

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

**June 21, 2017, at 10:00 a.m.**

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1. <a href="#"><u>17-22593-E-13</u></a> <b>HOWARD THOMAS</b> <b>W. Steven Shumway</b>	<b>STATUS CONFERENCE RE: CHAPTER 13 VOLUNTARY PETITION 6-6-17 <a href="#"><u>1</u></a></b>
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Debtor's Atty: W. Steven Shumway

<b>The Status Conference is <span style="color: red;">XXXXXXXXXXXXXXXXXXXX</span>.</b>
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Notes:

Set by order of the court dated 6/6/17 [Dckt 24]

[WSS-1] Order granting temporary waiver of credit counseling requirement filed 4/20/17 [Dckt 7]

[WSS-1] Debtor's Request to Dismiss Chapter 13 Case filed 5/23/17 [Dckt 19]; not set for hearing

Meeting of Creditors to be held 8/23/17 [Dckt 16]

[WSS-3] Application for order shortening time on motion to sell property filed 6/27/17 [Dckt 29]; Order granting filed 6/8/17 [Dckt 33], set for 6/8/17 at 10:30 a.m.

**JUNE 21, 2017 STATUS CONFERENCE**

A Chapter 13 case was filed for Howard Thomas ("Putative Debtor") on April 19, 2017. The Petition is not signed by Putative Debtor but by someone purporting to have a power of attorney granted by the Putative Debtor. Petition, Dckt. 1. This is not the first bankruptcy case filed for Putative Debtor with the assistance of his current attorney: It is not the second or even third recent cases by such counsel for Putative Debtor. This is the fourth case filed for Putative Debtor since May 2015. Each case was dismissed due to defaults in payments or failure to attend the First Meeting of Creditors, and failure to prosecute the case. E.D. Cal. Nos. 15-23697, 15-27296, and 16-28236. In some cases, including the current case, no plan payments were made by Putative Debtor. In other cases, while some payments may have been made, the defaults predominate.

In Case No. 16-28236, the Chapter 13 Trustee's Motion to Dismiss states that Putative Debtor failed to attend the First Meeting of Creditors. W. Steven Shumway as the attorney for Putative Debtor,

**June 21, 2017, at 10:00 a.m.**

appeared at the First Meeting of Creditors, however, and stated that Putative Debtor was incarcerated, had been incarcerated for some time, and would be incarcerated for the foreseeable future. 16-28236; Motion, Dckt. 21. Mr. Shumway further advised the court that the Petition, Schedules, Statement of Financial Affairs, and other related documents had been signed by someone else using a power of attorney. *Id.* There were no “wet signatures” on those documents filed in the 2016 case; the signatures were merely the “/s/ Name of Putative Debtor.”

On June 6, 2017, the court issued an order for this Status Conference. Dckt. 24. In the Order, the court discusses the above and a number of other points that cause grave concern over the filing and prosecution of this bankruptcy case in the name of Putative Debtor.

On June 15, 2017, the court held a hearing on shortened time on a Motion for the court to retroactively approve the sale of property “by” Putative Debtor, Easter Perkins purporting to act for the Putative Debtor pursuant to a power of attorney. The court identified other serious issues concerning the filing and prosecution (or lack thereof) of this and the prior bankruptcy cases. Civil Minutes, Dckt. **xx**.

### **Status Report**

On June 14, 2017, Steven Shumway, as the attorney for Putative Debtor, filed a Status Report as requested by the court. Dckt. 47. In it counsel states that on some unstated date prior to February 2015, Putative Debtor married Easter Perkins. Status Report, p. 2:4–5; Dckt. 47. However, at the June 15, 2017 hearing on the Motion for retroactive approval of the sale of property, Mr. Shumway advised the court that the actual marriage documents may not have been completed. Whether such a marriage exists is an open question, not a “fact” as stated in the Status Report.

In denying without prejudice the Motion for retroactive approval, the court noted that Easter Perkins, Mr. Shumway as counsel for Putative Debtor, and others for whom disbursements from the sales proceeds were sought appeared to be more interested in getting their money than properly fulfilling Ms. Perkins under the purported power of attorney in acting in Putative Debtor’s interests. It appeared that Ms. Perkins, with the assistance of Mr. Shumway, was willing to “gift” more than \$12,000.00 to a creditor with an avoidable lien and wasting that much of Putative Debtor’s homestead exemption. Civil Minutes, Dckt. **xx**.

In the Status Report, Mr. Shumway recites a series of “facts” with respect to Putative Debtor and how the various bankruptcy filings have come about. Mr. Shumway and Putative Debtor have provided a number of documents in support of the Status Report. Exhibits A–F, Dckt. 48; Exhibits G–I, Dckt. 49.

One of the documents is stated to be a “Uniform Borrower Assistance Form” that states it is submitted by Putative Debtor as borrower and Easter Perkins as the “co-borrower/non-obligor.” This document is signed only by Easter Perkins, personally and for Putative Debtor based on a power of attorney.

### **Additional Information Provided at Status Conference**

**xxxxxxx**

2. [15-25102](#)-E-13      LARRY/ROSEMARY CALKINS      CONTINUED MOTION TO DISMISS  
DPC-3      Peter Macaluso      CASE  
5-3-17 [\[77\]](#)

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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**The Motion to Dismiss is dismissed without prejudice, and the bankruptcy case shall proceed in this court.**

The Chapter 13 Trustee having filed an Ex Parte Motion to Dismiss the pending Motion on June 15, 2017, Dckt. 98; no prejudice to the responding party appearing by the dismissal of the Motion; the Trustee having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Debtor; the Ex Parte Motion is granted, the Trustee's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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. 98, 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 dismissed without prejudice, and the bankruptcy case shall proceed in this court.

**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).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 May 30, 2017. By the court's calculation, 22 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Dismiss is granted, and the case is dismissed.**

The Trustee argues that Debtor did not commence making plan payments and is \$940.00 delinquent in plan payments, which represents multiple months of the \$470.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor presented no opposition to the Motion.

The Trustee alleges that Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

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.

4. [13-24610-E-13](#)      **DAX/TINA CHAVEZ**      **CONTINUED MOTION TO DISMISS**  
**DPC-6**      **Peter Macaluso**      **CASE**  
3-1-17 [[157](#)]

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

**The Motion to Dismiss is dismissed without prejudice, and the bankruptcy case shall proceed in this court.**

The Chapter 13 Trustee having filed an Ex Parte Motion to Dismiss the pending Motion on June 15, 2017, Dckt. 230; no prejudice to the responding party appearing by the dismissal of the Motion; the Trustee having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Debtor; the Ex Parte Motion is granted, the Trustee's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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. 230, 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 dismissed without prejudice, and the bankruptcy case shall proceed in this court.

5.     [16-25610](#)-E-13     PAUL FERNANDES     MOTION TO DISMISS CASE  
DPC-2     Kristy Hernandez     6-6-17 [[99](#)]

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

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The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

6.     [17-20011](#)-E-13     DANIEL MARTINEZ     MOTION TO DISMISS CASE  
DPC-1     Mikalah Liviakis     6-6-17 [[15](#)]

**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).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 -----.

<b>The Motion to Dismiss is granted, and the case is dismissed.</b>
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The Trustee seeks dismissal of the case on the basis that Debtor is \$10,137.00 delinquent in plan payments, which represents multiple months of the \$3,379.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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.

7. <a href="#"><u>17-22014</u></a> -E-13 DPC-3	OMID FANAIAAN Pro Se	<b>MOTION TO DISMISS CASE AND/OR MOTION TO CONVERT CASE FROM CHAPTER 13 TO CHAPTER 7 5-24-17 [31]</b>
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**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.

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

Sufficient 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 May 24, 2017. By the court's calculation, 28 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). 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).

**The Motion to Convert the Chapter 13 Bankruptcy Case to a Case under Chapter 7 is granted, and the case is converted to one under Chapter 7.**

This Motion to Convert the Chapter 13 bankruptcy case of Omid Fanaian ("Debtor") has been filed by David Cusick, the Chapter 13 Trustee. The Trustee asserts that the case should be dismissed or converted based on the following grounds:

- A. Debtor did not commence making plan payments and is delinquent \$800.00 to the Trustee (with another \$800.00 becoming due before the hearing), which represents one month of the \$800.00 plan payment.
- B. Debtor's non-exempt equity totals \$1,240,700.00.

## APPLICABLE LAW

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: “[f]irst, it must be determined that there is ‘cause’ to act[;] [s]econd, once a determination of ‘cause’ has been made, a choice must be made between conversion and dismissal based on the ‘best interests of the creditors and the estate.’” *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause . . . .

11 U.S.C. § 1307(c). The court engages in a “totality of circumstances” test, weighing facts on a case-by-case basis and determining whether cause exists, and if so, whether conversion or dismissal is proper. *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120, 1123 (9th Cir. 2013) (citing *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219 (9th Cir. 1999)). Bad faith is one of the enumerated “for cause” grounds under 11 U.S.C. § 1307. *Nady v. DeFrantz (In re DeFrantz)*, 454 B.R. 108, 112 n.4 (B.A.P. 9th Cir. 2011) (citing *In re Leavitt*, 171 F.3d at 1224).

## DISCUSSION

The Trustee argues that Debtor did not commence making plan payments and is \$800.00 delinquent in plan payments (with another \$800.00 coming due before the hearing), which represents one month of the \$800.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor presented no opposition to the Motion.

Debtor's non-exempt equity totals \$1,240,700.00. Debtor scheduled the following assets: (1) Las Vegas properties on Schedule A valued at \$239,000.00, \$219,000.00, \$231,000.00; and (2) all assets on Schedule B valued at \$551,700.00. Debtor claimed 100% of fair market value, instead of claiming specific dollar amounts. California Code of Civil Procedure § 703.140(b)(2)–(5) does not allow claiming 100% of fair market value and requires the claimant to list actual values. The Court retains the discretion to convert a Chapter 13 case to Chapter 7 case if it is in the best interests of creditors and the estate. 11 U.S.C. § 1307(c).

Cause exists to convert this case pursuant to 11 U.S.C. § 1307(c) because Debtor has not made any plan payments but has substantial assets that can be distributed through liquidation. The Motion is granted, and the case is converted to a case under Chapter 7.

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 Convert the Chapter 13 case filed by David Cusick 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 Convert is granted, and the case is converted to a proceeding under Chapter 7 of Title 11, United States Code.

8. [17-21424](#)-E-13      **YVETTE EWELL**      **MOTION TO DISMISS CASE**  
DPC-1      **Mikalah Liviakis**      **5-23-17 [16]**

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

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

Sufficient 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 May 23, 2017. By the court's calculation, 29 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). 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 respondent 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 to Dismiss is granted, and the case is dismissed.</b>
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The Trustee argues that Debtor did not commence making plan payments and is \$483.00 delinquent in plan payments (with another \$483.00 coming due before the hearing), which represents one month of the \$483.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor presented no opposition to the Motion.

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.

9.	<a href="#"><u>12-39728</u></a> -E-13 DPC-1	MARK/TIFFANY WOLFGAM W. Steven Shumway	MOTION TO DISMISS CASE 5-24-17 [ <a href="#">171</a> ]
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**Final Ruling:** No appearance at the June 21, 2017 hearing is required.

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The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

10.

14-26329-E-13  
DPC-4

HATTIE FERRETTI  
Lucas Garcia

MOTION TO DISMISS CASE  
6-6-17 [78]

**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).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Dismiss is granted, and the case is dismissed.**

The Trustee seeks dismissal of the case on the basis that Debtor is \$5,046.20 delinquent in plan payments, which represents multiple months of the \$1,750.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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.

11. [12-31030](#)-E-13      **JOSEPH/DORI AZZOLINO**      **MOTION TO DISMISS CASE**  
DPC-1      **Matthew Gilbert**      **6-6-17 [27]**

**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).**  
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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 -----.

<p><b>The Motion to Dismiss is granted, and the case is dismissed.</b></p>
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The Trustee seeks dismissal of the case on the basis that Debtor is \$3,024.00 delinquent in plan payments, which represents multiple months of the \$1,008.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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.

12.	<a href="#"><u>17-21730-E-13</u></a>	<b>MITCHELL LOGAN</b> <b>Lucas Garcia</b>	<b>ORDER TO SHOW CAUSE - FAILURE TO PAY FEES</b> <b>5-22-17 [39]</b>
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**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on May 24, 2017. The court computes that 28 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$56.00 due on May 15, 2017.

<p><b>The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.</b></p>
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The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

**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.

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

Sufficient 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 May 23, 2017. By the court's calculation, 29 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). 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>
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The Trustee states the following grounds for moving to dismiss this Chapter 13 case:

- A. Debtor failed to commence making plan payments of \$750.00 and has another plan payment due prior to the hearing.
- B. Debtor has failed to provide the Trustee with a tax transcript or copy of the Federal Income Tax Return with attachments for the most recent pre-petition tax year for which a return was required or a written statement that no such documentation exists.
- C. Debtor has failed to provide the Trustee with sixty days of employer payment advices received prior to the filing of the petition.
- D. Debtor filed a plan, but failed to serve it on all interested parties and has not set a Motion to Confirm for any hearing to date.

#### DEBTOR'S REPLY

Debtor filed a Reply on June 8, 2017. Dckt. 60. Debtor responded to the Trustee's Motion for Dismissal, one day after the deadline for opposition as set by Bankruptcy Rule 9014-1(f)(1). Dckt. 60. Debtor asserts:

- A. Any delay and subsequent prejudice incurred by the parties by Debtor's failure to provide information was reasonable, as it was due to Debtor switching from pro per representation to representation by an attorney.
- B. Failure to commence payment and delinquency of \$1,500.00 was due to Debtor sending the Trustee personal checks as opposed to cashier's checks. Debtor "anticipates" bringing a cashier's check to the Trustee's office sometime "in advance of this hearing." Dckt. 60.
- C. Federal income tax returns and payment advices labeled as "missing" by the Trustee were delivered previously, but have been resent to the Trustee and were served or timely served on or about June 8, 2017.
- D. Motion to Confirm Plan was filed contemporaneously with this response, has been served properly on all parties, and is set for hearing on August 1, 2017.
- E. Every effort will be made to resolve the other issues raised by the Trustee on or before the hearing on the Motion to Dismiss.

#### **TRUSTEE'S RESPONSE**

The Trustee filed a Response on June 13, 2017. Dckt. 63. The Trustee responds:

- A. Debtor has failed to commence payments to the Trustee, and is now \$1,500 delinquent under the Plan, which represents multiple months of the \$750.00 plan payment.
- B. The Trustee has received Debtor's 2014 and 2015 federal income tax returns by email on June 8, 2017.
- C. The Trustee has **not** received any pay advices to date.
- D. Debtor has filed a Motion to Confirm, set for hearing on August 1, 2017.

#### **DISCUSSION**

The Trustee argues that Debtor did not commence making plan payments and is \$1,500.00 delinquent in plan payments, which represents multiple months of the \$750.00 plan payment. The Court's docket reflects that the \$1,500.00 delinquency has not been cured. Debtor's Reply, filed June 8, 2017, does not purport to make the payments but only that Debtor aspires to make the payments sometime "in advance of this hearing." Dckt. 60. Unfortunately for Debtor, a promise to cure the delinquency is not evidence of payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments.

The Trustee acknowledges receipt of Debtor's 2014 and 2015 federal income tax returns on June 8, 2017, a full twenty-eight days after the initial meeting of creditors. *See* 11 U.S.C. § 521(e)(2)(A)(I); FED. R. BANKR. P. 4002(b)(3).

Debtor has not provided the Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

As of June 8, 2017, Debtor has filed a motion to confirm the Plan as required by Local Bankruptcy Rule 3015-1(c)(3). Dckt. 56. Unfortunately, the confirmation hearing set for August 1, 2017, eighty-two days after the initial meeting of creditors, is well beyond the requirement that confirmation hearings be held not later than forty-five days after the date of the meeting of creditors. 11 U.S.C. § 1324(b).

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.

14. [17-20241](#)-E-13      **BONIFACIO/MARY ANN**      **MOTION TO DISMISS CASE**  
**DPC-2**      **OCAMPO**      **6-6-17 [26]**  
                 **Steele Lanphier**

**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).**  
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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Dismiss is granted, and the case is dismissed.**

Debtor has not provided the Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

A review of the docket shows that Debtor has not yet filed an order confirming the Plan following the court overruling the Trustee's Objection to Confirmation at the March 21, 2017 hearing. Debtor offers no explanation for the delay in filing the order confirming. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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.

15.    [14-21444](#)-E-13        **JEFFREY/ANN BROONER**                    **MOTION TO DISMISS CASE**  
         **DPC-1**                    **Mary Ellen Terranella**                    **5-17-17 [43]**

**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.

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

Sufficient 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 May 17, 2017. By the court’s calculation, 35 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). 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 Jeffrey Brooner and Ann Brooner (“Debtor”) are in material default under the Plan because Debtor has failed to turn over required tax refunds from 2016 to the Trustee, including a federal refund of \$431.00 and a state refund of \$804.00.

**DEBTOR’S OPPOSITION**

Debtor filed an Opposition on May 21, 2017. Dckt. 54. Debtor asserts that Debtor filed a motion to modify the Plan on May 21, 2017, that addressed the issue raised by the Trustee. Dckt. 47.

## TRUSTEE'S RESPONSE

The Trustee filed a Response on May 25, 2017. Dckt. 56. The Trustee asks the court to consider the instant Motion to Dismiss still. The Trustee asserts that Debtor's modified plan indicates that Debtor seeks to retain annual tax refunds (to pay for property repairs) that were previously committed to the Plan.

## DISCUSSION

Page two of the Order Confirming the Plan states that Debtor shall contribute both federal and state tax refunds into the Plan. Dckt. 36. Failure to provide those refunds puts Debtor in material default of the confirmed Plan. *See* 11 U.S.C. § 1307(c).

In this case, Debtor has proposed a modified plan that does not include contributing the tax refunds, however. In fact, the proposed modified plan states in Section 6 that Debtor "shall retain all tax refunds for tax years 2016, 2017, and 2018." Dckt. 52, at 8. The Trustee has opposed the motion to confirm that plan, and he has requested that the court consider this Motion to Dismiss, despite a new plan being filed.

In opposing the Motion to Dismiss, Debtor fails to provide any evidence, merely leaving it to Debtor's counsel to argue that all is well, Debtor will just amend the plan to cure the breach—now that they have been caught (the court adding the last portion of the phrase after the dash).

In support of the Motion to Confirm the Modified Plan, Debtor states that the funds are needed to perform various repairs to real property that is more than "120 years old." Dckt. 46, at 2:7. If the court were to consider a declaration filed in another contested matter, it falls short of providing a credible, good faith explanation for how Debtor has defaulted under the plan and now seeks to amend only after the Motion to Dismiss has been filed.

In the declaration, Debtor states that they bought a home in 2004 that requires extensive maintenance and repairs. This was all known when they confirmed their Chapter 13 Plan in April 2014. Order, Dckt. 36. Debtor was pleased with that order and getting the Plan confirmed, in which they committed their tax refunds to be paid into the Plan. In the declaration filed in the other contested matter, Debtor's statement that (apparently surprisingly) their children, now 6 and 3 ½ years old, have become more mobile since April 2014. They then describe a number of repairs, all of which appear to well predate 2014.

It appears that Debtor may actually have confirmed a plan in which Debtor had no good faith belief that Debtor could ever perform. It appears that Debtor never intended to provide the tax refunds to creditors through the Plan, but merely said that hoping that the Trustee would never check to see what overwithholding of Debtor's income had occurred.

It is unfortunate that for a sum of \$1,135.00 Debtor chose to gamble away their Chapter 13 Plan and bankruptcy case. If Debtor's plan, as proposed, was not feasible, then they should not have proposed it. If Debtor "discovered" that the plan was not feasible, then Debtor should have communicated with Debtor's experienced counsel to amend the plan, not merely divert plan money into Debtor's own pocket.

Debtor appears to approach this case as one in which only the laws as Debtor desires will apply—at least as to Debtor. That is not in good faith. Possibly, Debtor is desperate and will do anything (even lie to the court) to get what Debtor believes Debtor wants. In reality, Debtor’s argument is that Debtor has a house Debtor wants to remodel, but cannot afford to remodel it. If believed, Debtor describes this property as a health and safety hazard, into which much money must be sunk before it is liveable.

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.

16.	<a href="#"><u>17-20245-E-13</u></a>	<b>MARK BRADY</b> <b>Micahel Benavides</b>	<b>ORDER TO SHOW CAUSE - FAILURE TO PAY FEES</b> <b>5-22-17 [39]</b>
<b>DEBTOR DISMISSED: 06/05/2017</b>			

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

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The Order to Show Cause was served by the Clerk of the Court on Debtor and Debtor’s Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on May 24, 2017. The court computes that 28 days’ notice has been provided.

The court issued an Order to Show Cause based on Debtor’s failure to pay one or more installments of administrative and filing fees.

<b>The Order to Show Cause is discharged as moot.</b>
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The court having dismissed this bankruptcy case by prior order filed on June 5, 2017 (Dckt. 45), the Order to Show Cause is discharged as moot, with no sanctions ordered.

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 Order to Show Cause 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 Order to Show Cause is discharged as moot, and no sanctions are ordered.

17.     [17-22150-E-13](#)     **JAMES SMITH**     **MOTION TO DISMISS CASE**  
          DPC-3           **Matthew DeCaminada**     **5-23-17 [26]**

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

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

Sufficient 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 May 23, 2017. By the court's calculation, 29 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). 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).

<b>The hearing on the Motion to Dismiss is continued to 11:00 a.m. on July 26, 2017.</b>
--

David Cusick, the Chapter 13 Trustee, alleges that James Smith ("Debtor") did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

The Trustee argues that 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. *See* 11 U.S.C. § 521(e)(2)(A); FED. R. BANKR. P. 4002(b)(3). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Debtor has not provided the Trustee with employer payment advices for the period of sixty days preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

## **DEBTOR'S OPPOSITION**

Debtor filed an Opposition on June 7, 2017. Dckt. 34. Debtor reports that the Meeting of Creditors has been continued to 11:00 a.m. on July 6, 2017. Debtor contends that he is aware that attendance is mandatory. Dckt. 34.

Debtor contends that on or about May 25, 2017, he provided a true and correct copy of Debtor's 2016 federal income tax returns to the Trustee.

Debtor contends that on or about May 30, 2017, he provided the Trustee with a signed declaration from Debtor concerning his failure to provide payment advices. Debtor asserts that he did not receive any payment advices within sixty days prior to filing. *See* Dckt. 36 (Declaration of Garrett Lenox).

## **TRUSTEE'S REPLY**

The Trustee filed a Reply on June 13, 2017. Dckt. 41. The Trustee states that he has received Debtor's 2016 federal and state tax returns. He also acknowledges that he received a declaration from Debtor stating that "he has no pay advices" to provide to the Trustee.

The Trustee requests that the hearing be continued to allow the Meeting of Creditors to be conducted.

## **RULING**

The Trustee's Reply indicates that two of his grounds for moving to dismiss this case have been resolved. The remaining ground can be resolved by Debtor appearing at the continued Meeting of Creditors. That meeting has been set for July 6, 2017, and the Trustee has requested that the hearing on this Motion be continued until after that date. Therefore, the hearing on the Motion to Dismiss is continued to 11:00 a.m. on July 26, 2017.

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 continued to 11:00 a.m. on July 26, 2017.

18. [15-24851](#)-E-13      **WALTER ALLEN**  
DPC-1                      **Timothy Walsh**

**CONTINUED MOTION TO DISMISS  
CASE  
3-1-17 [30]**

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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Local Rule 9014-1(f)(1) Motion—Opposition Filed.

Sufficient 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 March 1, 2017. By the court’s calculation, 28 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). 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).

<b>The hearing on the Motion to Dismiss is continued to 10:00 a.m. on July 26, 2017.</b>
--

The Trustee argues that Walter Allen (“Debtor”) is in material default under the Plan because it will complete in eighty-three months with the current 100% dividend owed to unsecured claims. The general unsecured claims filed are \$12,530.51 greater than scheduled. Section 5.03 of the Plan makes that failure to timely complete the Plan a breach in addition to violating the Bankruptcy Code. Failure to provide for those claims puts Debtor in material default of the confirmed Plan. *See* 11 U.S.C. § 1307(c).

## **DEBTOR’S OPPOSITION**

Debtor filed an Opposition on March 6, 2017. Dckt. 34. Debtor states that he has filed a modified plan to account for the excess unsecured claims and that a motion to confirm that plan has been set for hearing on April 18, 2017.

## **PRIOR REVIEW OF MODIFIED PLAN AND CORRESPONDING PLEADINGS**

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. Dckts. 37 & 39.

The Motion appears to comply with Federal Rule of Bankruptcy Procedure 9013 (stating grounds with particularity). However, the Declaration fails to provide testimony as to facts to support confirmation based upon the Debtor’s personal knowledge. FED. R. EVID. 601, 602. Some of the more significant deficiencies in the Declaration and lack of testimony by Debtor are:

- A. Debtor has no knowledge as to what changes are in the Plan and why it was filed. She only is “informed and believes,” and thereon “alleges.” Debtor does not provide any testimony in Part A of the “declaration.” Plan, p. 1:24–28, 2L1–4; Dckt. 39.
- B. In Part B of the “declaration,” Debtor again can only be “informed and believes,” stating no personal knowledge for which she can testify. To the extent she is “informed and believes,” it is solely based on “information” from her attorney. *Id.*, p. 2:3–5.
- C. Debtor, purporting to testify under penalty of perjury:
  - 1. Provides the court with her legal opinion that the Plan complies with all of the provisions of Chapter 13 and the Bankruptcy Code. She further purports to provide her legal opinion that the Plan complies with all applicable non-bankruptcy law. *Id.*, p. 2:5–9.
  - 2. By her personal finding of fact, the Plan meets the Chapter 7 Liquidation Test.” Other than stating her personal finding of fact, Debtor fails (or is unable) to provide any personal knowledge testimony as to the assets and liabilities in this case. *Id.*, p. 12–17.
  - 3. That she has no idea how the secured claims are provided for under the Plan, with Debtor merely parroting the statutory alternative methods of providing for secured claims in the Plan. *Id.*, p. 2:18–28, 3:1–6.

Though this Plan provides for a 100% dividend on general unsecured claims, the court notes that the financial information provided by Debtor is now almost two years old. Debtor failing (or refusing) to provide any actual personal knowledge testimony and demonstrating a lack of any knowledge of what his plan provides for paying secured claims (merely parroting the statutory language of alternative treatment) puts not only his ability to perform the plan in question, but also his good faith in prosecuting this case.

On Schedule I, Debtor lists having \$8,434.37 in wages. Dckt. 1 at 21. On Schedule J Debtor listing having one dependent, a minor grandchild. After withholding and expenses, Debtor states he has \$493.04 in monthly net income. The Amended Plan incorporates the prior plan payment of \$370.00 per month through February 2017, and then increases the Plan payments to \$500.00 per month for the remaining forty months of the Plan.

The Plan does not provide for any Class 1, Class 2, Class 3, Class 5, or Class 6 Claims. In Class 4, Debtor states that he is current on his two mortgage payments and will continue to pay them, notwithstanding there being a negative equity in the Property.

The court cannot identify, from the current or prior confirmed plan why Debtor is in this Chapter 13 case. He has the ability to pay his creditors and had no defaults to cure (having provided for Class 4 plan payment treatment for all his secured claims).

Debtor, on December 12, 2016 filed a Motion to have the court approve a modification of the loan with Wells Fargo Bank, N.A. On the Plan and Schedule D, Debtor lists Wells Fargo Bank, N.A. having two secured claims. Motion, Dckt. 19. The Motion states that the then-current monthly mortgage payment to be modified was \$1,985, and the modification would decrease it to \$1,536, crediting additional monthly net income of \$450.00 per month. *Id.* at 2:14–16. Strangely, this stated monthly payment of the loan to be modified was \$100 per month more than stated on the original confirmed plan in this case. Dckt. 36. The court granted the Motion and authorized Debtor to reduce his monthly mortgage expense by \$450.00 per month.

For the Proposed Modified Plan, Debtor continues to state that the Class 4 payment to Wells Fargo Bank, N.A. on the modified loan is \$1,878—not the reduced \$1,536.00. Dckt. 36 at 4. Debtor’s lack of honest, truthful, personal knowledge about his current finances does not appear to be in good faith, but part of a coordinated effort with counsel to mislead the court.

### **MARCH 29, 2017 HEARING**

At the hearing, the court continued the matter to 10:00 a.m. on May 31, 2017, to allow Debtor to prosecute a motion to confirm, including filing a supplemental declaration. Dckt. 41.

### **DEBTOR’S OPPOSITION AND REQUEST FOR CONTINUANCE**

Debtor filed an Opposition on May 15, 2017. Dckt. 55. Debtor’s Counsel states that Debtor opposes the Motion—without giving any reason—and notes that there is a motion for Debtor’s Counsel to withdraw set for hearing at 3:00 p.m. on June 6, 2017. Debtor’s Counsel states that Debtor may be unable to process a modified plan before that date, and he requests a continuance to a hearing time after June 6, 2017.

### **MAY 31, 2017 HEARING**

At the hearing, the court continued the matter to 10:00 a.m. on June 21, 2017. Dckt. 58.

### **ORDER RESETTING HEARING**

On June 12, 2017, the court issued an Order Resetting Hearing for this matter to be heard at 10:00 a.m. on July 26, 2017. Dckt. 64.

### **DISCUSSION**

Grounds exist for dismissing this case. Far more serious relief may also be warranted because of Debtor’s misstatement and hidden \$450.00 of additional projected disposable income. Additionally, Debtor’s “testimony” consisting of merely signing a “declaration” quoting generic language from the Bankruptcy Code is a subject to be further addressed.

The court having issued an Order Resetting Hearing, this Motion will be heard at 10:00 a.m. on July 26, 2017.

19. [17-20052](#)-E-13      **MARIA DE LA CRUZ**  
DPC-2                      **Daniel Weiss**

**CONTINUED MOTION TO DISMISS  
CASE  
3-27-17 [60]**

**No 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.

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

Sufficient 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 March 27, 2017. By the court's calculation, 65 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). 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 respondent 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 to Dismiss is <span style="color: red;">XXXXXXXXXXXX</span>.</b>
--

The Trustee argues that Debtor did not commence making plan payments and has not proposed to make any according to the plan filed on February 17, 2017. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor presented no opposition to the Motion.

The Trustee alleges that Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay that is prejudicial to creditors and is cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

The Trustee argues that Debtor did not notice all interested parties of the Chapter 13 Plan and set a confirmation hearing. Debtor offers no explanation for the delay in setting a plan for confirmation. That is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

### **TRUSTEE'S STATUS UPDATE**

The Trustee filed a Status Update on May 18, 2017. Dckt. 81. The Trustee reports that Debtor did not appear at the continued Meeting of Creditors on April 6, 2017, or on May 4, 2017. Debtor has not made plan payments still, and Debtor's plan has not been served.

The Trustee states that he received a telephone call from Debtor's attorney on May 5, 2017, advising that he is ill and has been in and out of the hospital, which has hindered his ability to adequately represent debtors at this time.

### **MAY 31, 2017 HEARING**

At the hearing, attorney Eric Schwab made a courtesy appearance for Debtor's counsel. He reported that Debtor's counsel is in hospice and is not expected to survive. Mr. Schwab reported that he will be substituting in as counsel for Debtor in this case.

The Trustee concurred in a recommendation that the hearing be continued to afford Debtor and her new counsel time to resume in prosecuting this case. The court continued the hearing to 10:00 a.m. on June 21, 2017. Dckt. 86.

### **RULING**

No further pleadings have been filed since the May 31, 2017 hearing.

While the health of Debtor's attorney is unfortunate, Debtor has failed to appear at the Meeting of Creditors several times and has not made any plan payments to the Trustee. Cause exists to dismiss this case. The Motion is **xxxxxxxxxxxx**.

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 **xxxxxxxxxx**.

**Final Ruling:** No appearance at the January 18, 2017 hearing is required.  
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Local Rule 9014-1(f)(2) Motion—Hearing Required.

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 February 1, 2016. By the court's calculation, 16 days' notice was provided. 14 days' notice is required.

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. 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.

**The hearing on the Motion to Dismiss is continued to 10:00 a.m. on November 1, 2017.**

The Trustee asserts that the Debtor did not properly serve the Plan on all interested parties and has yet to file a motion to confirm the Plan. The Plan was filed after the notice of the Meeting of Creditors was issued. Therefore, the Debtor must file a motion to confirm the Plan. *See* Local Bankr. R. 3015-1(c)(3). A review of the docket shows that no such motion has been filed. This is unreasonable delay that is prejudicial to creditors. 11 U.S.C. §1307(c)(1).

Further, the Trustee alleges that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay which is prejudicial to creditors and cause to dismiss the case. 11 U.S.C. § 1307(c)(1).

The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the 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. *See* 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). This is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Trustee further objects, stating that the petition may not be filed in good faith. The Debtor has failed to list the six (6) prior bankruptcies between 2010 and 2015 filed by the Debtor. The Debtor does

not disclose this information. The failure to provide accurate and complete information is grounds to dismiss the case.

Though the Trustee points out the heretofore undisclosed prior bankruptcy filings by Debtor, there are additional related bankruptcy filings in which Debtor has participated and litigated. Those cases were filed by her brother, Jeffrey Akzam, and are:

- A. 11-25844 in *Pro Se*
  - 1. Chapter 13 Filed March 9, 2011
  - 2. Motion to Dismiss for failure to file motion to confirm plan, failure to file tax returns, failure to provide most recent tax return, and failure to provide copies of business records. Dckt. 28.
  - 3. Case converted to Chapter 7 at request of debtor Jeffrey Akzam. Order, Dckt. 42.
  - 4. Discharge entered September 2, 2011.
- B. 13-20155 in *Pro se*
  - 1. Chapter 13 Filed January 7, 2013.
  - 2. Case dismissed because of debtor Jeffery Akzam's failure to file tax returns and Mr. Akzam's failure to file a motion to confirm a Chapter 13 Plan. Civil Minutes, Dckt. 73. The court also determined that the Plan, as proposed by debtor Jeffery Akzam was not feasible and the plan was underfunded. *Id.*
  - 3. In connection with Jeffery Akzam's Chapter 13 case 13-20155, Jeffery Akzam filed an Adversary Proceeding disputing the lien of Option One Mortgage. Adv. 13-2103.
    - a. After granting a motion to dismiss the Complaint, a First Amended Complaint was filed, in which Debtor Dianne Akzam was added as a joint plaintiff with Jeffery Akzam. Debtor Dianne Akzam and her brother Jeffery Akzam disputed the secured claim and alleged violations of the automatic stay.
    - b. The court determined that abstention pursuant to 28 U.S.C. § 1334(c), the court finding that there were no issues arising under the Bankruptcy Code or in the bankruptcy case. Civil Minutes, Dckt. 85.

C. 14-30332 in *Pro Se*

1. Chapter 13 Case filed October 17, 2014
2. Case dismissed on July 8, 2015.
3. The case was dismissed due to debtor Jeffrey Akzam's failure to file an amended plan after the court denied confirmation of the proposed plan. Civil Minutes, Dckt. 83.

The six prior bankruptcy cases filed by Debtor are summarized as follows:

14-28272 <i>In Pro Se</i>	Chapter 13 Case	Filed August 14, 2014 Dismissed September 29, 2014
	<p>I. Case dismissed for failure to filed Schedules, Statement of Financial Affairs, and Chapter 13 Plan.</p> <p>II. Court denied Debtor's Motion to Extend the Automatic Stay 11 U.S.C. § 362(c)(3)(B). Dckt. 28. The court discussed in detail the Debtor's history of failure to prosecute prior multiple bankruptcy cases. Civil Minutes, Dckt. 28.</p> <p>III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.</p>	
14-23825 <i>In Pro Se</i>	Chapter 13 Case	Filed April 14, 2014 Dismissed July 23, 2014
	<p>I. Case dismissed because Debtor did not meeting the eligibility requirements for a Debtor in a Chapter 13 case as (1) she did not have any regular income and (2) had not filed a Certificate of Pre-Filing Credit Counseling. Dckt. 49.</p>	
12-37369 <i>In Pro Se</i>	Chapter 13 Case	Filed September 27, 2012. Dismissed November 19, 2012
	<p>I. The case was dismissed due to Debtor failing to file Schedules, Statement of Financial Affairs, and Plan. Dckt. 21.</p> <p>II. Motion to Vacate Dismissal Order denied. Order, Dckt. 33</p> <p>III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.</p>	

11-43187 <i>In Pro Se</i>	Chapter 13 Case	Filed September 27, 2011 Dismissed December 14, 2011
	<p>I. The case was dismissed for failure of Debtor to file Schedules, Statement of Financial Affairs, and Plan. Order, Dckt. 25.</p> <p>II. Case also dismissed due to Debtor failing to pay filing fees. Order, Dckt. 26.</p>	
11-20282 <i>In Pro Se</i>	Chapter 13 Case	Filed January 4, 2011 Dismissed March 18, 2011
	<p>I. Case dismissed due to Debtor's failure to attend First Meeting of Creditors and failure to file motion to confirm Chapter 13 Plan. Motion and Order, Dckts. 22, 27.</p> <p>II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.</p>	
10-45216 <i>In Pro Se</i>	Chapter 13 Case	Filed September 22, 2010 Dismissed December 16, 2010
	<p>I. The bankruptcy case was dismissed due to Debtor failing to file a motion to confirm the Chapter 13 Plan and Debtor being delinquent in Plan payments. Motion and Order, Dckts. 22, 38.</p> <p>II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees.</p>	

Jeffrey Akzam and his sister, the Debtor Diane Akzam, have filed a series of coordinated Chapter 13 cases without either of them engaging in the good faith prosecution of those cases. To the extent that either of them believe they have a bona fide dispute with the lender who asserted a lien against property in which these two debtor believed they had an interest, those issues are outside of bankruptcy.

In connection with the most recent filing by Diane Akzam, the U.S. Trustee has commenced an Adversary Proceeding seeking injunctive relief to preclude Diane Akzam from filing further non-productive bankruptcy cases. 15-2247.

Clearly, the Debtor's lack of good faith prosecution of this case warrants action under 11 U.S.C. § 1307. That could be dismissal of the case or conversion to Chapter 7 to allow an independent fiduciary Chapter 7 Trustee to take possession of all property of the bankruptcy estate, liquidate all non-exempt property, and make a disbursement to creditors.

Even if the court were to dismiss this case, an issue arises whether the dismissal should be with prejudice, Debtor having repeated filed bankruptcy cases that she has failed to prosecute in good faith.

### **FEBRUARY 17, 2016 HEARING**

At the hearing, the court continued the hearing to 10:00 a.m. on May 18, 2016. Dckt. 30.

### **MAY 20, 2016 HEARING**

Since the continued hearing, the Debtor appeared at the Meeting of Creditors held on February 25, 2016. Additionally, the Debtor filed an Amended Petition and Schedules. Dckts. 33 and 34.

On April 8, 2016, the Debtor filed a Motion to Confirm Plan but failed to attach a proposed plan. Dckt. 38.

There is pending an Adversary Proceeding in which the U.S. Trustee seeks to obtain a Prefiling Review Order in light of the Debtor's non-productive repeat filing of bankruptcy cases.

While the Trustee's objection to confirmation raises significant issues, the court will not dismiss this case at this time.

The court continued the hearing to 10:00 a.m. on August 10, 2016.

### **AUGUST 10, 2016 HEARING**

The Debtor filed and set for hearing a Motion to Confirm Amended Plan. Dckt. 82 and 85.

The Debtor filed amended Schedules E/F. Dckt. 86. A review of Debtor's Schedules showed the following:

- A. Schedule A (Dckt. 22)
  - 1. 802 Ohio Street
    - a. FMV.....\$240,000
    - b. Value of Debtor's Interest.....\$120,000
    - (1) Nature of Debtor's Interest..... "Homestead"
- B. Schedule B (*Id.*)
  - 1. Vehicles.....None
  - 2. Household Goods.....\$190
  - 3. Electronics.....\$225
  - 4. Clothing.....\$100

5. Jewelry.....\$ 35
6. Tax Refunds.....None
7. Claims Against Third Parties
  - a. Assault Claim.....No Value Give
  - b. Rescission Claim.....On Appeal

C. Schedule D (*Id.*)

1. Secured Claims.....None

D. Amended Schedule E (Dckt. 86)

1. Priority Claim.....None

E. Amended Schedule F (*Id.*)

1. General Unsecured.....\$37,240.00
  - a. \$31,800.00 listed as FTB Claim (consistent with POC 1)
  - b. Two other proofs of claims filed.

F. Schedule I (Dckt. 22)

1. Not Employed
2. Income, "Loan".....\$100
3. Income, "Gift From Brother".....\$350
4. On Amended Schedule J Debtor states she will apply for Social Security

G. Amended Schedule J (Dckt. 34)

1. Total Expenses.....\$355
  - a. Rent/Mortgage.....\$ 0.00
  - b. Property Taxes.....\$ 0.00
  - c. Homeowner's Ins.....\$ 0.00
  - d. Home Maintenance.....\$ 0.00
  - e. Electricity/Gas.....\$120.00
  - f. Water/Sewer/Garbage.....\$100.00
  - g. Food/Housekeeping Supplies.....\$ 29.00
  - h. Clothing.....\$ 5.00
  - i. Personal Care Products.....\$ 5.00
  - j. Medical/Dental Expenses.....\$ 5.00
  - k. Transportation.....\$ 16.00

l.	Entertainment.....	\$ 0.00
m.	Insurance.....	\$ 0.00

H. Statement of Financial Affairs (*Id.*)

1. Part 2, Income

a. Employment or Business

(1)	2016 YTD.....	None
(2)	2015.....	None
(3)	2014.....	None

b. Other Income

(1)	2016 YTD.....	\$4,200 (Gift from Brother) \$1,200 (Loan)
(2)	2015.....	\$4,200 (Gift from Brother) \$1,200 (Loan)
(3)	2014.....	\$4,200 (Gift from Brother) \$1,500 (Loan)

2. Part 4, Legal Actions

a. Akzam v. Sand Canyon.....On Appeal

The court has reviewed the Amended Plan, the terms of which are summarized as follows:

- A. Debtor will make \$95.00 a month Plan payments for sixty months.
- B. The Chapter 13 Trustee will be paid his fee from the monthly Plan payments, which amount the court projects to be \$6.65 (est. at 7%).
- C. Class 1 Payments Authorized.....None
- D. Class 2 Payments Authorized.....None
- E. Class 3 Surrenders Authorized.....None
- F. Class 4 Payments to be Made by Debtor.....None
- G. Class 5 Payments Authorized.....None

- H. Class 6 Payments Authorized.....None
- I. Class 7 Payments Authorized.....13% Dividend on \$37,240 in claims.

Amended Plan, Dckt. 85.

At the hearing, the court addressed the deficiencies in the prosecution of this case, as well as the apparent inability of the Debtor to prosecute the case. In light of the pending adversary proceeding by the U.S. Trustee for an order and judgment limiting the Debtor from filing further bankruptcy cases, in light of her multiple filing of prior non-productive cases which have been dismissed, the court continued the hearing on this motion. In light of the high likelihood of Debtor just filing another bankruptcy case, continuing the hearing on this motion and adjudicating these issues before another case is filed was consistent with proper judicial management of this case, as well as providing Debtor an environment to obtain assistance in the prosecution of this case, if there is a viable Chapter 13 case to be prosecuted.

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

At the hearing, the court noted that the Adversary Proceeding is pending still and that no supplemental pleadings have been filed in relation to the instant Motion to Dismiss. The court's concerns were the same as at the August 10, 2016 hearing. The court continued the hearing to 10:00 a.m. on January 18, 2017. Dckt. 129.

#### **JANUARY 18, 2017 HEARING**

The U.S. Trustee's Adversary Proceeding relating to the repeated bankruptcy filings by Debtor is set for a pre-trial conference on May 31, 2017. The court continues the hearing on the Motion to Dismiss until after the pre-trial conference.

#### **ORDER RESETTING HEARING**

On May 2, 2017, the court issued an Order Resetting Hearing and set the hearing for this matter at 10:00 a.m. on June 21, 2017. Dckt. 147.

#### **DISCUSSION**

The court has spent a substantial amount of time at status conferences and hearing in this case and the U.S. Trustee's Adversary Proceeding in which she is requesting a prefiling review order due to Debtor's multiple non-productive filing of prior bankruptcy cases (in addition to bankruptcy cases filed by her brother which have been dismissed). In these discussions, it has been made clear to the court that Debtor is involved in a dispute in which she contests the right of a third-party to foreclose on real property. The filing of the bankruptcy cases by Debtor (and her brother) were to gain the benefit of the automatic stay, without any productive prosecution of the bankruptcy cases.

Debtor believes that it is not “right” that this third-party could assert that it could foreclose, the debt was not enforceable, and that the bankruptcy laws should prevent such third-party from proceeding to attempt to assert its rights and interests over Debtor’s objection and litigation in the state court. The court has reviewed with the Debtor, Chapter 13 Trustee, and U.S. Trustee the basic principle that the Bankruptcy Code does not impose the automatic stay as a “free injunction” for non-bankruptcy case related litigation absent there being a good faith, productive prosecution of a bankruptcy case or reorganization. See *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

As this court discussed in *In re De la Salle*, a debtor or trustee can use the automatic stay in lieu of obtaining a preliminary injunction (Fed. R. Civ. P. 65), and posting the necessary bond, by providing an adequate protection fund. The fund, held by the Trustee or in a blocked account, is created with monthly plan payments (often in the amount of what the monthly mortgage payment would be) being paid into the fund. When the litigation is resolved, this court can then use the fund to pay for Rule 65(c) damages if it is determined that the automatic stay improperly enjoined the third-party from exercising its rights or obtaining possession of property that it was determined to own or be entitled to obtain. If the debtor or trustee wins, the fund can then be released to be disbursed through the plan.

In looking at the financial information provided by Debtor under penalty of perjury, she has no ability to fund a plan. She has no income, but receives only gifts from her brother (who has filed several bankruptcy cases) and loans. While Debtor believes that she will receive Social Security Benefits in December 2016, there is no indication that such monies will be sufficient to provide for Debtor’s actual living expenses and fund a plan.

The court review of Schedule J indicates that the amounts stated therein are not credible. While purporting to own a home, Debtor has no expenses for property taxes, property insurance, or property maintenance. Debtor will spend next to nothing on clothing and allocates very little for food. It appears that the expenses on Schedule J are made up numbers to mislead the court into believing that a plan can be funded, or to deluded the Debtor herself that bankruptcy presents a litigation option in her battle with the third-party.

While Debtor is convinced that she is right and that her adversary’s position in the property dispute is without merit, that does not entitle Debtor to file bankruptcy, ignore the rights and interest in dispute, and merely mark time for five years in lieu of obtaining a preliminary injunction or stay pending appeal based on the merits of her contentions in the court which is adjudicating those issues.

In looking at the Debtor’s schedules and financial information, the court cannot divine any the possible reorganization or restructure of the Debtor’s finances through a good faith Chapter 13 case. This highlights the apparent misuse of the Bankruptcy Code as a “free stay pending appeal” as an end around of the appellate stay requirements.

The U.S. Trustee and Debtor continue to prosecute the litigation, with the court to next conduct the trial setting conference on July 26, 2017. Though the Adversary Proceeding has been very delayed, it

will shortly go to trial. This case, in light of Debtor's repeated filings, will not be dismissed until that litigation is completed.

With Debtor's appeal ongoing in the District Court, continuing the hearing on this Motion is appropriate. The hearing on the Motion to Dismiss is continued to 10:00 a.m. on November 1, 2017.

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 continued to 10:00 a.m. on November 1, 2017.

21. [15-90358](#)-E-11      **LAWRENCE/JUDITH SOUZA**      **CONTINUED MOTION TO CONVERT**  
**UST-1**      **David Johnston**      **CASE TO CHAPTER 7 OR MOTION TO**  
           **DISMISS CASE**  
           **2-22-17 [[500](#)]**

**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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, the former Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 22, 2017. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion to Convert 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 to Convert the Chapter 11 Bankruptcy Case to a Case under Chapter 7 is granted, and the case is converted to one under Chapter 7.**

This Motion to Dismiss the Chapter 11 bankruptcy case of Lawrence Souza and Judith Souza has been filed by Tracy Hope Davis ("Movant"), the United States Trustee. Movant asserts that the case should be dismissed or converted based on the following grounds:

- A. The Debtor in Possession ( $\Delta$ IP), the two individual debtors who filed the voluntary Chapter 11 case, has not proposed a plan in the case's two-year history, causing prejudicial delay against creditors.
- B.  $\Delta$ IP owes quarterly fees of \$975.

#### **$\Delta$ IP'S DECLARATION IN OPPOSITION**

$\Delta$ IP filed a Declaration in Opposition on March 30, 2017. Dckt. 537.  $\Delta$ IP states in the declaration that the delinquent quarterly fees were paid on February 23, 2017.

Debtor acknowledges that a plan has not been proposed in this case and argues that the reason for the delay is that Debtor has been uncertain about tax consequences for various sales of real property that were owned by Souza Properties, Inc., Debtor's wholly-owned S-Corporation. Debtor states that a Certified Public Accountant that the court approved to be employed told Debtor that 2014 tax returns were incorrect and would need to be amended before 2015 tax returns could be filed. Debtor claims to be seeking "an experienced CPA to prepare the amended [2014] return," after which they would be closer to proposing terms for a plan.

#### **APRIL 13, 2017 HEARING**

At the hearing, the court noted that this matter could be influenced by whether the court decides to grant a motion to withdraw as attorney, and therefore, the court continued the hearing on this matter to 10:30 a.m. on May 4, 2017. Dckt. 558.

The court has granted the motion to withdraw, it effectively having been rendered moot by the ΔIP substituting in replacement counsel for the prior attorneys for ΔIP.

#### **MAY 4, 2017 HEARING**

At the hearing, the parties agreed to continue the hearing to allow ΔIP one final opportunity to prosecute a Chapter 11 plan or to determine that such a plan is not feasible due to taxes or other considerations. The court continued the hearing to 10:00 a.m. on June 21, 2017 (specially set to be heard in Courtroom 33 of the Sacramento Division of the bankruptcy court). Dckt. 582.

#### **APPLICABLE LAW**

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

## DISCUSSION

No further pleadings have been filed since the May 4, 2017 hearing. ΔIP has not proposed a Chapter 11 plan for the court's review.

The U.S. Trustee argues that the case should be converted because of ΔIP's failure to propose a Plan of Reorganization two years into this case. The U.S. Trustee emphasizes that prior status reports indicate that ΔIP's former counsel, who has now been substituted out in favor of the counsel who sought to have the case converted to one under Chapter 13, had drafted a disclosure statement and outline of a plan as early as June 2016, and possibly August 2015. The Trustee argues that not having provided those documents yet is prejudicial delay.

ΔIP argues that other factors delayed proposing any plan terms, however. ΔIP has argued that while they are attempting to sell various properties, their sales are subject to market conditions. Additionally, Debtor has been investigating how those property sales would affect taxes to them as individuals because the properties are owned by a S-Corporation that is property of the estate. Finally, ΔIP indicates that an accountant will need to help amend and file tax returns from prior returns, and after that point, ΔIP intends to propose a plan.

The court has allowed ΔIP use cash collateral, sell property of the estate, and administer the estate outside of a confirmed plan for two years due to the complexity of the companion bankruptcy case of Souza Propane. 14-91633. The Souza Propane case was filed on December 17, 2014. Lawrence and Judith Souza, the debtors and ΔIP in this case were the responsible person for the debtor in possession Souza Propane. That case was filed by ΔIP's current counsel, who was recently subbed-in to replace ΔIP's prior counsel.

In Souza Propane, the court ordered the appointment of a Chapter 11 Trustee on January 15, 2015, just twenty-nine days after the case was commenced. 14-91633; Order, Dckt. 56. The grounds for converting the case included the responsible persons for Souza Propane failing to properly perform their duties for that debtor in possession. This included making unauthorized unsecured loans to the bankruptcy estate, being unable to obtain post-petition financing to operate the propane business (purchase inventory), and the responsible persons had not filed the required monthly operating report for December 2015. *Id.*; Civil Minutes, Dckt. 70.

While ΔIP has paid the very small quarterly US Trustee payment that was in default, ΔIP has demonstrated that there is no intention to prosecute a Chapter 11 plan in this case. ΔIP, along with changing counsel has filed a counter motion stating that ΔIP needs to convert this case to one under Chapter 13. Such a conversion is impossible.

It being clear that ΔIP having no intention of pursuing a Chapter 11 plan, apparently because the ΔIP did not like what has to be in a Chapter 11 plan, believes having the case improperly converted to one under Chapter 13 will allow the ΔIP to run the case as they want, without regard to the bankruptcy laws.

At this point, the question becomes what is in the best interests of the estate and creditors—conversion or dismissal. 11 U.S.C. § 1112(b). The U.S. Trustee does not state with particularity

(FED. R. BANKR. P. 9013) what grounds weigh in favor of conversion and what grounds weigh in favor of dismissal. While the court can just deny a motion when sufficient grounds are not stated with particularity in the motion, here, it is clear that relief is proper, so it has been left to the court to make that determination. FN.1.

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FN.1. The court can anticipate the response from the U.S. Trustee, “judge, you just need to read our eight page points and authorities. Buried between the extensive citations, quotations, arguments, and conjecture, you can find, and state for us, the grounds for the proper relief. It is not the place of the court to assemble motions for parties.

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The Motion seeks to have this case converted to one under Chapter 7 as the preferred relief. Though not stated, the court infers that it is the U.S. Trustee’s determination based on the facts of this case that such conversion is in the best interests of creditors and the bankruptcy estate.

The last Monthly Operating Report filed by ΔIP is for February 2017. Dckt. 512. ΔIP has not filed one for March 2017, even though it was due by the 15th of April 2017. For February 2017, ΔIP reported \$645.00 in rent monies and \$7,223 from “Shareholder, Partners, or Other Insiders.” *Id.* at 3. The court is unsure how these two human beings, as individual debtors, have shareholders or partners. To the extent that they are funding the estate and bankruptcy case by borrowing monies from other family members, such borrowing has not been authorized. FN.2.

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FN.2. It appears that there may be a more benign answer. On the attachments to the Monthly Operation Report is a handwritten ledger in which the “income” is identified as “Judy - Retirement,” “Lawrence – S.Sec.,” and “Judy - S.Sec.” The court interprets this as the “Shareholder, Partners, Other Insiders” income is just the regular monthly retirement and Social Security income for the two Debtors. However, the Second Amended Monthly Operating Report for December 2016 (Dckt. 496) lists \$21,734 in “Funds from Shareholders, Partners, or Other Insiders.” However, the court cannot readily identify from the attachments to the Second Amended Monthly Operation Report for December 2016, the source of the monies beyond the retirement and Social Security income.

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In weighing the two options, the court concludes that conversion to one under Chapter 7 is appropriate for several reasons. Much water has been allowed to pass under the bridge in allowing the ΔIP to administer this case for the past two years. Dismissal after such long period of operation and issuance of numerous orders raises the specter of confusion for all parties in interest.

Second, the transactions between and rights of the estate relating to the Souza Propane bankruptcy case are complex. Dismissing this case could well throw a shadow over those proceedings, who has what rights and interests, and what this bankruptcy estate currently has to administer and disburse to creditors.

Third, though ΔIP has had the opportunity to address creditor claims and take advantage of the benefits of this Chapter 11 case, ΔIP has failed to do so. Dismissing this case may merely subject creditors

to further cost, expense, and time to try and address what the two Debtors may try to do to their advantage outside of the structure of bankruptcy.

Fourth, as discussed above, the assets of the estate and interests in businesses are not simple, and it will take the unbiased eye of a Chapter 7 trustee to determine what should be recovered for the estate and creditors and what should be abandoned.

Fifth, it may well be that what is in the best interests of the estate and creditors may well be in the best interests of these two Debtors. After two years, the ΔIP has not presented a plan to the court. Though professing that conversion to Chapter 13 is proper (which it clearly is not) and that a plan is feasible, ΔIP offered no inkling of what a plan could be. There was no proposed Chapter 13 Plan provided as an exhibit to support the Countermotion. There was no testimony by the ΔIP what the plan would or could be. Merely, ΔIP's assurance that some plan, at some time, which would somehow be feasible, will be presented. It may be that the ΔIP has such an unrealistic understanding of their remaining assets and future income, as well as the law, that they would just continue in a downward spiral outside of bankruptcy losing further assets and impairing their future.

Therefore, upon cause having been shown, the court orders this case converted to one under Chapter 7.

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 11 case filed by Tracy Hope Davis, the United States 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 is granted, and the case is converted to one under Chapter 7.

22.	<a href="#"><u>16-23259</u></a> -E-13 DPC-2	<b>CHRISTOPHER/LORA CLARK</b> <b>Robert Fong</b>	<b>MOTION TO DISMISS CASE</b> <b>6-6-17 [56]</b>
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**Final Ruling:** No appearance at the June 21, 2017 hearing is required.

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The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(I) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

23. [17-20460](#)-E-13 STACY JOHNSON  
Richard Jare

**ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES  
5-30-17 [43]**

**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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on June 1, 2017. The court computes that 20 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$77.00 due on May 25, 2017.

<p><b>The Order to Show Cause is sustained, and the case is dismissed.</b></p>
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The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$77.00.

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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

24. [17-20871](#)-E-13      **ANGEL ACOSTA**  
**Richard Jare**

**ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES**  
5-19-17 [[19](#)]

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on May 21, 2017. The court computes that 31 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$77.00 due on May 15, 2017.

**The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.**

The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

25. [17-20174](#)-E-13      **DAVID BERMAN**  
**Michael Hays**

**ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES**  
**5-16-17 [\[83\]](#)**

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on May 18, 2017. The court computes that 34 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$77.00 due on May 11, 2017.

**The Order to Show Cause is discharged, and the bankruptcy case shall proceed in this court.**

The court's docket reflects that the default in payment that is the subject of the Order to Show Cause has been cured.

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 Order to Show Cause 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 Order to Show Cause is discharged, no sanctions ordered, and the bankruptcy case shall proceed in this court.

26. [17-22975-E-13](#) **TERRY ARNOLD**  
**Scott Shumaker**

**ORDER TO SHOW CAUSE - FAILURE  
TO PAY FEES**  
6-5-17 [\[35\]](#)

**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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

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The Order to Show Cause was served by the Clerk of the Court on Debtor, Debtor's Attorney, and Chapter 13 Trustee as stated on the Certificate of Service on June 7, 2017. The court computes that 14 days' notice has been provided.

The court issued an Order to Show Cause based on Debtor's failure to pay the required fees in this case: \$79.00 due on May 31, 2017.

<p><b>The Order to Show Cause is sustained, and the case is dismissed.</b></p>
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The court's docket reflects that the default in payment that is the subjection of the Order to Show Cause has not been cured. The following filing fees are delinquent and unpaid by Debtor: \$79.00.

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 Order to Show Cause 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 Order to Show Cause is sustained, no other sanctions are issued pursuant thereto, and the case is dismissed.

27. [15-28983](#)-E-13      MANUEL/VIRGINIA MADRID      MOTION TO DISMISS CASE  
DPC-2      Matthew Grech      5-24-17 [[49](#)]

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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**The Motion to Dismiss is dismissed without prejudice, and the bankruptcy case shall proceed in this court.**

The Chapter 13 Trustee having filed an Ex Parte Motion to Dismiss the pending Motion on June 14, 2017, Dckt. 55; no prejudice to the responding party appearing by the dismissal of the Motion; the Trustee having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the opposition filed by Debtor; the Ex Parte Motion is granted, the Trustee's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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. 55, 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 dismissed without prejudice, and the bankruptcy case shall proceed in this court.

28. [17-20685](#)-E-13      JEREL/BARBARA MOORE      MOTION TO DISMISS CASE  
DPC-2      Edward Smith      5-23-17 [[27](#)]

**Final Ruling:** No appearance at the June 21, 2017 hearing is required.  
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The Chapter 13 Trustee having filed a Notice of Dismissal, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041, **the Motion to Dismiss the Bankruptcy Case was dismissed without prejudice, and the matter is removed from the calendar.**

29. [13-27986-E-13](#)  
DPC-2

DEBORAH CANDATE  
Mary Ellen Terranella

MOTION TO DISMISS CASE  
6-6-17 [\[107\]](#)

**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).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 Dismiss is granted, and the case is dismissed.**

The Trustee seeks dismissal of the case on the basis that Debtor is \$870.00 delinquent in plan payments, which represents multiple months of the \$325.00 plan payment. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

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.

30.     [17-21494](#)-E-13     **ARTHUR POMPA**     **MOTION TO DISMISS CASE**  
          DPC-2            **Peter Macaluso**       **6-6-17 [30]**

**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).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient 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 June 6, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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 -----.

<p><b>The Motion to Dismiss is granted, and the case is dismissed.</b></p>
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The Trustee argues that Debtor did not commence making plan payments and is \$8,000.00 delinquent in plan payments, which represents multiple months of the \$4,000.00 plan payment. 11 U.S.C. § 1307(c)(4) permits the dismissal or conversion of the case for failure to commence plan payments. Debtor presented no opposition to the Motion.

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.

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

**June 21, 2017, at 10:00 a.m.**  
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