**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

**October 18, 2016 at 1:00 p.m.**

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1. 15-29704-B-13 GARY HORTON — MOTION TO MODIFY PLAN
ARF-2 Allan R. Frumkin — 9-2-16 [50]

**Tentative Ruling:** The Debtor's Motion to Confirm Debtor's First Modified Chapter 13 Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 accurately reflect the dividend paid to the general unsecured creditors by stating the following: "Class 7 claims will receive a dividend of no less than 17.1%."

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

The court shall enter an appropriate minute order.

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| 2. | 11-36905-B-13<br>GW-8 | ABELARDO/SUSAN RODRIGUEZ<br>Gerald L. White | MOTION FOR COMPENSATION FOR GERALD L. WHITE, DEBTORS' ATTORNEY<br>9-30-16 [99] |

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given, the Motion for Final Approval of Debtors' Attorney Fees and/or costs 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 deny without prejudice the motion for compensation.

**FEES AND COSTS REQUESTED**

Gerald L. White ("Applicant"), the attorney to Chapter 13 Debtors, makes a final request for the allowance of $750.00 in fees and $0.00 in expenses. The total attorney's fees already approved in this case are $7,151.00 in fees and $314.50 in costs. Dkt. 68. The Debtors have opted out of the Guidelines. Dkt. 1, p. 46. The period for which the fees are requested is for May 15, 2012, through September 28, 2016. Applicant states that the initial rate agreed to be paid was $250.00 per hour, as indicated in the retainer agreement signed by the Debtors and Applicant on June 28, 2011. Dkt. 103, Exh. A. However, according to the Applicant, "[i]n a letter to Debtors dated 6/26/16, . . . the rate increased to $275.00 as of that date, and would increase to $300.00 as of 6/26/13." The Applicant has not submitted evidence of this letter.

Applicant provides a task billing statement to support evidence of the services provided. Dkt. 103, Exh. B.

**STATUTORY BASIS FOR PROFESSIONAL FEES**

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy

field; and

> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (I) unnecessary duplication of services; or
> (ii) services that were not--
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

**BENEFIT TO THE ESTATE**

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
>
> (b) To what extent will the estate suffer if the services are not rendered?
>
> (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

*Id.* at 959.

The Applicant’s billing statement does not specify which services were billed at the varied hourly rates of $250.00, $275.00, and $300.00. Instead, Applicant merely lumps times and rates by stating “.40 hrs. x $250/hr.”; “.25 hrs. x $275/hr.”; “2.50 hrs. x $300/hr.” Dkt. 103, Exh. B. Moreover, Applicant’s motion stating that the hourly rate was “increased to $275.00 as of [6/26/26] and would increase to $300.00 as of 6/26/13” appears to be erroneous and doesn’t provide any clarification for the court. It is not the responsibility of the court to comb through the docket of the case and the Applicant’s billing statement to determine the rate at which services were performed in an effort to justify the Applicant’s request. Accordingly, the motion for compensation is denied without prejudice.

The court shall enter an appropriate minute order.

3. 16-23911-B-13 DONNA ROCK MOTION TO CONFIRM PLAN
PGM-1 Peter G. Macaluso 9-6-16 [31]

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

The Motion to Confirm Debtor's First Amended Plan Filed September 6, 2016, has been set for hearing on the 42-days' notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtor has provided evidence in support of confirmation. No opposition to the motion has been filed by the Chapter 13 Trustee or creditors. The amended plan filed on September 6, 2016, complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court shall enter an appropriate minute order.

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

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

This matter will be continued to January 3, 2017, at 1:00 p.m.

Debtor and Capital One, N.A. each filed a status report stating that the Debtor submitted a new loan modification application on September 30, 2016. On October 6, 2015, the Creditor sent to the Debtor a notice for additional information and documents in order for it to make a decision. The additional information and documents are due by December 20, 2016.

The court shall enter an appropriate minute order.

5. 16-20018-B-13 JOJIE GOOSELAW
PGM-3 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM PLAN
7-27-16 [60]

**Tentative Ruling:** This matter is continued from September 13, 2016. The Motion to Confirm Debtor's First Amended Plan Filed on July 27, 2016, was originally set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to deny without prejudice the motion to confirm first amended plan.

The Trustee's objection to confirmation was heard and sustained on April 5, 2016. One of the Trustee's concerns stated in that objection was that the plan did not comply with 11 U.S.C. § 1325(a)(4) because unsecured creditors would receive a higher distribution in a Chapter 7 proceeding. The Trustee asserts that the amended plan filed July 27, 2016, does not resolve this concern. According to amended Schedules A, B, and C filed March 2, 2016, the total value of non-exempt property in the estate is $134,895.94 but the total amount that will be paid to unsecured creditors is only $68,120.04, which includes the unsecured priority claims of Internal Revenue Service and Franchise Tax Board.

Debtor filed a response proposing to increase the total paid to unsecured creditors to $95,040.00. Debtors state that this will be done by increasing plan payments by $720.00 per month for the remaining 48 months, which is an increase of over $34,000.00. Debtors propose to pay $1,000.00 for months 1-12 and $2,450.00 for months 13-60.

However, at the hearing on September 13, 2016, the Trustee questioned the source of Debtor's increased plan payments. The Debtor's attorney stated that the source of Debtor's income was from two jobs as a nurse. Although given an opportunity to do so, the Debtor has not provided any evidence explaining the additional income or its source.

Therefore, the court sustains the Trustee's objection, denies without prejudice the Debtor's motion to confirm her first amended plan, and the first amended plan is not confirmed. The Debtor has failed to prove feasibility. *See* 11 U.S.C. § 1325(a)(6). Since this matter has now been pending for nearly three months, no further continuances will be granted.

The court shall enter an appropriate minute order.

6. 16-25524-B-13 BARRY ROSENGRANT
CGM-1 Pro Se

MOTION TO VACATE DISMISSAL OF CASE AND/OR MOTION TO DISMISS CASE
10-4-16 [23]

DEBTOR DISMISSED: 09/07/2016

**Tentative Ruling:** The Motion (1) to Vacate Order Dismissing Chapter 13 Case for Failure to Timely File Documents, and (2) to Enter Order Dismissing Debtor's Chapter 13 Case Pursuant to 11 U.S.C. § 1307(c) with a 180-Day Bar 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 the motion with prejudice.

Creditors Rodrique V. Menard and Therese C. Menard, as Trustee for the Revocable Living Trust Agreement by and between Rodrique V. Menard and Therese C. Menard dated November 11, 1986, as restated on December 27, 2004, amended June 15, 2009, and Metal Wood Corporation, request that the court (1) vacate the Order Dismissing Case for Failure to Timely File Document(s) entered on September 7, 2016, and (2) enter a new order dismissing the case for cause pursuant to 11 U.S.C. § 1307(c) with a 180-day bar against refiling. Although this is the Debtor's first bankruptcy filed in the Eastern District of California, creditors assert that the Debtor is a serial abuser of the bankruptcy system since this is his fourth case filed since April 2014.

Creditors assert that their inability to file a motion to dismiss before the court issued its dismissal constitutes mistake or excusable neglect pursuant to Fed. R. Civ. P. 60(b)(1) that justifies vacating the court's order dismissing the case. The creditors argue that cause exists to dismiss the case due to Debtor's bad faith under 11 U.S.C. § 1307(c) and Debtor's inability to qualify for Chapter 13 relief under § 109(e).

**DISCUSSION**

Vacating the dismissal order and reinstating the Chapter 13 at the creditors' request would be tantamount to putting the Debtor back into a Chapter 13 involuntarily, which is not permitted under 11 U.S.C. § 303(a). Section 303(a) limits involuntary cases to Chapters 7 and 11. Therefore, the court cannot reinstate an involuntary case against the Chapter 13 Debtor at the creditors' request.

Furthermore, even if the court were to construe this as a Rule 52(b) or 59(e) motion, the creditors are untimely in their request since these motions must be filed 14 days after an order is entered. *See* Rule 7052 and 9023. The court's order dismissing the case was entered on September 7, 2016, and creditors' motion to vacate was filed on October 4, 2016. This is 27 days after the court entered its order and therefore is untimely.

The motion is denied with prejudice.

The court shall enter an appropriate minute order.

7. 14-26025-B-13 THOMAS/TONYA ROGERS
JPJ-2 Peter L. Cianchetta

OBJECTION TO NOTICE OF POSTPETITION MORTGAGE FEES, EXPENSES, AND CHARGES
8-15-16 [63]

**Tentative Ruling:** The Trustee's Objection to Allowance of Notice of Postpetition Mortgage Fees, Expenses and Charges Filed by Seterus, Inc. has been set for hearing on the 28-days notice required by Local Bankruptcy Rule 9014-1(f)(1). Opposition was filed. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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

Chapter 13 Trustee Jan Johnson objects to the Notice of Postpetition Mortgage Fees, Expenses, and Charges filed by Seterus, Inc. ("Creditor") on August 11, 2016. Creditor seeks attorney's fees of $1,605.00, filing fees and court costs of $176.00, property inspection fees of $930.00, and foreclosure fees and costs of $973.92. Trustee asserts that the Creditor provides no dates for when these services or costs were incurred.

However, the Debtors filed an objection on August 22, 2016, to this same Notice of Postpetition Mortgage Fees, Expenses, and Charges. The hearing on that objection was held on October 11, 2016, and was sustained as to Creditor's failure to provide adequate information related to fees incurred and denied without prejudice as to Debtors' request for attorney's fees.

Based on the evidence before the court, the Objection to the notice of postpetition mortgage fees, expenses, and charges is overruled as moot.

The court shall enter an appropriate minute order.

8. 16-25025-B-13 DONNA OCONNELL
JPJ-1 Nikki Farris
**Thru #9**

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE
9-14-16 [18]

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

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

The Debtor has not provided the Trustee with the requested proof of business insurance. The Debtor has not complied with 11 U.S.C. § 521(a)(3).

The Trustee's second issue regarding feasibility depending on the granting of a motion to value collateral for Nationstar is resolved. That motion is heard at Item #9 and granted.

Unless the Debtor has provided the Trustee with the proof of business insurance, the plan filed August 1, 2016, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

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

The court shall enter an appropriate minute order.

9. 16-25025-B-13 DONNA OCONNELL
NF-1 Nikki Farris

MOTION TO VALUE COLLATERAL OF NATIONSTAR MORTGAGE, LLC
9-8-16 [12]

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

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

The court's decision is to value the secured claim of Nationstar Mortgage LLC at $0.00.

Debtor's motion to value the secured claim of Nationstar Mortgage LLC ("Creditor") is accompanied by the Debtor's declaration. Debtor is the owner of the subject real property commonly known as 502 Sherman Road, Chester, California ("Property"). Debtor

seeks to value the Property at a fair market value of $67,900.00 as of the petition filing date. Given the absence of contrary evidence, the Debtor's opinion of value is conclusive. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

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

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

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

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

**No Proof of Claim Filed**

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

**Discussion**

The first deed of trust secures a claim with a balance of approximately $77,577.00. Creditor's second deed of trust secures a claim with a balance of approximately $55,399.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997).

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

The court shall enter an appropriate minute order.

10. 12-38030-B-13 TIMY/SHERRIE SHERMAN CONTINUED MOTION TO MODIFY PLAN
PGM-3 Peter G. Macaluso 8-3-16 [51]

**Tentative Ruling:** This matter is continued from September 13, 2016. The Motion to Modify Chapter 13 Plan After Confirmation Filed on August 3, 2016, was originally 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 deny the motion to modify with prejudice.

Presently before the court is a motion by Debtors Timy and Sherry Sherman ("Debtors") to modify their Chapter 13 plan filed on October 9, 2012, and confirmed on January, 22, 2013. This matter was initially heard on September 13, 2016. It was continued to October 18, 2016, to allow for additional briefing.[1] For the reasons explained below, the Debtors' motion will be denied without prejudice.

**Background**

The Debtors were above-median debtors when their Chapter 13 petition was filed and their plan confirmed. That required the Debtors to confirm a plan with a 60-month applicable commitment period ("ACP"). In other words, the Debtors were obligated to submit their disposable income to the Chapter 13 Trustee ("Trustee") for distribution to creditors for a period of no less than five years. Unsecured creditors would, however, receive only 1% of those payments.

Mr. Sherman is self-employed as a forklift mechanic. Mrs. Sherman does not work outside the home. The Debtors' income has fallen below the above-median threshold. Debtors attribute the reduction in their income to a loss of business. Debtors also report a significant unexplained increase in expenses on amended Schedule J filed as an exhibit.

Debtors' current plan payments are $425.00 per month. Because of a decrease in their income, the Debtors have been unable to make their regular plan payments for the past several months. During that time, however, they have managed to pay $225.00 per month instead of the required monthly $425.00 payment. The Debtors state these $225.00 monthly payments have been difficult. They do not state they are impossible.

Debtors have been offered a $4,000.00 "gift" from a family friend to pay off their remaining plan payments 16 months early. That $4,000.00 lump sum would not pay unsecured creditors in full. In fact, unsecured creditors would still receive 1%. Nevertheless, the Debtors maintain that they may modify their current plan to reduce their current ACP from 60 to 44 months. The Debtors maintain the ACP applicable at confirmation is no longer applicable upon modification and, in this case, particularly inapplicable since they are now below-median debtors. Put another way, the Debtors maintain that § 1325(b) is inapplicable to a plan modification made under § 1329(a).

The Trustee objects to the Debtors' proposed modification. The Trustee maintains that the ACP may not be modified to reduce it below 60 months for debtors who were above-median debtors when the plan was confirmed, at least not unless unsecured creditors are paid in full. The Trustee maintains the ACP is a temporal requirement, it is a minimum plan payment term, and it is set in stone at confirmation. Thus, while the Trustee does not dispute that the Debtors may modify their plan to reduce monthly plan payments

[1] Although cited nowhere in the Debtors' supplemental reply (dkt. 62), Debtors' supplemental reply seems strangely similar to the memorandum decision written by Judge McGarity in *In re Barnes*, 506 B.R. 777 (Bankr. E.D. Wis. 2014).

for the remaining term, the Trustee contends that, at least in this case, the plan term itself may not be reduced below 60 months by the Debtors' lump-sum payment.

**Discussion**

The court need not reach the ACP modification issue because the Debtors have failed to satisfy their independent burden of proving that their proposed modification is made in good faith as required by § 1329(b)(1), which incorporates § 1325(a)(3). *Mattson v. Howe (In re Mattson)*, 468 B.R. 361, 367 (9th Cir. BAP 2012) ("[Section 1329(b)(1)'s] reference to § 1325(a) means that the plan as modified must be proposed in good faith under § 1325(a)(3)."). In other words, independent of any argument that the Debtors may modify their plan to reduce the ACP below 60 months by making a lump-sum payment that does not pay unsecured creditors in full, the Debtors must still establish that their proposed modification is made in good faith. *In re Roe*, 511 B.R. 137, 140 (Bankr. D. Hawaii. 2014). The Debtors have not satisfied that burden.

The proper inquiry in determining good faith in the modification process "is whether the [debtors] acted equitably in proposing their Chapter 13 plan." *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir.1982). That determination is made by looking at the "totality of the circumstances," which permits the court to consider (1) whether the debtors misrepresented facts, unfairly manipulated the Bankruptcy Code, or otherwise proposed the plan in an inequitable manner; (2) the history of the debtors' filings and dismissals; (3) whether the debtors intended only to defeat state court litigation; and (4) whether the debtors' behavior was egregious. *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir.1999); *Meyer v. Lepe (In re Lepe)*, 470 B.R. 851, 857-58 (9th Cir. BAP 2012) (reciting *Leavitt* factors in § 1325(a)(3) analysis). Here, the court considers as "good faith" factors under *Leavitt* whether the Debtors proposed their modified plan in an inequitable manner, whether the Debtors are attempting to unfairly manipulate the Code, and whether the Debtors have misrepresented facts.

First, a debtor's desire to prepay and thereby no longer pay when there is a demonstrated ability to continue to pay as the debtor is obligated to pay by a confirmed plan is not enough to satisfy § 1325(a)(3)'s good faith requirement. *See Roe*, 511 B.R. at 140 ("Mr. Roe's motion simply says that his girlfriend wishes to prepay his plan payments in a lump sum. That is not enough to establish his good faith."). Here, the Debtors have a demonstrated ability to pay. Although the Debtors have been unable to make the $425.00 monthly plan payment, they have managed to make monthly payments of $225.00 for the past four months. While the Debtors state these payments have been difficult, the pattern of reduced payments demonstrates that continued payments at a reduced amount are not impossible.[2]

Second, the Debtors have not explained why they could not use the $4,000.00 supposedly "gifted" to them to supplement current reduced plan payments. With the Debtors apparently able to make monthly plan payments of $225.00 per month, a $4,000.00 reserve would permit the Debtors to supplement those lower monthly payments for an additional 20 months, which is longer than the remaining term of the Debtors' current plan. In fact, it may even leave the Debtors with a surplus upon plan completion. In any event, the $4,000.00 could carry the Debtors to the end of the plan term and would allow the Debtors to resume monthly payments at $425.00 per month currently required under their existing confirmed plan.[3]

Third, on amended schedules filed as exhibits to the motion the Debtors report an

[2]The court notes that the Debtors have no difficulty spending at least $100.00 per month on entertainment and increasing their clothing expense another $100.00 per month according to the amended schedules filed as an exhibit.

[3]Even if the Debtors' benefactor withdrew the $4,000.00 gift, as noted above, the Debtors could still make reduced monthly payments at $225.00 per month.

increase in expenses of nearly $4,000.00 per month. There is no evidence to support this substantial increase and there is no explanation at all for it. Evidence to support these substantial increases is certainly in the Debtors' possession, yet none is produced. That leaves the court to infer one of two things: (1) the expenses are fabricated; or (2) the increase is overstated. Both are indicative of an attempt to mislead and neither are conducive with good faith.

Finally, the court would reach the same conclusion even if it reached the ACP reduction issue. ACP is a temporal requirement established at confirmation. *Danielson v. Flores (In re Flores)*, 735 F.3d 855 (9th Cir. 2013) (en banc). Inasmuch as *Flores* describes the ACP as "a length of time that can expire or be altered[,]" *id.* at 859, any reduction, if at all, must be to the originally-established ACP. *See In re Pasley*, 507 B.R. 312, 319 (Bankr. E.D. Cal. 2014). Here that is 60 months.

Section § 1325(b)(4)(B) states that a 60-month ACP may be reduced to less than 60 months, if at all, only if unsecured creditors are paid in full. Since § 1325(b) is an element of § 1325(a)(3)'s good faith requirement applicable to modifications through § 1329(b)(1), *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538, 543 (9th Cir. BAP 2007), a proposed reduction of an established 60-month ACP that does not pay unsecured creditors in full would be one not made in good faith. Indeed, as the BAP explained in *Fridley*:

> The existence of the controlling *Goeb* test of § 1325(a)(3) good faith means that *Sunahara [v. Burchard (In re Sunahara)*, 326 B.R. 768, 781–82 (9th Cir. BAP 2005)] did not inadvertently license circumvention of § 1325(b) by the ploy of confirming a plan that complies with § 1325(b) and then promptly modifying the plan in a manner that does not comply with § 1325(b). Such a stratagem plainly would be an unfair manipulation of the Bankruptcy Code, which is a [good faith] factor named . . . as indicative of a plan proponent not acting equitably and, hence, not in good faith.

*Id.* at 843.

In short, even if the ACP is subject to reduction through modification, a determination the court need not make here, the Debtors' proposal to modify their plan by reducing the ACP with a lump-sum payment that does not result in payment to unsecured creditors in full would not be a modification proposed in good faith.

**Conclusion**

Based on the foregoing, it is ordered that the Trustee's objection to the Debtors' modified plan and opposition to the Debtors' motion to modify are sustained.

It is further ordered that the Debtors' motion to modify filed August 3, 2016, is denied without prejudice and the modified plan also filed August 3, 2016, is not confirmed.

The court shall enter an appropriate minute order.

11. 13-27034-B-13 NANCY LOPEZ — CONTINUED MOTION TO MODIFY PLAN
SJS-7 Matthew J. DeCaminada — 8-19-16 [122]

**Tentative Ruling:** This matter is continued from October 4, 2016. The Debtor's Motion to Modify Chapter 13 Plan After Confirmation was originally 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 matter will be determined at the scheduled hearing.

The Debtor is delinquent to the Chapter 13 Trustee in the amount of $1,265.00, which represents approximately 1 plan payment. At the October 4, 2016, hearing, the Debtor was allowed additional time to become current on plan payments by October 14, 2016. Dkt. 137.

If the Debtor is not current by the date of this hearing on October 18, 2016, the case shall be dismissed on the Trustee's ex parte application in open court. The Debtor would be deemed unable to make plan payments proposed and unable to carry the burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6).

12. 16-26234-B-13 ALLEN/ASHLEY WARRINGTON MOTION TO EXTEND AUTOMATIC STAY
SDH-1 Scott D. Hughes 9-22-16 [11]

**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.

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 the Debtors' second bankruptcy petition pending in the past 12 months. The Debtors' prior bankruptcy case was dismissed on January 12, 2016, for failure to make plan payments (case no. 16-20158, dkt. 33). 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 state that they filed the previous plan and the present plan to stop a trustee's sale on their home. Debtors assert that their circumstances have changed because Debtor is now employed with eScreenLogic and this will provide regular income. In the previous case Debtor, did not have regular income since he worked as a self-employed electrician doing independent contract work. Due to these changed circumstances, the Debtors believe that they are able to succeed in the present plan.

The Debtor s 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 shall enter an appropriate minute order.

13. 15-28836-B-13 BLG-2 **Thru #14**

CHARLES/PAMELA JACKSON
Pauldeep Bains

MOTION FOR COMPENSATION BY THE LAW OFFICE OF BANKRUPTCY LAW GROUP, PC FOR CHAD M. JOHNSON, DEBTORS' ATTORNEY(S)
9-20-16 [49]

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

Chad Johnson's First and Final Motion for Compensation in the Amount of $1,260.0 and Reimbursement of Cost in the Amount of $14.13 for an Aggregate of $1,274.13 [11 U.S.C. § 330(a); FRBP 2002(a)(6), 2017, 9014; LBR 9014-1(f)(1)] 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 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 for compensation.

**REQUEST FOR ADDITIONAL FEES AND COSTS**

Chad Johnson ("Applicant") served as attorney for the Debtors from November 13, 2015, through July 6, 2016. The Debtors are now represented by Bains Legal PC. Bankruptcy Law Group, PC had consented to compensation in accordance with the Guidelines for Payment of Attorney's Fees in Chapter 13 Cases (the "Guidelines"). The court had authorized payment of fees and costs totaling $4,000.00. Dkt. 21. Applicant asserts that the initial agreed-upon fee is not sufficient to fully compensate him for legal services rendered. Applicant now seeks fees in the amount of $1,260.0 and costs in the amount of $14.13 for an aggregate of $1,274.13.

Applicant provides a task billing analysis and supporting evidence of the services provided. Dkt. 52.

To obtain approval of additional compensation in a case where a "no-look" fee has been approved in connection with confirmation of the Chapter 13 plan, the applicant must show that the services for which the applicant seeks compensation are sufficiently greater than a "typical" Chapter 13 case so as to justify additional compensation under the Guidelines. *In re Pedersen*, 229 B.R. 445 (Bankr. E.D. Cal. 1999)(J. McManus). The Guidelines state that "counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. . . . Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation." Guidelines; Local Rule 2016-1(c)(3).

Applicant asserts that it provided services greater than a typical Chapter 13 case because it was unanticipated that the Debtors would become delinquent on their plan payments, that the Trustee would file a notice of default, and that the Debtors would need to modify their Chapter 13 plan. Applicant asserts that had it not filed a modified plan, the Debtors' case would have been dismissed.

The court finds the hourly rates reasonable and that the Applicant effectively used appropriate rates for the services provided. However, the court notes that the Applicant miscalculated the cost of total expenses at $14.13 when it should actually be $14.22 ($5.40 for copies plus $8.82 for postage). The court finds that the services provided by Applicant were substantial and unanticipated, and in the best interest of the Debtors, estate, and creditors.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as

compensation to this professional in this case:

| | |
|---|---|
| Additional Fees | $1,260.00 |
| Additional Costs and Expenses | $ 14.22 |
| Total | $1,274.22 |

The court shall enter an appropriate minute order.

14. 15-28836-B-13 CHARLES/PAMELA JACKSON — MOTION FOR COMPENSATION BY THE LAW OFFICE OF BAINS LEGAL, PC FOR PAULDEEP BAINS, DEBTORS' ATTORNEY(S)
PSB-1 — 9-16-16 [44]

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

Pauldeep Bains' First Motion for Compensation in the Amount of $540.0 and Reimbursement of Cost in the Amount of $0.00 for an Aggregate of $540.00 [11 U.S.C. § 330(a); FRBP 2002(a)(6), 2017, 9014; LBR 9014-1(f)(1)] 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 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 for compensation.

**REQUEST FOR ADDITIONAL FEES AND COSTS**

Pauldeep Bains ("Applicant") has served as attorney for the Debtors since July 7, 2016, after substituting into this case from Bankruptcy Law Group, PC. Bankruptcy Law Group, PC consented to compensation in accordance with the Guidelines for Payment of Attorney's Fees in Chapter 13 Cases (the "Guidelines"). The court had authorized payment of fees and costs totaling $4,000.00. Dkt. 21. Applicant asserts that the initial agreed-upon fee is not sufficient to fully compensate him for legal services rendered. Applicant now seeks compensation in the amount of $540.00 in fees and $0.00 in costs.

Applicant provides a task billing analysis and supporting evidence of the services provided. Dkt. 47.

To obtain approval of additional compensation in a case where a "no-look" fee has been approved in connection with confirmation of the Chapter 13 plan, the applicant must show that the services for which the applicant seeks compensation are sufficiently greater than a "typical" Chapter 13 case so as to justify additional compensation under the Guidelines. *In re Pedersen*, 229 B.R. 445 (Bankr. E.D. Cal. 1999)(J. McManus). The Guidelines state that "counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. . . . Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation." Guidelines; Local Rule 2016-1(c)(3).

Applicant asserts that it provided services greater than a typical Chapter 13 case because it was unanticipated that the Debtors would become delinquent on their plan payments, that the Trustee would file a notice of default, and that the Debtors would need to modify their Chapter 13 plan prior to Applicant taking over the case from

Bankruptcy Law Group. Although Bankruptcy Law Group prepared the modified plan filed May 27, 2016, the Applicant took over the case thereafter and responded to plan objections and appeared at the confirmation hearing.

The court finds the hourly rates reasonable and that the Applicant effectively used appropriate rates for the services provided. The court also recognizes that the Applicant has opted not to charge for 7.0 hours of service. The court finds that the services provided by Applicant were substantial and unanticipated, and in the best interest of the Debtors, estate, and creditors.

Applicant is allowed, and the Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

| | |
|---|---|
| Additional Fees | $540.00 |
| Additional Costs and Expenses | $ 0.00 |

The court shall enter an appropriate minute order.

15. 16-26445-B-13 LEON ALLEN — MOTION FOR RELIEF FROM AUTOMATIC STAY
SMR-1 Pro Se — 10-3-16 [13]

JOHN TRAN VS.

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given, Motion for Relief From the Automatic Stay, or Alternatively, Confirmation of the Absence of the Stay 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. If there is opposition offered at the hearing, the court may reconsider this tentative ruling.

The court's decision is to grant the motion for relief from stay.

John Tran ("Movant") seeks relief from the automatic stay with respect to the commercial real property commonly known as 3801 Florin Road, Suites A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10, Sacramento, California (the "Property"). Movant has provided the Declaration of Nick Ruzzo to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Ruzzo Declaration states that there are approximately 2 post-petition defaults, with a total of $5,493.14 in post-petition payments past due. Additionally, there are 13 pre-petition payments in default, with a total of $61,992.26 in pre-petition payments past due.

Furthermore, Movant asserts that it is the owner of the Property, the Debtor occupies it as a tenant, and the Debtor has no equity interest in the Property.

**Discussion**

Movant presents evidence that it is the owner of the Property. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento on July 12, 2016, with a Notice to Quit served on July 1, 2016. Exh. B, C, Dkt. 16. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8-*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, to exercise its rights to obtain possession and control of property including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The 14-day stay of enforcement under Rule 4001(a)(3) is not waived.

No other or additional relief is granted by the court.

The court shall enter an appropriate minute order.

16. 16-23447-B-13 SLE-1 — RUBEN FRAGOSO AND LAURA MIRANDA, Steele Lanphier — MOTION TO CONFIRM PLAN, 9-6-16 [32]

**Tentative Ruling:** The Motion to Confirm Amended Chapter 13 Plan has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

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

First, the Debtors have not amended the Statement of Financial Affairs Question #27 as requested by the Trustee at the meeting of creditors held on July 7, 216, and in the Trustee's objection to confirmation filed on July 14, 2016. The Statement of Financial Affairs does not reflect Debtors' interest in a handy man business as well as a house cleaning business. Without this information, it cannot be determined whether the plan complies with 11 U.S.C. § 1325(a)(4).

Second, the Debtors have not provided the Trustee with copies of pay stubs for the 6-month period preceding the filing of the case (November 2015 through April 2016). Until the pay stubs have been received and reviewed, it cannot be determine if the plan complies with 11 U.S.C. § 1325(a)(3) or (6) or § 1325(b)(1)(B). The Debtors have not complied with 11 U.S.C. § 521(a)(3).

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

The court shall enter an appropriate minute order.

17. 15-26967-B-13 JEREMIAH/SAMANTHA BAGULA — MOTION FOR ADDITIONAL TIME TO BECOME CURRENT WITH PLAN PAYMENTS
MOH-2 Michael O'Dowd Hays — 10-3-16 [52]

**Tentative Ruling:** Because less than 28 days' notice of the hearing was given, the Debtors' Motion for Additional Time to Become Current with Plan Payments 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.

The court's decision is to grant the motion.

Debtors request that they be given until October 18, 2016, to become current on their $600.00 monthly plan payments. Debtors assert that due to excessive medical expenses that were not covered by insurance and travel expenses to attend a family funeral, they fell behind on their plan payments. Debtors assert that they will receive payment from earnings on October 10, 2016, and that Debtors will have the funds after that time to become current. Alternatively, the Debtors request that they be given one week to propose a modified plan.

The court finds cause to provide the Debtors additional time to become current with their monthly plan payment. If the Debtors are not current with plan payments by the date of this hearing on October 18, 2016, the Debtors shall have until October 25, 2016, to file a modified plan.

The court shall enter an appropriate minute order.

18. 12-32772-B-13 JULIUS/KABELLA MAGEE
PGM-9 Peter G. Macaluso

MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY
9-20-16 [170]

**Tentative Ruling:** The Application for Additional Attorney Fees 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 deny with prejudice the motion for additional compensation as to the services performed.

**REQUEST FOR ADDITIONAL FEES AND COSTS**

As part of confirmation of the Debtors' Chapter 13 plan, Peter Macaluso ("Applicant") consented to compensation in accordance with the Guidelines for Payment of Attorney's Fees in Chapter 13 Cases (the "Guidelines"). The court authorized payment of fees and costs totaling $4,000.00, which was the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dkt. 169. Applicant now seeks additional compensation in the amount of $4,000.00 in fees and $0.00 in costs. Debtor states that he has provided pre-confirmation services at $8,985.00 and post-confirmation services at $480.00. Applicant provides a task billing analysis and supporting evidence of the services provided. Dkt. 173.

The Chapter 13 Trustee has filed an opposition stating that the Applicant is not entitled to any additional compensation since he has not shown evidence of substantial and unanticipated post-confirmation work.

To obtain approval of additional compensation in a case where a "no-look" fee has been approved in connection with confirmation of the Chapter 13 plan, the applicant must show that the services for which the applicant seeks compensation are sufficiently greater than a "typical" Chapter 13 case so as to justify additional compensation under the Guidelines. *In re Pedersen*, 229 B.R. 445 (Bankr. E.D. Cal. 1999)(J. McManus). The Guidelines state that "counsel should not view the fee permitted by these Guidelines as a retainer that, once exhausted, automatically justifies a fee motion. . . . Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation." Guidelines; Local Rule 2016-1(c)(3).

The Applicant here does not address the foregoing standard. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. However, the majority of fees that Applicant requests is for pre-confirmation work. The only post-confirmation work Applicant performed are the following: prepared and sent letter to Deutsche Bank regarding deficient proof of claim; received and reviewed letter from Natomas Park Master Association re: delinquent payments, sent letter to clients; received, reviewed and forwarded to Trustee vehicle loss report for 2008 Honda Accord; received and reviewed withdrawal of Claim #17; received reviewed and responded to e-mail form clients re: HOA issues; received, reviewed and forwarded to clients letter from Ocwen Loan Servicing. These post-confirmation services, which Applicant states is $480.00, do not appear to be substantial and unanticipated to justify additional fees.

Accordingly, the motion for compensation is denied without prejudice.

The court shall enter an appropriate minute order.

19. 12-26182-B-13 EDWIN BRYDEN
JPJ-5 Michael David Croddy

MOTION TO CONVERT CASE TO CHAPTER 7 AND/OR MOTION TO DISMISS CASE
9-6-16 [106]

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

The Trustee's Motion of 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). Responses were filed by Debtor and U.S. Bank National Association.

The court's decision is to dismiss the case. The Debtor filed a motion to voluntarily dismiss his case on October 12, 2016. Dkt. 115. The Trustee's motion is dismissed as moot.

The court shall enter an appropriate minute order.

20. 16-23189-B-13 ANTHONY DAY — MOTION TO CONFIRM PLAN
PGM-1 Peter G. Macaluso — 9-6-16 [37]
**Thru #21**

**Tentative Ruling:** The Motion to Confirm Debtor's First Amended Plan Filed on September 6, 2016, has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

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

The terms for payment of the Debtor's attorney's fees are unclear. The plan does not specify as to whether counsel shall seek approval of fees by either complying with Local Bankr. R. 2016-1(c) or by filing and serving a motion in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017.

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

The court shall enter an appropriate minute order.

21. 16-23189-B-13 ANTHONY DAY — COUNTER MOTION TO DISMISS CASE
PGM-1 Peter G. Macaluso — 9-29-16 [46]

**Tentative Ruling:** The motion will be conditionally denied.

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.

The court shall enter an appropriate minute order.

22. 16-22891-B-13 DANIEL/NANCY BALAGUY
JPJ-3 Dale A. Orthner

OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS
9-14-16 [52]

**Tentative Ruling:** The Objection to Exemptions has been set for hearing on at least 28-days the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

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

The Trustee objects to the Debtors' use of California Code of Civil Procedure § 704.070 to fully exempt cash on hand with a value of $50.00, First US Community CU checking and savings accounts with a total value of $8,191.73, and First US Community CU business checking and savings accounts with a total value of $140.39. The total value of the cash on hand and accounts is $8,382.12. Section 704.070 permits a debtor to exempt only 75% of the amount deposited that is traceable to paid earnings.

Debtors have filed a response asserting that they are exempting less than the amount they are entitled to exempt under California Code of Civil Procedure § 704.070. Debtors state that their total income within the last 30 days of filing is $12,835.63 and that 75% of this is $9,626.72, which is greater than the $8,382.12 that the Debtors are claiming exempt. Debtors assert that their pay advices reflecting these numbers were attached with their 521 documents emailed to the Trustee on June 15, 2016.

The Debtors appear to not comprehend the nature of the exemption they have claimed under California Code of Civil Procedure § 704.070. Even assuming the Debtors sent the Trustee pay advises with their § 521 documents, and further assuming those pay advices reflect that the Debtors were paid $12,835.63 within 30 days of the petition date, the missing piece of the puzzle is evidence that the funds on hand and in the two First US Community CU checking and savings accounts are those paid earnings. As the exemption claimant, the Debtors bear the burden of proving the funds in those accounts claimed as exempt are the same paid earnings reflected on the pay advices they provided the Trustee with their § 521 documents. *See* California Code of Civil Procedure § 703.580(b); *Diaz v. Kosmala (In re Diaz)*, 547 B.R. 329, 337 (9th Cir. BAP 2016); *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015); *In re Pashenee*, 531 B.R. 834 (Bankr. E.D. Cal. 2015). The Debtors have not satisfied their burden of proof – either as to production or persuasion. Therefore, the Trustee's objection to the Debtors' claim of exemption is sustained and the exemption claimed by the Debtors under California Code of Civil Procedure § 704.070 is disallowed in its entirety.

The court shall enter an appropriate minute order.

| | | | |
|---|---|---|---|
| 23. | 16-20194-B-13<br>PGM-1 | ALIDA/MANUEL DE JESUS LOPEZ<br>Peter G. Macaluso | OBJECTION TO CLAIM OF CAVALRY SPV I, LLC, CLAIM NUMBER 1-1<br>8-30-16 [32] |

**Final Ruling:** No appearance at the October 18, 2016, hearing is required.

The Debtors' Objection to Claim #1-1, Filed by Cavalry SPV I, LLC As Assignee of HSBC Consumer Lending USA, Inc./Household Finance 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. 1-1 of Cavalry SPV I, LLC As Assignee of HSBC Consumer Lending USA, Inc./Household Finance and the claim is disallowed in its entirety.

Alida Lopez and Manuel de Jesus Lopez, the Chapter 13 Debtors ("Objectors"), request that the court disallow the claim of Cavalry SPV I, LLC As Assignee of HSBC Consumer Lending USA, Inc./Household Finance ("Creditor"), Claim No. 1-1. The claim is asserted to be in the amount of $13,546.40. Objectors assert 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 proof of claim, the last payment was received on or about May 24, 2010, which is more than four years prior to the filing of this case. Hence, when the case was filed on January 14, 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 shall enter an appropriate minute order.

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| 24. | 16-25468-B-13<br>JPJ-1 | ROBERT DANIEL AND DIANNA DANIEL<br>Pauldeep Bains | CONTINUED: OBJECTION TO CONFIRMATION OF PLAN BY JAN P. JOHNSON AND/OR MOTION TO DISMISS CASE<br>9-22-16 [27] |

**Tentative Ruling:** This matter was continued from October 11, 2016. The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was originally 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). A written reply has been filed to the objection.

The matter will be determined at the scheduled hearing.

As stated at the hearing held on October 11, 2016, the issues related to the Class 1 Checklist and Authorization to Release Information and the motion to value collateral for Barclays Bank PLC have been resolved. Additionally, Debtors' counsel stated at the hearing in open court that the discrepancy in the Rights and Responsibilities of Chapter 13 Debtors and the Disclosure of Compensation of Attorney for Debtor can be resolved in the order confirming, should the plan be confirmable.

Thus, the pending issue is the discrepancy between the Trustee and Debtors' calculation of 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 Trustee and Debtors also disagree as to the number of months the plan will complete.

If the plan filed August 18, 2016, does not comply with 11 U.S.C. §§ 1322 and 1325(a) and 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 Debtor have not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.