

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher M. Klein  
Chief Bankruptcy Judge  
Sacramento, California

April 21, 2015 at 1:30 P.M.

1. [14-27476](#)-C-13 EDUARDO/MARIE ORTEGA  
CA-3

CONTINUED MOTION TO CONFIRM  
PLAN  
2-5-15 [[142](#)]

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**At this hearing, an evidentiary hearing will be scheduled to resolve the factual issues involved in the plan confirmation.**

**Tentative Ruling:** The Motion to Confirm the 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). 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.**

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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, all creditors, parties requesting special notice, and Office of the United States Trustee on February 5, 2015. Forty-two days' notice is required. That requirement was met.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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 court's tentative decision is to deny the Motion and not confirm the Plan.</b>
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MARCH 25, 2015 HEARING

The court concluded that an evidentiary hearing will be required to determine the factual issues in dispute and continued the scheduling question to April 14, 2015.

#### Trustee's Objection

Chapter 13 Trustee opposes confirmation of the Plan on the basis that Debtor is \$11,637.00 delinquent in plan payments to Trustee to date and the next scheduled payment of \$5,987.00 is due March 25, 2015.

#### Creditor's Objection

Creditor Robert Guerra opposes confirmation of the Plan on the basis that:

1. The Plan proposes to pay only a fraction of Creditor's debt. Creditor has a non-dischargeable debt for fraud in the amount of \$125,000 and the Plan only proposes to pay Creditor \$562.50 per month for five years.
2. The Plan was not filed in good faith, evidence by the fact that the plan does not reflect Debtors' substantial salary increase.

The Plan does not comply with 11 U.S.C. §§ 1322 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 Plan is denied and the proposed Chapter 13 Plan is not confirmed.

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**At this hearing an evidentiary hearing will be scheduled-see calendar item #1.**

**Tentative Ruling:** The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

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 January 27, 2015. Fourteen days' notice is required. That requirement was met.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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. At the hearing -----  
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<b>The court's decision is to grant the Motion to Dismiss, the case is dismissed.</b>
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#### **PRIOR HEARINGS**

This matter was continued from the February 10, 2015 2:00 p.m. hearing. The court docket reflects no further filings beyond the original filings to the instant motion.

At the hearing on March 24, 2015, the court concluded that an evidentiary hearing will be required to determine the factual issues in dispute. The hearing was continued to April 14, 2015 to allow the court to determine how it wants to schedule the evidentiary hearing.

The court determined that a further continuance is required so that the instant Motion to Dismiss may be heard in conjunction with the evidentiary hearing on the Motion to Confirm the Chapter 13 Plan. The matter was continued to April 21, 2015 at 1:30.

Creditor, Robert Guerra, seeks dismissal of Debtor's case based on the following:

1. Debtors' failure to confirm a Chapter 13 plan has cause unreasonable delay that is prejudicial to Creditor. 11 U.S.C. § 1307(c)(1). Creditor is the largest unsecured creditor of the estate with a \$125,000 plus judgment which is non-dischargeable under 11 U.S.C. § 523(a)(2). Creditor asserts that Debtors have filed two bankruptcy cases (including the instant one) in order to avoid debt payment to Creditor. Creditor is a pensioner who has receive little in payment of his non-dischargeable judgment against Debtors. Debtors' bankruptcy filings and failure to submit a confirmable bankruptcy plan have been cause highly prejudicial delays to him.
  - a. Creditor obtained a non-dischargeable judgment against Debtors from the Bankruptcy Court of the Central District of California (Adversary Case No. 97-01766). Creditor asserts that when each of the bankruptcy cases was filed, a wage garnishment was in place against Debtors.
  - b. The Debtors filed a previous Chapter 13 bankruptcy case in October of 2012, in which the Debtors' proposed plan paid unsecured creditors no money and sought to discharge Creditor's non-dischargeable debt. Creditor objected and Debtors filed an amended Chapter 13 plan paying a de minimis dividend over five years and excepting Creditor's claim from discharge. Creditor again objected to the amended plan and filed a motion to dismiss on the grounds that Debtors were ineligible for Chapter 13 by reason of having too much debt to qualify. Debtors then converted their prior case to Chapter 7.
  - c. The instant Chapter 13 bankruptcy was filed by Debtors on July 22, 2014. The initial plan and amended plan in the instant action sought to pay Creditor little to no monies. Creditor filed objections to both plans on the basis that they were not filed in good faith and failed to include all of Debtors' disposable income. Both proposed plans have been denied by the court to date. Debtors have not submitted any further amended plans that may be confirmable.

#### **DEBTORS' RESPONSE**

Debtors respond that they have been prosecuting their case in good faith, pointing out that they are current on fees and payments, have paid over \$30,000 into the plan to date, and only await confirmation of a plan for Trustee to begin distributing funds.

Debtors further provide that after filing this case on July 22, 2014, Debtors disclosed receiving a post-petition raise, and incorporated all changes in a First Amended Chapter 13 plan and motion to confirm on November 11, 2014. By the confirmation hearing on January 13, 2015, Debtors had satisfactorily resolved objections from Trustee and Creditor Wells Fargo Bank, N.A., each

willing to set forth the resolution in the order confirming the plan. The only objection outstanding as of January 13, 2015 was that of Creditor-Movant, Robert Guerra.

Debtors assert that this is Creditor's second motion to dismiss, as they were successful in defeating Movant's first motion to dismiss on December 3, 2014.

Debtors filed a second amended plan on February 5, 2015 addressing the Creditor-Movant's above concerns and have set the confirmation of that plan for March 24, 2015, today's hearing.

## **DISCUSSION**

The court is not satisfied that Debtors are adequately prosecuting their Chapter 13 case. The court is concerned by the Debtors' inability to confirm a plan, and the prejudice this delay creates for Creditor Robert Guerra, who in 1997 obtained a non-dischargeable fraud judgment against Debtors from the Bankruptcy Court of the Central District of California (Adversary Case No. 97-01766).

Further, as noted by Trustee's objection to the motion to confirm plan, Debtors are \$11,637.00 delinquent in plan payments to Trustee to date. Failure to make plan payments is unreasonable delay which is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

In light of the unreasonable delay that is prejudicial to Creditor Robert Guerra, as well as Debtors' inability to confirm chapter 13 plan due to delinquency in plan payments, 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.

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