

**UNITED STATES BANKRUPTCY COURT**

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

**September 11, 2018 at 1:30 p.m.**

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1.	<a href="#"><u>16-27050-E-13</u></a> <a href="#"><u>DPC-1</u></a>	<b>ROBERT WOOD</b> <b>Michael Benavides</b>	<b>CONTINUED MOTION TO DISMISS</b> <b>CASE</b> <b>8-3-18 [26]</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—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 August 3, 2018. By the court's calculation, 33 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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David Cusick ("the Chapter 13 Trustee") seeks dismissal of the case on the basis that Robert Wood ("Debtor") is \$3,840.00 delinquent in plan payments, which represents multiple months of the \$1,280.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

The Chapter 13 Trustee argues further that Debtor is in material default under the Plan because Debtor's delinquency in payments. Section 1.01 of the Plan (Dckt. 13) makes that failure a breach of the Plan in addition to violating the Bankruptcy Code. *See* 11 U.S.C. § 1307(c).

**September 11, 2018 at 1:30 p.m.**

## DEBTOR'S OPPOSITION

Debtor filed an Opposition on August 20, 2018. Dckt. 31. Debtor asserts he fell behind on payments after missing a week of work, and proposes a payment schedule with cure payments August 8, August 24, August 31, and September 10 of 2018. Dckt. 32.

Debtor's counsel, within Debtor's Opposition, requests a continuance until September 10, 2018, for Debtor to become current and because counsel "will be on a returning flight at the exact time of this [September 5, 2018,] hearing." Dckt. 31.

## SEPTEMBER 5, 2018, HEARING

At the September 5, 2018, hearing, the court specially continued the hearing on the Motion to September 11, 2018, at 1:30p.m. (specially set) to afford Debtor's counsel the opportunity to attend the hearing on the Motion.

## RULING

Debtor states he fell behind on payments because he "was very sick and had to take a week off of work and I did not have any paid vacation time." Dckt. 32, ¶ 7. A review of Debtor's Schedule I shows a monthly income of \$6,859.06, exclusive of his nonfiling spouse's income. Schedule I, Dckt. 12. A week of Debtor's monthly income should be approximately \$1,714.76. In fact, Debtor states further in his Declaration work is "ramping up" and he expects \$1,600.00 each week. Dckt. 32, ¶ 8. What is missing is how Debtor fell behind on *three* monthly payments after missing a weeks' work.

Debtor elects not to provide a Modified Plan curing the delinquencies in payments. Rather, Debtor has told the court when he wants to pay under his plan and requests this court continue this Motion to fit his schedule. No explanation is provided to the court regarding where Debtor is receiving funds to cure all his delinquencies while continuing the impending plan payments. Debtor states he missed payments due to taking off a week, but it appears he suddenly conjured multiple weeks' income when this Motion arose.

The court finds Debtor's testimony is not credible. Debtor's delay without explanation is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1). The court also questions whether this case, where Debtor and his nonfiling spouse are significantly above median income, is being pursued in good faith. *See* 11 U.S.C. § 1325(a)(7).

At the hearing, **XXXXXXXXXXXXXXXXXXXX**

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 David Cusick (“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.