

UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Hearing Date: Wednesday, December 5, 2018
Place: Department B - Courtroom #13
Fresno, California

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

THE COURT ENDEAVORS TO PUBLISH ITS RULINGS AS SOON AS POSSIBLE. HOWEVER, CALENDAR PREPARATION IS ONGOING AND THESE RULINGS MAY BE REVISED OR UPDATED AT ANY TIME PRIOR TO 4:00 P.M. THE DAY BEFORE THE SCHEDULED HEARINGS. PLEASE CHECK AT THAT TIME FOR POSSIBLE UPDATES.

9:30 AM

1. [17-12998](#)-B-12 **IN RE: LJB FARMS, LLC**
[WJH-1](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
11-7-2018 [[169](#)]

COMMUNITY WEST BANK/MV
JACOB EATON
KURT VOTE/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The movant, Community West Bank, seeks relief from the automatic stay under § 11 U.S.C. 362(d)(1) with respect to two parcels of real property known as "Farm One" and "Farm Three." Doc. #172.

11 U.S.C. § 362(d)(1) allows the court to grant relief from stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." In re Mac Donald, 755 F.2d 715, 717 (9th Cir. 1985).

After review of the included evidence, the court concludes that "cause" exists to lift the stay because debtor failed to make the payments under the plan. Doc. #173.

Debtor did not oppose this motion. Nor did the chapter 12 trustee.

Accordingly, the motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to dispose of its collateral pursuant to applicable law and to use the proceeds from its disposition to satisfy its claim. No other relief is awarded.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be ordered waived so movant may commence foreclosure proceedings as soon as possible.

2. [18-13678](#)-B-11 **IN RE: VERSA MARKETING, INC.**
[WW-1](#)

CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION FOR
CREATION OF A PACA TRUST ACCOUNT
11-15-2018 [[108](#)]

VERSA MARKETING, INC./MV
RILEY WALTER

NO RULING.

3. [18-13678](#)-B-11 **IN RE: VERSA MARKETING, INC.**
[WW-10](#)

CONTINUED MOTION FOR AN ORDER AUTHORIZING THE PAYMENT OF
PREPETITION CLAIMS ASSERTED UNDER THE PERISHABLE
AGRICULTURAL COMMODITIES ACT
11-14-2018 [[93](#)]

VERSA MARKETING, INC./MV
RILEY WALTER

NO RULING.

4. [18-13678](#)-B-11 **IN RE: VERSA MARKETING, INC.**
[WW-8](#)

CONTINUED MOTION FOR ORDER ESTABLISHING PROCEDURES FOR THE
IDENTIFICATION, TREATMENT, AND PAYMENT OF CLAIMS ARISING
UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT
11-14-2018 [[99](#)]

VERSA MARKETING, INC./MV
RILEY WALTER

NO RULING.

5. [18-13678](#)-B-11 **IN RE: VERSA MARKETING, INC.**
[JLG-1](#)

CONTINUED MOTION TO APPROVE STIPULATION FOR RELIEF FROM THE
AUTOMATIC STAY
11-15-2018 [[114](#)]

FRESNO FIRST BANK/MV
RILEY WALTER
JESSICA GIANNETTA/ATTY. FOR MV.

NO RULING.

6. [18-13678](#)-B-11 **IN RE: VERSA MARKETING, INC.**
[JLG-3](#)

MOTION TO SELL FREE AND CLEAR OF LIENS
11-29-2018 [[152](#)]

FRESNO FIRST BANK/MV
RILEY WALTER
JESSICA GIANNETTA/ATTY. FOR MV.
OST 11/28

NO RULING.

7. [17-13239](#)-B-12 **IN RE: JOE/MARIA NASCIMENTO**
[WW-9](#)

MOTION TO SELL
12-3-2018 [[141](#)]

JOE NASCIMENTO/MV
RILEY WALTER
OST 12/3/18

NO RULING.

1:30 PM

1. [18-13527](#)-B-13 **IN RE: GREG/SHERRY KELLY**
[PK-7](#)

MOTION TO VALUE COLLATERAL OF PREFERRED CREDIT INC.
11-20-2018 [[80](#)]

GREG KELLY/MV
PATRICK KAVANAGH

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The debtor is competent to testify as to the value of the Kirby vacuum. Given the absence of contrary evidence, the debtor's opinion of value may be conclusive. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004). The respondent's secured claim will be fixed at \$200.00. The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

2. [18-13527](#)-B-13 **IN RE: GREG/SHERRY KELLY**
[PK-8](#)

MOTION TO VALUE COLLATERAL OF SYNCHRONY BANK
11-20-2018 [\[87\]](#)

GREG KELLY/MV
PATRICK KAVANAGH

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party will submit a proposed order after hearing.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

The debtor is competent to testify as to the value of the Sleep Number bed. Given the absence of contrary evidence, the debtor's opinion of value may be conclusive. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004). The respondent's secured claim will be fixed at \$500.00. The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

3. [18-12132](#)-B-13 **IN RE: ALICE BURTON**
[MHM-3](#)

CONTINUED MOTION TO DISMISS CASE
9-12-2018 [\[47\]](#)

MICHAEL MEYER/MV
DAVID JENKINS
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied.

ORDER: The court will issue an order.

This motion is DENIED.

By prior order of the court, a chapter 13 plan must have been served, filed, and set for hearing before December 5, 2018. Debtor's chapter 13 plan was confirmed on November 29, 2018. The grounds of

this motion are that debtor failed to confirm a chapter 13 plan. Because a chapter 13 plan has been confirmed, this motion is DENIED.

4. [18-13832](#)-B-13 **IN RE: ANDREA SOUSA**
[JRL-2](#)

MOTION TO CONFIRM PLAN
10-31-2018 [[30](#)]

ANDREA SOUSA/MV
JERRY LOWE
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Denied without prejudice.

ORDER: The court will issue an order.

This motion is DENIED WITHOUT PREJUDICE for failure to comply with the Local Rules of Practice ("LBR").

LBR 3015-1(d) states that motions to confirm chapter 13 plans must be filed on at least 35 days' notice.

This motion was filed and served on November 2, 2018 and set for hearing on December 5, 2018. Doc. #39. December 5, 2018 is 33 days after November 2, 2018, and therefore this hearing was set on less than 35 days' notice under LBR 3015-1(d).

The court notes the objection of Wilmington Trust, National Association ("Creditor"). Doc. #44. Creditor may file another objection, if and when debtor files another motion to confirm plan.

5. [18-13633](#)-B-13 **IN RE: STEVEN/AURORA COCIO**
[PBB-1](#)

MOTION TO VALUE COLLATERAL OF CAPITAL ONE AUTO FINANCE
10-18-2018 [[19](#)]

STEVEN COCIO/MV
PETER BUNTING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the

hearing as required by LBR 9014- 1(f) (1) (B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The respondent's secured claim will be fixed at \$4,953.00. The only evidence movant submits to support the valuation is creditor's claim, which lists the same amount as secured. This jurisdiction's local rules require a motion to value collateral be noticed and set for a hearing before a plan can be confirmed if the plan reduces an allowed secured claim in class 2 based on collateral value. See Local Rule of Practice 3015-1(i). Because respondent's claim is not actually being impaired, the court does not believe a declaration from the debtor, an appraisal, or some other form of evidence is necessary to value the collateral at \$4,953.00.

The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

6. [18-14334](#)-B-13 **IN RE: SHANNON TAYLOR**
[SL-1](#)

MOTION TO VALUE COLLATERAL OF CHRYSLER CAPITAL
10-30-2018 [\[12\]](#)

SHANNON TAYLOR/MV
STEPHEN LABIAK

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f) (1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014- 1(f) (1) (B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-

mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

The debtor is competent to testify as to the value of the 2014 Jeep Cherokee. Given the absence of contrary evidence, the debtor's opinion of value may be conclusive. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004). The respondent's secured claim will be fixed at \$8,467.00. The proposed order shall specifically identify the collateral, and if applicable, the proof of claim to which it relates. The order will be effective upon confirmation of the chapter 13 plan.

7. [18-14143](#)-B-13 **IN RE: DAVID/CARLA LOWERY**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
11-16-2018 [\[20\]](#)

CHRISTOPHER FISHER
\$79.00 AND \$77.00 INSTALLMENT PAYMENTS 11/19/18

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: The OSC will be vacated.

ORDER: The court will issue an order.

The record shows that an installment payment of \$79.00, and an installment payment of \$77.00, was paid on November 19, 2018.

The order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

8. [18-14143](#)-B-13 **IN RE: DAVID/CARLA LOWERY**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H.
MEYER
11-15-2018 [[17](#)]

CHRISTOPHER FISHER

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT.

Debtor filed an amended plan nine days after this objection was filed. Therefore, this objection is moot.

9. [18-11357](#)-B-13 **IN RE: ENRIQUE/GUADALUPE REYES**
[JAM-5](#)

MOTION TO CONFIRM PLAN
10-30-2018 [[138](#)]

ENRIQUE REYES/MV
JAMES MICHEL
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(1). The failure of the creditors, the debtor, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amount of damages). Televideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a prima facie showing that they are entitled to the relief sought, which the movant has done here.

This motion is GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

10. [18-14560](#)-B-13 **IN RE: MATTHEW/ANGELA WANTA**
[PK-2](#)

MOTION TO EXTEND AUTOMATIC STAY
11-21-2018 [\[21\]](#)

MATTHEW WANTA/MV
PATRICK KAVANAGH

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue the order.

This Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Rule of Practice ("LBR") 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 offer 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.

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.

If the debtor has had a bankruptcy case pending within the preceding one-year period, but was dismissed, then under 11 U.S.C. § 362(c)(3)(A), the automatic stay under subsection (a) of this section with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease, shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Debtor had one case pending within the preceding one-year period, case no. 18-13386. That case was filed on August 21, 2018 and was dismissed on November 9, 2018 for failure to provide necessary and requested documents to the trustee's office. This case was filed on November 9, 2018 and the automatic stay will expire on December 9, 2018.

11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest

demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable. Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition." Emmert v. Taggart (In re Taggart), 548 B.R. 275, 288, n.11 (9th Cir. BAP 2016) (citations omitted).

In this case the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith because the prior case was dismissed on the grounds that debtor failed to file documents as required by the bankruptcy code and the court without substantial excuse. 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa).

However, based on the moving papers and the record, and in the absence of opposition, the court is persuaded that the presumption has been rebutted, the debtors' petition was filed in good faith, and it intends to grant the motion to extend the automatic stay as to all creditors.

Debtor failed to provide paystubs in the previously dismissed case. However, debtor states in his declaration that the all the documents regarding child support will be prepared by November 26, 2018. Doc. #23. Debtor also made all the payments in the previous case. *Id.*

The motion will be granted and the automatic stay extended for all purposes as to all parties who received notice, unless terminated by further order of this court. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order.

11. [18-13481](#)-B-13 **IN RE: JAVIER VELIZ**
[MHM-3](#)

OBJECTION TO CONFIRMATION OF PLAN BY MICHAEL H. MEYER
11-14-2018 [[45](#)]

MICHAEL MEYER/MV
PETER BUNTING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to January 17, 2019 at 1:30 p.m.

ORDER: The court will issue an order.

This motion will be set for a continued hearing on January 17, 2019 at 1:30 p.m. The court will issue an order. No appearance is necessary.

The trustee has filed a detailed objection to the debtor's chapter 13 plan. Unless this case is voluntarily converted to chapter 7, dismissed, or the trustee's opposition to confirmation is withdrawn, the debtor shall file and serve a written response not later than January 3, 2019. The response shall specifically address each issue raised in the opposition to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the debtor's position. If the debtor elects to withdraw this plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than January 10, 2019. If the debtor does not timely file a modified plan or a written response, the motion to confirm the plan will be denied on the grounds stated in the opposition without a further hearing.

12. [18-13887](#)-B-13 **IN RE: GREG/MARY JENNINGS**
[AP-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY BANK OF AMERICA, N.A.
11-7-2018 [[17](#)]

BANK OF AMERICA, N.A./MV
SUSAN HEMB
WENDY LOCKE/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

This objection is OVERRULED AS MOOT. Debtor withdrew the amended plan. Doc. #24.

13. [18-14589](#)-B-13 **IN RE: TIMOTHLY/VICKIE WEATHERLY**
[SL-1](#)

MOTION TO EXTEND AUTOMATIC STAY
11-20-2018 [[12](#)]

TIMOTHLY WEATHERLY/MV
SCOTT LYONS

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue the order.

This Motion to Extend the Automatic Stay was set for hearing on the notice required by LBR 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. Creditor Woodland Hills Mortgage Corporation ("Woodland") filed opposition to the motion. Doc. #22. If any other potential respondents appear at the hearing and offer 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. 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.

If the debtors have had a bankruptcy case pending within the preceding one-year period, but was dismissed, then under 11 U.S.C. § 362(c)(3)(A), the automatic stay under subsection (a) of this section with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease, shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Debtors had one case pending within the preceding one-year period, case no. 16-14574. The court notes that debtors' declaration stated that the previous case was case no. 18-12186, filed on May 31, 2018 and dismissed on December 22, 2018. Doc. #14. However, the court takes judicial notice that that statement is incorrect; the debtors of case no. 18-12186 are not Timothy and Vickie Weatherly, nor can a case have been dismissed on December 22, 2018 because that date has not yet arrived. Case no. 16-14574 which did involve these debtors was filed on December 22, 2016 and dismissed on October 15, 2018 for failure to make plan payments. This case was filed on November 13, 2018 and the automatic stay will expire unless extended by the court on December 13, 2018.

11 U.S.C. § 362(c)(3)(B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor or a party in interest

demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c)(3)(C) exist. The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable. Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition.'" *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288, n.11 (9th Cir. BAP 2016) (citations omitted).

In this case the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith because the prior case was dismissed because the debtors failed to perform the terms of a plan confirmed by the court. 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc).

Debtors' previous case was dismissed for failure to make plan payments. For one and a half years, Mr. Weatherly was working as an exclusive contractor on one home, averaging over \$7,000.00 per month. Doc. #14. That job was abruptly ended, and due to Mr. Weatherly working on a single home, his income fell to half that and he had to rebuild his client list. *Id.* Mr. Weatherly has now found new employment building a house but will also be working other small projects to mitigate an unexpected termination as before. *Id.* Ms. Weatherly has also received several sales commissions in the last two months. *Id.* Ms. Weatherly claims she has sales commissions and they are reserved so the debtors can make a few month's plan payments should Mr. Weatherly's employment situation change.

The court is not convinced the stay should be extended as to any creditor.

First, the court notes that the notice of this motion did not contain the language required under LBR 9014-1(d)(3)(B)(iii). LBR 9014-1(d)(3)(B), which is about noticing requirements, requires movants to notify respondents that they can determine whether the matter has been resolved without oral argument or if the court has issued a tentative ruling by checking the Court's website at www.caeb.uscourts.gov after 4:00 p.m. the day before the hearing.

Second, the declaration upon which the motion is based is factually incorrect. So, the court is not convinced by clear and convincing evidence that the Weatherly's situation has significantly changed. Ms. Weatherly's declaration (Doc. 14) states that their previous case was 18-12186 and was filed May 31, 2018 and dismissed December 22, 2018. The court takes judicial notice that the Weatherly's previous case was filed in 2016 (16-14574) and dismissed October 15, 2018. The Weatherly's previous case could not have been dismissed December 22, 2018 as that date has not yet occurred. Since this declaration is clearly false, it cannot be clear and convincing evidence.

Third, the previous case was problematic and there does not appear to be a significant change of circumstance. According to the docket in the 2016 case, the Chapter 13 Trustee filed two motions to dismiss before the Plan was confirmed on May 22, 2017. (16-14574 Doc. #'s 23, 33, 48). After confirmation, the Trustee filed three Notices of Default and Intent to Dismiss for failure to make Plan payments (16-14574 Doc. #'s 49, 54, 59).

The court has reviewed Ms. Weatherly's declaration where she explains that Mr. Weatherly's unexpected job loss made it difficult if not impossible for them to perform the Plan in the previous case. There is no real change of circumstance here in this case. Mr. Weatherly is still employed to construct custom homes. There is still a more than speculative question about the regularity of income and Ms. Weatherly's declaration does not address how her income can supplement the potential disruption in income for more than a few months. The declaration references Mr. Weatherly's ability to still perform smaller projects simultaneously with an existing custom home project but that does not mean there will be an equivalent amount of income that will be available to maintain Plan payments should circumstances on the large project change.

Fourth, as to Woodland specifically, the passage of time has negatively affected Woodland's security position. The County of Tulare in the first case filed a proof of claim for unpaid property taxes of \$8,149.75 (Doc. 22). Now, according to the debtors' schedules almost \$10,000 is owed for property taxes to the County of Tulare secured by Woodland's collateral. Woodland's claim filed in this case shows a balance of \$247,000 owed. Woodland's claim could be partially unsecured if the debtor's valuation of Woodland's collateral is correct (\$250,000).

The motion is DENIED.