



**UNITED STATES BANKRUPTCY COURT
Eastern District of California
Honorable René Lastreto II
Wednesday, September 21, 2022
Department B – Courtroom #13
Fresno, California**

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INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called, and all parties will need to appear at the hearing unless otherwise ordered. The court may continue the hearing on the matter, set a briefing schedule, or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

Post-Publication Changes: The court endeavors to publish its rulings as soon as possible. However, calendar preparation is ongoing, and these rulings may be revised or updated at any time prior to 4:00 p.m. the day before the scheduled hearings. Please check at that time for any possible updates.

9:30 AM

1. [22-11203](#)-B-13 **IN RE: SAUNDRA HIGHTOWER**

ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
9-2-2022 [\[56\]](#)

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: The minutes of the hearing will be the court's findings and conclusions.

ORDER: The court will issue an order.

This matter will proceed as scheduled. If the fees due at the time of the hearing have not been paid prior to the hearing, the case will be dismissed on the grounds stated in the OSC.

If the installment fees due at the time of hearing are paid before the hearing, the order permitting the payment of filing fees in installments will be modified to provide that if future installments are not received by the due date, the case will be dismissed without further notice or hearing.

2. [22-11203](#)-B-13 **IN RE: SAUNDRA HIGHTOWER**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H. MEYER
8-30-2022 [\[47\]](#)

NO RULING.

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to Sandra Ashley Hightower's ("Debtor") *Chapter 13 Plan* dated July 28, 2022 because (i) the Debtor will not be able to make to make all payments under the plan and comply with the plan (11 U.S.C. § 1325(a)(6)); (ii) the Debtor has not provided Trustee with her last filed tax return (11 U.S.C. § 521(e)(2)(A)); (iii) the plan fails to provide for the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim in at least the amount that would be paid on such claim if the estate was liquidated under chapter 7 (11 U.S.C. § 1325(a)(4)); and (iv) the plan has not been proposed in good faith and/or the petition was filed in bad faith (11 U.S.C. § 1325(a)(7)). Doc. #47.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will be called and proceed as scheduled. If

Debtor's case is not dismissed or converted in matter #3 below (MHM-2), this objection will be CONTINUED to October 26, 2022 at 9:30 a.m.

If continued, and unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's objection to confirmation is withdrawn, the Debtor shall file and serve a written response not later than October 12, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. Trustee shall file and serve a reply, if any, by October 19, 2022.

If the Debtor elects to withdraw the plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than October 19, 2022. If the Debtor does not timely file a modified plan or a written response, this objection will be sustained on the grounds stated in the objection without a further hearing.

3. [22-11203](#)-B-13 **IN RE: SAUNDRA HIGHTOWER**
[MHM-2](#)

MOTION TO DISMISS CASE
8-30-2022 [[51](#)]

MICHAEL MEYER/MV

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Unless the trustee's motion is withdrawn at the hearing the court intends to grant the motion to dismiss on the grounds stated in the motion.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") asks the court to dismiss this case under 11 U.S.C. § 1307(c). Doc #51.

Though not required, Sandra Ashley Hightower opposed. Doc. #71.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, this motion may be GRANTED.

This matter was noticed pursuant to LBR 9014-1(f)(2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondent's default and grant the motion. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is

necessary.

Trustee moves to dismiss this case for the following reasons:

1. Unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1));
2. Failure to make the first plan payment of \$2,898.00, which was due on August 25, 2022 (11 U.S.C. § 1307(c)(4));
3. Failure to provide copies of Debtor's Federal income tax return to trustee (11 U.S.C. § 521(e)(2)(A));
4. Failure to file 2021 income tax returns (11 U.S.C. § 1397(e)); and
5. Failure to file a Credit Counseling Certificate, so Debtor may be ineligible to be a debtor in chapter 13 (11 U.S.C. § 109(h)).

Doc. #51.

On September 15, 2022, Debtor filed, among other things, a declaration with copies of her 2021 Federal income tax returns. Doc. #63.

On September 16, 2022, Debtor filed a Credit Counseling Certificate and opposition. Doc. #70. Debtor claims that the Credit Counseling Certificate was filed at the outset of the case and is not mentioned in the notice regarding missing documents. Doc. #71. For convenience, Debtor "refiled" it. Doc. #70.

Additionally, Debtor claims that the first payment to the mortgage company was paid, but Debtor was locked out of the mortgage company's payment portal by her ex-husband, so she cannot obtain proof of that payment. *Id.* Debtor does not discuss whether the first plan payment of \$2,898.00 has been paid but Debtor does ask where she should pay her October mortgage payment. *Id.* Although the mortgage is listed in Class 1 – which is to be paid by Trustee under the plan – Debtor may have paid a portion of the delinquent plan payment to the mortgage company directly, rather than to the Trustee.

Based on the current record, there has been unreasonable delay by the Debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)) because Debtor has failed to make her first plan payment of \$2,898.00 that was due on August 25, 2022 (11 U.S.C. § 1307(c)(4)).

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for cause. "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescope Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(1) for unreasonable delay.

In addition, the trustee has reviewed the schedules and determined that this case has a liquidation value of \$9,519.90 comprised of a

2011 BMW, cash, funds in a bank account, a 403b for Ray Hightower, and unpaid wages. Doc. #53. Trustee says it is difficult to determine whether, in a chapter 7, there would be non-exempt assets depending on whether Debtor's exemptions were corrected. *Id.*

Written opposition was not required and may be presented at the hearing. The court is inclined to GRANT the motion and either dismiss or convert this case to chapter 7.

4. [22-11203](#)-B-13 **IN RE: SAUNDRA HIGHTOWER**
[MMJ-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY CREDITOR CAPITAL ONE
AUTO FINANCE
8-23-2022 [[35](#)]

CAPITAL ONE AUTO FINANCE/MV
MARJORIE JOHNSON/ATTY. FOR MV.

NO RULING.

Secured creditor Capital One Auto Finance, a division of Capital One, N.A. ("Creditor") objects to Sandra Ashley Hightower's ("Debtor") *Chapter 13 Plan* dated July 28, 2022 because (i) the plan fails to pay the full replacement value of the collateral securing Creditor's claim as required by 11 U.S.C. § 1325(a)(5)(B); (ii) the plan fails to pay the applicable prime plus interest rate as measured by the formula rate expressed in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); (iii) the plan does not provide for equal monthly payments to Creditor as required by 11 U.S.C. § 1325(a)(5)(B)(iii)(1). Doc. #35.

This objection was filed and served pursuant to Local Rule of Practice ("LBR") 3015-1(c)(4) and will be called and proceed as scheduled. If Debtor's case is not dismissed or converted in matter #3 above (MHM-2), this objection will be CONTINUED to October 26, 2022 at 9:30 a.m.

Unless this case is voluntarily converted to chapter 7, dismissed, or Creditor's objection to confirmation is withdrawn, the Debtor shall file and serve a written response not later than October 12, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtor's position. Creditor shall file and serve a reply, if any, by October 19, 2022.

If the Debtor elects to withdraw the plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than October 19, 2022. If the Debtor does not timely file a modified plan or a written response, this objection will be sustained on the grounds stated in the objection without a further hearing.

5. [21-12814](#)-B-13 **IN RE: DUSTIN DUTRA**
[SL-4](#)

MOTION TO MODIFY PLAN
8-16-2022 [[60](#)]

DUSTIN DUTRA/MV
SCOTT LYONS/ATTY. FOR DBT.
RESPONSIVE PLEADING

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order approved as to form by Trustee.

Dustin Anthony Dutra ("Debtor") moves for an order confirming the *Third Modified Chapter 13 Plan* dated August 16, 2022. Doc. #60. The plan proposes that Debtor shall pay no less than \$7,030.00 to the chapter 13 trustee by August 17, 2022 and the payment shall increase to no less than \$1,240.00 per month no later than September 25, 2022 and stay at that level through completion of Debtor's 60-month plan in months 9 through 60. Doc. #65. Debtor's *Amended Schedules I and J* indicate that Debtor receives \$1,243.35 in monthly net income, which is sufficient to fund the proposed plan. Doc. #67.

In contrast, the operative *Chapter 13 Plan* dated December 17, 2021, confirmed February 14, 2022, requires Debtor to pay \$1,386.58 per month effective month 1 with a \$9,756.00 dividend to allowed, non-priority unsecured claims. Docs. #3; #15.

Chapter 13 trustee Michael H. Meyer ("Trustee") timely objected to confirmation of the plan under 11 U.S.C. § 1325(a)(1) because the plan fails to comply with provisions of the Bankruptcy Code. Doc. #70. Trustee quotes Additional Provision 7.02, which states:

The debtor will pay no less than (and at least) \$7,030.00 to the Chapter 13 Trustee by August 17, 2022. This relates to sections 2.01 of Debtors' original Chapter 13 Plan. Any additional money paid by Debtors shall be distributed by the Chapter 13 Trustee pursuant to Debtor's Third Modified Chapter 13 Plan as well as Debtor's Original Chapter 13 Plan.

Doc. #65. If confirmed, the proposed plan would be the only plan that Trustee could make payments under. Trustee says that he cannot make payments pursuant to the original and modified plan. The proposed plan replaces all previous plans, so this language needs to be stricken in its entirety. Doc. #70.

Additionally, Trustee claims that Additional Provision 7.01 needs to be stricken and replaced with the Trustee's attorney discharge language, which can be provided upon request. *Id.*

Debtor responded, agreeing to strike Additional Provision 7.02 in its entirety, and striking and replacing Additional Provision 7.01 with Trustee's suggested attorney discharge language. Doc. #72.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d)(2). The failure of the creditors, the U.S. Trustee, or any other party in interest except Trustee to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest except Trustee are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

This matter will be called and proceed as scheduled because it appears that Trustee's objection can be resolved in an order confirming plan. If granted, the confirmation order shall include the docket control number of the motion, reference the plan by the date it was filed, and be approved as to form by Trustee.

6. [17-13832](#)-B-13 **IN RE: DAVID BISHOP AND TIESHA GILL**
[FW-3](#)

MOTION FOR COMPENSATION BY THE LAW OFFICE OF FEAR WADDELL,
P.C. FOR PETER L. FEAR, DEBTORS ATTORNEY(S)
8-12-2022 [[66](#)]

PETER FEAR/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Peter L. Fear of Fear Waddell, P.C. ("Applicant"), attorney for David Wayne Bishop and Tiesha Marie Gill (collectively "Debtors"), seeks compensation in the sum of \$3,224.47 on a final basis under 11 U.S.C. § 330. Doc. #66. This amount consists of \$3,077.00 in fees as reasonable compensation for services rendered and of \$147.47 for reimbursement of actual, necessary expenses from July 1, 2018 through August 10, 2022. *Id.*

Debtors executed a statement dated August 11, 2022 that they have read the application and approve the same. Doc. #68, *Ex. E*.

No party in interest timely filed written opposition. This motion will be GRANTED.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and Fed. R. Bankr. P. ("Rule") 2002(a)(6). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *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 *Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

Debtors filed chapter 13 bankruptcy on October 2, 2017. Doc. #1. The *Chapter 13 Plan* dated October 2, 2017, confirmed March 14, 2018, is the operative plan in this case. Docs. #5; #48. Section 3.05 provides that Applicant was paid \$1,800.00 prior to filing the case and, subject to court approval, an additional \$8,225.00 shall be paid through the plan by filing and serving a motion in accordance with 11 U.S.C. §§ 329, 330, and Rule 2002, 2016, and 2017. *Id.* The motion indicates that Applicant was paid \$1,800.00 plus the \$310.00 filing fee, for a total of \$2,110.00 in pre-petition payments. Doc. #66. These amounts are reflected in Applicant's *Disclosure of Compensation* dated October 2, 2017. Doc. #1.

This is Applicant's second and final fee application. In the first fee application, Applicant performed \$5,940.50 in fees for services and incurred \$364.91 in expenses, for a total of \$6,305.41. Doc. #51. After drawing down the \$2,110.00 in pre-petition payments, the court authorized Trustee to pay Applicant \$4,195.41 in fees and expenses. Docs. ##58-59.

The source of funds for this application will be solely from the chapter 13 plan in accordance with the confirmed chapter 13 plan. Doc. #66. It appears that \$4,039.59 remains in the plan for payment of attorney fees and expenses. Doc. #5.

Applicant's firm provided 12.50 billable hours of legal services totaling **\$3,077.00** in fees:

Professional	Rate	Hours	Amount
Gabriel J. Waddell (no charge)	\$0	0.1	\$0.00
Gabriel J. Waddell (2018)	\$295	0.5	\$147.50
Gabriel J. Waddell (2019)	\$310	1.10	\$341.00
Gabriel J. Waddell (2020)	\$320	0.10	\$32.00
Gabriel J. Waddell (2021)	\$330	0.20	\$66.00
Gabriel J. Waddell (2022)	\$345	1.50	\$517.50
Gabriel J. Waddell (estimated)	\$345	4.00	\$1,380.00
Katie Waddell (2018)	\$195	0.30	\$58.50
Kayla Schlaak (2018)	\$70	0.80	\$56.00
Kayla Schlaak (2019)	\$80	0.20	\$16.00
Kayla Schlaak (2022)	\$125	3.70	\$462.50
Total Hours & Fees		12.50	\$3,077.00

Doc. #68, Exs. B, C. Applicant also incurred **\$147.47** in expenses:

Photocopying	\$78.00
Postage	+ \$69.47
Total Costs	= \$147.47

Id., Ex. B. These combined fees and expenses total **\$3,224.47**.

11 U.S.C. § 330(a)(1)(A) and (B) permit approval of "reasonable compensation for actual, necessary services rendered by . . . [a] professional person, or attorney" and "reimbursement for actual, necessary expenses." In determining the amount of reasonable compensation to be awarded to a professional person, the court shall consider the nature, extent, and value of such services, considering all relevant factors, including those enumerated in subsections (a)(3)(A) through (E). § 330(a)(3).

Applicant's services included, without limitation: (1) communicating with the trustee regarding exemption issues and working with Debtors to amend the schedules; (2) corresponding with the Debtors regarding plan issues and conducting a case review re: plan funding; (3) finalizing the first interim fee application (FW-2); (4) preparing discharge paperwork and preparing the case for case closing; and (5) preparing and filing this fee application (FW-3). Doc. #68, Ex. A. The court finds the services and expenses actual, reasonable, and necessary. No party in interest filed opposition and Debtors have consented to payment of the proposed fees. *Id.*, Ex. E.

Accordingly, this motion will be GRANTED. Applicant shall be awarded \$3,077.00 in fees and \$147.47 in expenses on a final basis under 11 U.S.C. § 330. Trustee will be authorized, in Trustee's discretion, to pay Applicant \$3,224.47 in accordance with the confirmed plan for services rendered to and expenses incurred for the estate from July 1, 2018 through August 10, 2022. Additionally, the court will approve on

a final basis the interim award of \$5,940.50 in fees for services and \$364.91 in expenses, totaling \$6,305.41, from August 22, 2017 through June 30, 2018. The total amount of compensation in this case will be \$9,529.88. After application of the \$2,110.00 in pre-petition payments, the total amount paid in this case by the trustee through the plan will be \$7,419.88.

7. [22-11035](#)-B-13 **IN RE: DONALD/STEPHANIE SALKIN**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H.
MEYER
8-29-2022 [[38](#)]

BENNY BARCO/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Continued to October 26, 2022 at 9:30 a.m.

ORDER: The court will issue an order.

Chapter 13 trustee Michael H. Meyer ("Trustee") objects to Donald Lee Salkin's and Stephanie Austin Salkin's (collectively "Debtors") Chapter 13 Plan dated June 28, 2022 under Local Rule of Practice ("LBR") 3015-1(c)(4) because the plan does not provide for all of Debtors' projected disposable income to be applied to unsecured creditors as required by 11 U.S.C. § 1325(b). Doc. #38. The plan provides for a 23% dividend to unsecured claims, which results in \$34,960.00 paid through the plan. Since Debtors are above median income, under Form 122C-2, Debtors' monthly disposable income is \$1,315.03. Therefore, Trustee claims that unsecured creditors must receive a pro rata sum of \$78,901.80 minus attorney fees in the plan. *Id.*

This objection will be CONTINUED to October 26, 2022 at 9:30 a.m.

Unless this case is voluntarily converted to chapter 7, dismissed, or Trustee's objection to confirmation is withdrawn, the Debtors shall file and serve a written response not later than October 12, 2022. The response shall specifically address each issue raised in the objection to confirmation, state whether the issue is disputed or undisputed, and include admissible evidence to support the Debtors' position. Trustee shall file and serve a reply, if any, by October 19, 2022.

If the Debtors elect to withdraw the plan and file a modified plan in lieu of filing a response, then a confirmable modified plan shall be filed, served, and set for hearing, not later than October 19, 2022. If the Debtors do not timely file a modified plan or a written response, this objection will be sustained on the grounds stated in the objection without a further hearing.

8. [19-10752](#)-B-13 **IN RE: STEVEN CHAVEZ**
[MHM-3](#)

CONTINUED MOTION TO DISMISS CASE
7-12-2022 [\[158\]](#)

MICHAEL MEYER/MV
SHARLENE ROBERTS-CAUDLE/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted or continued.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

This matter was originally heard on August 10, 2022. Doc. #169.

Chapter 13 trustee Michael H. Meyer ("Trustee") asked the court to dismiss this case under 11 U.S.C. § 1307(c)(1) for unreasonable delay by the debtor that is prejudicial to creditors and 11 U.S.C. § 1307(c)(6) for failure to make all payments due under the confirmed plan. Doc. #158.

Steven Chavez ("Debtor") did not oppose. However, on August 9, 2022, Debtor filed the *Fourth Modified Chapter 13 Plan* dated August 9, 2022 to cure the delinquency and set it for hearing on September 21, 2022, which is the subject of matter #9 below. Docs. #159; #165. The court continued the hearing to the same date and time as the confirmation hearing. Docs. ##169-70.

On September 17, 2022, Debtor withdrew the plan and filed the *Fifth Modified Chapter 13 Plan* dated the same, which is set for hearing on October 26, 2022. Docs. ##176-83.

The record shows that there has been unreasonable delay by the debtor that is prejudicial to creditors (11 U.S.C. § 1307(c)(1)). The debtor has failed to make all payments due under the plan as required by 11 U.S.C. § 1307(c)(6). Doc #160.

Under 11 U.S.C. § 1307(c), the court may convert or dismiss a case, whichever is in the best interests of creditors and the estate, for "cause". "A debtor's unjustified failure to expeditiously accomplish any task required either to propose or to confirm a chapter 13 plan may constitute cause for dismissal under § 1307(c)(1)." *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 915 (B.A.P. 9th Cir. 2011). There is "cause" for dismissal under 11 U.S.C. § 1307(c)(6) for failure to complete the terms of the confirmed plan.

In addition, Trustee has reviewed the schedules and determined that this case has a liquidation value of \$76,986.00 after trustee

compensation. Doc. #168. This amount is comprised of the value of Debtor's 2015 Ford Automobile, 2013 Harley Davidson, 1992 Sea Ray Boat, Bank account balance, guns, farm animals, and farm equipment. *Id.* If Debtor were to amend the exemptions, there would still remain non-exempt equity that could be realized for the benefit of unsecured creditors should the case be converted to chapter 7. *Id.* Therefore, conversion, rather than dismissal, serves the interests of creditors and the estate.

This matter will be called and proceed as scheduled. The court intends to either GRANT AS MODIFIED and CONVERT THE CASE TO CHAPTER 7, or to CONTINUE this motion to October 26, 2022 to be heard in connection with Debtor's motion to modify plan.

9. [19-10752](#)-B-13 **IN RE: STEVEN CHAVEZ**
[SFR-7](#)

MOTION TO MODIFY PLAN
8-9-2022 [[162](#)]

STEVEN CHAVEZ/MV
SHARLENE ROBERTS-CAUDLE/ATTY. FOR DBT.
RESPONSIVE PLEADING

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Withdrawn; taken off calendar.

NO ORDER REQUIRED.

The debtor withdrew this motion to modify plan on September 17, 2022. Doc. #176. Accordingly, this motion will be taken off calendar pursuant to the withdrawal.

10. [20-10859](#)-B-13 **IN RE: KEITH/GERALDINE CASH**
[TCS-6](#)

MOTION TO VACATE DISMISSAL OF CASE
8-26-2022 [\[82\]](#)

GERALDINE CASH/MV
TIMOTHY SPRINGER/ATTY. FOR DBT.
DEBTOR AND JOINT DEBTOR DISMISSED: 08/18/2022

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Denied.

ORDER The minutes of the hearing will be the court's findings and conclusions. The court will issue an order.

Geraldine Lee Cash ("Debtor"), individually and as representative for decedent Keith Raymond Cash (collectively "Debtors"), moves for an order vacating the order (Doc. #78) dismissing this case on August 18, 2022 ("Dismissal Order") under Civ. Rule 60 (Rule 9024).¹ Doc. #82.

This matter will be called and proceed as scheduled. The court is inclined to DENY the motion.

This motion was set for hearing on less than 28 days' notice pursuant to LBR 9014-1(f)(2) and will proceed as scheduled. Written opposition was not required and may be presented at the hearing. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults. If opposition is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f)(2). The court will issue an order if a further hearing is necessary.

Debtors filed chapter 13 bankruptcy on March 5, 2020. Doc. #1. A chapter 13 plan was confirmed on August 10, 2020. Docs. #2; #37. Debtors confirmed a modified plan on September 24, 2021. Docs. #44; #57. Keith Cash passed away on March 22, 2022 and Debtor was appointed as representative of the estate for both parties on July 25, 2022. Doc. #75. Debtor has been in bankruptcy for nearly 2.5 years.

On July 8, 2022, chapter 13 trustee Michael H. Meyer ("Trustee") filed a *Notice of Default and Intent to Dismiss Case* ("Notice of Default") because Debtor was delinquent \$764.00 through June 2022. Doc. #71. Debtor had three options:

- (1) Bring the payments current by (a) paying the current delinquency of \$764.00 to be received by Trustee on or before July 29, 2022, or (b) if that amount is not received by July 29, 2022, then paying \$764.00 plus the July 2022 payment of \$397.00, for a total

of \$1,161.00 to be received by Trustee on or before August 17, 2022;

- (2) File a modified plan that cures the default within 30 days of mailing of the Notice of Default (which is August 7, 2022); or
- (3) If Debtor believes there is no default in plan payments, then Debtor shall file, serve, and set for hearing on at least 14 days' notice an objection to the Notice of Default within 28 days (which is August 5, 2022).

Id. On August 18, 2022, Trustee filed a declaration in support of an order dismissing the case stating that Debtors neither cured the delinquency by August 17, 2022, nor filed a modified plan, nor contested the Notice of Default. Doc. #76.

The court issued the Dismissal Order on August 18, 2022 at 3:36:25 p.m. Doc. #78. Approximately 1.5 hours later, at 5:03:35 p.m., Debtor filed a *Motion to Convert Case From Chapter 13 to Chapter 7*. Doc. #80. However, the case had already been dismissed, so the case was not converted. The next day on August 19, 2022, the clerk of the court issued a *Notice of Entry of Order of Dismissal* ("Dismissal Notice"). Doc. #79. Now, Debtor wishes to vacate the Dismissal Order so that this case can be converted and completed under chapter 7.

Rule 9024 incorporates Civ. Rule 60(b) and permits the court to grant relief from a final judgment, order, or proceeding based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that could not have been discovered in time to move for a new trial under Civ. Rule 59(b); (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason that justifies relief. Civ. Rule 60(b). Such request must be made "within a reasonable time" generally, and within one year when requested under Civ. Rule 60(b)(1), (2), or (3). Civ. Rule 60(c). Here, the case was dismissed on August 18, 2022 and this motion was filed 8 days later on August 26, 2022.

Debtor seeks relief under subsections (b)(1) and (b)(6): mistake, inadvertence, surprise, or excusable neglect, and/or any other reason that justifies relief. Doc. #82. The motion says that Debtor's counsel did not ensure that the motion to dismiss was withdrawn and apologizes profusely for the mistake. But the case was dismissed as the result of a declaration on a Notice of Default. Debtor's counsel declares, after Trustee filed the Notice of Default and after the hearing appointing Debtor as representative for Mr. Cash, it was decided that it would be most advantageous to convert the case to chapter 7 rather than file a modified plan. Doc. #84.

The motion says that the order converting the case was docketed after the Dismissal Order, but the Dismissal Order was filed 1.5 hours before the motion to convert case. See Docs. #78; #80. However,

Dismissal Order was docketed after the motion to convert case despite being filed one day after the motion to convert.

Debtor acknowledges that this motion requests an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Id.*, quoting *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

Courts are permitted, where appropriate, to relieve a party or its legal representative from a judgment, order, or proceeding due to a party's "inadvertence, mistake, or carelessness, as well as intervening circumstances beyond the party's control." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993). This determination is "an equitable one taking account of all relevant circumstances surrounding the party's omission." *Id.*, at 395. The factors to consider include:

1. Danger of prejudice to the debtor;
2. Length of delay and potential impact on judicial proceedings;
3. Reason for the delay, including whether it was in the movant's control; and
4. Whether the party acted in good faith.

1. Danger of prejudice to the debtor: The motion claims that Debtor would be extremely prejudiced the motion is denied and she has to refile the case since Mr. Cash passed away and was jointly responsible for the debts. Debtor claims that creditors would not be prejudiced. This factor appears to favor granting the motion.

2. Length of delay and potential impact on judicial proceedings: Debtor filed this motion 8 days after the case was dismissed. The request appears to have been made within a reasonable time. This factor favors granting the motion.

3. Reason for delay, including whether it was in the movant's control: The motion claims that Debtor's counsel did not ensure that the motion to dismiss was withdrawn. But since the case was dismissed on a declaration following a Notice of Default, no withdrawal was necessary. Debtor needed to file the motion to convert case to chapter 7 prior to entry of the Dismissal Order. Alternatively, Debtor could have cured the plan delinquency or filed a modified plan.

Debtor's final deadline to cure the default or otherwise cure the Notice of Default was August 17, 2022. After that date, the case could be dismissed at any time. Debtor waited until August 18, 2022 at 5:03:35 p.m. to convert the case, but by then the case had already been dismissed.

Debtor does not explain why the case was not converted sooner. Why wait until the last minute if it was determined that the case needed to be converted? Alternatively, Debtor could have cured the plan

delinquency or filed a modified plan. This factor heavily weighs against granting the motion and allowing the dismissal to stand.

4. Whether the party acted in good faith: Nothing in the record suggests that Debtor has acted in bad faith. This factor is neutral, or slightly favors granting the motion.

Though the *Pioneer* factors appear to slightly favor granting the motion, no admissible evidence has been provided. Debtor has not explained the reason for not taking action sooner, nor whether such lack of action is excusable.

Debtor also seeks to vacate the dismissal under Civ. Rule 60(b)(6). This provision permits the court "on just terms" to relieve a party from a final judgment for "any other reason justifies relief."

This relief is unavailable to Debtors here. The long-standing rule in this circuit is that "clause (6) [of Civ. Rule 60(b)] and the preceding clauses are mutually exclusive; a motion brought under clause (6) must be from some other reason other than the five reasons preceding it under the Rule." *Lyon v. Augusta S.P.A.*, 252 F.3d 1078, 1098 (9th Cir. 2001) (citations omitted). Debtor seeks relief for alleged mistake or inadvertence and cannot have it both ways.

Additionally, Debtor has not established an extraordinary circumstance justifying relief under Civ. Rule 60(b)(6). This "catch-all" provision is available where "petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere neglect on his part." *United States ex rel. Familian Nw. v. RG & B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994), quoting *Klapprott v. U.S.*, 335 U.S. 601, 613 (1949). Debtor mistakenly failed to convert the case before it was dismissed, to cure the delinquency, or modify the plan before the deadlines to do so. This does not evidence an extraordinary circumstance even if Civ. Rule 60(b)(6) relief was available.

This matter will be called and proceed as scheduled.

¹ Unless otherwise indicated, references to "LBR" will be to the Local Rules of Practice for the United States Bankruptcy Court, Eastern District of California; "Rule" will be to the Federal Rules of Bankruptcy Procedure; "Civ. Rule" will be to the Federal Rules of Civil Procedure; and all chapter and section references will be to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

11. [22-11476](#)-B-13 **IN RE: JORGE ESPINO AND HEIDI GUTIERREZ**
[SL-1](#)

MOTION TO EXTEND AUTOMATIC STAY
8-31-2022 [\[10\]](#)

HEIDI GUTIERREZ/MV
SCOTT LYONS/ATTY. FOR DBT.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted.

ORDER: The minutes of the hearing will be the court's findings and conclusions. The Moving Party shall submit a proposed order after hearing.

Jorge Santiago Espino and Heidi Gutierrez (collectively "Debtors") request an order extending the automatic stay under 11 U.S.C. § 362(c) (3). Doc. #10.

Written opposition was not required and may be presented at the hearing. In the absence of opposition, this motion will be GRANTED.

This motion was filed and served pursuant to Local Rule of Practice ("LBR") 9014-1(f) (2) and will proceed as scheduled. Unless opposition is presented at the hearing, the court intends to enter the respondents' defaults and grant the motion. If opposition is presented at the hearing, the court will set a briefing schedule and final hearing unless there is no need to develop the record further. The court will issue an order if a further hearing is necessary.

Under 11 U.S.C. § 362(c) (3) (A), if the debtors have had a bankruptcy case pending within the preceding one-year period that was dismissed, then the automatic stay under subsection (a) shall terminate on the 30th day after the latter case is filed. Debtors had one case pending within the preceding one-year period that was dismissed: Case No. 17-11433.² That case was filed on April 17, 2017 and was dismissed on June 29, 2022 under 11 U.S.C. §§ 1307(c) (6) and (c) (8) for material default with respect to a term of a confirmed plan, and termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of plan payments. This case was filed on August 26, 2022. Doc. #1. The automatic stay will expire on September 25, 2022.

11 U.S.C. § 362(c) (3) (B) allows the court to extend the stay to any or all creditors, subject to any limitations the court may impose, after a notice and hearing where the debtor demonstrates that the filing of the latter case is in good faith as to the creditors to be stayed.

Cases are presumptively filed in bad faith if any of the conditions contained in 11 U.S.C. § 362(c) (3) (C) exist. § 362(c) (3) (C). The

presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* Under the clear and convincing standard, the evidence presented by the movant must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence offered in opposition.'" *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288, n.11 (B.A.P. 9th Cir. 2016) (citations omitted) (vacated and remanded on other grounds by *Taggart v. Lorenzen*, 139 S. Ct. 1785 (2019)).

In this case, the presumption of bad faith arises. The subsequently filed case is presumed to be filed in bad faith as to all creditors because Debtor has more than one previous case under chapter 13 that was pending within the preceding one-year period and the Debtors failed to perform the terms of a plan confirmed by the court. § 362(c) (3) (C) (i) (I), (c) (3) (C) (i) (II) (cc).

Joint debtor Jorge Santiago Espino declares that the previous case was dismissed because of a material default with respect to the confirmed plan. Doc. #12. Specifically, the plan proposed to pay secured creditor FCI Lender Services \$42,197.76, but the proof of claim filed by FCI was \$79,948.43. As of May 7, 2022, the total claims filed in the case required an aggregate payment of \$107,278.77. Though Debtors remained current on plan payments, they only paid \$55,025.06 through the plan. In total, Debtors needed to pay a remaining \$52,025.06 to complete the plan. As a result, the case was dismissed.

Debtors refiled this case on August 26, 2022 and proposed a plan to pay their second mortgage in full by the end of a 60-month term. *Id.*; Doc. #3. Debtors are confident that they can make their plan payments because at the time of the prior case, Mr. Espino's average gross monthly income working at Vallarta Supermarkets full-time was \$1,516.22 per month. Doc. #12; see also Case No. 17-11433, Doc. #1. It has since increased to \$2,555.47 per month. Docs. #1; #12. Additionally, Debtor's brother-in-law, Jaime Gutierrez, is currently renting a room from Debtors as of June 2022 and paying Debtors \$1,500 in rent per month. *Id.* Mr. Espino is confident that Debtors have the ability to maintain plan payments for an extended period of time

In sum, Debtors' monthly net income has increased from \$815.00 per month to \$1,275.00 per month. Doc. #1. This amount appears to be sufficient to fund Debtors' proposed chapter 13 plan. Doc. #3.

Based on the moving papers and the record, the presumption of bad faith has been rebutted by clear and convincing evidence because Debtors' financial condition and circumstances have materially changed. Debtors' petition appears to have been filed in good faith and the proposed plan appears to be feasible.

This matter will be called and proceed as scheduled. In the absence of opposition at the hearing, this motion may be GRANTED. If opposition

is presented at the hearing, the court will consider the opposition and whether further hearing is proper pursuant to LBR 9014-1(f) (2).

² Debtors also filed a joint chapter 7 bankruptcy case on June 28, 2012 and received an order of discharge on October 9, 2012. Case No. 12-15774.

12. [19-12878](#)-B-13 **IN RE: MICHAEL/SALENA NOWAK**
[PBB-2](#)

MOTION TO MODIFY PLAN
8-16-2022 [[45](#)]

SALENA NOWAK/MV
PETER BUNTING/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Granted.

ORDER: The Moving Party shall submit a proposed order in conformance with the ruling below.

Michael H. Nowak and Salena M. Nowak (collectively "Debtors") move for an order confirming the *First Modified Chapter 13 Plan* dated August 16, 2022. Doc. #45. The plan proposes that Debtors shall pay an aggregate of \$82,297.01 in the first 37 months, then \$2,395.00 per month for 23 months with a 100% dividend to allowed, nonpriority unsecured claims. Doc. #50. Debtors' *Amended Schedules I and J* indicate that they receive \$2,395.14 in monthly net income, which is sufficient to fund the plan. Doc. #43.

In contrast, the operative *Chapter 13 Plan* dated July 3, 2019, confirmed September 11, 2019, provides that Debtors shall pay \$2,300.00 per month for 33 months and \$2,800.00 per month for 27 months with a 100% dividend to unsecured claims. Docs. #2; #27. No party in interest timely filed written opposition.

This motion was set for hearing on 35 days' notice as required by Local Rule of Practice ("LBR") 3015-1(d) (2). The failure of the creditors, the chapter 13 trustee, the U.S. Trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f) (1) (B) may be deemed a waiver of any opposition to the granting of the motion. *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 Boone v. Burk (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys.*,

Inc. v. Heidenthal, 826 F.2d 915, 917 (9th Cir. 1987). Constitutional due process requires that a plaintiff make a *prima facie* showing that they are entitled to the relief sought, which the movant has done here.

This motion will be GRANTED. The confirmation order shall include the docket control number of the motion and it shall reference the plan by the date it was filed.

13. [22-11185](#)-B-13 **IN RE: MARTHA WALLWORK**

OBJECTION TO CONFIRMATION OF PLAN BY CAM XI TRUST
8-30-2022 [\[34\]](#)

CAM XI TRUST/MV
JERRY LOWE/ATTY. FOR DBT.
REILLY WILKINSON/ATTY. FOR MV.
WITHDRAWN

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Withdrawn; taken off calendar.

NO ORDER REQUIRED.

On September 15, 2022, Cam Xi Trust withdrew its motion for relief from the automatic stay. Doc. #43. Accordingly, this motion will be taken off calendar pursuant to the withdrawal.

14. [22-10387](#)-B-13 **IN RE: MATTHEW/MARGARET TORRES**
[JCW-2](#)

MOTION FOR RELIEF FROM AUTOMATIC STAY
8-12-2022 [\[55\]](#)

FEDERAL HOME LOAN MORTGAGE
CORPORATION/MV
GABRIEL WADDELL/ATTY. FOR DBT.
JENNIFER WONG/ATTY. FOR MV.

NO RULING.

Select Portfolio Servicing, Inc., servicing agent for Federal Home Loan Mortgage Corporation, as Trustee for the benefit of the Freddie Mac Seasoned Loans Structured Transactional Trust, Series 2018-2 ("Movant") seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d) with respect to real property located at 654 Stanislaus Street, Parlier, CA 93648 ("Property"). Doc. #55.

Matthew Torres and Margaret Rose Torres ("Debtors") did not oppose. However, in other filings, Debtors claim to have sold Property pre-petition subject to Movant's lien for approximately \$142,000.00. See Docs. #37; #42. Therefore, it does not appear that Property is property of the Debtors, or ever was property of the estate.

This motion was set for hearing on 28 days' notice as required by Local Rule of Practice ("LBR") 9014-1(f)(1) and will proceed as scheduled. The failure of the creditors, the debtors, the chapter 13 trustee, the U.S. trustee, or any other party in interest to file written opposition at least 14 days prior to the hearing as required by LBR 9014-1(f)(1)(B) may be deemed a waiver of any opposition to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Therefore, the defaults of the above-mentioned parties in interest are entered. Upon default, factual allegations will be taken as true (except those relating to amounts of damages). *Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917 (9th Cir. 1987).

11 U.S.C. § 362(d)(1) allows the court to grant relief from the stay for cause, including the lack of adequate protection. "Because there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case-by-case basis." *In re Mac Donald*, 755 F.2d 715, 717 (9th Cir. 1985).

Margaret R. Torres and Matthew Torres ("Debtors") obtained a loan secured by Property from Movant's predecessor. Doc. #58, *Exs. A, C*. The loan was assigned to Movant and modified by Debtors. *Id.*, *Exs. B, D*. Movant claims that Debtors are in default under the note and are delinquent \$2,696.82 in post-petition payments as of June 21, 2022. *Id.*, *Ex. G*.

However, Debtors have previously claimed that Property was sold subject to Movant's lien on August 11, 2021 to Big Holding LLC in the amount of \$142,000. Doc. #37; *cf.* Doc. #1, *Stmt. Fin. Affairs*. Debtors received a net of \$1,900, which was used towards the purchase of a 2013 Chevy Equinox. Since Property was sold pre-petition, it is unclear whether Debtors or the estate has any interest in Property. And if not, whether the court can grant stay relief here.

This matter will be called and proceed as scheduled. The court is inclined to DENY AS MOOT this motion because neither Debtors nor the estate appear to have any interest in Property.

15. [22-11195](#)-B-13 **IN RE: EDWARD/ARSELIA BERMUDEZ**
[APN-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY THE MONEY SOURCE INC.
8-29-2022 [\[22\]](#)

THE MONEY SOURCE INC./MV
GABRIEL WADDELL/ATTY. FOR DBT.
AUSTIN NAGEL/ATTY. FOR MV.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

The debtors moved to voluntarily dismiss this case pursuant to 11 U.S.C. § 1307(b) on September 16, 2022, which was granted on September 19, 2022. Docs. #34; #36. Accordingly, the secured creditor's objection to plan confirmation will be OVERRULED AS MOOT because the case has been dismissed.

16. [22-11195](#)-B-13 **IN RE: EDWARD/ARSELIA BERMUDEZ**
[MHM-1](#)

OBJECTION TO CONFIRMATION OF PLAN BY TRUSTEE MICHAEL H.
MEYER
8-26-2022 [\[18\]](#)

GABRIEL WADDELL/ATTY. FOR DBT.

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Overruled as moot.

ORDER: The court will issue an order.

The debtors moved to voluntarily dismiss this case pursuant to 11 U.S.C. § 1307(b) on September 16, 2022, which was granted on September 19, 2022. Docs. #34; #36. Accordingly, the chapter 13 trustee's objection to plan confirmation will be OVERRULED AS MOOT because the case has been dismissed.

11:00 AM

1. [22-10569](#)-B-7 **IN RE: SUMAIRA RAHMAN**
[22-1014](#) [CAE-1](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-5-2022 [[1](#)]

RAHMAN ET AL V. MTGLQ
INVESTORS LP ET AL
SUMAIRA RAHMAN/ATTY. FOR PL.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Concluded.

ORDER: The court will issue an order.

The court intends to dismiss this case without prejudice in matter #2 below. JCW-1. Accordingly, the court intends to CONCLUDE this status conference pursuant to the dismissal. Thereafter, the clerk of the court will close the adversary proceeding without notice. After the adversary proceeding has been closed, the parties will have to file an application to reopen the adversary proceeding if further action is required. The court will issue an order concluding the status conference.

2. [22-10569](#)-B-7 **IN RE: SUMAIRA RAHMAN**
[22-1014](#) [JCW-1](#)

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF
REMOVAL
8-4-2022 [[10](#)]

RAHMAN ET AL V. MTGLQ
INVESTORS LP ET AL
JENNIFER WONG/ATTY. FOR MV.

TENTATIVE RULING: This matter will proceed as scheduled.

DISPOSITION: Granted. The complaint is dismissed without prejudice.

ORDER: The moving party will prepare the order.

Defendants MTGLQ Investors, LP, Quality Loan Service Corporation, and Rushmore Loan Management Services, Inc. (collectively, "Movants") move to dismiss the complaint filed by Plaintiffs, Debtor Sumaira Rahman ("Debtor") and non-debtor Syed Rahman (collectively "Plaintiffs").

Doc. #10. Movants raise insufficient service of process under Federal Rule of Civil Procedure ("Civ. Rule") 12(b)(5) (Federal Rule of Bankruptcy Procedure ("Rule") 7012), Plaintiff's lack of standing, and several challenges to the sufficiency of the complaint under Civ. Rule 12(b)(6) - failure to state a claim upon which relief can be granted.

Movants admit Defendant Rushmore Loan Management Services was served, but claim the other Defendants were not.

Plaintiffs did not timely respond to the motion.

The court will grant the motion and dismiss the complaint without prejudice for insufficient service of process and Plaintiffs' lack of standing.

1.

Without proper service of process, the court cannot exercise jurisdiction over a defendant. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). A motion to dismiss under Civ. Rule 12(b)(5) challenges irregularities in the manner of delivery of the summons and complaint. *Chilicky v. Schweiker*, 796 F.2d 1131, 1136 (9th Cir. 1986), *reversed on other grounds*, 487 U.S. 412 (1988). The court must look to matters outside the complaint to determine whether it has jurisdiction. *Darden v. DaimlerChrysler N. Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002).

Other than Defendant Rushmore, there is no proof the other defendants have been served. Plaintiffs neither filed a certificate of service nor a response to this motion nor a request for more time to properly effect service. The Plaintiffs bear the burden of proving adequate service of process under Civ. Rule 4 (Rule 7004). *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). The Plaintiffs have not done so here.

Movants' substantive motion is not deemed to waive the right to challenge service. First, Movants were clear in their supporting documents they were not waiving proper service. Second, Movants used their first opportunity to raise the issue. See, Civ. Rule 12(b).

Challenges to the manner of service are interpreted strictly, even for *pro se* litigants. *Rosado v. Roman*, No. CV-781-SI, 2017 U.S. Dist. LEXIS 127893, at *3 (D. Or. Aug. 11, 2017). No proof has been offered of proper service. So, as to Defendants MTGLQ and Quality, the motion should be GRANTED.

2.

Due to the chapter 7 bankruptcy, Plaintiffs lack standing to prosecute this action against the defendants. Debtor Sumaira Rahman filed chapter 13 bankruptcy on April 5, 2022. Bankr. Case No. ("Bankr.") 22-10569, Doc. #1. On July 4, 2022, Plaintiffs initiated this adversary

proceeding. Doc. #1. However, Debtor's bankruptcy case was converted to chapter 7 on July 6, 2022. Bankr. Doc. #75. As a result of the conversion, all of Plaintiffs' assets, including the property subject to this adversary proceeding and the Debtor's interest in this lawsuit, are property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). Additionally, Plaintiff Syed Rahman appears to be Debtor's spouse. Under 11 U.S.C. § 541(a)(2), all interests of the debtor and the debtor's spouse in community property are property of the estate. Consequently, Plaintiffs have relinquished their rights and interests to the estate, including title, right to sell, transfer, or initiate lawsuits with respect to estate property. 11 U.S.C. § 541(a)(4).

In chapter 7, only the trustee may pursue causes of action belonging to the bankruptcy estate. *In re Stoll*, 252 B.R. 492, 495 (B.A.P. 9th Cir. 2000); 11 U.S.C. §§ 323, 363, 542-43. Unless the chapter 7 trustee abandons the cause of action, a chapter 7 debtor loses standing to prosecute a pre-petition cause of action. *Auday v. Wet Seal Retail, Inc.*, 698 F.3d 902 (6th Cir. 2012).

Accordingly, this complaint should be dismissed against all defendants because, absent the chapter 7 trustee's abandonment, Plaintiffs do not have standing to prosecute this cause of action.

3.

The question then becomes whether the court should dismiss the complaint or quash service as to defendants MTGLQ and Quality. The court has discretion to do either. *S.J. v. Issaquah School Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006).

The court will dismiss the complaint without prejudice. Plaintiffs have not responded, which suggests they are abandoning the claims in this court. Also, there is the standing issue which affects all the defendants.

The motion is GRANTED. The complaint will be DISMISSED WITHOUT PREJUDICE.

3. [20-11296](#)-B-7 **IN RE: KYLE/DEANNA MAURIN**
[20-1044](#)

FURTHER SCHEDULING CONFERENCE RE: COMPLAINT
7-10-2020 [[1](#)]

KAPITUS SERVICING, INC. V.
MAURIN
MICHAEL MYERS/ATTY. FOR PL.
DISMISSED 8/31/2022

FINAL RULING: There will be no hearing on this matter.

DISPOSITION: Concluded.

ORDER: The court will issue an order.

On August 31, 2022, the parties jointly stipulated to dismiss this adversary proceeding with prejudice. Doc. #102. Under Fed. R. Civ. P. 41(a)(1)(A)(ii), *incorporated by* Fed. R. Bankr. P. 7041, the stipulation of dismissal signed by all parties operates as a voluntary dismissal by the plaintiff.

Accordingly, this status conference will be CONCLUDED and taken off calendar pursuant to the stipulation of dismissal. Thereafter, the clerk of the court will close the adversary proceeding without notice. After the adversary proceeding has been closed, the parties will have to file an application to reopen the adversary proceeding if further action is required. The court will issue an order concluding the status conference.