $422.36.

Facially, the proposed treatment of the movant's claim complies with 11 U.S.C. § 1325(a)(5)(B). It will receive interest at a rate that exceeds the prime rate, it will be paid in full, the movant will be paid an equal monthly installment over the plan's duration, and the plan requires that adequate protection payments/plan payments be made before and after confirmation of the plan as required by 11 U.S.C. § 1326(a)(1)(C). There is no evidence before the court that the vehicle is depreciating at a rate faster than the loan will be retired under the terms of the plan.

Therefore, the court will not terminate the automatic stay. However, if no plan is confirmed within 75 days, if the debtor fails to provide proof of vehicle registration in California within 10 days of taking possession of it, if insurance coverage lapses or fails to name the movant as a loss payee, the stay will be terminated on the movant's further ex parte application.

3. 16-24758-A-13 FRANCISCO/JUDITH GUERRERO — OBJECTION TO CONFIRMATION OF PLAN
JPJ-1 — 8-23-16 [16]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The objection will be sustained.

The debtor has not carried the burden of proving that the plan will pay unsecured creditors the present value of what they would receive in a chapter 7 liquidation as required by 11 U.S.C. § 1325(a)(4) because the debtor has not come forward with evidence establishing the value of the debtor's home.

4. 16-24364-A-13 RITA KAKALIA — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 8-23-16 [30]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

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

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

Second, the plan classifies the debt owed to Consolidated Utilities as a priority unsecured claim. However, there is no apparent basis for concluding that it is entitled to priority or is a secured claim. By providing treatment as if the claim were secured or entitled to priority the debtor is discriminating unfairly among all unsecured claims. This claim will be paid in full but all others will be paid nothing. This violates 11 U.S.C. § 1322(b)(1).

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

5. 16-24566-A-13 LEWIS/MARY HACKETT — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 8-23-16 [18]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

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

First, the plan is not feasible as required by 11 U.S.C. § 1325(a)(6) because the monthly plan payment of $2,001 is less than the $2,457 in dividends and expenses the plan requires the trustee to pay each month.

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

Because the plan proposed by the debtor is not confirmable, the debtor will be given a further opportunity to confirm a plan. But, if the debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause

for dismissal. If the debtor has not confirmed a plan within 75 days, the case will be dismissed on the trustee's ex parte application.

6. 16-23869-A-13 ROBIN SWANSON — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 8-12-16 [35]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The objection will be sustained and the case will be dismissed.

First, counsel for the debtor failed to appear at the meeting of creditors. Without counsel present the debtor could not be examined. No plan can be confirmed prior to the conclusion of the meeting.

Second, the debtor has failed to commence making plan payments and has not paid approximately $2,052 to the trustee as required by the proposed plan. This has resulted in delay that is prejudicial to creditors and suggests that the plan is not feasible. This is cause to deny confirmation of the plan and for dismissal of the case. See 11 U.S.C. §§ 1307(c)(1) & (c)(4), 1325(a)(6).

Third, in violation of 11 U.S.C. § 521(a)(1)(B)(iv) and Local Bankruptcy Rule 1007-1(c) the debtor has failed to provide the trustee with employer payment advices for the 60-day period preceding the filing of the petition. The withholding of this financial information from the trustee is a breach of the duties imposed upon the debtor by 11 U.S.C. § 521(a)(3) & (a)(4) and the attempt to confirm a plan while withholding this relevant financial information is bad faith. See 11 U.S.C. § 1325(a)(3).

Fourth, 11 U.S.C. § 521(e)(2)(B) & (C) requires the court to dismiss a petition if an individual chapter 7 or 13 debtor fails to provide to the case trustee a copy of the debtor's federal income tax return for the most recent tax year ending before the filing of the petition. This return must be produced seven days prior to the date first set for the meeting of creditors. The failure to provide the return to the trustee justifies dismissal and denial of confirmation. In addition to the requirement of section 521(e)(2) that the petition be dismissed, an uncodified provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 found at section 1228(a) of BAPCPA provides that in chapter 11 and 13 cases the court shall not confirm a plan of an individual debtor unless requested tax documents have been turned over. This has not been done.

Fifth, the debtor has failed to fully and accurately provide all information required by the petition, schedules, and statements. Specifically, the debtor failed to file a detailed statement of income and expenses attributable to the rental of property or the operation of a business even though Schedule I

indicates the debtor receives $2,500 a month from the rental of property or the operation of a business. This nondisclosure is a breach of the duty imposed by 11 U.S.C. § 521(a)(1) to truthfully list all required financial information in the bankruptcy documents. To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Sixth, because the plan fails to specify how debtor's counsel's fees will be approved, either pursuant to Local Bankruptcy Rule 2016-1 or by making a motion in accordance with 11 U.S.C. §§ 329, 330 and Fed. R. Bankr. P. 2002, 2016, 2017, but nonetheless requires the trustee to pay counsel a monthly dividend on account of such fees, in effect the plan requires payment of fees even though the court has not approved them. This violates sections 329 and 330.

Seventh, the plan does not comply with 11 U.S.C. § 1325(b) because it neither pays unsecured creditors in full nor pays them all of the debtor's projected disposable income. The plan will pay unsecured creditors nothing even though Form 22 shows that the debtor will have more than $68,000 of projected disposable income over the next five years.

7. 16-23869-A-13 ROBIN SWANSON — MOTION TO DISGORGE FEES 8-12-16 [31]
JPJ-2

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted in part.

Before the case was filed, counsel for the debtor received $3,800 as a fee to represent the debtor in this case. After it was filed, counsel failed to appear at the meeting of creditors.

Further, the debtor failed to commence plan payments resulting in the dismissal of the case.

Given that the case was quickly dismissed and that counsel failed to discharge an important obligation by appearing at the meeting of creditors, the court concludes that the fee paid to counsel was unreasonable in light of subsequent developments and must be repaid to the debtor or the person who paid it to counsel. See 11 U.S.C. §§ 328, 329. However, prior to such repayment, and within 45 days of the hearing, counsel shall file and set for hearing a fee application complaint with 11 U.S.C. § 330, detailing the actual work performed in this case prior to its dismissal and the court will consider awarding reasonable compensation. If the no application is filed timely and/or set for hearing, and to the extent the compensation awarded is less than $3,800, the retainer shall be refunded.

Despite dismissal of the case, the court retains jurisdiction over counsel's fees.

8. 16-24670-A-13 JORGE/LAURA ORELLANA — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 8-23-16 [12]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The objection will be sustained and the case will be dismissed.

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

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

9. 16-24671-A-13 KIMBERLY LAWSON — OBJECTION TO CONFIRMATION OF PLAN AND MOTION TO DISMISS CASE
JPJ-1 — 8-23-16 [19]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

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

First, the plan is not feasible as required by 11 U.S.C. § 1325(a)(6) because the monthly plan payment of $1,350 is less than the $1,367 in dividends and expenses the plan requires the trustee to pay each month.

Second, to pay the dividends required by the plan at the rate proposed by it will take 83 months which exceeds the maximum 5-year duration permitted by 11 U.S.C. § 1322(d).

Third, Local Bankruptcy Rule 3015-1(b)(6) provides: "*Documents Required by Trustee*. The debtor shall provide to the trustee, not later than the fourteen (14) days after the filing of the petition, Form EDC 3-088, *Domestic Support Obligation Checklist,* or other written notice of the name and address of each person to whom the debtor owes a domestic support obligation together with the name and address of the relevant state child support enforcement agency (see 42 U.S.C. §§ 464 & 466), Form EDC 3-086, *Class 1 Checklist*, for each Class 1 claim, and Form EDC 3-087, *Authorization to Release Information to Trustee Regarding Secured Claims Being Paid By The Trustee*." Because the plan includes a class 1 claim, the debtor was required to provide the trustee with a Class 1 checklist. The debtor failed to do so.

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

Fifth, the debtor has failed to fully and accurately provide all information required by the petition, schedules, and statements. Even though Schedule I shows that the debtor receives rental or business income the debtor has failed to append to Schedules I and J a detailed statement of business income and expenses. This nondisclosure is a breach of the duty imposed by 11 U.S.C. § 521(a)(1) to truthfully list all required financial information in the bankruptcy documents. To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Sixth, the debtor has failed to give the trustee financial records for a closely held business. This is a breach of the duties imposed by 11 U.S.C. § 521(a)(3) & (a)(4). To attempt to confirm a plan while withholding relevant financial information from the trustee is bad faith. See 11 U.S.C. § 1325(a)(3).

Because the plan proposed by the debtor is not confirmable, the debtor will be given a further opportunity to confirm a plan. But, if the debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause

for dismissal. If the debtor has not confirmed a plan within 75 days, the case will be dismissed on the trustee's ex parte application.

10. 15-26281-A-13 STEPHEN TRUMAN — OBJECTION TO EXEMPTIONS 3-9-16 [52]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The objection will be sustained in part.

Creditor MGM Grand Hotel, L.L.C., objects to the debtor's Cal. Civ. Pro. Code § 703.140(b)(10)(E) exemption in a $186,000 self-directed IRA that holds sports gambling tickets now in the possession of MGM. MGM also objects to the debtor's wild card exemptions under Cal. Civ. Pro. Code § 703.140(b)(5), contending they exceed the allowed statutory maximum amount.

On April 11, 2016, the debtor filed opposition to the objection. Docket 79. On April 17, 2016, the debtor amended his Schedule C, continuing to rely on Cal. Civ. Pro. Code § 703.140(b)(10)(E) but also adding 11 U.S.C. § 522(b)(3)(C) as an additional exemption basis. Docket 82.

The court held a hearing on the objection on April 25, issuing a tentative decision sustaining the objection because the debtor had not met his evidentiary burden. The opposition was devoid of evidence. Docket 79.

To give the debtor further opportunity to present evidence on the exemption, the court continued the hearing on the objection to June 6, 2016, giving the debtor until May 24 to file further opposition to the motion and giving MGM until May 31 to file a reply. Docket 85.

The debtor did not file further opposition to the objection by the May 24 deadline. In light of this, MGM filed additional papers in support of the objection on May 27. Dockets 113, 114, 116. Only then did the debtor file further opposition. It was filed seven days after the May 24 deadline, on May 31. Dockets 117-127.

At the June 6 hearing, the court once again continued the hearing on the objection, to July 11, 2016, in order to consider the debtor's late-filed further opposition and give MGM the opportunity to file a reply to that opposition. MGM filed its reply to the further opposition on June 27. Docket 156.

At the July 11 hearing, the court had to continue the hearing on the objection once again, to August 1, in order first to consider the debtor's motion to dismiss the chapter 13 case. Docket 175.

The debtor formed a self-directed IRA on March 31, 2015. Docket 121. On or about April 27, 2015, the debtor also formed Saaz, L.L.C. and his IRA became 100% owner of that LLC. Docket 114 at 80 & 86. The debtor and his wife became managing members of the LLC. Docket 114 at 80. The LLC operating agreement provided that the IRA, as equity member, was to fund the LLC with $300,000. Docket 114 at 64.

On May 4, 2016, the debtor transferred an unknown amount of rollover funds into the IRA. Dockets 118 at 2 & 123.

Soon after forming the LLC, the debtor opened a bank account in the name of the LLC and the IRA appears to have transferred an unknown amount of funds into that account. Docket 114 at 92.

On May 26, 2015, the debtor withdrew $120,000 from the LLC's account at Wells Fargo Bank. Docket 114 at 92. On the same day, May 26, the debtor walked into the Bellagio Hotel and Casino in Las Vegas, Nevada to gamble at least $200,000. Docket 114 at 20-21. He presented the Bellagio with a $200,000 cashier check and also used "other funds" to gamble on sports wagers. Id. These bets resulted in $169,000 of winning sports betting tickets, which the debtor did not redeem before leaving the Bellagio on May 27. Id.

On May 27, the day he left the Bellagio, the debtor deposited $138,000 into the LLC's Wells Fargo Bank account. Docket 114 at 95.

Fed. R. Bankr. P. 4003(c) provides that:

"In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." See also Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999); Tyner v. Nicholson (In re Nicholson), 435 B.R. 622, 630 (B.A.P. 9th Cir. 2010); Hopkins v. Cerchione (In re Cerchione), 414 B.R. 540, 548-49 (B.A.P. 9th Cir. 2009); Kelley v. Locke (In re Kelley), 300 B.R. 11, 16-17 (B.A.P. 9th Cir. 2003).

Despite Rule 4003(c), it is state law that governs the burden of proof to establish the claim of exemption. Diaz v. Kosmala (In re Diaz), Case No. CC-15-1219-GDKi, 2016 WL 937701, at *5-6 (B.A.P. 9th Cir. Mar. 11, 2016); In re Barnes, 275 B.R. 889, 899 (Bankr. E.D. Cal. 2002) (concluding that the burden of proof is determined by state law in light of Supreme Court's decision in Raleigh v. lllinois Department of Revenue, 530 U.S. 15 (2000), which held that the burden of proof on a claim is a substantive element of the claim); see also In re Pashenee, 531 B.R. 834, 836-37 (Bankr. E.D. Cal. 2015) (also concluding that state law governs the burden of proof on the establishment of exemptions, in light of the Raleigh decision).

Cal. Civ. Pro. Code § 703.580(b) prescribes that "[a]t a hearing under this section, the exemption claimant [*i.e.*, the debtor] has the burden of proof" on the exemption claim.

The Ninth Circuit case cited by the debtor, Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999), is a case decided prior to the Supreme Court's Raleigh decision.

More, in this case, the court cannot force MGM to prove a false negative. It cannot prove that the debtor's IRA does not qualify under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

The court will strike **Partners Federal Credit Union's "joinders" (Dockets 81 & 115) in the objection and the reply to the opposition (Docket 164). The civil and bankruptcy rules do not allow joinders in motions, objections or replies. Also, the joinders to the objection were filed late, on April 12, 2016 and May 31, 2016, whereas the objection was filed on March 9, 2016.**

Second, the debtor's Amended Schedule C caps the exemptions under Cal. Civ. Pro. Code § 703.140(b)(5) to the statutory maximum of $26,925, when considered in conjunction with the allowed exemptions under Cal. Civ. Pro. Code §

703.140(b)(1). The cap of 703.140(b)(1) and (b)(5) pre-April 1, 2016 totals $26,925 and not $25,340. Docket 52 at 3. This part of the objection will be dismissed as moot. See Dockets 82 & 156.

Third, MGM's objection in the reply to the debtor's tax refund under 15 U.S.C. § 1673 will be dismissed without prejudice because it was not brought up in the original objection. See Dockets 52, 82, 113. It is untimely and even if timely the court will not allow MGM to sandbag the debtor by inserting a new objection in a reply and depriving the debtor of the opportunity of responding to the new objection.

Fourth, the court rejects the debtor's invocation of Cal. Civ. Proc. Code § 704.115(b) as an additional exemption for the IRA. Docket 117. The debtor has not claimed an exemption in the IRA under this statute in Amended Schedule C. Docket 82.

Fifth, the debtor has not met his burden of proof on the exemption claim.

Section 703.140(b)(10)(E) provides for the exemption of:

"*The debtor's right to receive . . . (E) A payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless all of the following apply:*

"*(i) That plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose.*

"*(ii) The payment is on account of age or length of service.*

"*(iii) That plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code of 1986.*"

The requirements of Cal. Civ. Pro. Code § 703.140(b)(10)(E) mirror the language of the exemption in 11 U.S.C. § 522(d)(10)(E).

The debtor readily satisfies subsections 703.140(b)(10)(E)(i) and (ii), in that he established the IRA himself and his right to receive payments under the IRA is directly tied to his age.

As to subsection (iii) of Cal. Civ. Pro. Code § 703.140(b)(10)(E), the question is whether the IRA qualifies under Section 401(a), 403(a), 403(b), 408, or 408A of the Internal Revenue Code of 1986.

This is also the question under 11 U.S.C. § 522(b)(3)(C), which allows "an individual debtor [to] exempt from property of the estate . . . (3) . . . (C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."

The debtor has asserted that his IRA is exemptible as it is qualified under 11 U.S.C. §§ 408 and 408A, which treats Roth IRAs in the same manner as IRAs under section 408. docket 117 at 5; 26 U.S.C. § 408A(a).

26 U.S.C. § 408(e) provides that:

"*(e)* ***Tax treatment of accounts and annuities.***--

"*(1) Exemption from tax.--Any individual retirement account is exempt from taxation under this subtitle unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).*

"*(2) Loss of exemption of account where employee engages in prohibited transaction.--*

"*(A) In general.--<u>If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year</u>. For purposes of this paragraph--*

"*(i) the individual for whose benefit any account was established is treated as the creator of such account, and*

"*(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.*"

Under 26 U.S.C. § 4975(c)(1), prohibited transactions include:

"*(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;*

"*(B) lending of money or other extension of credit between a plan and a disqualified person;*

"*(C) furnishing of goods, services, or facilities between a plan and a disqualified person;*

"*(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;*

"*(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or*

"*(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.*"

For purposes of section 4975, "*the term 'disqualified person' means a person who is--*

"*(A) a fiduciary;*

"*(B) a person providing services to the plan;*

"*(C) an employer any of whose employees are covered by the plan;*

"*(D) an employee organization any of whose members are covered by the plan;*

"*(E) an owner, direct or indirect, of 50 percent or more of--(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,(ii) the capital interest or the profits interest of a partnership, or(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);*

"*(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);*

"*(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of--(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,(ii) the capital interest or profits interest of such partnership, or(iii) the beneficial interest of such trust or estate,is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);*

"*(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or*

"*(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).*

"*The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).*

"*(3) **Fiduciary**.--For purposes of this section, the term 'fiduciary' means any person who--*

"*(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,*

"*(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or*

"*(C) has any discretionary authority or discretionary responsibility in the administration of such plan.*

"*Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.*"

26 U.S.C.A. § 4975(e)(2) & (3).

In MGM's objection filed on March 9, 2016, MGM specifically asserted that debtor "also used personal funds to gamble," in connection with the winning sports bets. Docket 52 at 3.

Given the debtor's burden of proof on the exemption and having already noted that the court cannot force MGM to prove a false negative, the debtor was expected to provide evidence on the source of funds he used to gamble and win the sports wagering tickets he is now seeking to claim as exempt under Cal. Civ. Pro. Code § 703.140(b)(10)(E) and 11 U.S.C. § 522(b)(3)(C).

He has claimed that the IRA is qualified under 26 U.S.C. §§ 408 and 408A and was expected to substantiate the arguments that his IRA did not engage in prohibited transactions, specifically focusing on the transactions pertaining to his winning of the sports wagering tickets.

But, the debtor has not produced such evidence, much less admissible or probative evidence, on the source of funds for gambling and winning the sports tickets. The totality of the evidence proffered by the debtor is that:

- he obtained the services and advice of a law firm to form his limited liability company and the self-directed IRA that owns the LLC;

- the LLC is 100% owned by the IRA;

- the debtor is the manager of the LLC under its operating agreement;

- the LLC operating agreement prohibits him from receiving any compensation, personally benefitting, or entering into outlined prohibited transactions;

- he consulted with the law firm before he began investing in wagering tickets;

- the law firm advised him that investing in wagering tickets is not a prohibited transaction under the Internal Revenue Code's prohibited transaction rules;

- eventually he received an opinion letter from the law firm pertaining to his investment in wagering tickets;

- he is not aware of any favorable or unfavorable IRS or court determinations of his IRA;

- he disputes receiving any compensation, personally benefitting, or entering into prohibited transactions as manager of the LLC;

- the current balance in the IRA is approximately $190,000 and he needs that sum for retirement, as his only other source of retirement income is social security.

Docket 118.

Besides conclusory statements that he has not caused the IRA to engage in prohibited transactions, the debtor offers nothing probative to substantiate the source of funds for the gambling and winning of the tickets.

The debtor refers to a letter the law firm that helped him form the IRA and LLC wrote on October 1, 2015. In advising him about the propriety of investment in gambling, the letter states, "[o]n May 27, 2015, IRA funds sitting in the IRA LLC bank account were used to place sports bets at the Bellagio casino in Las Vegas, Nevada." Docket 125 at 3.

However, the attorney who prepared the letter, Kevin Kennedy, unequivocally

states that the letter is based on "representations made by [the debtor]." Docket 125 at 3. Mr. Kennedy's opinion is qualified as "[b]ased on these facts and representations." Id.

In other words, the letter is not based on Mr. Kennedy's investigation of the facts but on what the debtor has represented to him to be the facts. Hence, Mr. Kennedy's factual statements, including his statement about the source of the funds the debtor used to gamble and win the sports tickets, are at best inadmissible hearsay. Fed. R. Evid. 801(a)-(c) & 802.

The verbal assurances of the absence of a prohibited transaction by Mr. Kennedy's law firm are hearsay as well. See Docket 118 at 3.

The debtor has not shown that his IRA is indeed qualified under 26 U.S.C. § 408 or 408A, as claimed, and thus exemptible under Cal. Civ. Pro. Code § 703.140(b)(10)(E) and 11 U.S.C. § 522(d)(10)(E). This alone is basis for sustaining the objection.

Finally, the record contains sufficient evidence to establish that the debtor did not use LLC funds to gamble and win the sports wagering tickets.

Jacqueline Zwerner, an employee of the Bellagio, has executed a declaration under the penalty of perjury, stating that the debtor presented a $200,000 cashier check along with "other funds," to gamble and win the sports tickets on May 26 and 27. Dockets 116 & 114 at 20-21.

But, prior to walking into the Bellagio to gamble on May 26, the debtor withdrew only $120,000 from the LLC account. Docket 114 at 92. Although the withdrawal statement does not indicate whether the debtor was given a cashier check for the $120,00, the debtor presented a single cashier check for $200,000 — "a cashier check" — to the Bellagio on May 26. Docket 114 at 20 & 116. And the debtor has not disputed withdrawing only $120,000 from the LLC account prior to gambling at the Bellagio.

The debtor has failed to refute any of the foregoing. He has not even produced bank statements from the LLC account.

Even if the debtor used the $120,000, or some part of it, to gamble at the Bellagio, there is at least $80,000 unaccounted for by him. Given the lack of evidence and candor from the debtor, the court is not convinced of the veracity of his statements.

From the above, the court infers that the funds the debtor used to gamble at the Bellagio did not come from the LLC bank account. They came from elsewhere. The $169,000 in winnings were not the product of an investment the debtor made on behalf of the LLC. This is not surprising because the debtor was known to gamble at other establishments in Las Vegas. The record reflects that the debtor gambled also at the MGM and Ceaser's Palace. Docket 114 at 20-21 & 116.

This leaves only one other source for the funds with which the debtor won the sports tickets — the debtor himself.

The debtor has not accounted for his use of the $120,000 he withdrew on May 26 from the LLC account. The next day, May 27, he deposited $138,700 back into the LLC account. Also, he stated in a state court litigation with MGM that the $120,000 generated "a profit of $187,700," a different figure from the $169,000 sports tickets. Docket 114 at 51, 92, 94. This begs the question of why the

debtor did not deposit all $187,700 of the winnings into the LLC account?

The debtor is a fiduciary for purposes of 26 U.S.C.A. § 4975(e)(2)(A) because, by being a manager of the LLC, which is owned by the IRA and administering assets of the IRA, he exercises authority or control respecting management or disposition of the IRA's assets. 26 U.S.C.A. § 4975(e)(3)(A). This makes the debtor a disqualified person under section 4975(e)(2)(A) for purposes of 26 U.S.C. § 4975(c)(1).

As a disqualified person, the debtor is prohibited from transferring to himself or using IRA income or assets. 26 U.S.C. § 4975(c)(1)(D). Yet, by keeping the balance of the $187,700 in profits generated by the $120,000 he withdrew from the LLC account, the debtor has transferred to himself or used IRA assets.

As a disqualified fiduciary person, the debtor is also prohibited from dealing with the income or assets of a plan in his own interest or for his own account. 26 U.S.C. § 4975(c)(1)(E).

However, by retaining part of the $187,700 in winnings and by placing the sports tickets in the IRA, when MGM sought to satisfy the debt it is owed with the tickets, the debtor engaged in self-dealing. Dockets 114 at 20-21 & 116. Such transactions are prohibited and disqualifying for the debtor's IRA. The IRA then cannot be exempted under Cal. Civ. Pro. Code § 703.140(b)(10)(E) or 11 U.S.C. § 522(b)(3)(C). The objection will be sustained in part.

11. 15-26281-A-13 STEPHEN TRUMAN — MOTION TO DISMISS CASE 7-1-16 [169]
MRL-4

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted in part.

This case was originally commenced under chapter 7. The debtor converted it to one under chapter 13 on April 25, 2016. However, the debtor has been unable to confirm a chapter 13 plan, primarily because, even though the debtor earns a very high income, the plan will not pay unsecured creditors in full nor will it devote all projected disposable income to the payment of their claims as required by 11 U.S.C. § 1325(b). In voluntarily dismissing the motion to confirm his last proposed plan, the debtor admitted he was unable to pay all projected disposable income to unsecured creditors. See 11 U.S.C. § 1325(a)(6) and (b).

So now the debtor wants the case dismissed, not reconverted to chapter 7. He argues that because of his high income, a chapter 7 discharge would be a substantial abuse under 11 U.S.C. § 707(b).

In other words, the debtor believes that section 1325(b), as interpreted by the Supreme Court in Hamilton v. Lanning, prevents the debtor from proceeding under both chapter 7 and chapter 13.

The short answer to this is that any dismissal under 11 U.S.C. § 707(b) would come only at the request of the U.S. Trustee or a creditor. See 11 U.S.C. § 707(b). If no one asks for dismissal, the case will proceed under chapter 7. And, given the potential for a substantial dividend given the court's ruling on the objection to the debtor's exemption of a retirement account, a dismissal

motion is unlikely.

Because this case was originally filed under chapter 7, the debtor lost the ability to unilaterally dismiss it. See 11 U.S.C. § 1307(b). Instead, a dismissal must be pursuant to 11 U.S.C. § 1307(c) which permits the court, on the request of a party in interest, to dismiss or convert the case to one under chapter 7, whichever is in the bests interests of creditors.

Despite the debtor's high income, given the prospects for a substantial dividend due to the debtor's nonexempt assets (see the court's disposition of the objection, Docket #59 to the exemption of an IRA), the court concludes conversion is in the best interests of creditors. The case will be reconverted to chapter 7.

12. 15-26281-A-13 STEPHEN TRUMAN — MOTION TO APPROVE COMPENSATION OF TRUSTEE'S ATTORNEY
HSM-5 — 6-13-16 [134]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The motion will be granted.

Hefner, Stark & Marois, attorney for the former chapter 7 trustee, has filed its motion for approval of compensation. The requested compensation consists of $39,051 in fees and $147,50 in expenses, for a total of $39,198.50. This motion covers the period from September 4, 2015 through June 10, 2016. The court approved the movant's employment as the trustee's attorney on September 25, 2915.

11 U.S.C. § 330(a)(1)(A)&(B) permits approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person" and "reimbursement for actual, necessary expenses." The movant's services primarily involved assisting the trustee with conducting an investigation concerning the debtor's assets, primarily a substantial IRA.

The court concludes that the compensation is for actual and necessary services rendered in the administration of this estate. The requested compensation will be approved.

13. 15-26281-A-13 STEPHEN TRUMAN — MOTION TO APPROVE COMPENSATION OF CHAPTER 7 TRUSTEE
HSM-6 — 6-13-16 [139]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: Given the court's announced decision to reconvert the case to chapter 7, and assuming the former chapter 7 trustee will be reappointed, the motion is premature. The motion will be dismissed without prejudice.

14. 15-26281-A-13 STEPHEN TRUMAN — MOTION FOR RELIEF FROM AUTOMATIC STAY
JGM-2 — 8-25-16 [198]
MGM GRAND HOTEL, L.L.C. VS.

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

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

The motion will be denied. Given the court's reconversion of the case to chapter 7, the stipulation between the movant and the debtor regarding the IRA is not binding on the estate and is not a sufficient cause to modify the automatic stay.

15. 15-26281-A-13 STEPHEN TRUMAN — STATUS CONFERENCE
15-2216 — 5-5-16 [30]
MGM GRAND HOTEL, L.L.C. V. TRUMAN

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: None.

16. 15-26281-A-13 STEPHEN TRUMAN — STATUS CONFERENCE
16-2004 — 4-18-16 [20]
PARTNERS FEDERAL CREDIT UNION V. TRUMAN

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: None.

17. 16-23304-A-13 LA WANDA LOWE — OBJECTION TO TRUSTEE'S FINAL REPORT AND ACCOUNT
8-11-16 [40]

- ☐ Telephone Appearance
- ☐ Trustee Agrees with Ruling

Tentative Ruling: The objection will be overruled.

First, the motion is not accompanied by a certificate of service demonstrating that the objection was served on the trustee.

Second, the trustee's final report and account shows that the debtor made no plan payments. This was one of the reasons the court dismissed the case on

July 29. The objection does not allege, much less prove, that the debtor made payments that the trustee has not accounted for in his report and account. Consequently, the report is accurate and the court sees no basis for objecting to it. It accurately states that the trustee received no money and paid no money.

Third, the objection that the trustee failed to discharge his duties under 11 U.S.C. § 704(a)(5) as incorporated by 11 U.S.C. § 1302(b)(1) by examining the proof of claim of Santander and objecting to it will be overruled. According to the debtor, the amount claimed by Santander is incorrect.

A review of the claims' register reveals that Santander filed one proof of claim on June 21, 2016, demanding a total of $14,502.48. The proof of claim also states that Santander's claim is secured by a vehicle that had a value of $8,775. Consequently, Santander bifurcated its claim as $8,775 secured and $5,727.48 unsecured. The proof of claim contained one other relevant number, $2,574.58, the amount necessary to cure the delinquent payments

The debtor listed the debt owed to Santander on Schedule D. According to the debtor, the total amount owed was $12,865 and the value of the vehicle securing the claim was $3,850. Using the debtor's figures, this gave Santander a bifurcated claim of $3,850, secured, and $9,015, unsecured [although Schedule D states the latter at $9,011].

The debtor's original plan provided for Santander's claim in Class 1. This meant that the debtor intended to cure the arrears through the plan while maintaining the monthly contract installment payment. According to the plan, the arrears on the claim were $2,520.

However, as noted in the court's written ruling of July 25, 2016 (Docket No. 32) sustaining the trustee's objection to the confirmation of the plan and dismissing the case, the plan's treatment of Santander's claim was defective because it provided for its payment in both Class 1 and Class 2. These classes are mutually exclusive. A secured claim belongs in one of these classes but not both.

Class 1 is reserved for secured claims that will mature after the completion of the plan and that will not be modified by the plan other than to cure the prebankruptcy arrears. A home loan is most common type of Class 1 claim. Most home loans have maturities longer than 5 years, the maximum duration of a chapter 13 plan, and these claims cannot be modified in a chapter 13 case other than to cure any arrears. See 11 U.S.C. § 1322(b)(2). A Class 1 secured claim receives two dividends: the first to retire the arrears, and a second equal to the monthly contract installment. When the plan comes to an end, the debtor continues to pay the monthly contract installment.

Class 2 is reserved for secured claims that will be modified by the plan. The typical Class 2 claim is a car loan. These claims are frequently reduced to the value of the car. Such a secured claim is paid in full with interest and, if the claim can be reduced to the value of the collateral, the under-collateralized portion is paid as a nonpriority unsecured claim (Class 7). See 11 U.S.C. § 1325(a)(5)(B). The secured portion of a Class 2 secured claim receives one monthly dividend: an equal monthly installment that will retire the secured claim with interest over the duration of the plan.

The debtor maintains that the trustee's report and account is inaccurate because it indicates Santander has two claims or accounts when it has only one.

The debtor is incorrect. The trustee's report and account identifies only one Santander claim but it breaks that claim down into two parts: the arrears and total amount of the claim. As noted above, Santander's proof of claim indicates that it is owed a total of $14,502.48 and that the arrears on its claim were $2,574.58. The debtor similarly broke this single claim down into two components. Schedule D indicates Santander is owed a total of $12,865 and that the arrears on the claim were $2,520. The final report and account similar breaks Santander's claim down into its components.

The debtor also disputes the amounts claimed by Santander and believes the trustee should have objected to the claim.

The objection makes reference to Santander demanding $131,906.40. However, this amount appears neither in the proof of claim nor in the trustee's report and account.

Assuming the trustee had reason to believe that Santander's claim amounts were in error and that the debtor's numbers were correct, nonetheless there was no reason to object to Santander's claim because the debtor never made a plan payment and never confirmed a plan directing the trustee to pay Santander and/or other creditors. Unless and until a plan is confirmed, the trustee does not pay claims. See 11 U.S.C. § 1326(a)(2). Only when the trustee is in position to pay claims, i.e., once a plan is confirmed and once the debtor is making plan payments, would it serve any purpose to object to a proof of claim.

The debtor's objection also complains that Claim No. 7 by creditor Consumer Cellular is not owed. Assuming it is not owed, once again it made no sense to object to the claim until a plan was confirmed.

Finally, to the extent some purpose would be served by objecting to any claim prior to the commencement of plan payments and the confirmation of a plan, the debtor could have objected to the claim. The trustee is not the only party in interest with standing to object to a claim.

FINAL RULINGS BEGIN HERE

18. 16-21007-A-13 ELIZABETH PAZ — MOTION TO CONFIRM PLAN
AF-1 — 7-7-16 [56]

Final Ruling: The court concludes that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, an actual hearing is unnecessary and this matter is removed from calendar for resolution without oral argument. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006).

The motion will be dismissed without prejudice. Because the debtor has filed another plan which the debtor has set for a confirmation hearing on October 3, the court deems this motion to have been voluntarily dismissed.

19. 16-21007-A-13 ELIZABETH PAZ — MOTION TO CONFIRM PLAN
AF-2 — 7-19-16 [71]

Final Ruling: The court concludes that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, an actual hearing is unnecessary and this matter is removed from calendar for resolution without oral argument. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006).

The motion will be dismissed without prejudice. Because the debtor has filed another plan which the debtor has set for a confirmation hearing on October 3, the court deems this motion to have been voluntarily dismissed.

20. 16-21007-A-13 ELIZABETH PAZ — MOTION TO VALUE COLLATERAL
AF-3 — 8-6-16 [79]
VS. COUNTRYWIDE HOME LOANS, INC.

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

The motion will be granted.

The debtor seeks to value the debtor's residence at a fair market value of $582,076 as of the date the petition was filed. It is encumbered by a first deed of trust held by Nationstar Mortgage. The first deed of trust secures a loan with a balance of approximately $735,295.11 as of the petition date. Therefore, Countrywide Home Loan's claim secured by a junior deed of trust is completely under-collateralized. No portion of this claim will be allowed as a secured claim. See 11 U.S.C. § 506(a).

Any assertion that the respondent's claim cannot be modified because it is secured only by a security interest in real property that is the debtor's principal residence is disposed of by In re Zimmer, 313 F.3d 1220 (9th Cir. 2002) and In re Lam, 211 B.R. 36 (B.A.P. 9th Cir. 1997). See also In re

Bartee, 212 F.3d 277 (5th Cir. 2000); In re Tanner, 217 F.3d 1357 (11th Cir. 2000); McDonald v. Master Fin., Inc. (In re McDonald), 205 F.3d 606, 611-13 (3rd Cir. 2000); and Domestic Bank v. Mann (In re Mann), 249 B.R. 831, 840 (B.A.P. 1st Cir. 2000).

Because the claim is completely under-secured, no interest need be paid on the claim except to the extent otherwise required by 11 U.S.C. § 1325(a)(4). If the secured claim is $0, because the value of the respondent's collateral is $0, no interest need be paid pursuant to 11 U.S.C. § 1325(a)(5)(B)(ii).

Any argument that the plan, by valuing the respondent's security and providing the above treatment, violates In re Hobdy, 130 B.R. 318 (B.A.P. 9th Cir. 1991), will be overruled. The plan is not an objection to the respondent's proof of claim pursuant to Fed. R. Bankr. P. 3007 and 11 U.S.C. § 502. The plan makes provision for the treatment of the claim and all other claims, and a separate valuation motion has been filed and served as permitted by Fed. R. Bankr. P. 3012 and 11 U.S.C. § 506(a). The plan was served by the trustee on all creditors, and the motion to value collateral was served by the debtor with a notice that the collateral for the respondent's claim would be valued. That motion is supported by a declaration of the debtor as to the value of the real property. There is nothing about the process for considering the valuation motion which amounts to a denial of due process.

To the extent the respondent objects to valuation of its collateral in a contested matter rather than an adversary proceeding, the objection is overruled. Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. Further, even if considered in the nature of a claim objection, an adversary proceeding is not required. Fed. R. Bankr. P. 3007. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's deed of trust will remain of record until the plan is completed. This is required by 11 U.S.C. § 1325(a)(5)(B)(I). Once the plan is completed, if the respondent will not reconvey its deed of trust, the court will entertain an adversary proceeding. See also 11 U.S.C. § 1325(a)(5)(B)(I).

In the meantime, the court is merely valuing the respondent's collateral. Rule 3012 specifies that this is done by motion. Rule 3012 motions can be filed and heard any time during the case. It is particularly appropriate that such motions be heard in connection with the confirmation of a plan. The value of collateral will set the upper bounds of the amount of the secured claim. 11 U.S.C. § 506(a). Knowing the amount and character of claims is vital to assessing the feasibility of a plan, 11 U.S.C. § 1325(a)(6), and determining whether the treatment accorded to secured claims complies with 11 U.S.C. § 1325(a)(5).

To the extent the creditor objects to the debtor's opinion of value, that objection is also overruled, particularly in light of its failure to file any contrary evidence of value. According to the debtor, the residence has a fair market value of $582,076. Evidence in the form of the debtor's declaration supports the valuation motion. The debtor may testify regarding the value of property owned by the debtor. Fed. R. Evid. 701; So. Central Livestock Dealers, Inc., v. Security State Bank, 614 F.2d 1056, 1061 (5th Cir. 1980).

21. 15-28608-A-13 ALBERT/LINDA GREEN — OBJECTION TO CLAIM
JPJ-1
VS. CAVALRY INVESTMENTS, L.L.C. — 7-11-16 [26]

Final Ruling: This objection to the proof of claim of Cavalry Investments has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(c)(1)(ii). 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 (9th Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The objection will be sustained and the claim disallowed.

Because 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 but the statute renews upon each payment made after default. The proof of claim indicates the last payment was on September 14, 2001. Therefore, using this date as the date of breach, when the case was filed on November 4, 2015, more than 4 years had passed. Therefore, when the bankruptcy was filed, this debt was time barred under applicable nonbankruptcy law and must be disallowed. See 11 U.S.C. § 502(b)(1).

22. 15-23724-A-13 MONTE/ALONNA MONTGOMERY — MOTION TO APPROVE COMPENSATION OF DEBTORS' ATTORNEY
PGM-2 — 8-10-16 [51]

Final Ruling: This compensation motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Fed. R. Bankr. R. 2002(a)(6). The failure of the trustee, the debtor, the United States Trustee, the creditors, and any other party in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The motion seeks approval of $3,390 in additional fees incurred in connection with the defense of an adversary proceeding. The foregoing represents reasonable compensation for actual, necessary, and beneficial services rendered to the debtor. Any retainer may be drawn upon and the balance of the approved compensation is to be paid through the plan in a manner consistent with the plan and Local Bankruptcy Rule 2016-1, if applicable.

23. 12-31734-A-13 JAMES/SANDRA QUICK
PGM-1

MOTION TO MODIFY PLAN
8-8-16 [36]

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

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

24. 16-23137-A-13 NELLIE SCHNEIDER
JPJ-2

OBJECTION TO EXEMPTIONS
8-12-16 [43]

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

The objection will be sustained.

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

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

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

California state law gives debtors filing for bankruptcy the right to choose

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

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

25. 16-22067-A-13 JONATHAN MCNABB — MOTION TO CONFIRM PLAN
SJS-2 — 7-27-16 [33]

Final Ruling: The court concludes that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, an actual hearing is unnecessary and this matter is removed from calendar for resolution without oral argument. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006).

The motion will be granted on the condition that the plan is further modified in the confirmation order to account for all prior payments made by the debtor under the terms of the prior plan, and to provide for a plan payment of $240 beginning August 25, 2016. As further modified, the plan complies with 11 U.S.C. §§ 1322(a) & (b), 1323(c), 1325(a), and 1329.

26. 16-21184-A-13 LATARUS JAMES — MOTION TO CONFIRM PLAN
JLK-2 — 7-28-16 [29]

Final Ruling: The motion will be dismissed without prejudice.

Local Bankruptcy Rule 2002-1(c) provides that notices in adversary proceedings and contested matters that are served on the IRS shall be mailed to three entities at three different addresses: (1) IRS, P.O. Box 7346, Philadelphia, PA 19101-7346; (2) United States Attorney, for the IRS, 501 I Street, Suite 10-100, Sacramento, CA 95814; and (3) United States Department of Justice, Civil Trial Section, Western Region, Box 683, Franklin Station, Washington, D.C. 20044.

Service in this case is deficient because the IRS was not served on the IRS at the Washington DC address.

27. 16-21185-A-13 AMANDA/JEREMY MALMSTROM — MOTION TO CONFIRM PLAN
JLK-3 — 7-28-16 [37]

Final Ruling: The motion will be dismissed without prejudice.

Local Bankruptcy Rule 2002-1(c) provides that notices in adversary proceedings and contested matters that are served on the IRS shall be mailed to three entities at three different addresses: (1) IRS, P.O. Box 7346, Philadelphia, PA 19101-7346; (2) United States Attorney, for the IRS, 501 I Street, Suite 10-100, Sacramento, CA 95814; and (3) United States Department of Justice, Civil Trial Section, Western Region, Box 683, Franklin Station, Washington, D.C.

20044.

Service in this case is deficient because the IRS was not served on the IRS at the Washington DC address.