UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

November 21, 2017 at 1:00 p.m.

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1. 16-28428-B-13 DANZHEL TU — MOTION TO SELL
ADR-2 Justin K. Kuney — 11-6-17 [52]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, Debtor's Motion to Sell Real Property Pursuant to 11 U.S.C. §§ 363(B) and 1303 is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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

The Bankruptcy Code permits a Chapter 13 debtor to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363(b) and 1303. Debtor proposes to sell the property described as 9068 Marble Valley Court, Sacramento, California ("Property").

Proposed purchasers Phung The Dang and Diem Kieu Nguyen have agreed to purchase the Property for $500,000.00. The sale proceeds will pay all liens and encumbrances in full. Based on the contract, preliminary report, and estimated settlement statement, Debtor estimates that she will net $199,501.64 after payment of all liens, selling costs, and commissions. Debtor states in her declaration that she intends to use the proceeds from the sale to pay all remaining claims in her case. After the sale, Debtor states that she will move into her parents' home until she can make other housing arrangements.

At the time of the hearing the court will announce the proposed sale and request that all other persons interested in submitting overbids present them in open court.

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate.

Net proceeds from the sale shall be applied to allowed claims prior to any distribution to the Debtor.

The court will enter an appropriate minute order.

2.	14-23633-B-13 JPJ-1	LESLIE VAN SYCKEL Peter G. Macaluso	OBJECTION TO CLAIM OF EMPLOYMENT DEVELOPMENT DEPT., CLAIM NUMBER 5 10-3-17 [55]

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The objection to proof of claim 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. 5 of Employment Development Dept. and the claim is disallowed in its entirety.

Jan P. Johnson, the Chapter 13 Trustee ("Objector"), requests that the court disallow the claim of Employment Development Dept. ("Creditor"), Proof of Claim No. 5 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $3,816.80. Objector asserts that the Claim has not been timely filed. *See* Fed. R. Bankr. P. 3002(c). The deadline for filing proofs of claim in this case for a non-government unit was August 13, 2014. Notice of Bankruptcy Filing and Deadlines, dkt. 10. The Creditor's Proof of Claim was filed October 7, 2014.

Section 501(a) of the Bankruptcy Code provides that any creditor may file a proof of claim. "A proof of claim is a written statement setting forth a creditor's claim." Rule 3001(a). If the claim meets the requirements of § 501, the bankruptcy court must then determine whether the claim should be allowed. Section 502(a) provides that a claim is deemed allowed unless a party in interest objects. If such an objection is made, the court shall allow such claim "except to the extent that the proof of claim is not timely filed." *See* 11 U.S.C. § 502(b)(9).

Federal Rule of Bankruptcy Procedure 3002(c) governs the time for filing proofs of claim in a Chapter 13 case. Rule 9006(b)(3) prohibits the enlargement of time to file a proof of claim under Rule 3002(c) except as provided in one of the six circumstances included in Rule 3002(c). *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428, 1432-1433 (9th Cir. 1990) ("We . . . hold that the bankruptcy court cannot enlarge the time for filing a proof of claim unless one of the six situations listed in Rule 3002(c) exists."). No showing has been made that any of those circumstances apply.

The court also notes that the excusable neglect standard does not apply to permit the court to extend the time to file a proof of claim under Rule 3002(c). As the Ninth Circuit stated in *Coastal Alaska*:

> Rule 9006(b) plainly allows an extension of the 90-day time limit established by Rule 3002(c) only under the conditions permitted by Rule 3002(c). Rule 3002(c) identifies six circumstances where a late filing is allowed, and excusable neglect is not among them. Thus, the 90-day deadline for filing claims under Rule 3002(c) cannot be extended for excusable neglect.

Id. at 1432. In fact, the time for filing claims under Rule 3002(c) cannot be extended for any equitable reason at all. As stated in *Spokane Law Enforcement Credit Union v. Barker (In re Barker)*, 839 F.3d 1189, 1197 (9th Cir. 2016): "[T]he Ninth Circuit has repeatedly held that the deadline to file a proof of claim in a Chapter 13 proceeding is 'rigid' and the bankruptcy court lacks equitable power to extend this deadline after the fact."

In sum, Creditor filed an untimely proof of claim and has not demonstrated any reason that would permit the court to allow its late-filed proof of claim.

Based on the evidence before the court, the Creditor's claim is disallowed in its entirety as untimely. The objection to the proof of claim is sustained.

The court will enter an appropriate minute order.

3. 17-25134-B-13 DAVID/SAMANTHA HEATON MOTION TO CONFIRM PLAN
MRL-3 Mikalah R. Liviakis 9-30-17 [27]

Tentative Ruling: The Motion to Confirm Debtor's 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 confirm the plan.

The objection raised by the Chapter 13 Trustee pertains to the plan's understated valuation of the collateral of Schools Financial Credit Union. Due to the understated value, the plan will take approximately 72 months to complete, which exceeds the maximum length of 60 months pursuant to 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. § 1325(b)(4).

Debtors assert that they have resolved these issues by reaching an agreement with Schools Financial Credit Union to pay creditor $21,945.82 as a secured claim with 5.75% interest, the balance of the claim shall be treated as unsecured, and the Trustee shall pay creditor $300.00 per month during months 1-2 and $432.00 per month during months 3-60. Plan payments pursuant to Sections 1.01 and 6.01 shall be $445.00 for 2 months and then $535.00 for 58 months. Furthermore, Debtors' attorney's fees shall be paid at a rate of $50.00 per month during months 3-60.

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

The court will enter an appropriate minute order.

4. 12-30838-B-13 EVELINA ROMO
JPJ-1 Stephen N. Murphy

CONTINUED MOTION TO DISMISS CASE
10-11-17 [19]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Trustee's Motion to Dismiss Case is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2).

The matter will be determined at the scheduled hearing.

This matter was continued from October 31, 2017, pursuant to Local Rule 9014-1(f)(2), which states that if an opposition is "presented, or if there is other good cause, the Court may continue the hearing to permit the filing of evidence and briefs." Consistent with the Local Rule, the court exercised its discretion to continue the hearing on the Trustee's motion to November 21, 2017, at 1:00 p.m.

The Debtor is delinquent to the Chapter 13 Trustee in the amount of $350.00, which represents the final plan payment. The Debtor states in her declaration that she has worked hard to complete the terms of her confirmed plan and the docket does not reflect any other motion to dismiss during the Debtor's 5-year repayment term. The petition was filed on June 7, 2012, and the case is in month 64.

If the Debtor's final plan payment of $350.00 is not received at the Trustee's office by 3:00 p.m. on Monday, November 20, 2017, the court will consider the Trustee's motion to dismiss at the continued hearing, which will be a final hearing. In order to ensure that the Debtor's final plan payment is timely received by the Trustee, the Debtor is strongly encouraged to hand-deliver that final plan payment. If the Debtor's final plan payment is timely received by the Trustee, the Trustee's motion to dismiss will be dismissed as moot as all plan payments will have been completed. The Trustee may file a reply by November 14, 2017.

The court will enter an appropriate minute order.

5. 16-22152-B-13 THOMAS/DENISE RAHMING MOTION TO MODIFY PLAN
NBC-6 Eamonn Foster 10-7-17 [92]

Tentative Ruling: The Motion to Confirm Fourth Modified Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition was filed by the Chapter 13 Trustee.

The court's decision is to permit the requested modification and confirm the modified plan provided that the Trustee's issues are resolved.

The Trustee objects to confirmation on grounds that the plan is unclear and cannot be effectively administered. The plan filed October 7, 2017, states at Additional Provisions 6.02 that the Debtors have paid $27,293.00 into the plan as of October 5, 2017, and that monthly plan payments will resume at $1,920.00 each month beginning October 25, 2016 (which is approximately one year prior to the filing of the modified plan). If this is correct, the Debtors would be delinquent in plan payments in the amount of $22,300.00. If the Debtors intended the date to begin October 25, 2017, then the Debtors are ahead by $740.00. The Debtors have filed a response stating that the intention was to have the date begin 2017.

The Trustee also objects to confirmation on grounds that the Debtors have not carried their burden of showing that the plan complies with 11 U.S.C. § 1325(a)(6). The Debtors have twice defaulted with monthly payments since October 27, 2016, and have provided no explanation for their failure to make timely plan payments. Debtors also provide no evidence of their ability to pay $2,880.00 each month for November 2017 to February 2018.

The Debtors filed a response acknowledging that they became delinquent in plan payments. They explain that the first delinquency was due to having an issue with making payments via the online TFS system. The second delinquency was due to personal and financial issues, specifically their son running away, medical expenses, and a bank overdraft.

Provided that the Trustee's concerns are resolved, the modified plan filed October 7, 2017, complies with 11 U.S.C. §§ 1322 and 1325(a) and will be confirmed.

The court will enter an appropriate minute order.

6. 17-25667-B-13 FAE/DARIN FORDYCE — MOTION FOR RELIEF FROM AUTOMATIC STAY
APN-1 Edward A. Smith — 10-11-17 [15]

WELLS FARGO BANK, N.A. VS.

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The Motion for Relief From the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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 relief from stay.

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2004 Ford F250, VIN ending in 7210 (the "Vehicle"). The moving party has provided the Declaration of Travis G. Daniels to introduce into evidence the documents upon which it bases the claim and the obligation owed by the Debtors.

The Daniels Declaration provides testimony that Debtors are delinquent $1,412.04. This represents 1 post-petition payment in default of $455.55 and 2 pre-petition payments in default of $956.49.

From the evidence provided to the court, and only for purposes of this motion, the debt secured by this asset is determined to be $16,951.81, as stated in the Daniels Declaration. Debtors' plan states in Schedules E/F that the Vehicle was voluntarily surrendered on August 21, 2017.

Discussion

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the Debtors and the estate have not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). Moreover, it appears from Debtors' plan that they have already surrendered the Vehicle.

Additionally, once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Vehicle for either the Debtors or the Estate. 11 U.S.C. § 362(d)(2). And no opposition or showing having been made by the Debtors or the Trustee, the court determines that the Vehicle is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Wells Fargo Bank, N.A., and its agents, representatives and successors, and all other creditors having lien rights against the Vehicle, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

There also being no objections from any party, the 14-day stay of enforcement under Rule 4001(a)(3) is waived.

No other or additional relief is granted by the court.

The court will enter an appropriate minute order.

7. 17-24576-B-13 KATHERINE NEWMAN — MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE
SJD-2 Susan J. Dodds — 10-24-17 [18]

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The Motion to Value Collateral of Capital One Auto Finance, A Division of Capital One, N.A. 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 Capital One Auto Finance, A Division of Capital One, N.A. at $13,133.00.

Debtor's motion to value the secured claim of Capital One Auto Finance, A Division of Capital One, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2013 KIA Optima ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $13,133.00 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).

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Claim No. 1 filed by Capital One Auto Finance is the claim which may be the subject of the present motion.

Discussion

The lien on the Vehicle's title secures a purchase-money loan incurred on September 16, 2014, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $17,108.22. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of $13,133.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Fed. R. Civ. P. 3012 and 11 U.S.C. § 506(a) is granted.

The court will enter an appropriate minute order.

8. 17-26480-B-13 TORREAN TYUS
PGM-1 Peter G. Macaluso

MOTION TO VALUE COLLATERAL OF SANTANDER CONSUMER USA, INC.
10-24-17 [14]

Tentative Ruling: The Motion to Value Collateral of Santander Consumer USA, Inc. 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 without prejudice the motion to value and set the matter for an evidentiary hearing.

Debtor's motion to value the secured claim of Santander Consumer USA, Inc. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2011 Ford Mustang ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of $11,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is some evidence of the asset's value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Proof of Claim Filed

The court has reviewed the Claims Registry for this bankruptcy case. It appears that Claim No. 1 filed by Santander Consumer USA, Inc. is the claim which may be the subject of the present motion.

Opposition by Creditor

Creditor has filed an opposition asserting the vehicle's replacement value should be set at $16,400.00 based on the NADA Official Used Car Guide. Creditor notes that the valuation takes into account the 100,000 mileage asserted by the Debtor. However, the valuation does not account for any assorted problems stated in the Debtor's declaration. Creditor contends that the Debtor's statements regarding the assorted problems are inadmissible hearsay because the Debtor is not qualified as an expert on auto mechanics.

Response by Debtor

Debtor has filed a response acknowledging that the parties have a disagreement as to the value of the collateral. Debtor requests that this matter be set for an evidentiary hearing or continued for 60 days for the parties to confer.

Discussion

Although the $16,400.00 value offered by the Creditor accounts for the 100,000 mileage, the valuation appears to be based on a "clean" retail evaluation by NADA Used Car Guide. This valuation presumes that the car has "no mechanical defects and passes all necessary inspections with ease; paint, body and wheels have minor surface scratching with a high gloss finish; interior reflects minimal soiling and wear, with all equipment in complete working order; vehicle has a clean title history. Because individual vehicle condition varies greatly, users may need to make independent adjustments for actual vehicle condition." Cf. http://www.nadaguides.com.

The clean retail value suggested by the Creditor cannot be relied upon by the court to establish the Vehicle's replacement value. First, this value assumes that the Vehicle is in excellent condition. This may not be the case. Second, 11 U.S.C. § 506(a)(2) asks for "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined." What must be determined, therefore, is what a retailer would charge for this particular Vehicle as it is.

Nor has the Debtor proven to the court's satisfaction the replacement value of the Vehicle. The Debtor's declaration lists various parts of the Vehicle that need repair but the Debtor is not qualified as an expert on auto mechanics. It is uncertain how the Debtor reached an alleged retail valuation of $11,000.00.

While neither parties have persuaded the court regarding their position of the value of the Vehicle, the Debtor has the burden of proof.

This matter will be set for an evidentiary hearing on Wednesday, January 10, 2018, at 10:00 a.m. Local Bankruptcy Rule 9017-1 direct testimony declarations and exhibits are due (lodged with the courtroom deputy and not filed) from both parties by 4:00 p.m., December 20, 2017. The Debtor is ordered to make the Vehicle available for inspection and appraisal if requested by Creditor.

The court will enter an appropriate minute order.

9. 16-27483-B-13 RICHARD/GRACE HINDES — MOTION TO APPROVE DISTRIBUTION OF FUNDS FROM SETTLEMENT AGREEMENT
FF-3 Gary Ray Fraley — 10-31-17 [31]

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the Motion to Approve Distribution of Funds from Settlement Agreement 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 to approve distribution of funds from settlement agreement.

Debtors seek court approval to distribute $7,000.00 currently held in Debtors' attorney's trust account to Carrington Mortgage Services, LLC and Wilmington Savings Fund Society, FSB, as Trustee of the Stanwich Mortgage Loan Trust C. pursuant to the terms of the Settlement Agreement and Release, Section 1.D.i. *See* dkt. 33, exh. A. The funds will be used to offset the principal, interest payments, and any costs/expenses in arrears shown on Claim No. 3 as $25,330.63 as of the date of Debtors' bankruptcy filing.

No opposition has been filed by the Chapter 13 Trustee or any creditors. The motion is granted.

The court will enter an appropriate minute order.

10. 17-22885-B-13 JANINE KING MOTION TO CONFIRM PLAN
MJD-4 Matthew J. DeCaminada 10-4-17 [69]

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The Debtor having filed a Notice of Withdrawal for the pending Motion to Confirm Second Amended Chapter 13 Plan, the withdrawal being consistent with any opposition filed to the Motion, the court interpreting the Notice of Withdrawal to be an ex parte motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7014 for the court to dismiss without prejudice the Motion, and good cause appearing, the Motion to Confirm Second Amended Chapter 13 Plan is dismissed without prejudice.

The court will enter an appropriate minute order.

11. 17-22198-B-13 ERIN VIEIRA-ANDERSON MOTION TO CONFIRM PLAN
EAS-1 Edward A. Smith 10-9-17 [35]

DEBTOR DISMISSED: 10/08/2017

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The case having been dismissed on October 8, 2017, the motion is denied as moot.

The court will enter an appropriate minute order.

12. 17-25899-B-13 RCO-1 — CARLOS/ROBIN ROBLES — Candace Y. Brooks — CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK, N.A. 10-2-17 [42]

Final Ruling: No appearance at the November 21, 2017, hearing is required.

The Chapter 13 Trustee's objection to the plan filed September 1, 2017, was sustained on November 7, 2017. Therefore, the objection filed by Wells Fargo Bank, N.A. will be overruled as moot.

The court will enter an appropriate minute order.

13. 17-27330-B-13 TAG-1 ROBERT/SUSAN OBY
Aubrey L. Jacobsen

MOTION TO EXTEND AUTOMATIC STAY
O.S.T.
11-8-17 [9]

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

The court's decision is to deny without prejudice 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 November 1, 2017, due to Debtors' failure to comply with the terms of an Order Granting Extension that required all documents to be filed and served on the Trustee on or before October 30, 2017, and for a proposed Chapter 13 plan and motion to confirm it to be filed and served on all parties on or before October 30, 2017 (case no. 17-26569, dkt. 24). 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).

Debtors assert that both cases were filed in an effort to bring current the mortgage on their primary residence. Debtors state that the previous case was dismissed because they mistakenly failed to file a motion to confirm plan and proof of service by the deadline of October 30, 2017. However, the Debtors have not stated in their motion or declaration how their circumstances have changed such that the present case will succeed. Debtors state only generally in their declaration that they are able to comply with the Chapter 13 plan filed in this case.

The Debtors have not 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 denied without prejudice.

The court will enter an appropriate minute order.