

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Ronald H. Sargis  
Chief Bankruptcy Judge  
Sacramento, California

**December 6, 2016, at 1:30 p.m.**

---

1. <a href="#"><u>16-27508-E-13</u></a> <b>MAC-1</b>	<b>TARILYN ELLIOTT</b> <b>Marc Carpenter</b>	<b>MOTION TO EXTEND AUTOMATIC STAY O.S.T. 11-22-16 <a href="#"><u>13</u></a></b>
---	---	--

**Tentative Ruling:** 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.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----  
Local Rule 9014-1(f)(3) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors and parties requesting special notice on November 22, 2016. By the court's calculation, 14 days' notice was provided.

The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 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. At the hearing -----.

**The Motion to Extend Automatic Stay is granted.**

Tarilyn Elliott ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-27843) was dismissed on October 12, 2016, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 15-27843, Dckt. 56, October 12, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because she missed payments while she was unemployed, an effect of dealing with domestic violence.

## **TRUSTEE'S NON-OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on November 23, 2016. Dckt. 21.

## **DISCUSSION**

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 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, 209–10 (2008). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

*In re Elliot-Cook*, 357 B.R. at 814–15.

The Debtor has sufficiently rebutted 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 issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

2. [16-24111](#)-E-13      **ABBIGAIL CLYMER**  
NLG-1                      **Randall Ensminger**

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
8-24-16 [25](#)**

**BOSCO CREDIT, LLC VS.**

**Tentative Ruling:** 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).

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.

**Below is the court's tentative ruling.**

-----  
Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditor Wells Fargo Bank, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice 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). The defaults of the non-responding parties are entered.

<p><b>The Motion for Relief from the Automatic Stay is granted.</b></p>
---

Abbigail Clymer ("Debtor") filed the instant bankruptcy case on June 24, 2016. Dckt. 1. Bosco Credit LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6059 Kingwood Circle, Rocklin, California (the "Property"). Movant has provided the Declaration of Gina D'Elia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Gina D'Elia Declaration states that there are two (2) post-petition defaults in the payments on the obligation secured by the Property, with a total of \$594.58 in post-petition payments past due. The Declaration also provides evidence that there are ninety-seven (97) pre-petition payments in default, with a pre-petition arrearage of \$26,811.99. Dckt. 27.

Movant's Motion for Relief from Automatic Stay lists two (2) bankruptcy cases—including the current one—commenced by Debtor, since September 4, 2009, that affect Movant's interest in the Property. Those cases are:

- A. Case No. 09-39133
  - 1. Filed: September 4, 2009
  - 2. Type: Chapter 7
  - 3. Date of Discharge: December 9, 2009.
  - 4. This case was reopened on March 28, 2016. Movant requested relief from the automatic stay, which was denied as moot. Debtor also requested the court to convert the case to a Chapter 13, which was denied, and the case was closed once again on July 21, 2016.
- B. Case No. 16-24111
  - 1. Filed: June 24, 2016
  - 2. Type: Chapter 13
  - 3. Instant Case
  - 4. This case was filed while the prior bankruptcy action and Debtor's Motion to Convert the prior action were pending still.

## **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response on September 6, 2016. Dckt. 38. The Trustee states that Debtor is current on plan payments under the proposed plan filed on June 24, 2016 (Dckt. 5). The Trustee notes that no confirmed plan exists, and a proposed plan was denied confirmation on August 30, 2016 (Dckt. 34).

The Trustee supplies the following information:

- A. Debtor has paid a total of \$813.94 to date.
- B. One disbursement of \$300.00 has been made to Franklin Credit Management Corp., which represents two adequate protection payments of \$150.00 for the months of July and August 2016.

## **DEBTOR'S OPPOSITION**

Debtor filed opposition on September 7, 2016. Dckt. 44. Debtor asserts that she is currently in the process of seeking a loan modification of Movant's note and second deed of trust. Debtor believes the

Chapter 13 plan will give her a “platform” from which to negotiate a restructuring with Movant over the note and second deed of trust (\$68,887.35) and to protect the equity in her home (\$81,312.65).

Debtor intends to file an amended plan with all necessary pages to replace the current plan that misses pages 3, 4, and 7.

Debtor states that she will continue to make plan payments of \$406.97 per month, and \$150.00 of that amount will be paid to Movant.

## **SEPTEMBER 20, 2016 HEARING**

At the hearing, the court denied the requested relief from stay based on 11 U.S.C. § 362(d)(4), and the court continued the matter on the requested relief from stay under 11 U.S.C. § 362(d)(1) because Debtor stated that she was attempting to find a roommate to increase her income, which was why Debtor had not filed an amended plan reflecting her current finances. Dckt. 59.

## **OCTOBER 25, 2016 HEARING**

At the hearing, the court continued the matter to 1:30 p.m. on December 6, 2016. Dckt. 70.

## **DISCUSSION**

Neither a supplemental pleading nor an amended plan has been filed with the court since the September 20, 2016 hearing.

At the November 16, 2016 hearing, the court continued the Chapter 13 Trustee’s Motion to Dismiss to 10:00 a.m. on January 18, 2017. Dckt. 78. At that hearing on November 16, 2016, Debtor and Debtor’s counsel assured the court that Debtor’s plan is to sell her residence and protect what she computes to be \$100,000.00 in equity. However, a review of the Docket does not show any motion to approve the employment of a real estate broker or that Debtor is actively, in good faith, attempting to promptly sell the property.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$242,687.35 (including \$68,887.35 secured by Movant’s second deed of trust), as stated in Schedule D filed by Debtor. The value of the Property is determined to be \$320,000.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay as cause under 11 U.S.C. § 361(d)(1). In this case, the equity cushion in the Property for Movant’s claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

While Debtor professes to be prosecuting a Chapter 13 Plan, there is no proposed plan before the court. Confirmation was originally delayed due to what appears to have been a clerical error when the plan was filed (pages missing from Plan filed).

However, it was made clear to Debtor as early as August 4, 2016, that the Plan filed with the court was defective. Trustee's Objection to Confirmation, Dckt. 17. In the eighty-two (82) days that have passed since that time, no action has been taken by Debtor to file an amended plan and motion to confirm an amended plan. Rather, Debtor is living in the no-plan limbo. That is not consistent with prosecuting this case in good faith.

On Schedule I, Debtor states that her monthly gross income is \$2,512.00. Dckt. 1 at 28. On Schedule J, excluding secured debt payment on her residence, Debtor states under penalty of perjury that her reasonable and necessary monthly expenses are \$1,167.00. *Id.* at 30. No provision is made for property taxes or property insurance. No provision is made for any income taxes. Debtor purports to have monthly food and housekeeping supplies expenses of only \$200.00 per month. Allowing \$50.00 per month for household supplies, Debtor purports to pay only \$1.66 per meal (assuming a 30 day month). This does not appear to be reasonable.

Additionally, Debtor lists no expenses for home maintenance, repair, or upkeep. This too appears unreasonable.

Debtor's real property is stated to have a value of \$320,000.00. Schedules A/B and D, Dckt. 1. Wells Fargo Bank, N.A. is listed as having a claim in the amount of \$169,000.00 and Movant is listed as having a Claim in the amount of \$70,000.00. By Debtor's calculation there is approximately a \$90,000.00 equity cushion for both creditors.

Debtor purports to make \$406.97 in monthly payments, of which \$150.00 would be paid to Movant. There is no indication as to why or how this is a reasonable payment.

Wells Fargo Bank, N.A. has filed its proof of claim, stating a secured claim in the amount of \$169,008.61. Proof of Claim No. 5. The monthly payment on this claim is stated to be \$917.70. *Id.* Debtor has listed \$938.00 on Schedule J as the payment for her home.

Movant has sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1). Though given the opportunity to prosecute a Chapter 13 Plan that provides for a possible loan modification, Debtor has failed to act.

The Relief From the Automatic Stay pursuant to 11 U.S.C. § 362(d)(1) is granted.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by Bosco Credit LLC (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Bosco Credit LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 6059 Kingwood Circle, Rocklin, California.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.

No other or additional relief is granted.

3. [13-30919](#)-E-13      **BUN AUYEUNG AND SOO TSE**      **CONTINUED MOTION TO DISMISS**  
**DPC-1**      **Peter Macaluso**      **CASE**  
8-18-16 [[254](#)]

**Tentative Ruling:** The Motion to Dismiss 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).

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.

**Below is the court's tentative ruling.**

-----

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on August 18, 2016. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

<b>The Motion to Dismiss is granted, and the case is dismissed.</b>
---

The Trustee's Motion argues that Bun Auyeung and Soo Tse ("Debtor") did not file a Plan or a Motion to Confirm a Plan following the court's denial of confirmation to Debtor's prior plan on July 22, 2014. A review of the docket shows that Debtor has not yet filed a new plan or a motion to confirm a plan. This is unreasonable delay that is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

#### **DEBTOR'S OPPOSITION**

Debtor filed an Opposition on September 27, 2016. Dckt. 264. Debtor asserts the following points:

- A. Debtor's Motion to Avoid Lien of Barton and Paula Christensen and Debtor's Motion to Confirm Plan were denied on July 28, 2014.



- B. An appeal of the Motion to Avoid Lien was filed on August 6, 2014, and that appeal is pending.
- C. The total amount of claims is \$382,329.01, of which \$237,632.27 relates to a surrendered property from the Debtor's prior Chapter 7 case.
- D. Of the remaining \$144,696.74 secured claims amount, Barton Christensen and Paula Christensen have a claim for \$140,000.00.
- E. Debtor's plan proposes thirty-six (36) payments of \$100 and a lump-sum payment of \$13,000.00, which totals \$16,600.00.
- F. Debtor is in month thirty-seven (37) and have paid \$16,700.00.
- G. Debtor's plan would be completed if the appeal is granted in Debtor's favor.

#### **OCTOBER 12, 2016 HEARING**

At the hearing, Debtor's counsel argued that he did not know that he needed to get a plan confirmed and believed that so long as he filed an appeal of the court denying confirmation of the prior plan, Debtor could exist in this bankruptcy case for years with no confirmed plan or make any attempt to confirm a plan.

The arguments of counsel reminded the court that the denial of confirmation was not merely due to denying the motion to avoid the lien, but the Debtor not qualifying as a Chapter 13 debtor—there being no regular income to fund a plan. Instead, Debtor stands as the proxy for Debtor's children who have "contributed" \$13,000 to fund the plan.

That further reminded the court that it appears that Debtor may be the subject of possible elder abuse, the children preventing Debtor from receiving substantial equity in the property to fund their day-to-day expenses, instead forcing Debtor to live in squalor. The court questions how counsel for the Debtor, who owes a fiduciary duty to the Debtor, would allow this to continue.

Counsel for Debtor provided no good explanation for why or how he could believe that Debtor could ignore a secured claim and exist in this Chapter 13 case with no payments to creditors because no plan was confirmed.

The court debated dismissing the case, but decided to continue the matter to 10:00 a.m. on November 16, 2016, to give Debtor's counsel an opportunity to propose and seek confirmation of a plan that complies with the Code.

The court also mentioned possibly referring this matter to the Sacramento County department responsible for investigating elder abuse. Lastly, the court ordered the Debtor and any children responsible for the care of Debtor to appear on October 18, 2016, for the hearing on the Motion for Omnibus Relief.

## **MOTION FOR OMNIBUS RELIEF HEARING ON OCTOBER 18, 1016**

At the hearing, the court could not determine—with Debtor and her daughter present—that Debtor was capable of administering the case on behalf of the deceased co-debtor or that further administration of this Chapter 13 is in the best interests of all parties. The court denied without prejudice the Motion for Omnibus Relief.

## **NOVEMBER 16, 2016 HEARING**

At the hearing, the court continued the matter to 1:30 p.m. on December 6, 2016. Dckt. 286. The court ordered Debtor to file a declaration by November 30, 2016, written in her native language along with an English translation that was created by an independent, credible third party translation service.

The court also ordered Debtor to file a supplemental briefing providing the court with the laws and regulations that would Debtor's homestead exemption proceeds to be confiscated by the United States government and not be used for Debtor's housing, care, and basic life needs.

## **DISCUSSION**

On November 9, 2016, Debtor filed a supplement to the Opposition. In reviewing the Opposition, the court notes that it is long on argument and short on citation to any legal authorities. The one case authority cited in the Supplemental Opposition is "*In re Patrick*, Case No. 12-03042 NPO (S.D. Miss. 2013)." That case addressed whether a debtor is required to use Social Security payments to fund a Chapter 13 Plan.

On November 30, 2016, Debtor had her attorney file a Reply stating that an unauthenticated exhibit is filed as Exhibit B, but because of the "time difference" between the U.S. and China, no declaration from the Chinese translator has been obtained. No explanation is provided as to why no certified translator in the United States is available to provide the service.

Exhibit B, Dckt. 288, the purported English translation of Debtor's handwritten declaration, states in significant part:

- A. Debtor is 85 years old.
- B. Debtor and her daughter have been living in "Erpu" for approximately 30 years.
- C. In 2006 Debtor was involved in "E.D's" deceit.
- D. Debtor has been defrauded by "E.D." for ten years.
- E. Debtor does not know if the "land" has been "sold out."
- F. Fines have forced Debtor into bankruptcy.

- G. Debtor sold everything in the “coffer” that she intended to give her daughters as a gift for their marriage.
- H. Debtor has nothing else for them, on the “land.”
- I. Debtor wants to live in “Mengfang” until she dies.

Thus, Debtor appears to have little intention of complying with the Bankruptcy Code, but just wants to live in the house, not providing for payments to creditors.

The Debtor continues to obfuscate the real legal issue of eligibility for Debtor under 11 U.S.C. § 109(e) that “Only an individual with regular income . . .” may be a Chapter 13 debtor. Debtor ignores any case law and quotes the legislative history that states “regular income” for this Code section may include: “individuals whose primary income is from investments, pensions, social security, or welfare.” This language from the legislative history is quoted in Debtor’s Supplemental Pleading (p. 2:22–26) and then ignored when Debtor argues that because most of the money to fund a plan is a one-time “gift,” that is adequate.

In this Supplemental Opposition, Debtor’s counsel continues the theme that the two debtors in this case “are neither sophisticated debtors, and are persons of limited means trying to simply live in their home peacefully and undisturbed.” Dckt. 277 at p. 5:13–15. Though counsel continues to speak of Debtor in the plural, one of the debtors has passed away during this case. Additionally, while counsel continues the theme of the “unsophisticated debtor,” it had been disclosed that the late debtor was a doctor (MD) and at the last hearing that the surviving debtor has a university degree.

A short declaration has been filed for Debtor, in which she states that she has written a longer declaration in her native language (since she does not speak or write in English), and it will be filed with the court at some later date. Declaration, Dckt. 278. In this Declaration, Debtor states that if she sells the property and claims her homestead exemption

“I will not be able to keep any cash due to the social security restrictions and how it will affect my receiving health care, and the cost which may be in excess of the \$855 per month under the Obamacare plan.”

*Id.*, p. 2:5–9. Counsel for Debtor has not provided the court with any laws or regulations that provide that the government will confiscate Debtor’s homestead exemption portion of the proceeds from the sale of the property. Rather, it appears that counsel is being driven (and using as a canard) the statements of the “neither sophisticated” Debtor that he has argued to this court. Or possibly he is relying on the “legal conclusions” of Debtor’s daughter, Florence Auyeung. *See* Florence Auyeung Declaration, Dckt. 280 at p. 2:9–11, stating under penalty of perjury, “While it seems like selling the property will be [sic] bring some benefit to my mother, the sale would be taken by the social security administration and medicare.” The statements by Debtor’s daughter, who may want to increase her inheritance rather than creditors be paid, is not persuasive testimony that the federal government will confiscate all of the Debtor’s exemption and leave her penniless, wasting away in a convalescent home.

Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Dismiss is granted, and the case is dismissed.

4. [16-20227](#)-E-13      **PAMELA BEARD HUGHES**      **MOTION FOR RELIEF FROM**  
**ABG-2**      **Mikalah Liviakis**      **AUTOMATIC STAY**  
           **10-24-16 [47]**

**21ST MORTGAGE CORPORATION**  
**VS.**

**Tentative Ruling:** 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.

-----  
Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were not served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 24, 2016. 43 days' notice was provided. 28 days' notice 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<b>The Motion for Relief from Automatic Stay is granted.</b>
--

Pamela Hughes (“Debtor”) commenced this bankruptcy case on November 15, 2016. 21st Mortgage Corporation (“Movant”) seeks relief from the automatic stay with respect to an asset identified as a 2003 HBOS Manufacturing Oakwood (27’x56’) Mobilehome, located at 6421 Capital Circle, Sacramento, California (“Property”). The moving party has provided the Declaration of Trey Gibson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor. FN. 1.

---

FN.1. Movant filed the motion and points & authorities and the declaration & exhibits in this matter as one document each. That is not the practice in the Bankruptcy Court. “Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court’s expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents, as required by Local Bankruptcy Rule 9004(a). Failure to comply is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

---

The Gibson Declaration provides testimony that Debtor has not made five post-petition payments, with a total of \$3,529.40 in post-petition payments past due.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$75,000.00, as stated in Schedules A/B and D filed by Debtor.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$75,659.27, as stated in the Gibson Declaration, while the value of the Property is determined to be \$75,000.00, as stated in Schedules B and D filed by Debtor.

## **TRUSTEE’S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a Response on November 21, 2016. Dckt. 53. The Trustee states that Debtor is current under the confirmed plan that classifies Movant in Class 4. The Trustee also notes that Debtor proposed a Modified Plan that was denied by the court. Debtor has paid \$7,529.00 to the Trustee, who holds \$1,218.46 currently.

## **DEBTOR’S “OPPOSITION”**

Debtor filed a Response on November 22, 2016, which the court interprets as an Opposition. Dckt. 61. Debtor confirms that she is delinquent in payments to Movant, but she asserts that she now seeks confirmation of another modified plan that will cure the mortgage arrears and make monthly payments to Movant.

Debtor asserts that she was not able to cancel certain auto-draft payments that had been established prior to filing for bankruptcy, which caused her to miss mortgage payments. Debtor is pursuing sanctions against at least two creditors she alleges violated the automatic stay by taking her automatic payments despite being notified of the bankruptcy case. *See* Dckts. 63 & 70.

## DISCUSSION

Debtor has filed a Modified Plan and Motion to Confirm. The court has reviewed the Motion to Confirm the Modified Plan and the Declaration in support filed by the Debtor. Dckt. 59. The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity), and the Declaration appears to provide testimony as to facts to support confirmation based upon the Debtor's personal knowledge. Fed. R. Evid. 601, 602.

Though the Debtor has not provided testimony that she is current on the proposed plan payments, there is no evidence she is not. The Creditor rushed to file this motion upon denial of the prior plan, stating as grounds the prior defaults and the court not confirming the prior plan. In reviewing the Civil Minutes from that denial, one of the items which weighed heavy with the court was the Debtor ignoring the alleged violations of the automatic stay and merely seeking to may Creditor delay getting any arrearage payments until the 28<sup>th</sup> month of the Plan.

Under the current proposed Plan Debtor again delays making any cure payments to Movant until the 28 month of the Plan. Debtor does not advance an argument why Movant an be forced to have its arrearage payment delayed two years. With a monthly plan payment of \$1,299.00, the Plan should be able to fund the following:

Plan Payment For 54 Months	\$1,299
Trustee Fee (Est. 7%)	(\$91)
Movant's Current Monthly Payment	(\$706)
Movant's \$3,200 Arrearage Over 54 Months	(\$60)
Dodge Car Loan	(\$382)
Monthly Amount For Legal Fees \$2,575 (\$42 over 60 months)	(\$60)
	-----
Surplus After Payment of Above	\$0

It appears Debtor could properly fund a plan to provide for paying Movant on its secured claim arrearage without deferring that payment for sixty months. However, it appears that the arrearage payment is being deferred to pay Debtor's counsel the balance due on his legal fees (after having received a partial payment from Debtor's legal insurance).

While Debtor is attempting to prosecute a plan, it does not properly address Movant's secured claim. 11 U.S.C. § 1325(a)(5)(B)(iii)(I) & (II) requires monthly payments to be in equal amounts that "shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan." Deferring payment to Movant on the post-petition arrearage is improper. *See In re Kirk*, 465 B.R. 300, 305 (Bankr. N.D. Ala. 2012) ("[S]taggering payments to secured claimants post-confirmation

to allow attorney's fees and other administrative expenses to be more rapidly paid is not permissible under the statutory framework for distribution of chapter 13 plan payments.") (citing *In re Willis*, 460 B.R. 784 (Bankr. D. Kan. 2011)); *see also In re Parker*, 1 BAMS L 685 (Bankr. E.D. Mo. 1981) (requiring creditor to wait twenty-one months before receiving payments on its secured claim does not meet requirements of 11 U.S.C. § 1325(a)(5)(B)(ii)).

While this court will allow some "flexibility" with stepped up payments based on objective future events, the court has been unwilling to allow a creditor to go unpaid on an arrearage claim for years.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because Debtor's continued use of the Property without providing adequate protection harms Movant's interest in the Property.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by 21st Mortgage Corporation ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Property, under its security agreement, loan documents granting it a lien in the asset identified as a 2003 HBOS Manufacturing Oakwood (27'x56') Mobilehome, located at 6421 Capital Circle, Sacramento, California ("Property"), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Property to the obligation secured thereby.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other additional relief is granted.

5. [16-25441](#)-E-13 AVELINO SANTOS  
NLG-1 Chad Johnson

**MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR RELIEF FROM CO-DEBTOR STAY  
11-4-16 [63]**

**DEUTSCHE BANK NATIONAL TRUST  
COMPANY VS.**

**Final Ruling:** No appearance at the December 6, 2016 hearing is required.  
-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on November 4, 2016. By the court's calculation, 32 days' notice was provided. 28 days' notice 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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.

<b>The Motion for Relief from the Automatic Stay is granted.</b>
--

Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1, its successors and/or assigns ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 912 Sapphire Circle, Vacaville, California ("Property"). Movant has provided the Declaration of Ryan Butryn to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Butryn Declaration states that there are two post-petition defaults in the payments on the obligation secured by the Property, with a total of \$1,908.44 in post-petition payments past due. The Declaration also provides evidence that there are ninety-two pre-petition payments in default, with a pre-petition arrearage of \$87,788.24.



## TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on November 22, 2016. Dckt. 73. The Trustee states that Debtor is current under the proposed plan, which has not been confirmed. The Trustee notes a discrepancy. Movant's Summary Sheet states that Movant holds a first deed of trust on the Property, but Movant's Claim No. 2 and Debtor's proposed plan state that Movant holds a second deed of trust. The Trustee also notes that the proposed plan calls for the Property to be surrendered.

## DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$476,705.45 (including \$187,613.56 secured by Movant's second deed of trust), as stated in the Butryn Declaration and Schedule D filed by Avelino Santos, Jr. ("Debtor"). The value of the Property is determined to be \$392,000.00, as stated in Schedules A and D filed by Debtor.

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, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

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. 11 U.S.C. § 362(g)(2); *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375–76 (1988). 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). Based upon the evidence submitted to the court, and no opposition or showing having been made by the Debtor or the Trustee, the court determines that there is no equity in the property for either the Debtor or the Estate, and the property 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 Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Movant also requests relief from the co-debtor stay, but the court notes that there is no co-debtor in this case. Accordingly, this portion of the Motion is denied as moot.

Because Movant has established that there is no equity in the property for Debtor and no value in excess of the amount of Movant's claims as of the commencement of this case, Movant is not awarded attorneys' fees as part of Movant's secured claim in the total amount of \$187,613.56 for all matters relating to this Motion.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Movant makes an additional request stated in the prayer, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. As noted by another bankruptcy judge, such (unsupported by any grounds or legal authority),

“request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.

Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.”

*In re Van Ness*, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the “silly” request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a per se violation of the automatic stay.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1, its successors and/or assigns (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Deutsche Bank National Trust Company, as Certificate Trustee on behalf of Bosco Credit II Trust Series 2010-1, its successors and/or assigns, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 912 Sapphire Circle, Vacaville, California.

**IT IS FURTHER ORDERED** that the request to terminate the co-debtor stay of 11 U.S.C. § 1301 is denied as moot, there being no co-debtor.

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause.

**IT IS FURTHER ORDERED** that Movant having established that the value of the Property subject to its lien not having a value greater than the obligation secured, Movant is not awarded attorneys’ fees as part of Movant’s secured claim in the total amount of \$187,613.56 for all matters relating to this Motion.

No other or additional relief is granted.

6. [16-24246-E-13](#) **RICHARD CRUZ**  
**TRM-62** **Eric Vandermey**

**MOTION FOR RELIEF FROM  
AUTOMATIC STAY AND/OR MOTION  
FOR ADEQUATE PROTECTION  
10-20-16 [\[72\]](#)**

**HILTON RESORTS CORPORATION  
VS.**

**Final Ruling:** No appearance at the December 6, 2016 hearing is required.  
-----

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 20, 2016. By the court's calculation, 47 days' notice was provided. 28 days' notice 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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.

<b>The Motion for Relief from the Automatic Stay is granted.</b>
--

Hilton Resorts Corporation, and/or its assigns ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 2000 Fashion Show Drive, Las Vegas, Nevada (the "Property"). Movant has provided the Declaration of Donna Barras to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Barras Declaration states that there are two post-petition defaults in the payments on the obligation secured by the Property, with a total of \$1,012.10 in post-petition payments past due. The Declaration also provides evidence that there are fifteen pre-petition payments in default, with a pre-petition arrearage of \$7,590.75.

## TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on November 21, 2016. Dckt. 88. The Trustee states that Debtor is current under the plan and has paid \$3,100.00 so far. The Trustee notes that even though Movant filed a proof of claim, Movant has not been provided for in the Plan.

## DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be \$37,021.32 (secured by Movant's first deed of trust), as stated in the Barras Declaration. The Property's value is determined to be \$0.00, as stated on Schedule D.

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, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

Movant makes an additional request stated in the prayer, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. As noted by another bankruptcy judge, such (unsupported by any grounds or legal authority),

"request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law

recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.

Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is."

*In re Van Ness*, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a per se violation of the automatic stay.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Hilton Resorts Corporation, and/or its assigns ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Hilton Resorts Corporation, and/or its assigns, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 2000 Fashion Show Drive, Las Vegas, Nevada .

**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is not waived for cause.

No other or additional relief is granted.

7. **16-20465-E-13**      **NYKIN RESHETNYAK AND**      **MOTION FOR RELIEF FROM**  
**APN-1**      **VALENTINA PETROVA**      **AUTOMATIC STAY**  
                 **Mark Shmorgon**      **11-7-16 [31]**  
**WELLS FARGO BANK, N.A. VS.**

**Tentative Ruling:** 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.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on November 7, 2016. By the court's calculation, 29 days' notice was provided. 28 days' notice 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Relief from the Automatic Stay is denied as moot.**

Nykin Reshetnyak and Valentina Petrova ("Debtor") commenced this bankruptcy case on January 28, 2016. Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2007 Dodge Truck Ram 3500 Pickup-V8, VIN ending in 7767 ("Vehicle"). The moving party has provided the Declaration of Shemeka Winston to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Winston Declaration provides testimony that Debtor has not made three post-petition payments, with a total of \$1,108.16 in post-petition payments past due.

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. Fed. R. Evid. 803(17). The NADA Valuation Report indicates a retail value of \$24,625.00 for the Vehicle.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$10,275.61, as stated in the Winston Declaration, while the value

of the Vehicle is determined to be \$19,000.00, as stated in Amended Schedule A/B filed by Debtor. Dckt. 23.

## **TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a Response on November 22, 2016. Dckt. 37. The Trustee notes that Debtor is current under the Plan, having paid \$1,720.00 to date. Movant is listed in Class 4 of the Plan, and the Trustee is not aware why Movant seeks additional relief, unless it believes that the phrase "in the event of a default under applicable law or contract" in the Plan requires a bankruptcy court determination that the Debtor is in default for Movant to seek relief.

## **DEBTOR'S OPPOSITION**

Debtor has provided evidence that the default that caused Movant to file this Motion has been cured. Exhibit B, Dckt. 42. Additionally, both Debtor and the Trustee are correct to illustrate that Movant did not need to file this Motion to seek relief against Debtor. Class 4 of the Plan states clearly that "[u]pon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." Even if Debtor had not cured the default, this Motion would be moot.

The default has been cured, and Movant did not need to file this Motion according to the Plan. The Motion is denied as moot, the automatic stay having already been terminated by confirmation of the Chapter 13 Plan.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the Motion is denied as moot, the automatic stay having been terminated for Movant as it relates to Movant's secured claim for which the 2007 Dodge Truck Ram 3500 Pickup-V8, VIN ending in 7767, is the collateral, by the confirmation of the Chapter 13 Plan in this case, which provides, "Upon confirmation of the plan, all bankruptcy stays are modified to allow the holder of a Class 4 secured claim to exercise its rights against its collateral and any nondebtor in the event of a default under applicable law or contract." Chapter 13 Plan, Section 2.11, Dckt. 5; Confirmation Order; Dckt. 26.



8.

[15-22182](#)-E-13  
DPC-4

RUTH CLARK  
Peter Macaluso

CONTINUED MOTION TO DISMISS  
CASE  
10-17-16 [\[178\]](#)

**APPEARANCE OF RUTH CLARK, THE CHAPTER 13 DEBTOR,  
AND THOMAS CAREY  
REQUIRED AT THE HEARING**

**NO TELEPHONIC APPEARANCES PERMITTED**

**Tentative Ruling:** 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.

-----

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on October 17, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

<p><b>The Motion to Dismiss is granted, and the case is dismissed.</b></p>
--

**DISMISSAL OF MOTION FILED BY TRUSTEE**

The Chapter 13 Trustee filed an Ex Parte Motion to Dismiss the pending Motion on November 7, 2016. Dckt. 185. In requesting the Ex Parte dismissal of the current motion, the Chapter 13 Trustee states that Debtor and Debtor's counsel delivered a proposed order confirming the Chapter 13 Plan (sometime between the November 2, 2016 filing of Debtor's Opposition and the November 7, 2016 filing of the Trustee's Ex Parte Motion to dismiss the present Motion).

**NOVEMBER 16, 2016 HEARING**

At the hearing, the court believed that the Debtor and Thomas Carey were present because: (1) the court's tentative ruling granting the Motion and dismissing the case, and (2) that granting the Motion would result in the case being dismissed. Though the Chapter 13 Trustee filed an ex parte motion to dismiss the Motion, the court in the tentative ruling announced that the ex parte motion was denied. Dckt. 187.

The court continued the hearing to 1:30 p.m. on December 6, 2016. Dckt. 191. The court ordered Ruth Clark and Thomas Carey to appear personally at the continued hearing. Also, the court ordered that on or before November 30, 2016, Debtor shall file a report identifying what documents were required to be issued by or obtained from El Dorado Savings Bank that precluded Debtor from attempting to engage the services of a real estate broker during the period from August 2016 through October 2016 and why that inability of the Debtor to act arises from the conduct of El Dorado Savings Bank.

## **REPORT OF EL DORADO SAVINGS BANK**

On November 30, 2016, El Dorado Savings Bank filed a Report in which it states that it previously completed a foreclosure on Debtor's residence, but then agreed to rescind and has rescinded that foreclosure sale. Dckt. 194; *see also* Exhibit C, Dckt. 91. The Rescission is reported to have been recorded on July 22, 2015, seventeen months ago. The Bank does not assert to having done anything further that Debtor has been waiting on before she could promptly hire a real estate broker and market her property.

## **CONDUCT OF DEBTOR**

Debtor has not filed any supplemental pleadings.

This case has a long, difficult history, with Debtor seemingly trying to get the case dismissed and lose her equity in her home. The court issued its order granting the Debtor's Motion to Confirm the Amended Chapter 13 Plan on August 29, 2016. Order, Dckt. 177. Much information was begrudgingly provided by Debtor and her counsel. The fact that Carey Thomas, her supposed financial benefactor, held a power of attorney was not disclosed until late in this case.

Debtor provided the court with patently inaccurate financial information concerning her expenses. The court addresses this incomplete (and inaccurate) statement of expenses in the Civil Minutes from the confirmation hearing. August 23, 2016 Civil Minutes, Dckt. 175 at 7– 8. Notwithstanding the lack of candor, truthfulness, and accuracy by the Debtor and her allies, the court confirmed the plan that provides for Debtor to sell her property and save her homestead exemption. In the Civil Minutes, the court stated the additional language that Mr. Carey agreed to in open court.

Notwithstanding the Ruling of the court on the Motion to confirm and Mr. Carey committing to the order terms, counsel for Debtor did not submit to the Chapter 13 Trustee the order confirming the Plan. A week passed, then two weeks. Weeks turned into months, until the Trustee filed the present Motion to Dismiss on October 17, 2016. Then, on November 2, 2016, seventy-one days after Mr. Carey agreed to the terms of the order in open court, Debtor's counsel advises the court that "Mr. Thomas (misidentifying the Debtor's benefactor, which causes the court to believe that Debtor's counsel did not prepare this pleading) is seeking independent legal counsel on the signing of the Order. . . ." Opposition, Dckt. 183. Why seventy-one days after the hearing and stating on the record his agreement was he only then seeking "independent legal counsel" is unstated.

From this delay and inaction by Debtor and Debtor's counsel, the court concludes that Debtor, Debtor's counsel, and Mr. Carey (who states he holds a power of attorney for Debtor) are not prosecuting

this case in good faith. Mr. Carey has demonstrated that his word is not his bond, and is looking for (and is likely to flee) his legal obligations to Debtor and under the Plan.

That the Debtor, Debtor's counsel, and Mr. Carey did not promptly act to get the order confirming the plan in place and acted, begrudgingly, only on the eve of hearing on this present motion is consistent with their prior improper conduct in this case. It further demonstrates that the Debtor, and Debtor's counsel, have no good faith intention to proceed with the marketing and sale of the real property as provided in the Plan, but are working only to mislead the court as they ignore their obligations.

As stated in the Civil Minutes for the August 23, 2016 Confirmation Hearing:

"At the hearing, Mr. Carey stated on the record his concurrence with the above mandatory injunction. It was also stated that the Debtor now believes that it is in her interests to sell the home, will be employing (with authorization from the court) a real estate broker, and listing her home for sale (which sale shall be approved by the court)."

Dckt. 175, p. 12.

In the eighty-three days from stating that in open court and the November 14, 2016 hearing on this Motion to Dismiss, no real estate broker has been engaged to market the property.

Now, another thirty days have passed and Debtor still has not attempted to employ a real estate broker to market the property.

## **RULING**

The court denied the Chapter 13 Trustee's *Ex Parte* Motion to Dismiss the Motion before the court. While the court appreciates the Trustee's compassion and the court's preference to allow good faith debtors and their attorneys every opportunity to prosecute a Chapter 13 plan, in this case that compassion is misplaced.

The court grants the Chapter 13 Trustee's Motion to Dismiss this bankruptcy case. As addressed above and in the court's prior rulings, the Debtor, Debtor's counsel, and Mr. Carey have been less than honest and forthright in the prosecution of this case. Having saved the Debtor from foreclosure by the thinnest of hairs, a good faith debtor, good faith counsel, and good faith benefactor would quickly have gotten the order confirming the plan in place and a real estate broker employed. Mr. Carey had already stated in open court that he was obligated to provide the plan funding for sixty months. The order confirming as required by the court does nothing more, other than make that promise legally enforceable. Mr. Carey was unwilling to allow that order to proceed until, once again, forced by the Chapter 13 Trustee. Such does not bode well for the performance of a plan.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 Case filed by the Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt.185, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Trustee's Motion to Dismiss the Chapter 13 Case is granted, and the bankruptcy case is dismissed.

9.	<a href="#"><u>16-24396</u></a> -E-13 RSM-4	<b>ROBERT MACBRIDE</b> Pro Se	<b>CONTINUED MOTION TO CONFIRM PLAN</b> 9-27-16 <a href="#"><u>[47]</u></a>
----	--	----------------------------------	--

**Tentative Ruling:** 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.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on September 17, 2016. By the court's calculation, 80 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

<b>The Motion to Confirm the Amended Plan is denied.</b>
--

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

## **TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 3, 2016. Dckt. 62. The Trustee states the following:

- A. Robert MacBride ("Debtor") is delinquent, having made no plan payments.
- B. The proposed plan pays post-petition arrears to Ocwen Loan Servicing in Class 1, which Class 1 may not be entitled to under 11 U.S.C. § 1322(e).
- C. The proposed plan will complete in seventy-four months, exceeding the maximum of sixty months.
- D. Debtor may not be able to make plan payments because the nature of his work is unpredictable, and he provides very little household support on Schedule J.
- E. The proposed plan may not be feasible because Debtor has not provided declarations in support of the family contributions claimed on Schedule I.
- F. The proposed plan may not be the Debtor's best efforts because he has proposed a duplicate mortgage payment and may have additional income.
- G. Debtor listed a claim by County of Sacramento in Class 5, but the claim may be entitled to interest.
- H. Proper notice was not provided.
  - 1. Debtor's Declaration was not served on all creditors.
  - 2. Correct notice was not provided to the Internal Revenue Service ("IRS") and Franchise Tax Board ("FTB").
- I. Debtor failed to provide a copy of his tax transcript or Federal Income Tax Return for 2015.
- J. The Motion does not plead with particularity any grounds upon which the court can determine why the Plan is being amended.
- K. Debtor has not reported all assets relating to investment accounts and sales of stock accounts in 2014.

## **NOVEMBER 22, 2016 HEARING**

The court continued the hearing on the Trustee's Motion to Dismiss to 1:30 p.m. on December 6, 2016, due to defaults in plan payments and other asserted plan defects. The court was not provided with

information as to whether Debtor has addressed the default in payments and the other issues. The court continued hearing on the Motion to Confirm Amended Plan to the same time as the continued hearing on the Motion to Dismiss—1:30 p.m. on December 6, 2016—to assess the status of the case and whether Debtor is pursuing the Plan. Dckt. 72.

## **DISCUSSION**

The Trustee's objections are well-taken.

Debtor is \$8,613.00 delinquent in plan payments, which represents multiple months of the \$2,871.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Amended Plan does not comply with 11 U.S.C. § 1325(a)(1) because it provides improper post-petition arrearage interest to Class 1. Section 2.08(a)(1) of the proposed plan states that all arrears on Class 1 claims shall be paid in equal monthly installments on a cure that incurs interest unless 0% interest is specified. Debtor left the interest rate column blank for Class 1, meaning by the terms of the Amended Plan interest accrues at 10%.

Debtor is in material default under the Amended Plan because the it will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in seventy-four months due to insufficient payments to pay all class as proposed. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

The Debtor may not be able to make plan payments or comply with the plan under 11 U.S.C. § 1325(a)(6). On Schedule I, Debtor reports \$1,200.00 per month earned as a handyman and \$2,000.00 per month from online retail sales. At the Meeting of Creditors, Debtor stated that he earns a maximum of \$275.00 per month from handyman work and a maximum of \$1,200.00 from online retail sales. The difference is \$1,725.00. Debtor also lists on Schedule J that his expenses are \$180.00 for food, \$10.00 for clothing, \$15.00 for personal care, and \$50.00 for transportation. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the plan is confirmable.

Debtor has claimed family contributions, but he has not provided supporting declarations. The Trustee and the court cannot determine the feasibility of the proposed plan, and Debtor may not be able to comply under 11 U.S.C. § 1325(a)(6).

The proposed plan is not Debtor's best effort under 11 U.S.C. § 1325(b) because he has proposed mortgage payments in Class 1 of the Amended Plan, but he has also deducted ongoing monthly mortgage payments (in the amount of \$1,807.52) on Schedule J. Such duplication is not allowed, leaving additional disposable income for the Debtor to report.

Debtor appears to have violated 11 U.S.C. § 1325(a)(1) because Claim 2.3 for County of Sacramento has been listed in Class 5, but Debtor admitted at the Meeting of Creditors that the claim is for property taxes, which would be a secured claim and entitled to interest.

Debtor has not complied with Federal Rule of Bankruptcy Procedure 2002(b) in that he has not provided adequate notice to the IRS and the FTB, and he has not served his declaration in support of the Motion on all creditors. That is a violation of Local Bankruptcy Rules 2002-1(b) & (c) and 9014-1(e)(1).

Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required—2015. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). This is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

### **Motion Pleading Practice**

Though appearing in pro se, Debtor must comply with the basic rules, including those for pleadings. The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based. The motion merely states legal conclusions and instructs the court and parties in interest to mine other pleadings and assemble for Movant the required grounds. That is not sufficient or proper under the Federal Rules of Bankruptcy Procedure or Federal Rules of Civil Procedure (Fed. R. Civ. 7(b)).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The Twombly pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Here, the motion states the following "grounds" upon which confirmation is requested: (1) Debtor filed bankruptcy and (2) as set forth in the declaration the Plan complies with 11 U.S.C. § 1325. Dckt. 47. This is nothing more than a partial stating of what the court's ultimate conclusions of law could be if the Motion were to be granted.

Though the Declaration may state what should be grounds stated in the Motion, the Declaration is not the "motion." Each is a separate pleading, serving separate legal purposes. L.B.R. 9004-1 and the Revised Guidelines for Preparation of Documents for the Eastern District of California. Much of the "personal knowledge" testimony (Fed. R. Evid. 601, 602) is merely Debtor's personal conclusions of law and not testimony of facts by which the court can then make the actual findings of fact and conclusions of law.

Not stating with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Civil Procedure 7(b) and Federal Rules of Bankruptcy Procedure 7007 and 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try to float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were “mere academic postulations” not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such “postulations.”

Lastly, it appears that Debtor has not reported all of his assets because Debtor’s 2014 tax return indicates that there are unreported investment accounts, including some that were sold in 2014. At the Meeting of Creditors, Debtor stated that he did not list the accounts because there is money in them. The Trustee is uncertain of what assets Debtor has not reported.

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

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.



**Tentative Ruling:** 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.

-----

Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on October 17, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

<p><b>The Motion to Dismiss is granted, and the case is dismissed.</b></p>
--

The Trustee argues that the Debtor did not commence making plan payments and is \$5,742.00 delinquent in plan payments (with another \$2,871.00 coming due before the hearing), which represents multiple months of the \$2,871.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

#### **DEBTOR'S OPPOSITION**

Robert MacBride ("Debtor") filed an Opposition to the Trustee's Motion on November 2, 2016. Dckt. 59. The Debtor states that the Trustee does not have an obligation to make any adequate protection payments to a creditor until a proof of claim has been filed and that the Trustee is required to pay the arrears owed to the creditor holding a secured claim before he can make payments to either the priority unsecured creditor or the unsecured creditor, which would mean that there has been no unreasonable delay to those creditors.

#### **NOVEMBER 16, 2016 HEARING**

At the hearing, the court continued the matter to 1:30 p.m. on December 6, 2016, to allow Debtor to become current with plan payments and to address any other defaults.

## **DISCUSSION**

Neither Debtor nor the Trustee has filed any supplemental pleadings indicating that the default has been cured. Therefore, cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss is granted, and the case is dismissed.