

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Christopher D. Jaime
Bankruptcy Judge
Sacramento, California

August 15, 2017 at 1:00 p.m.

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1. [17-23400](#)-B-13 ANTHONY/LEETA HIGHTOWER OBJECTION TO CONFIRMATION OF
JPJ-1 Gerald B. Glazer PLAN BY JAN P. JOHNSON
Thru #2 7-26-17 [[18](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and deny confirmation of the plan.

The plan does not comply with 11 U.S.C. § 1325(b)(1)(B) since the Debtors' projected disposable income is not being applied to make payments to unsecured creditors.

The Calculation of Disposable Income (Form 122C-2) Line #9b includes an improper expense for the second deed of trust held by Nationstar Mortgage in the amount of \$275.90. The second deed of trust is a wholly unsecured debt. Payments to wholly unsecured junior deeds of trust do not qualify as deductions and must be excluded from Form 22C. *Thissen v. Johnson*, 406 B.R. 888, 894 (E.D. Cal. 2009). Additionally, Line #17 of Form 122C-2 includes \$158.86 for involuntary deductions. A review of the Debtors' pay advices show that neither appear to have any involuntary deductions. Finally, Line #45 of Form 122C-2 shows a monthly disposable income under § 1325(b)(2) as \$97.76.

When the improper expenses at Lines #9b and #17 are added, Line #45 changes to \$532.52. This means that the Debtors must pay no less than \$31,951.20 to their unsecured, non-priority creditors. The Debtors plan proposes to pay a 0% dividend to their unsecured, non-priority creditors.

The plan filed May 31, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

2. [17-23400](#)-B-13 ANTHONY/LEETA HIGHTOWER OBJECTION TO CONFIRMATION OF
MJ-1 Gerald B. Glazer PLAN BY BANK OF THE WEST
7-27-17 [[22](#)]

Tentative Ruling: The Objection to Confirmation of Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been

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filed to the objection.

The court's decision is to sustain the objection and deny confirmation of the plan.

Objecting creditor Bank of the West, by and through its servicing agent Bank of America, N.A., holds a deed of trust secured by the Debtors' residence. The creditor has filed a timely proof of claim in which it asserts \$103,063.85 in pre-petition arrearages. The plan does not propose to cure these arrearages. Because the plan does not provide for the surrender of the collateral for this claim, the plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. See 11 U.S.C. §§ 1322(b)(2), (b)(5) & 1325(a)(5)(B). Because it fails to provide for the full payment of arrearages, the plan cannot be confirmed.

The plan filed May 31, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

3. [17-23902](#)-B-13 LUIS/FELICIA FLORES OBJECTION TO CONFIRMATION OF
APN-1 Michael O'Dowd Hays PLAN BY WELLS FARGO BANK, N.A.
Thru #4 7-26-17 [[34](#)]

Tentative Ruling: Secured Creditor, Wells Fargo Bank, N.A., dba Wells Fargo Dealer Services's Objection to Confirmation of Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to continue the matter to August 29, 2017, at 1:00 p.m.

Feasibility depends on the granting of the motion to value collateral of Wells Fargo Bank, N.A. That matter was heard on August 1, 2017, and continued to August 29, 2017, at 1:00 p.m. The objection to confirmation by Wells Fargo Bank, N.A. is continued to that date and time.

The court will enter an appropriate minute order.

4. [17-23902](#)-B-13 LUIS/FELICIA FLORES OBJECTION TO CONFIRMATION OF
JPJ-1 Michael O'Dowd Hays PLAN BY JAN P. JOHNSON AND/OR
 MOTION TO DISMISS CASE
 7-26-17 [[39](#)]

Tentative Ruling: Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). A written reply has been filed to the objection.

The court's decision is to continue the matter to August 29, 2017, at 1:00 p.m.

Feasibility depends on the granting of motions to value collateral of Wells Fargo Bank, N.A. and Ally Bank. Those matters were heard on August 1, 2017, and continued to August 29, 2017, at 1:00 p.m. The Trustee's objection to confirmation and conditional motion to dismiss are continued to that date and time.

Although Debtors filed a response regarding the valuations of collateral held by Wells Fargo Bank, N.A. and Ally Bank, and the priority claim held by the Internal Revenue Service, none of these creditors were served.

The court will enter an appropriate minute order.

5. [17-23906](#)-B-13 BALVINDER BHATOYA
JPJ-1 Nima S. Vokshori

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
7-26-17 [[15](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the Debtor has failed to perform the following tasks as requested by the Trustee at the meeting of creditors held July 20, 2017: (1) provide a signed stipulation regarding discharge, (2) amend the petition to add Debtor's "aka" Balvinder Kaur Bhatoya, and (3) provide a copy of the debtor's 2016 tax return from the Franchise Tax Board. The Debtor has not complied with 11 U.S.C. § 521(a)(3).

Second, Section 2.07 of the plan specifies a monthly payment of \$0.00 for administrative expenses. It is not possible for the Trustee to pay the balance of Debtor's attorney's fees and any other administrative expenses through the plan with a monthly payment specified at \$0.00.

The plan filed June 9, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court will enter an appropriate minute order.

6. [17-23108](#)-B-13 CARRIE LOUIS-SANTOS
JPJ-1 Richard L. Sturdevant
Thru #7

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
7-26-17 [[20](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the Debtor has failed to disclose in her petition the filing of a previous case. The Debtor has not fully and accurately provided all information required by the petition, schedules, and Statement of Financial Affairs. The plan has not been proposed in good faith as required pursuant to 11 U.S.C. § 1325(a)(3) and the Debtor has not fully complied with the duty imposed by 11 U.S.C. § 521(a)(1).

Second, the amount of attorney's fees is unclear. The plan, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, and the Disclosure of Compensation all show that Debtor's counsel was paid \$1,445.00 prior to the filing of the petition. But Question 16 of the Statement of Financial Affairs shows that Debtor's counsel was paid \$2,555.00 prior to the filing of the petition. Until all four of these documents are reconciled and consistent, it cannot be determined what amount should be paid by the Trustee to Debtor's counsel through the plan.

Third, the plan will take approximately 82 months to complete, which exceeds the maximum length of 60 months pursuant to 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. § 1325(b)(4).

The plan filed May 19, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court will enter an appropriate minute order.

7. [17-23108](#)-B-13 CARRIE LOUIS-SANTOS
RCO-1 Richard L. Sturdevant

OBJECTION TO CONFIRMATION OF
PLAN BY LAKEVIEW LOAN
SERVICING, LLC
7-28-17 [[24](#)]

Tentative Ruling: The Objection to Confirmation of Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to overrule the objection but deny confirmation for reasons stated at Item #6.

Objecting creditor Lakeview Loan Servicing holds a deed of trust secured by the Debtor's residence. The creditor asserts \$17,678.10 in pre-petition arrearages but has not yet filed a proof of claim. Although the creditor provides the Declaration of Gina Miner, an employee, there is no evidence to support the amount of claimed pre-petition arrears. The creditor does not provide a Declaration from an individual who maintains or controls the bank's loan records or any evidence of accounting. Without a proof of claim or evidence to support its assertion, the creditor's objection is overruled.

Nonetheless, for reasons stated at Item #6, the plan filed May 19, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is overruled and the plan is not confirmed.

The court will enter an appropriate minute order.

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and deny confirmation of the plan.

First, the Debtor did not appear at the meeting of creditors set for July 20, 2017, as required pursuant to 11 U.S.C. § 343.

Second, the Debtor has not provided the Trustee with copies of payment advices or other evidence of income received within the 60-day period prior to the filing of the petition. The Debtor has not complied with 11 U.S.C. § 521(a)(1)(B)(iv).

Third, the Debtor has not provided the Trustee with a copy of an income tax return for the most recent tax year a return was filed. The Debtor has not complied with 11 U.S.C. § 521(e)(2)(A)(1).

Fourth, the Debtor has failed to provide the Trustee with requested copies of certain items related to Debtor's ownership and operation of an in-home childcare business including, but not limited to, a completed business examination checklist, income tax returns for the 2-year period prior to the filing of the petition, bank account statements for the 6-month period prior to the filing of the petition, proof of all required insurance, and proof of required licenses or permits. The Debtor has not complied with 11 U.S.C. § 521.

Fifth, the Debtor has not fully and accurately provided all information required by the petition, schedules, and Statement of Financial Affairs. The Debtor failed to disclose 8 prior bankruptcies on her petition. The plan is not proposed in good faith as required pursuant to 11 U.S.C. § 1325(a)(3) and the Debtor has not fully complied with the duty imposed by 11 U.S.C. § 521(a)(1).

Sixth, it cannot be determined whether the Debtor's plan is paying all she can to unsecured, non-priority creditors under the Means Test. See 11 U.S.C. § 1325(b)(1)(B). The Statement of Current Monthly Income (Form 122C-1) shows that Line #20b (current monthly income) is \$115,680.00, which is greater than Line #20c (median family income). The Debtor has not filed the Calculation of Disposable Income (Form 122C-2).

The plan filed June 16, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

9. [17-21810](#)-B-13 MONTE KLINKENBORG OBJECTION TO CONFIRMATION OF
HJH-4 Mikalah R. Liviakis PLAN BY HELLEN J. HERNANDEZ
8-1-17 [[47](#)]

Tentative Ruling: The Creditor's Objection to Confirmation of Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C).

The court's decision is to overrule the objection as moot.

Subsequent to the filing of the Helen J. Hernandez's objection, the Debtor filed an amended plan on August 11, 2017. The confirmation hearing for the amended plan is scheduled for October 3, 2017. The earlier plan filed June 12, 2017, is not confirmed.

The court will enter an appropriate minute order.

10. [17-21810](#)-B-13 MONTE KLINKENBORG MOTION TO CONFIRM PLAN
MRL-1 Mikalah R. Liviakis 6-12-17 [[39](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

The Debtor having filed an amended plan on August 11, 2017, the motion to confirm plan filed June 12, 2017, is denied as moot.

The court will enter an appropriate minute order.

11. [16-26719](#)-B-13 HENRY NGUYEN AND DANA OBJECTION TO CLAIM OF BANK OF
JPJ-2 DINH AMERICA, N.A., CLAIM NUMBER 7
Thru #12 Jasmin T. Nguyen 6-14-17 [[55](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

Trustee's Objection to Allowance of Claim of Bank of America, N.A. has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9 Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The court's decision is to sustain the objection to Claim No. 7-1 of Bank of America, N.A. and the claim is disallowed in its entirety.

Jan Johnson, the Chapter 13 Trustee ("Objector"), requests that the court disallow the claim of Bank of America, N.A. ("Creditor"), Claim No. 7-1. The claim is asserted to be in the amount of \$25,762.75. Objector asserts that the claim should be disallowed because the statute of limitations has run pursuant to California Code of Civil Procedure § 337(1).

According to the proof of claim, the underlying debt is a contract claim, most likely based on a written contract. California law provides a four-year statute of limitations to file actions for breach of written contracts. See Cal. Civ. Pro. Code § 337. This statute begins to run from the date of the contract's breach. According to the Objector's exhibits, the last payment was received on or about November 8, 2011, which is more than four years prior to the filing of this case. Hence, when the case was filed on October 7, 2016, this debt was time barred under applicable nonbankruptcy law, i.e., Cal. Civ. Pro. Code § 337(1), and must be disallowed. See 11 U.S.C. § 502(b)(1).

Based on the evidence before the court, the Creditor's claim is disallowed in its entirety.

The court will enter an appropriate minute order.

12. [16-26719](#)-B-13 HENRY NGUYEN AND DANA OBJECTION TO CLAIM OF BANK OF
JPJ-3 DINH AMERICA, N.A., CLAIM NUMBER 8
Jasmin T. Nguyen 6-14-17 [[59](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

Trustee's Objection to Allowance of Claim of Bank of America, N.A. has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). The failure of the claimant to file written opposition at least 14 calendar days prior to the hearing is considered as consent to the sustaining of the objection. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the objecting party, an actual hearing is unnecessary. See *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9 Cir. 2006). Therefore, the claimant's default is entered and the objection will be resolved without oral argument.

The court's decision is to sustain the objection to Claim No. 8-1 of Bank of America, N.A. and the claim is disallowed in its entirety.

Jan Johnson, the Chapter 13 Trustee ("Objector"), requests that the court disallow the

claim of Bank of America, N.A. ("Creditor"), Claim No. 7-1. The claim is asserted to be in the amount of \$24,237.34. Objector asserts that the claim should be disallowed because the statute of limitations has run pursuant to California Code of Civil Procedure § 337(1).

According to the proof of claim, the underlying debt is a contract claim, most likely based on a written contract. California law provides a four-year statute of limitations to file actions for breach of written contracts. See Cal. Civ. Pro. Code § 337. This statute begins to run from the date of the contract's breach. According to the Objector's exhibits, the last payment was received on or about April 20, 2011, which is more than four years prior to the filing of this case. Hence, when the case was filed on October 7, 2016, this debt was time barred under applicable nonbankruptcy law, i.e., Cal. Civ. Pro. Code § 337(1), and must be disallowed. See 11 U.S.C. § 502(b)(1).

Based on the evidence before the court, the Creditor's claim is disallowed in its entirety.

The court will enter an appropriate minute order.

Tentative Ruling: Because less than 28 days' notice of the hearing was given, the motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The court's decision is to grant the motion.

Peter G. Macaluso ("Movant"), attorney for Debtor, moves to withdraw as attorney because the relationship between the Movant and Debtor has deteriorated. Movant asserts that communication has broken down and that the Debtor is unwilling to follow Movant's legal advice. Dkts. 67, 69. Debtor states in a letter to Movant that she feels he did not properly follow instructions of the court, did not honor her requests, and that she intends to communicate her dissatisfaction to the court and American Bar Association. Dkt. 70.

Local Bankruptcy Rule 2017-1(e) provides: "Unless otherwise provided herein, an attorney who has appeared may not withdraw leaving the client in propria persona without leave of court upon noticed motion and notice to the client and all other parties who have appeared. The attorney shall provide an affidavit stating the current or last known address or addresses of the client and the efforts made to notify the client of the motion to withdraw. Withdrawal as attorney is governed by the Rules of Professional Conduct of the State Bar of California, and the attorney shall conform to the requirements of those Rules. The authority and duty of the attorney of record shall continue until relieved by order of the Court issued hereunder. Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit."

"The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the trial court." *American Economy Ins. Co. v. Herrera*, No. 06CV2395-WQH, 2007 WL 3276326, at *1 (S.D. Cal. Nov. 5, 2007) (quoting *Irwin v. Mascott*, 2004 U.S. Dist. LEXIS 28264 (N.D. Cal. December 1, 2004), citing *Washington v. Sherwin Real Estate, Inc.*, 694 F.2d 1081, 1087 (7th Cir.1982)). Factors considered by courts ruling on the withdrawal of counsel are (1) the reasons why withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Herrera*, at *1 (citing *Irwin*, 2004 U.S. Dist. LEXIS 28264 at 4).

California Rule of Professional Conduct 3-700 provides that:

(A) In General.

(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules.

(B) Mandatory Withdrawal.

A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a

client in other matters shall withdraw from employment, if:

- (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
- (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
- (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

(C) Permissive Withdrawal.

If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) The client

- (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
- (b) seeks to pursue an illegal course of conduct, or
- (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
- (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
- (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
- (f) breaches an agreement or obligation to the member as to expenses or fees.

(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or

(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or

(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or

(5) The client knowingly and freely assents to termination of the employment; or

(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

The Movant asserts that the Debtor is unwilling to follow Movant's legal advice and that the Debtor has expressed in person and via letter that she no longer wishes to be represented by Movant. This is cause for permitting the Movant's withdrawal pursuant to California Professional Conduct Rule 3-700(C) (1) (e).

The court will permit the Movant's withdrawal from this bankruptcy case. The motion will be granted. The Movant shall mail Debtor her case file within seven (7) days of the hearing on this motion, at the last known address of the Debtor.

The court will enter an appropriate minute order.

14. [17-23228](#)-B-13 ANDRES FLORES
JPJ-3 Patrick Riazzi

OBJECTION TO DEBTOR'S CLAIM OF
EXEMPTIONS
7-6-17 [[35](#)]

DEBTOR DISMISSED: 7/27/2017

Final Ruling: No appearance at the August 15, 2017, hearing is required.

The case having been dismissed on July 27, 2017, the objection to Debtor's claim of exemptions is dismissed as moot.

The court will enter an appropriate minute order.

15. [15-22030](#)-B-13 ROBERT ROGERS
MET-3 Mary Ellen Terranella

MOTION TO MODIFY PLAN
6-8-17 [[67](#)]

Tentative Ruling: The Motion to Modify Plan After Confirmation has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not permit the requested modification and not confirm the modified plan.

The modified plan understates the total amount of unsecured claims at Section 2.15 at \$3,494.00. The Debtor's objection to the allowance of the claim of Cavalry SPV I, LLC was overruled on July 3, 2017. The total amount of allowed unsecured non-priority claims is \$4,948.90. The plan will take approximately 56 months to complete, which is 8 months longer than the proposed Duration of Payments of 48 months. Pursuant to § 1.03 of the mandatory form plan, monthly payments may only continue for an additional 6 months.

The modified plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

The court will enter an appropriate minute order.

16. [16-24635](#)-B-13 MICHAEL/CLARA LANGTON MOTION TO MODIFY PLAN
MJD-1 Matthew J. DeCaminada 7-11-17 [[65](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

Debtors' Motion to Modify Chapter 13 Plan After Confirmation has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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's decision is to confirm the amended plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtors have filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan filed on July 11, 2017, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

17. [13-24850](#)-B-13 BRIAN DEIS
MJD-1 Scott J. Sagaria

MOTION TO MODIFY PLAN
7-7-17 [[23](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

Debtor's Motion to Modify Chapter 13 Plan After Confirmation has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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's decision is to permit the requested modification and confirm the modified plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan filed on July 7, 2017, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

18. [17-23854](#)-B-13 TIAJUANNA TOLES OBJECTION TO CONFIRMATION OF
DWE-1 Peter G. Macaluso PLAN BY NATIONSTAR MORTGAGE,
Thru #19 LLC
7-6-17 [[19](#)]

Tentative Ruling: The Objection to Confirmation of the Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). A written reply has been filed to the objection.

The court's decision is to overrule the objection but deny confirmation for reasons stated at Item #19.

Objecting creditor Nationstar Mortgage, LLC holds a deed of trust secured by the Debtor's residence. The creditor asserts \$99,545.33 in pre-petition arrearages but has not yet filed a proof of claim. Although the creditor states that it will file a proof of claim prior to the claims bar deadline, the creditor provides no evidence to support the amount of claimed pre-petition arrears. In fact, the Debtor disputes the amount of pre-petition arrears owed given that the Debtor paid toward the creditor's ongoing mortgage, pre-petition arrears, and post-petition arrears in Debtor's previous case no. 17-23854.

The creditor does not provide a Declaration from any individual who maintains or controls the bank's loan records or any other supporting evidence. Without a proof of claim or evidence to support its assertion, the creditor's objection is overruled.

Nonetheless, the plan filed June 8, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a) for reasons stated at Item #19. The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

19. [17-23854](#)-B-13 TIAJUANNA TOLES OBJECTION TO CONFIRMATION OF
JPJ-1 Peter G. Macaluso PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
7-26-17 [[25](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the plan will take approximately 67 months to complete, which exceeds the maximum length of 60 months pursuant to 11 U.S.C. § 1322(d) and which results in a commitment period that exceeds the permissible limit imposed by 11 U.S.C. § 1325(b)(4).

Second, the plan payment in the amount of \$1,620.00 does not equal the aggregate of the Trustee's fees, monthly post-petition contract installments due on Class 1 claims, the monthly payment for administrative expenses, and monthly dividends payable on account of Class 1 arrearage claims, Class 2 secured claims, and executory contract and unexpired lease arrearage claims. The aggregate of the monthly amounts plus the

Trustee's fee is \$1,686.89. The plan does not comply with Section 4.02 of the mandatory form plan.

The plan filed June 8, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtor will be given a further opportunity to confirm a plan. But, if the Debtor is unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtor has not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court will enter an appropriate minute order.

Final Ruling: No appearance at the August 15, 2017, hearing is required.

The Motion to Modify Chapter 13 Plan After Confirmation and Confirm Second Modified Chapter 13 Plan has been set for hearing on the 35-days' notice required by Local Bankruptcy Rule 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). 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's decision is to permit the requested modification and confirm the modified plan.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. No opposition to the motion was filed by the Chapter 13 Trustee or creditors. The modified plan filed on June 29, 2017, complies with 11 U.S.C. §§ 1322, 1325(a), and 1329, and is confirmed.

The court will enter an appropriate minute order.

Tentative Ruling: The Motion to Modify Chapter 13 Plan After Confirmation has been set for hearing on the 35-days' notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to permit the requested modification and confirm the modified plan provided that the order confirming cure the entire amount of post-petition arrears in the amount of \$2,944.96.

The Trustee opposes confirmation on grounds that the modified plan does not cure the entire post-petition arrearage owed to Ocwen Loan Servicing, LLC. The plan proposes to cure post-petition arrearages in the amount of only \$2,858.25. The actual amount of post-petition arrears is \$2,944.96. The Trustee states that it does not oppose granting the Debtor's motion on condition that the order confirming cure the entire amount of post-petition arrears in the amount of \$2,944.96.

The Debtor has filed a response stating that it has no opposition to provide for the full amount of post-petition arrears in the order confirming.

The modified plan complies with 11 U.S.C. §§ 1322 and 1325(a) and is confirmed.

The court will enter an appropriate minute order.

Tentative Ruling: The Motion to Confirm Debtor's Chapter 13 Plan Filed on June 30, 2017, has been set for hearing on the 42-days notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to confirm the amended plan.

Objecting creditor Carisbrook Asset Holding Trust holds a deed of trust secured by the Debtor's residence. The creditor asserts \$246,144.61 in pre-petition arrearages but has not yet filed a proof of claim. The creditor provides no evidence to support the basis for the claimed pre-petition arrears. The creditor does not provide a Declaration from any individual who maintains or controls the company's loan records or any other supporting evidence. Without a proof of claim or evidence to support its assertion, the creditor's objection is overruled.

The amended plan complies with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is confirmed.

The court will enter an appropriate minute order.

23. [15-29573](#)-B-13 SAUNDRA BATTAGLIA
[17-2091](#) BMV-1
BATTAGLIA V. THE BANK OF NEW
YORK MELLON ET AL

MOTION TO DISMISS ADVERSARY
PROCEEDING
7-14-17 [[14](#)]

Tentative Ruling: The Motion to Dismiss Adversary Complaint has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Opposition having been filed, the court will address the merits of the motion at the hearing.

The court's decision is to not dismiss the adversary proceeding.

Plaintiff-Debtor Saundra Battaglia alleges that defendants Bank of New York Mellon and Select Portfolio Servicing, Inc. violated the automatic stay when (1) Bank of New York Mellon purchased real property located at 15935 D Street, Meridian, California ("Property") at a nonjudicial foreclosure sale on December 14, 2015, when the debtor had already filed for bankruptcy on December 11, 2015, and (2) when Select Portfolio Servicing recorded a Trustee's Deed Upon Sale in Sutter County on December 22, 2015.

Plaintiff seeks a determination that:

(I) the defendants willfully violated the automatic stay;

(II) compensatory damages are warranted including economic damages, emotional distress damages, and attorney's fees and costs pursuant to 11 U.S.C. § 362(k); and

(III) punitive damages are warranted in an amount the punish defendants' misconduct and deter future misconduct pursuant to 11 U.S.C. § 362(k).

Defendants argue that they did not violate the automatic stay because plaintiff did not have legal title to the Property at the time she filed bankruptcy and, therefore, legal title to the Property never passed to the bankruptcy estate and was not subject to the automatic stay.

Background

As of March 2, 2004, plaintiff and her [then] husband, Kevin Heimburger, jointly held title to the Property as joint tenants. Dkt. 17, exh. A.

On August 10, 2004, plaintiff executed a deed of trust, encumbering her interest in the Property to secure repayment of a \$30,000.00 personal loan from John Roth III ("DOT 1"). Dkt. 17, exh. B.

On October 3, 2005, Mr. Heimburger executed a deed of trust in favor of Countrywide Home Loans for a personal loan ("DOT 2"). Plaintiff also signed that deed of trust as a joint tenant with her [then] husband. Plaintiff conveyed an interest in the Property under the deed of trust. The deed of trust includes representations by the plaintiff that she had an interest in the Property and that she was authorized to convey that interest to secure the Countrywide loan. That deed of trust was subsequently assigned to defendants. Dkt. 17, exh. C.

On July 6, 2011, Mr. Roth foreclosed on DOT 1 via a nonjudicial foreclosure sale. Dkt. 17, exh. D. Mr. Roth was the highest bidder, and he subsequently caused to be recorded a Trustee's Deed Upon Sale. Dkt. 17, exh. E.

On September 22, 2011, Mr. Heimburger also quitclaimed any remaining interest in the Property to Mr. Roth. Dkt. 17, exh. F.

Plaintiff filed for Chapter 13 on December 11, 2015.

Three days after plaintiff filed her Chapter 13 petition, on December 14, 2015, defendants conducted a nonjudicial foreclosure sale under DOT 2. Dkt. 17, exh. G. Defendants then caused to be recorded a Trustee's Deed Upon Sale.

On December 30, 2015, Mr. Roth conveyed all his interest in the Property to defendants. Dkt. 17, exh. H.

On January 28, 2016, Bank of New York Mellon filed an objection to confirmation of plaintiff's Chapter 13 plan on grounds that the plan did not provide for payments on plaintiff's promissory note secured by a deed of trust on Property. Dkt. 22, case no. 15-29573.

Bank of New York Mellon withdrew its objection to confirmation on March 22, 2016.

Plaintiff's bankruptcy was dismissed on May 11, 2016.

On November 9, 2016, Bank of New York Mellon commenced an Unlawful Detainer action. Dkt. 17, exh. I.

Plaintiff commenced this adversary proceeding on May 30, 2017.

Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Judicial Notice

The court can take judicial notice of matters of public record and recorded documents

on a motion to dismiss without converting the motion to dismiss to one for summary judgment. Typically, such documents must be certified.

Here, the parties request judicial of copies of recorded documents and matters public record that are not certified. Nevertheless, neither party objects to the others request for judicial notice. Therefore, defendant's request for judicial notice at dkt. 17 is GRANTED. Plaintiff's request for judicial notice at dkt. 20 is GRANTED in part and DENIED in part. It is GRANTED as to nos. 1-7 and DENIED as to request nos. 8 and 9 which are outside the pleadings. The court exercises its discretion to consider only matters "within the pleadings" so as to not convert this motion to dismiss to a motion for summary judgment.

Discussion

To survive a motion to dismiss, the plaintiff's complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible. Plaintiff's complaint states that defendants violated the automatic stay by conducting the nonjudicial foreclosure sale and subsequently recording the Trustee's Deed Upon Sale. In order for the defendants to be held liable for violating the automatic stay, plaintiff must have had legal or equitable interest in the Property at the time she filed for bankruptcy.

When a debtor is completely divested of all legal and equitable rights in property prior to the filing of its petition, the automatic stay is inapplicable. See *Eden Place, LLC v. Perl (In re Perl)*, 811 F.3d 1120, 1127-28 (9th Cir. 2016). In *Perl*, prior to the debtor's bankruptcy filing, a nonjudicial foreclosure sale had occurred, the trustee's deed was timely recorded, and the purchaser at the sale had obtained an unlawful detainer judgment and writ of possession. These events collectively terminated the debtor's legal title and right of possession in the property prepetition under California law. As a result, the Ninth Circuit held that the purchaser of the property did not violate the automatic stay by evicting the debtor after he filed for bankruptcy. *Cnty. of Imperial Treasurer-Tax Collector v. Stadtmueller (In re RW Meridian LLC)*, 564 B.R. 21, 28 (B.A.P. 9th Cir. 2017).

Defendants attempt to align this case with *Perl*. Defendants maintain that the 2011 foreclosure on DOT 1 extinguished *all* of plaintiff's interest in the Property which means plaintiff had no interest in the Property that became property of the estate when she filed her Chapter 13 petition in 2015. Defendants also maintain they did not disturb whatever possessory interest plaintiff may have had in the Property while her Chapter 13 case was pending because they did not commence unlawful detainer proceedings to remove plaintiff from the Property until after the Chapter 13 case was dismissed. Defendants thus assert that, as a matter of law, their post-petition foreclosure on December 15, 2015, three days after plaintiff filed her Chapter 13 petition on December 11, 2015, did not violate the automatic stay of 11 U.S.C. § 362(a) and that they are not liable for damages under 11 U.S.C. § 362(k). The court disagrees, at least at this stage of the proceedings and for purposes of the motion to dismiss.

Although the argument is poorly developed, plaintiff's opposition alludes to an interest in the Property that plaintiff was able to convey under DOT 2 in 2005, over a year after she purported to convey an interest in the Property through DOT 1 in 2004. Plaintiff signed DOT 2 as a joint tenant with her [then] husband. That deed of trust includes a conveyance by the plaintiff of an interest in Property to secure the Countrywide loan and a representation by the plaintiff that she was authorized to convey an interest in the Property. Moreover, when DOT 2 was recorded DOT 1 was of record. Thus, Countrywide had constructive or inquiry notice of plaintiff's earlier conveyance under DOT 1 and, yet, it elected to proceed with the loan to plaintiff and her [then] husband. From that, the court can infer that Countrywide made the loan secured by DOT 2, which included a conveyance by the plaintiff of an interest in the Property, based on its determination that plaintiff had some interest in the Property she could and was authorized to convey.

Taking the allegations of the complaint and inference drawn from those allegations and matters of which the court has taken judicial notice as true, as the court must for purposes of this motion to dismiss, it is plausible that the 2011 foreclosure of DOT 1

did not extinguish *all* of the plaintiff's interest in the Property. In other words, it appears that plaintiff conveyed *some* interest in the Property through DOT 1 and *some* interest in the Property through DOT 2. The extent of the interest conveyed under each of those deeds of trust is a factual question that the court does not resolve on a motion to dismiss. At this juncture, it is sufficient that the court can conclude by assuming the truth of the matters before it that despite the 2011 foreclosure on DOT 1 in 2011 plaintiff nevertheless had some interest in the Property through DOT 2 when she filed her Chapter 13 petition on December 11, 2015, that the defendants' foreclosure three days after the petition was filed on December 15, 2015, extinguished without stay relief.

In sum, the court concludes that the complaint states a plausible claim for relief under §§ 362(a) and 362(k). Therefore, for the foregoing reasons, defendants' motion to dismiss is DENIED.

Defendants are ORDERED to file and serve an answer to the complaint by August 31, 2017.

IT IS FURTHER ORDERED that the status conference set for August 15, 2017, at 1:00 p.m. [Calendar Item #29] is continued for 30 days to September 19, 2017, at 11:00 a.m.

The court will enter an appropriate minute order.

24. [17-23779](#)-B-13 MARIA CRISTINA CRUZ
JPJ-1 GALLEGOS
Chad M. Johnson

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON
7-26-17 [[14](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). A written reply has been filed to the objection.

The court's decision is to sustain the objection and deny confirmation of the plan.

Chapter 13 Trustee Jan Johnson objects to confirmation on grounds that the Debtor has failed to comply with the Trustee's request to amend her plan. The Debtor testified at her July 20, 2017, meeting of creditors that her 2013 Nissan Altima, listed under Class 4 as a claim paid directly by the Debtor, will pay off within the 60-month term of the plan. Because payment of this debt would complete prior to the 60-month plan term, the Trustee had requested that the Debtor amend her plan to include the car as a debt being paid through her plan as Class 2 plan that will mature before the plan is complete.

In response, the Debtor states that the vehicle is listed as a Class 4 claim with a stop-up additional provision because her mother-in-law is the primary borrower and the Debtor does not want the modification of the loan to impact her mother-in-law. However, no declaration or exhibits showing the mother-in-law's interest in the vehicle has been filed. Without further evidence, it cannot be determined whether vehicle has been properly classified in the plan.

The plan filed June 5, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

The court will enter an appropriate minute order.

25. [17-23780](#)-B-13 MELANIE PAULY MONTERROSA OBJECTION TO CONFIRMATION OF
JPJ-1 W. Scott de Bie PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
7-26-17 [[53](#)]

Final Ruling: No appearance at the August 15, 2017, hearing is required.

This matter will be continued to September 5, 2017, at 1:00 p.m. to be heard in conjunction with the hearing on the Debtor's motion to value collateral of Franchise Tax Board.

The court will enter an appropriate minute order.

26. [17-23783](#)-B-13 ALLEN/ANNETTE PURDY
JPJ-1 Scott D. Hughes

OBJECTION TO CONFIRMATION OF
PLAN BY JAN P. JOHNSON AND/OR
MOTION TO DISMISS CASE
7-26-17 [[13](#)]

Tentative Ruling: The Trustee's Objection to Confirmation of the Chapter 13 Plan and Conditional Motion to Dismiss Case was properly filed at least 14 days prior to the hearing on the motion to confirm a plan. See Local Bankruptcy Rules 3015-1(c)(4) & (d)(1) and 9014-1(f)(2). The Debtors, creditors, the Trustee, the U.S. Trustee, and any other parties in interest may, at least 7 days prior to the date of the hearing, serve and file with the court a written reply to any written opposition. Local Bankruptcy Rule 9014-1(f)(1)(C). No written reply has been filed to the objection.

The court's decision is to sustain the objection and conditionally deny the motion to dismiss.

First, the Debtors' plan, Rights and Responsibilities, and Statement of Attorney Compensation state that their attorney received \$1,000.00 prior to the date of the petition. This is inconsistent with Line #16 of the Statement of Financial Affairs, which states their attorney did not receive any funds from the Debtors prior to the petition date. The Debtors filed an amended Statement of Financial Affairs on August 8, 2017, to fix this discrepancy.

Second, the Debtors have not provided the Trustee with copies of payment advices or other evidence of income received within the 60-day period prior to the filing of the petition. The Debtors have not complied with 11 U.S.C. § 521(a)(1)(B)(iv).

Third, the Debtors have not provided the Trustee with requested documents in connection with Debtors' ownership and operation of Bay Valley Real Estate including, but not limited to, completed business examination checklist, proof of all required insurance, and proof of required licenses. The Debtors have not complied with 11 U.S.C. § 521.

For the second and third reasons stated above, the plan filed June 5, 2017, does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the plan is not confirmed.

Because the plan is not confirmable, the Debtors will be given a further opportunity to confirm a plan. But, if the Debtors are unable to confirm a plan within a reasonable period of time, the court concludes that the prejudice to creditors will be substantial and that there will then be cause for dismissal. If the Debtors have not confirmed a plan within 75 days, the case will be dismissed on the Trustee's ex parte application.

The court will enter an appropriate minute order.

27. [13-32286](#)-B-13 MARCOS SMITH
WW-3 Mark A. Wolff

CONTINUED OBJECTION TO CLAIM OF
VICTOR CORREIA, CLAIM NUMBER
6-1
6-1-17 [[80](#)]

Tentative Ruling: The Objection to Claim of Victor Correia, Claim Number 6-1 has been set for hearing on at least 44 days' notice to the claimant as required by Local Bankruptcy Rule 3007-1(b)(1). Opposition was filed. 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.

The matter will be determined at the scheduled hearing.

This matter was continued from July 17, 2017, given representation at the hearing in open court by Debtor's attorney that the Debtor and creditor Victor Correia ("Creditor") have a resolution in the works. Absent a resolution, the objection will be sustained.

Debtor requests that the court disallow the claim of Creditor, Claim No. 6-1. The claim is asserted to be in the amount of \$22,785.53. Objector asserts that the claim was paid through the plan of his prior bankruptcy case (no. 08-26780) and that Creditor received a sum of \$20,185.53. Objector believes that a balance of only \$4,409.47 is due and requests that the claim be disallowed to the extent it exceeds \$12,158.96 and that all the funds in excess of this be paid to the Chapter 13 Trustee.

Responses

Responses were filed by both the Chapter 13 Trustee and Creditor.

Chapter 13 Trustee Jan Johnson asserts that the deadline to file an objection to the Notice of Filed Claims has passed. Pursuant to Local Bankr. R. 3007-1(d)(3), objections to claims shall be filed no later than 60 days after service of the Notice of Filed Claims. In this case, more than three years have passed. Pursuant to Local Bankr. R. 3007-1(d)(4), any objection filed after the 60 day period, if sustained, shall not result in any order that the claimant refund amounts paid on account of its claim. The Trustee has already paid Creditor \$22,000.00 and opposes the Objector's request to the extent it would require Creditor to refund any of this amount to the Trustee.

Creditor has filed a response reiterating the Trustee's assertion that the deadline to file an objection to the Notice of Filed Claims has expired pursuant to Local Bankr. R. 3007-1(d)(3). Creditor also states that the amount claimed in Claim No. 6-1 is correct and is comprised of \$12,158.96 in pre-petition claims and new attorneys fees and costs incurred from this second bankruptcy case, the filing of a second adversary proceeding, and in negotiating a settlement agreement.

28. [16-22090](#)-B-13 JOSHUA/MARILYN JOHNSON
CYB-4 Candace Y. Brooks

OBJECTION TO NOTICE OF MORTGAGE
PAYMENT CHANGE
7-11-17 [[62](#)]

Tentative Ruling: The Objection to Notice of Mortgage Payment Change Filed March 2, 2017, by Wells Fargo Bank, N.A. has been set for hearing on the 28-days notice required by Local Bankruptcy Rule 9014-1(f)(1). Opposition was filed. 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.

The court's decision is to continue the matter to September 19, 2017, at 1:00 p.m.

Debtors object to the Notice of Mortgage Payment Change filed by U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., Home Equity Asset Trust 2006-1, Home Equity Pass-Through Certificates, Series 2006-1, its assignees and/or successors, by and through its servicing agent Wells Fargo Bank, N.A., ("Creditor"). Debtors dispute the increase in their mortgage due to the fact that a public nuisance lien filed by the County of Sacramento has been abated. They state that the County of Sacramento had refunded to Creditor the \$7,130.00 that Creditor had paid toward the public nuisance lien. Debtors further believe that their mortgage payment to Creditor is \$2,242.05 and not \$3,466.48, that the Creditor is not entitled to the increased escrow amount of \$1,224.43 or additional administrative trustee fees that were created by the March 2, 2017, Notice of Mortgage Payment Change, and that the Notice of Mortgage Payment Change should be disallowed.

Creditor has filed a response stating that it agreed that the fee associated with the nuisance that increased escrow is no longer at issue. Creditor requests that the objection be denied or alternatively that the matter be continued for 30 days so that an amended Notice of Payment Change can be filed.

The Creditor shall have until September 14, 2017, to file an amended notice. Any opposition to the amended notice shall be filed by September 18, 2017.

The court will enter an appropriate minute order.

29. [15-29573](#)-B-13 SAUNDRA BATTAGLIA
[17-2091](#)
BATTAGLIA V. THE BANK OF NEW
YORK MELLON ET AL

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
5-30-17 [[1](#)]

See Also #23

CONTINUED TO 9/19/17 AT 11:00 A.M. AS STATED AT ITEM #23.