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8 UNITED STATES BANKRUPTCY COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

10 In re ) Case No. 05-62381-B-13  
11 Claudine Lopez, ) DC No. MHM-1  
12 Debtor. )  
13 \_\_\_\_\_)

14 **MEMORANDUM DECISION REGARDING TRUSTEE'S**  
15 **MOTION FOR ORDER OF DISMISSAL**

16 This memorandum decision is not approved for publication and may not be cited except  
17 when relevant under the doctrine of law of the case or the rules of res judicata and claim  
preclusion.

18 Michael H. Meyer, Esq., appeared in his capacity as the chapter 13 trustee (the  
19 "Trustee").

20 Terri L. McCracken, Esq., appeared on behalf of debtor Claudine Lopez (the "Debtor").

21 Before the court is the Trustee's motion to dismiss this chapter 13 case for "cause"  
22 pursuant to 11 U.S.C. § 1307(c)<sup>1</sup> (the "Motion"). For the reasons set forth below, the  
23 Trustee's Motion will be conditionally denied, provided the Debtor shall, within ten (10)  
24 days, properly file, serve, and notice a hearing to approve a modified chapter 13 plan.

25 This memorandum decision contains the court's findings fact and conclusions of  
26

27  
28 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code,  
11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted  
and promulgated *prior* to October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 law as required by Federal Rule of Civil Procedure 52(a), made applicable to this  
2 contested matter by Federal Rule of Bankruptcy Procedure 7052. The bankruptcy court  
3 has jurisdiction over this matter under 28 U.S.C. § 1334 and 11 U.S.C. § 1307 and  
4 General Orders 182 and 330 of the U.S. District Court for the Eastern District of  
5 California. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

6 **Background.**

7 This bankruptcy was filed as a voluntary chapter 13 on October 14, 2005. The  
8 Debtor confirmed a chapter 13 plan on January 31, 2006 (the “Plan”). The Plan, as  
9 modified by the confirmation order, required the Debtor to make monthly payments to the  
10 Trustee in the amount of \$150, culminating with one balloon payment sufficient to pay  
11 100% of all allowed unsecured claims (estimated in the Plan to be \$55,392.14) in the 24th  
12 month of the case. The Plan suggests, but does not require, that the source of funds for  
13 the balloon payment will be a refinance of the house that the Debtor lives in (the  
14 “Residence”).

15 On December 19, 2007, the Trustee brought this Motion on the grounds that the  
16 Debtor failed to make the balloon payment when it came due after 24 months, i.e., at the  
17 end of October 2007. The Debtor appeared with her attorney, Terri L. McCracken, Esq.,  
18 in opposition to the Motion. Ms. McCracken represented to the court that title to the  
19 Residence is presently vested in the name of the Debtor’s deceased husband. Further, the  
20 Debtor cannot refinance the Residence and pay off the Plan unless and until she  
21 successfully completes a probate proceeding for her deceased husband and acquires title  
22 to the Residence. Ms. McCracken acknowledged that the Debtor had failed to commence  
23 any proceedings in the probate court during the two years after the Plan was confirmed;  
24 she requested a one year extension of the Plan, and deferral of the balloon payment, to file  
25 and complete the probate proceeding and the refinance process. Ms. McCracken  
26 represented that she “closed her file and forgot” about the case after the Plan was  
27 confirmed in 2006 and she accepted full responsibility for the default. The court  
28 instructed Ms. McCracken to file and serve a modified plan immediately and took the

1 Trustee's Motion under submission to monitor the progress of that effort.

2 As of this date, the Debtor has not filed a modified plan or properly set the matter  
3 for a hearing in compliance with this court's General Order 05-03 ¶ 8(b) (effective  
4 October 17, 2005), as amended by General Order 06-01, which prescribes the procedure  
5 for modification of chapter 13 plans. The court notes that Ms. McCracken did file a  
6 purported motion to modify the Plan, and noticed a hearing for February 14, 2008, but  
7 those pleadings do not include a modified plan and the purported motion to modify  
8 cannot be approved. Pursuant to § 1327(a), the debtor and the creditors are bound by the  
9 terms of the confirmed plan unless and until it is properly modified, at which point, the  
10 modified plan becomes the plan and sets the new benchmarks for performance.  
11 § 1329(b)(2). The creditors in this case were originally promised full payment within 24  
12 months and the ongoing delay is prejudicial to creditors. The court is persuaded that  
13 cause will exist to dismiss this case under § 1307(c) unless, within ten (10) days, a  
14 modified plan is filed and properly set for hearing in compliance with the Bankruptcy  
15 Code, the Federal Rules of Bankruptcy Procedure, and the General Orders and Local  
16 Rules of this court.

17 **Conclusion.**

18 Based on the foregoing, the Trustee's Motion to dismiss this chapter 13 case will  
19 be denied, provided the Trustee may renew his request for dismissal by ex parte  
20 application after ten (10) days if the Debtor fails to file a modified chapter 13 plan to cure  
21 the default and properly set a hearing on her motion for approval of the modified plan, in  
22 compliance with, *inter alia*, this court's General Order 05-03 ¶ 8(b). The Trustee may  
23 also renew this Motion on ten (10) days' notice if the modified plan is not approved for  
24 any reason.

25 Dated: January 23, 2008

26  
27 /s/ W. Richard Lee  
28 W. Richard Lee  
United States Bankruptcy Judge