

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 10, 2017, at 3:00 p.m.

1. [15-29404-E-13](#) TAEVONA MONTGOMERY MOTION TO SELL
Richard Jare 12-8-16 [\[117\]](#)

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.

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

Correct Notice Not Provided. No Proof of Service has been filed. 28 days' notice is required. FN.1.

FN.1. Movant is reminded that the Local Rules require the use of a new Docket Control Number with each motion. Local Bankr. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(c)(1).

The Motion to Sell Property has not been properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Sell Property is denied without prejudice.

CORRECT NOTICE NOT PROVIDED

Taevona Montgomery ("Debtor") has not filed a Proof of Service with this Motion. Local Bankruptcy Rule 9014-1(e)(2) & (3) require that a proof of service be filed as a separate document within three days of filing a motion. Without proof that all parties have been served, the court cannot rule on the Motion. The Motion is denied without prejudice.

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 Sell Property filed by Taevona Montgomery, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Sell Property is denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR SERVES ALL REQUIRED PARTIES PROPERLY AND WITH SUFFICIENT TIME

The Bankruptcy Code permits Taevona Montgomery, the Chapter 13 Debtor, (“Movant”) to sell property of the estate after a noticed hearing. 11 U.S.C. §§ 363 and 1303. Here, the Debtor herself, purportedly acting in pro se, filed a motion titled, “Motion for Order Permitting Sale Free and Clear.” Dckt. 117. While purporting to act in pro se, Debtor is represented by counsel in this bankruptcy case.

The Motion states that Debtor seeks to sell the real property commonly known as 6106 Camden Street, Oakland, California which is referred to as “residence.” The Motion further advises the court that “an amended motion may follow.” Nothing else is provided to the court.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 27, 2016. Dckt. 138. The Trustee objects because there are no supporting documents filed with the Motion and because Movant filed the Motion on her own behalf, instead of having her attorney file it.

CREDITOR’S OPPOSITION

Wells Fargo Bank, N.A., Creditor with a secured claim, filed an Opposition on December 27, 2016. Dckt. 141. Creditor objects because the Motion does not plead any supporting grounds with particularity and because Movant has not followed procedures under the Local Bankruptcy Rules.

Creditor illustrates that no factual grounds have been pleaded according to Federal Rule of Civil Procedure 8 to support a motion under 11 U.S.C. § 363(f). Additionally, Movant has not provided a Docket Control Number for the Motion (Local Bankruptcy Rule 9014-1(c)(1)), has not provided supporting evidence (Local Bankruptcy Rule 9014-1(d)(7)), and has not provided proof of service for the Motion (Local Bankruptcy Rule 9014-1(e)).

DISCUSSION

Before getting to the objections, the court first notes that Debtor is represented by counsel of record and it is her counsel who must bring the motion. In her Amended Chapter 13 Plan Debtor states that she is surrendering the “residence” property to Wells Fargo Bank, N.A. so that it may foreclose on its collateral. While the surrender is not necessarily diametrically opposed to a debtor attempting to conduct a short sale, however, Debtor attempting to act in pro se and obtain from the court an order for the sale of the creditor’s collateral “free and clear” of its lien, without stating any proper grounds for such a motion, is not consistent with a debtor acting in good faith in the prosecution of his or her bankruptcy case.

This is not the Debtor’s first or second recent attempt at a Chapter 13 rehabilitation. Debtor and another attorney filed a prior Chapter 13 case on May 22, 2015. Bankr. E.D. Cal. 15-24150 (“Second Chapter 13 Case”). The Second Chapter 13 Case was dismissed due to Debtor’s default in multiple monthly plan payments. Second Chapter 13 Case, Dckt. 42.

Debtor filed her first Chapter 13 case, represented by the same attorney as in the Second Chapter 13 case, on June 22, 2013, and it was dismissed on January 1, 2015. Bankr. E.D. Cal. 13-28641. The first Chapter 13 case was dismissed due to Debtor defaulting in plan payments.

It appears that Debtor is now taking to representing herself, working at cross purposes to the efforts of her current attorney.

Additionally, the Trustee’s and Creditor’s objections are well-taken. Movant has not provided any information about the proposed sale of property. For example, there is no attached exhibit for the sale agreement, no information about the buyer, no terms for the sale, and no supporting declaration from Movant (despite the Motion stating that one was attached). Federal Rule of Bankruptcy Procedure 9013 requires that a motion state with particularity the grounds upon which it seeks relief, but that has not been done in the present Motion. Movant has merely requested a blank endorsement to sell property.

Additionally, Movant has not clearly proposed whether the sale is free and clear of the lien of a creditor. The Motion’s title is for an “Order Permitting Sale Property Free and Clear,” but the Motion itself has not pleaded any grounds relating to a sale of property free and clear of liens under 11 U.S.C. 363(f).

The Motion itself has not been submitted properly. Not only is it missing essential information mentioned above, but it is also submitted by the Debtor herself. Debtor’s counsel of record in this case is Richard Jare, and yet, his name does not appear with this Motion. Debtor signed the Motion and placed her contact information in the upper left-hand corner, whereas those sections should contain information for Movant’s counsel. Federal Rule of Bankruptcy Procedure 9011(a). This Motion fails on both procedural and substantive grounds and is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

the current \$1,788.42 per month to \$1,286.07 per month. The modification will capitalize arrears into the principal amount and additionally will reduce the interest rate from 5.42% to 3.25% for the next forty years.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on December 22, 2016. Dckt. 134. The Trustee states that he has no basis to oppose the Motion.

DISCUSSION

The Motion is supported by the Declaration of Taevona Montgomery. Dckt. 130. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms. Debtor testifies that the lower monthly payments will ensure the success of her bankruptcy case.

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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 Approve Loan Modification filed by Taevona Montgomery 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 court authorizes Taevona Montgomery ("Debtor") to amend the terms of the loan with U.S. Bank N.A. ("Creditor"), which is secured by the real property commonly known as 131 Cedar Rock Circle, Sacramento, California, on such terms as stated in the Modification Agreement filed as an exhibit in support of the Motion (Dckt. 131).

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2016. By the court’s calculation, 53 days’ notice was provided. 42 days’ notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a statement of non-opposition on November 22, 2016.

CREDITOR’S OPPOSITION

Wells Fargo Bank, National Association (“Creditor”), filed an Opposition on December 20, 2016. Dckt. 50. Creditor opposes confirmation of the Plan on the basis that:

- A. Delayed Payment: The Debtor’s plan anticipates arrearage payments beginning in month thirteen, which is over a year post-petition. Creditor seeks ongoing monthly payments in equal amounts over the entire life of the Plan. This will avoid unfair disadvantage and delay if the Debtor defaults on the plan payments.

1. The Plan provides for a step-up in month thirteen, when Debtor anticipates his non-filing spouse and adult son will obtain employment and contribute to the income of the household. Currently, neither the wife nor the adult son contributes any income to the household.
2. The mortgage payment is an escrowed loan that will fluctuate over time. The amount indicated in the Plan needs to accurately reflect that. The Proof of Claim will provide for that amount as well.

On January 3, 2017, Debtor provided a declaration in reply to the Opposition. Dckt. 55. In it he discusses his wife's (non-debtor) work history, illness, and efforts to find a job. Debtor also candidly addresses the issues challenging his son's efforts to obtain employment and the positive steps his son has taken in that regard.

DISCUSSION

The Creditor's objections are well-taken.

11 U.S.C. § 1325(a)(5)(B)(iii)(I) requires that the Plan provide equal monthly payments with respect to each secured claim provided for in the Plan. Debtor's Plan proposes making unequal payments, however, because the Plan delays payment to Creditor until month thirteen.

While the court will draw the inference that the belief in future income is well intentioned, Debtor offers no legally sufficient explanation as to why he can make the creditor holding the claim secured by a lien on the residence forgo arrearage cure payments for thirteen months. Debtor does propose under the plan to make \$2,303.83 payments to keep the creditor from falling further into the financial hole.

On Schedule D Debtor lists the property securing Creditor's claim as having a value of \$479,116.00 and the debt secured by it being in the amount of (\$353,471.00). Dckt. 14 at 12. This would indicate an equity of \$126,000.00.

However, on Proof of Claim No. 4, the claim of Wells Fargo Bank, N.A. states a secured claim in the amount of (\$518,189.28). Of this, (\$139,675.30) is listed as the arrearage. It appears that Debtor has ignored the arrearage amount in stating the amount of the secured claim on Schedule D.

On Proof of Claim No. 4 Creditor leaves blank the information as to the asserted value of the property that secures the claim.

Creditor makes an additional request for attorneys' fees and costs associated with opposing the Motion. Creditor has not provided any grounds or legal authority for its claim, or any evidence thereon. To the extent appropriate, Creditor may seek such fees in a post-hearing motion, with the court taking into account the reasonableness of such proceedings.

The court denies without prejudice the Motion. As objected to by creditor, it proposes a deferment of commencing payment on the arrearage for thirteen months. It appears that there is no equity cushion for Creditor.

However, the court notes the practical aspects of this case—for both Debtor and Creditor. Debtor desires to keep this real property, desiring it so much that Debtor and his family will pay over \$100,000.00 (with after tax monies) in excess of the value to keep it. Creditor appears to be intent on foreclosing on the property and taking a significant loss, and incurring the expenses of foreclosure, then continuing to receive the monthly payments and afford Debtor the next eight months to get the family's financial life straightened out.

In proposing the Plan Debtor is not stating that the cure payments will occur thirteen months after confirmation, but in the thirteen month of the Plan—September 2017, seven months from now. With the denial of this Plan, Debtor will have the opportunity to present the court with another plan, quite possibly proposing to begin the cure payments only a couple months after confirmation—similar to a modified plan to cure a post-petition default in payments.

From the Creditor's perspective, while not appearing ideal, the current plan provides the opportunity to lock the Debtor in to either performing or having a foreclosure occur. If Debtor's spouse cannot obtain employment, Debtor could seek the alternative between now and September 2017 to market and sell the property, pocketing the equity (if any exists). Creditor also avoids the cost and expense of another motion or the dismissal of this case and filing of a new case when the non-debtor spouse has found employment.

Both Debtor and Creditor can take a hard look at the real economics of the situation and determine what is truly in their best respective financial interests.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on December 15, 2016. By the court’s calculation, 26 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

Wells Fargo Bank, N.A. (“Creditor”), opposes confirmation of the Plan on the basis that:

- A. The Plan was not proposed in good faith;
- B. The Plan does not provide for the full value of Creditor’s claim;
- C. The Plan does not promptly cure Creditor’s pre-petition arrears as required by 11 U.S.C. § 1322(b)(5);
- D. Irene Espiritu (“Debtor”) has not contributed all disposable income into the Plan; and
- E. The Plan fails to provide for ongoing post-petition payments.

Creditor argues that the Plan was not proposed in good faith under 11 U.S.C. § 1325(a)(3) because Debtor has proposed plan payments of only \$100.00 despite having significantly more disposable

income, the Schedules are incomplete, Debtor has not paid filing fees, Debtor has not made plan payments, Debtor did not appear at the first Meeting of Creditors, and Debtor's history of filing five Chapter 13 petitions only to have them dismissed without a confirmed plan all indicate bad faith. Taking into account the totality of circumstances standard iterated in the Ninth Circuit, the court agrees that the Plan was not filed in good faith pursuant to 11 U.S.C. § 1325(a)(3). *See Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982); *see also Warren v. Fidelity & Casualty Co. of N.Y. (In re Warren)*, 89 B.R. 87, 93 (B.A.P. 9th Cir. 1988) (listing factors to determine if a plan is proposed in good faith). For example, the Plan is incomplete; there are blank spaces throughout it that should be filled. Additionally, Debtor has not made even one payment toward completing the Plan. Debtor's behavior in this case indicates that she is not serious about pursuing a plan.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's reorganization and that the claim will not be paid. This is cause for relief from the automatic stay. *See* 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent Creditor's secured claim raises doubts about the Plan's feasibility. *See* 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

The objecting Creditor holds a deed of trust secured by the Debtor's residence. The Creditor has not filed a timely proof of claim, but it asserts \$119,906.10 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

Creditor alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

The incomplete Plan does not specify what percent will be paid to unsecured claims, but the monthly plan payment is \$100.00. Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals \$3,816.00 according to Creditor.

However, 11 U.S.C. § 1325(b)(1) states that the only parties able to raise this ground, though, are "the trustee or the holder of an allowed unsecured claim." Creditor asserts that its claim is secured, and it is not a trustee in this case. Therefore, objecting to the disposable income is not a valid ground for Creditor.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim 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 Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

5. [16-27113-E-13](#) IRENE ESPIRITU
DPC-1 Pro Se

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK
12-13-16 [21]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on December 13, 2016. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

- A. Debtor is \$100.00 delinquent in plan payments;
- B. Debtor failed to appear at the first Meeting of Creditors;
- C. Debtor failed to provide tax returns; and
- D. Debtor's Plan does not propose a dividend to unsecured claims.

The Trustee's objections are well-taken. The Trustee asserts that Debtor is \$100.00 delinquent in plan payments, which represents one month of the \$100.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each

month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Debtor has not provided the Trustee with either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide the tax transcript. That is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor's Plan is incomplete. Section 2.15 of the Plan has not been filled out to indicate what amount will be distributed as a dividend to unsecured claims, even if the amount is 0%.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

6. 16-28316-E-13 SHARRY STEVENS-GOREE
FF-1 Gary Fraley

MOTION TO EXTEND AUTOMATIC
STAY
12-27-16 [8]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 27, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion to Extend the Automatic Stay is granted.

Sharry Stevens-Goree ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond thirty days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 14-28303) was dismissed on March 3, 2016, after Debtor failed to make plan payments. *See* Order, Bankr. E.D. Cal. No. 14-28303, Dckt. 43, March 3, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Here, Debtor states that the instant case was filed in good faith and explains that the previous case was dismissed because she fell behind on plan payments when her monthly mortgage payment increased from \$1,374.66 to \$2,095.78. Debtor asserts that the house subject to the mortgage is now in a foreclosure sale that has been postponed to January 3, 2017, and Debtor states that a new Schedule I reflects that her gross income has increased.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on December 28, 2016. Dckt. 13. The Trustee notes that Debtor's Schedule I in this case shows gross income of \$13,277.00 and net income of \$7,863.00, whereas Schedule I in Case 14-28303 showed gross income of \$11,263.00 and net income of \$6,667.00. The Trustee does not believe that Debtor has presented a compelling argument in support of the Motion, but he does not oppose extending the automatic stay.

DISCUSSION

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if one or more of Debtor's cases was pending within the year preceding filing of the instant case. *Id.* § 362(c)(3)(C)(i)(I). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); *see also* Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209–10 (2008). Courts consider many factors—including those used to determine good faith under §§ 1307(c) and 1325(a)—but the two basic issues to determine good faith under § 362(c)(3) are:

- A. Why was the previous plan filed?
- B. What has changed so that the present plan is likely to succeed?

In re Elliot-Cook, 357 B.R. at 814–15.

Since the last case, Debtor has reported more gross and net income on Schedule I, and she is about to be relieved of the burdensome mortgage that allegedly caused her to default in the previous case. The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

The Motion is granted, and the automatic stay is extended for all purposes and parties, unless terminated by operation of law or further order of this court.

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 Extend the Automatic Stay filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and the automatic stay is extended pursuant to 11 U.S.C. § 362(c)(3)(B) for all purposes and parties, unless terminated by operation of law or further order of this court.

7. [16-24717-E-13](#) **GEORGE ALM** **MOTION TO CONFIRM PLAN**
RPH-1 **Robert Huckaby** **11-2-16 [44]**

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 2, 2016. By the court’s calculation, 69 days’ notice was provided. 42 days’ notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 21, 2016. Dckt. 55. The Trustee states that George Alm (“Debtor”) has listed in the additional provisions of the proposed plan that he has applied for a loan modification, but the Trustee has no evidence of such application or modification.

The Trustee also notes that the Plan is not the Debtor’s best effort under 11 U.S.C. § 1325(b) because Debtor deducts ordinary and business expenses of \$2,494.00 from gross business income on line

5 of Form 122C-1, and Debtor should be above median income, but he has failed to properly complete Form 122C-2.

The proposed amended plan lists \$20,202.00 in unsecured debts. The original plan listed \$8,202.00, and Schedules E/F disclosed priority unsecured debt of \$5,300.00 and general unsecured debt of \$8,202.00. Debtor has not explained the increase in unsecured debts, and he has not filed amended Schedules E/F.

DISCUSSION

Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor fails to use the gross income amount and complete the Means Test to satisfy the above-median income requirements. Further, Debtor fails to provide information relating to an apparent loan modification, including the application for the loan modification or the actual modification with its terms. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Trustee argues that the Plan is not feasible because it lists more unsecured debt than has been disclosed on Debtor's Schedules. The Plan lists \$20, 202.00 in unsecured debts, but Schedule E/F lists \$8,202.00 in general unsecured debt and \$5,300.00 in priority unsecured debt. Debtor has not amended his Schedules and has not testified to the change in the unsecured debt amount. Without accurate Schedules, the court cannot determine if Debtor will be able to make plan payments under 11 U.S.C. § 1325(a)(6).

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

8. [16-20227-E-7](#) PAMELA BEARD HUGHES
LDD-1 Mikalah Liviakis

MOTION FOR SANCTIONS FOR
VIOLATION OF THE AUTOMATIC STAY
11-25-16 [63]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the January 10, 2017 hearing is required.

The Debtor having filed a Notice of Withdrawal, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on December 20, 2016, Dckt. 88; no prejudice to the responding party appearing by the dismissal of the Motion; the Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the response filed by the Trustee; the Ex Parte motion is granted, the Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Sanctions for Violation of the Automatic Stay filed by the Debtor having been presented to the court, the Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 88, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Debtor's Motion for Sanctions for Violation of the Automatic Stay is dismissed without prejudice.

9. [16-20227-E-7](#) PAMELA BEARD HUGHES
LDD-2 Mikalah Liviakis

MOTION FOR SANCTIONS FOR
VIOLATION OF THE AUTOMATIC STAY
11-25-16 [70]

WITHDRAWN BY M.P.

Final Ruling: No appearance at the January 10, 2017 hearing is required.

The Debtor having filed a Notice of Withdrawal, which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on December 20, 2016, Dckt. 90; no prejudice to the responding party appearing by the dismissal of the Motion; the Debtor having the right to request dismissal of the motion pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041; and the dismissal being consistent with the response filed by the Trustee; the Ex Parte motion is granted, the Debtor's Motion is dismissed without prejudice, and the court removes this Motion from the calendar.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Sanctions for Violation of the Automatic Stay filed by the Debtor having been presented to the court, the Debtor having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 9014 and 7041, Dckt. 90, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Debtor's Motion for Sanctions for Violation of the Automatic Stay is dismissed without prejudice.

Final Ruling: No appearance at the January 10, 2016 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on November 16, 2016. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

The Trustee objects to Shauna Dingus's ("Debtor") claimed exemptions, for which Debtor failed to cite any statutory basis therefore. The Trustee further asserts that if Debtor amends her Schedules to use of the California exemptions, then she will be required to file a spousal waiver pursuant to California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

If the petition is filed individually, and not jointly, for a spouse, the exemptions provided by this chapter other than the provisions of subdivision (b) are applicable, except that, if **both** of the spouses effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(emphasis added). The court's review of the docket reveals that no amended Schedule C and spousal waiver have been filed. The Trustee's Objection is sustained, and the claimed exemptions are disallowed.

- A. Exemptions for 4173 County Road K, Orland, California, and for Remaining Lands, Orland, California, because they are “not the dwelling place of the Debtor and not afforded an exemption;”
- B. Exemptions for Honda Insight, Chevrolet Silverado, Jaguar S, and BMW K75 because Debtor has claimed exemptions that exceed the statutory limit for aggregate equity in motor vehicles;
- C. Exemptions for Bayliner, Safari Zanzibar, Polaris, John Deere, and Ford 9N because Debtor has not specified any statutory basis for exemptions related to those items.

The court’s review of the docket shows that an Amended Schedule C has not been filed. The Creditor’s Objection is sustained, and the claimed exemptions are disallowed.

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 Objection to Claimed Exemptions filed by the 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 Objection is sustained, and the claimed exemptions are disallowed in their entirety.

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2016. By the court’s calculation, 53 days’ notice was provided. 35 days’ notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 27, 2016. Dckt. 47. The Trustee states that the Plan is not feasible because it will take seventy-nine months to complete. Steven Seale and Marilyn Seale (“Debtor”) have proposed a 0.85% dividend, estimating \$352,673.00 to unsecured claims. The actual filed unsecured claims total \$485,561.08.

Additionally, the Plan does not provide for payments to Class 2A creditor VW Credit. The Trustee has disbursed \$14,876.65 to that creditor, but the claim has not been provided for, and the Trustee has not been authorized to make payments.

DEBTOR'S REPLY

The Debtor filed a Reply on December 29, 2016. Dckt. 50. Debtor proposes to modify paragraph 2.15 of the Plan to provide a dividend of no less than 0.40% to Class 7 claims. Additionally, Debtor requests authorization for the Trustee to pay \$14,876.65 to creditor VW Credit pursuant to Class 2A of the Debtor's confirmed plan of December 16, 2013. Debtor asserts that no additional disbursements are owed to VW Credit.

DISCUSSION

With the dividend to Class 7 claims being modified to be 0.40%, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is confirmed. Additionally, Debtor has requested that the court authorize the Trustee to make payments to VW Credit—payments which have already been made in full. That additional request is warranted and granted. With the Trustee's two objections having been satisfied, the Motion is granted, and the Modified Plan is confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Modified Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, Debtor's Modified Chapter 13 Plan filed on November 18, 2016, and as modified to reflect that the dividend paid to Class 7 claims shall be no less than 0.40%, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

IT IS FURTHER ORDERED that the Trustee is authorized to pay \$14,876.65 to creditor VW Credit (listed under Class 2A of the plan confirmed on December 16, 2013) in full satisfaction of its claim.

Final Ruling: No appearance at the January 10, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 12, 2016. By the court’s calculation, 29 days’ notice was provided. 28 days’ notice is required.

The Motion to Incur Debt has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Motion to Incur Debt is granted.

David Johnson, Jr. and Lori Johnson (“Debtor”) seek permission to borrow \$33,800.00 against Debtor David Johnson, Jr.’s pension and pay off the Chapter 13 Plan at 100%.

TRUSTEE’S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on December 19, 2016. Dckt. 60.

DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at *1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, “including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions.” Fed. R. Bankr. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The proposed loan against Debtor's pension appears to be reasonable and in the best interest of Debtor because it would complete the Plan at 100% and allow Debtor to perform home repairs before marketing the property for sale. Debtor has not complied with Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), however. Debtor provided an e-mail from Tiffany Johnson of Federal Credit Union stating that "David Johnson is eligible for up to \$33,800.00 on a Supplemental Pension loan," but Debtor has not provided anything more. Debtor must provide the actual loan agreement that the court is to approve. Debtor has not complied fully at this time, and accordingly, the Motion is denied without prejudice.

Waiver of Loan Document Requirement

Though not complying with the requirements of Federal Rule of Bankruptcy Procedure 4001(c)(1)(B), the court is presented with an extraordinary set of facts upon which provide a basis for the court waiving the requirement to provide the court with the loan agreement or loan terms. First, Debtor is using the loan to pay off his plan and provide a 100% dividend to creditors. Second, he is borrowing the money from himself (his own pension loan) and will be repaying himself.

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 Incur Debt filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted, and David Johnson, the Debtor, is authorized to obtain a Supplemental Pension Loan through SMW 104 Federal Credit Union in an amount up to **\$XXXXXXXXXXXX.**

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 10, 2016. By the court’s calculation, 61 days’ notice was provided. 42 days’ notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S AMENDED OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Amended Opposition on January 3, 2017, in which he asserts additional grounds to an original opposition filed on December 20, 2016 (Dckt. 43). Dckt. 47. The Trustee states the following:

- A. Katrina Culverson’s (“Debtor”) Amended Schedule I lists net income of \$6,960.00, but Schedule J lists \$6,210.00. If \$6,960.00 were used, Debtor’s disposable income would be \$3,973.20. The Plan pays \$3,223.00 for sixty months with a 100% dividend to unsecured claims.
 - 1. The Trustee does not oppose the Plan on this ground.

- B. Amended Schedule B lists interest in a worker's compensation claim with an unknown amount. Prior Schedules did not list the claim, and the Trustee requests that the order confirming include the non-exempt portion of any worker's compensation claim be paid into the Plan.
- C. The first Meeting of Creditors was held on November 17, 2016, and was continued to January 5, 2017. Debtor and counsel appeared, but Debtor did not provide all requested documents.
1. The Trustee requests that this Motion be continued if Debtor fails to appear at the continued meeting.
- D. Debtor has not provided the Trustee with proof of income for the sixty-day period preceding filing the bankruptcy case and has failed to provide business documents that are required seven days before the first Meeting of Creditors.
1. Trustee requested a business questionnaire, six months of profit and loss statements, six months of bank statements, two years of tax returns, a business license, and proof of insurance for Debtor's business.
 2. Trustee has received one income statement for October 16–29, 2016, profit and loss statements for September 1–October 31, a signed responsibility of business debtor, a business license that expired on December 31, 2016, six months of bank statements, and 2015 federal tax return.
 3. The Trustee has requested copies of additional checks listed on Debtor's October bank statement and has not received them yet.
 4. The Trustee is concerned that Debtor may not be able to make plan payments because no business budget has been filed and because Schedule J lists only \$2,986.80 in expenses, despite \$3,560.00 being written in checks in October 2016. Prior months showed significant spending at Thunder Valley casino in the following amounts:
 - a. \$4,005.60 in May,
 - b. \$2,154.20 in June,
 - c. \$4,300.00 in July,
 - d. \$3,169.82 in August, and
 - e. \$1,260.00 in September (a \$2,000.00 check was cashed in Tahoe).

- E. Debtor has not listed all assets. Debtor did not list an interest in a landscaping business (*i.e.*, The Lawn Shark) on Schedule B. On Schedule I, Debtor lists her non-filing spouse as a self-employed landscaper. The business license for the company lists Debtor as the owner. Additionally, Debtor has not listed any inventory or business equipment on Schedule B.

The Trustee requests that the Motion be denied or continued to after the continued Meeting of Creditors.

DISCUSSION

As to the Trustee's first grounds for opposing the Motion, the correct net income amount can be listed in the order confirming, amending the Plan accordingly. Debtor's Amended Schedule I indicates that the amount should be \$6,960.00 for net income.

Debtor has listed a worker's compensation claim on Amended Schedule B that is not accounted for in the Plan. Any non-exempt portion of that claim should be paid into the Plan, and per the Trustee's request, any order confirming shall include the non-exempt portion of Debtor's worker's compensation claim.

The Debtor has failed to timely provide the Trustee with business documents including: questionnaire; tax returns, profit and loss statements, proof of valid license and insurance or written statement that no such documentation exists. 11 U.S.C. § 521(e)(2)(A); Fed. R. Bankr. P. 4002(b)(3). Those documents are required seven days before the date set for the first meeting. 11 U.S.C. § 521(e)(2)(A)(I). Without the Debtor submitting all required documents, the court and the Trustee are unable to determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor has not listed a landscaping business on Schedule B, despite being listed as its owner. Similarly, Debtor has listed any inventory or business equipment. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A). The court may award interim fees for professionals pursuant to 11 U.S.C. § 331, which award is subject to final review and allowance pursuant to 11 U.S.C. § 330.

Benefit to the Estate

Even if the court finds that the services billed by an attorney are “actual,” meaning that the fee application reflects time entries properly charged for services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing

judgment with regard to the services provided as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [professional fees and expenses] without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

- (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including successfully modifying a plan in response to the Trustee's motion to dismiss and acquiring a loan modification for Debtor. The court finds the services were beneficial to the Client and bankruptcy estate and were reasonable.

"No-Look" Fees

In this District the Local Rules provide consumer counsel in Chapter 13 cases with an election for the allowance of fees in connection with the services required in obtaining confirmation of a plan and the services related thereto through the debtor obtaining a discharge. Local Bankruptcy Rule 2016-1 provides, in pertinent part,

(a) Compensation. Compensation paid to attorneys for the representation of chapter 13 debtors shall be determined according to Subpart (c) of this Local Bankruptcy Rule, unless a party-in-interest objects or the attorney opts out of Subpart (c). The failure of an attorney to file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys, shall signify that the attorney has opted out of Subpart (c). When there is an objection or when an attorney opts out, compensation shall be determined in accordance with 11 U.S.C. §§ 329 and 330, Fed. R. Bankr. P. 2002, 2016, and 2017, and any other applicable authority."

...

(c) Fixed Fees Approved in Connection with Plan Confirmation. The Court will, as part of the chapter 13 plan confirmation process, approve fees of attorneys representing chapter 13 debtors provided they comply with the requirements to this Subpart.

(1) The maximum fee that may be charged is \$4,000.00 in nonbusiness cases, and \$6,000.00 in business cases.

(2) The attorney for the chapter 13 debtor must file an executed copy of Form EDC 3-096, Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys.

(3) If the fee under this Subpart is not sufficient to fully and fairly compensate counsel for the legal services rendered in the case, the attorney may apply for additional fees. The fee permitted under this Subpart, however, is not a retainer that, once exhausted, automatically justifies a motion for additional fees. Generally, this fee will fairly compensate the debtor's attorney for all preconfirmation services and most postconfirmation services, such as reviewing the notice of filed claims, objecting to untimely claims, and modifying the plan to conform it to the claims filed. Only in instances where substantial and unanticipated post-confirmation work is necessary should counsel request additional compensation. Form EDC 3-095, Application and Declaration RE: Additional Fees and Expenses in Chapter 13 Cases, may be used when seeking additional fees. The necessity for a hearing on the application shall be governed by Fed. R. Bankr. P. 2002(a)(6).

The Modified Chapter 13 Plan expressly provides that Applicant is allowed \$4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Applicant prepared the order confirming the Plan.

If Applicant believes that there has been substantial and unanticipated legal services that have been provided, then such additional fees may be requested as provided in Local Bankruptcy Rule 2016-1(c)(3). The attorney may file a fee application, and the court will consider the fees to be awarded pursuant to 11 U.S.C. §§ 329, 330, and 331. In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the lodestar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles Cty. Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

FEES REQUESTED

Applicant has not provided a task billing analysis and supporting evidence for the services provided, which are presumably described in the following main categories. It appears that Applicant may

have believed that it is so “simple” that the task billing would not be required. Being that “simple,” it would have been even simpler for Applicant to do it than forcing the court to do in this analysis.

However, in light of the modest amount of fees, the court notes the following drawn from the Motion:

Motion to Modify Chapter 13 Plan: Applicant billed \$960.00 (6.4 hours) that the court allocates to this category of services. .

Loan Modification and Motion to Approve Loan Modification: Applicant billed \$1,095 (7.3 hours) in this category

Motion to Dismiss Case: Applicant billed \$255.00 (1.7 hours) in this category.

The court grants the Motion and allows Applicant the requested \$1,200.00 of additional attorneys fees for substantial and unanticipated legal services provided to Debtor in this Chapter 13 case. FN.1.

FN.1. Fortunately for Applicant organizing the task billing was simple, and counsel was saved having to attend a second hearing and expend additional time (for which no compensation would be allowed) in putting together such “simple” information for the court. Applicant should not count on the court providing such “services” in the future.

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 for Allowance of Professional Fees filed by Peter Macaluso (“Applicant”), Attorney for the Chapter 13 Debtor having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Allowance of Professional Fees is granted, and Applicant is allowed \$1,200.00 for “substantial and unanticipated” legal services provided the Debtor in this case. The Chapter 13 Trustee is authorized to pay these additional legal fees through the Chapter 13 Plan.

16. [16-26941](#)-E-13 **DEBRA FREEMAN**
AP-1 **Michael Hays**

**OBJECTION TO CONFIRMATION OF
PLAN BY QUICKEN LOANS, INC.**
12-14-16 [\[23\]](#)

CASE DISMISSED: 12/16/2016

Final Ruling: No appearance at the January 10, 2017 hearing is required.

The case having previously been dismissed, the Objection is overruled as moot.

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 Objection to Confirmation of Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled as moot, the case having been dismissed.

17. [16-26941](#)-E-13 **DEBRA FREEMAN**
DPC-1 **Michael Hays**

**OBJECTION TO CONFIRMATION OF
PLAN BY DAVID P. CUSICK**
12-13-16 [19]

CASE DISMISSED: 12/16/2016

Final Ruling: No appearance at the January 10, 2017 hearing is required.

The case having previously been dismissed, the Objection is overruled as moot.

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 Objection to Confirmation of Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled as moot, the case having been dismissed.

18. [16-22942-E-13](#)
RJ-4

TRACI HAMILTON
Richard Jare

MOTION TO CONFIRM PLAN
11-15-16 [87]

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.

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

Correct Notice Not Provided. No Proof of Service has been filed. 35 days' notice is required.

The Motion to Confirm the Amended Plan has not been properly set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied without prejudice.

CORRECT NOTICE NOT PROVIDED

Traci Hamilton ("Debtor") has not filed a Proof of Service with this Motion. Local Bankruptcy Rule 9014-1(e)(2) & (3) require that a proof of service be filed as a separate document within three days of filing a motion. Additionally, Local Bankruptcy Rule 2002-1(c) instructs how to provide notice to the Internal Revenue Service. Without proof that all parties have been served, the court cannot rule on the Motion. The Motion is denied without prejudice.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Amended Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR SERVES ALL REQUIRED PARTIES PROPERLY AND WITH SUFFICIENT TIME

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 20, 2016. Dckt. 94. The Trustee states first that no Proof of Service has been provided to show that adequate notice was given to the parties. One of parties not noticed is the Internal Revenue Service, which was added to Section 2.13 of the proposed plan but has not been listed on Schedules D, E, or F.

The Trustee notes that some of the additional provisions in the proposed Amended Plan duplicate earlier provisions without altering them in any way. Debtor's counsel addresses this stating that though he interlined the changes on the standard test, he acknowledges that such interlinations are not to be made but changes set forth in the Additional Provisions.

Also, Section 6.03 calls for the Trustee to pay post-petition arrears and ongoing mortgage payments to "LSF8 REIT Caliber Home Loans, (Cit Fin Serv.)." That section calls for ongoing payment beginning with "the end of July 2016" that "may change with the terms of the note and deed to trust to take into account escrow and rate changes." The Trustee interprets that section as requiring him to determine what is required, and the Trustee is uncertain how to comply with the provision.

Traci Hamilton ("Debtor") may not be able to comply with the Plan under 11 U.S.C. § 1325(a)(6) because of relying on receiving and paying into the Plan monies from two separate claims settlements. First, Debtor lists on Schedule B an interest in tax refunds that have been withheld due to identity theft issues. The total listed is \$21,001.98. The Trustee is uncertain about the status of the refunds and if and when the funds will be released by the government agencies because Debtor has not provided sufficient information. The Trustee requests that a lump sum payment be made immediately upon receipt of the tax refunds.

Debtor also lists a wrongful termination claim on Schedule B against KFC restaurants that has an unknown value. Section 6.04 of the Plan calls for 100% of any litigation net proceeds to be paid into the Plan, but the Motion to Confirm conflicts and states that 75% will be paid.

The Trustee notes that Schedule D lists a \$9,000.00 perfected mechanic's lien for Quality First Home Improvement Inc. that Debtor's original plan listed as a \$0.00 secured claim in Class 2C provided that a motion to value secured claim was filed. Such a motion was filed and denied. Now, the proposed plan does not provide for the claim. While the Plan proposes to pay a different creditor secured by the same property in Class 1, the Plan depends on Quality First Home Improvement Inc. not seeking to enforce its claim. Debtor has not addressed the likelihood of that event.

The Franchise Tax Board filed Claim 9-1 on October 28, 2016, indicating that Debtor had not filed a tax return for 2015.

DISCUSSION

First, the court notes that the service and notice issues have been discussed above. Debtor must comply with all service and notice rules to bring a valid motion before the court.

The Trustee's objections largely rest on the proposed Amended Plan not being feasible. First, the additional payment provisions in Section 6.03 are unclear. The Trustee is instructed to make payment beginning with "the end of July 2016," but the Plan also notes that such payment may change. The Plan does not instruct the Trustee how to proceed with payments, and therefore, it is not feasible.

Second, the Plan calls for payments from two separate claims settlements, but one for tax refunds is uncertain because the Debtor has not provided information about if and when the funds may be released. The other payment is listed in the Plan as a payment of 100% of litigation net proceeds, but the Motion conflicts and states that the payment is 75%.

Debtor's Schedule D estimates the amount of Quality First Home Improvement, Inc.'s claim as \$9,000.00, but does not provide for it in the Plan, despite listing it in a prior plan.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that specifies the mandatory provisions of a plan. It requires only that a debtor adequately fund a plan with future earnings or other future income that is paid over to the Trustee (11 U.S.C. § 1322(a)(1)), provide for payment in full of priority claims (11 U.S.C. § 1322(a)(2) & (4)), and provide the same treatment for each claim in a particular class (11 U.S.C. § 1322(a)(3)). Nothing in § 1322(a) compels a debtor to propose a plan that provides for a secured claim, however.

11 U.S.C. § 1322(b) specifies the provisions that a plan may include at the option of the debtor. With reference to secured claims, the debtor may not modify a home loan but may modify other secured claims (11 U.S.C. § 1322(b)(2)), cure any default on a secured claim—including a home loan—(11 U.S.C. § 1322(b)(3)), and maintain ongoing contract installment payments while curing a pre-petition default (11 U.S.C. § 1322(b)(5)).

If a debtor elects to provide for a secured claim, 11 U.S.C. § 1325(a)(5) gives the debtor three options:

- A. Provide a treatment that the debtor and creditor agree to (11 U.S.C. § 1325(a)(5)(A)),
- B. Provide for payment in full of the entire claim if the claim is modified or will mature by its terms during the term of the Plan (11 U.S.C. § 1325(a)(5)(B)), or
- C. Surrender the collateral for the claim to the creditor (11 U.S.C. § 1325(a)(5)(C)).

Those three possibilities are relevant only if the plan provides for the secured claim, though.

When a plan does not provide for a secured claim, the remedy is not denial of confirmation. Instead, the claimholder may seek termination of the automatic stay so that it may repossess or foreclose upon its collateral. The absence of a plan provision is good evidence that the collateral for the claim is not necessary for the debtor's reorganization and that the claim will not be paid. This is cause for relief from the automatic stay. See 11 U.S.C. § 362(d)(1).

Notwithstanding the absence of a requirement in 11 U.S.C. § 1322(a) that a plan provide for a secured claim, the fact that this Plan does not provide for the respondent Creditor's secured claim raises doubts about the Plan's feasibility. See 11 U.S.C. § 1325(a)(6). That is reason to sustain the Objection.

Lastly, the Trustee notes the Franchise Tax Board's claim that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for 2015. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). Failure to provide the tax transcript is an independent ground to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

19. [16-27442-E-13](#) **KORIE MARTINEZ**
TAG-1 **Aubrey Jacobsen**

**MOTION TO VALUE COLLATERAL OF
SOLANO FEDERAL CREDIT UNION
12-7-16 [14]**

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, creditors, and Office of the United States Trustee on December 9, 2016. FN.1. By the court’s calculation, 32 days’ notice was provided. 28 days’ notice is required.

FN.1. The court notes that the original Proof of Service states that service occurred on November 7, 2016, and the amended Proof of Service states that service occurred on November 9, 2016. *Compare* Dckt. 18, *with* Dckt. 19. Those documents were filed with the court on December 7 and 9, 2016, respectively. The court interprets service as having occurred in December, not November.

The Motion to Value Secured Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value Secured Claim of Solano Federal Credit Union (“Creditor”) is denied without prejudice.

The Motion filed by Korie Martinez (“Debtor”) to value the secured claim of Solano Federal Credit Union (“Creditor”) is accompanied by Debtor’s declaration. Debtor is the owner of a 2012 Volkswagen Beetle (“Vehicle”). Debtor seeks to value the Vehicle at a replacement value of \$11,000.00 as of the petition filing date. As the owner, the Debtor’s opinion of value is evidence of the asset’s value. *See* Fed. R. Evid. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on December 21, 2016. Dckt. 24. The Trustee asserts that Debtor has not provided any information about the Vehicle relating to style, condition, or options, and the Trustee notes that the Creditor has not filed a Proof of Claim.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred in 2014 to secure a debt owed to Creditor with a balance of approximately \$18,043.00. Declaration of Korie Martinez, Dckt. 16.

Debtor has not provided the actual date that the debt was incurred, only stating that it was at some time in 2014, and has not provided a copy of the loan agreement. There are dates in 2014 that are within 910 days prior to the filing of the petition. The hanging paragraph in 11 U.S.C. § 1325(a) may apply to make § 506 inapplicable if the purchase money security interest in the motor vehicle was acquired on or after May 14, 2014. If before that date, the Creditor's claim secured by a lien on the asset's title would be under-collateralized and would be determined to be in the amount of \$11,000.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is denied without prejudice because Debtor has not provided the date that the purchase money security interest was acquired.

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 for Valuation of Collateral filed by Korie Martinez ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

Tentative Ruling: The Objection to Debtor’s Claim of Exemptions 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).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on November 16, 2016. By the court’s calculation, 55 days’ notice was provided. 28 days’ notice is required.

The Objection to Claimed Exemptions has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties’ pleadings.

The Objection to Claimed Exemptions is sustained, and the exemptions are disallowed in their entirety.

The Trustee objects to Alvaro Rodriguez’s (“Debtor”) use of the California exemptions without the filing of the spousal waiver required by California Code of Civil Procedure § 703.140. California Code of Civil Procedure § 703.140(a)(2), provides:

If the petition is filed individually, and not jointly, for a spouse, the exemptions provided by this chapter other than the provisions of subdivision (b) are

applicable, except that, if **both** of the spouses effectively waive in writing the right to claim, during the period the case commenced by filing the petition is pending, the exemptions provided by the applicable exemption provisions of this chapter, other than subdivision (b), in any case commenced by filing a petition for either of them under Title 11 of the United States Code, then they may elect to instead utilize the applicable exemptions set forth in subdivision (b).

(emphasis added). The court's review of the docket reveals that the spousal waiver has not been filed. The Trustee's Objection is sustained, and the claimed exemptions are disallowed.

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 Objection to Claimed Exemptions filed by the 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 Objection is sustained, and the claimed exemptions are disallowed in their entirety.

21. [16-24246-E-13](#)
EWV-112

RICHARD CRUZ
Eric Vandermey

MOTION TO CONFIRM PLAN
11-18-16 [82]

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 18, 2016. By the court's calculation, 53 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 20, 2016. Dckt. 97. The Trustee states that the Plan exceeds sixty months, improperly classifies the claim of HSBC Bank USA, N.A. and Nationstar Mortgage LLC, and changes the amount of attorneys' fees owed without explanation.

DISCUSSION

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in seventy-seven months due to increased claims from the Internal Revenue Service and Franchise Tax Board that the Plan does not have sufficient proceeds to pay. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d), which is a ground to deny confirmation.

Section 2.08 of the proposed plan includes in Class 1 all delinquent secured claims that mature after the completion of the Plan. Debtor listed Nationstar Mortgage LLC in Class 4, but HSBC Bank USA, N.A./Nationstar Mortgage LLC filed a claim for mortgage arrears of \$21,769.34. The Trustee believes that the claim should be paid through Class 1 or in Class 3 as a property to be surrendered. The court agrees that the language of Section 2.08 takes the claim out of Class 4.

The proposed plan changes attorneys' fees paid from \$0.00 to \$1,500.00 and the balance due from \$4,000.00 to \$2,500.00. Debtor's Rights and Responsibilities and Disclosure of Compensation, though, report that \$0.00 has been and that \$4,000.00 is due. Debtor has not filed updated versions of those documents and has not testified to paying any attorneys' fees. Without a complete, accurate picture, the court cannot determine if the Plan is feasible, viable, or complies with 11 U.S.C. § 1325.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Motion to Confirm the Amended Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 9, 2016. By the court’s calculation, 32 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

HSBC Bank USA, National Association as Trustee for Structured Adjustable Rate Mortgage Loan Trust, Mortgage Pass-Through Certificates, Series 2007-7, its assignees and/or successors in interest, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

- A. Richard Cruz’s (“Debtor”) Plan is not adequately funded because it fails to include arrearages for Creditor’s claim.

The Creditor’s objection is well-taken. The objecting Creditor holds a deed of trust secured by the Debtor’s residence. The Creditor has filed a timely proof of claim in which it asserts \$21,769.34 in pre-petition arrearages. The Plan does not propose to cure those arrearages. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments because it does not provide for the surrender of the collateral for this claim. *See* 11 U.S.C. §§ 1322(b)(2) & (5), 1325(a)(5)(B). The Plan cannot be confirmed because it fails to provide for the full payment of arrearages.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by a Creditor with a secured claim 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 Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor’s Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 27, 2016. By the court’s calculation, 75 days’ notice was provided. 42 days’ notice is required. FN.1.

FN.1. The court notes that the Certificate of Service for the Amended Notice of Hearing was provided on November 30, 2016, which is 41 days’ notice, one short of the required 42 days. Given that all parties were properly served with the original Certificate of Service and that the only change was to set the hearing date for January 10, 2017, the court uses October 27, 2016, as the date of service for this Motion.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Amended Plan is denied.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on November 18, 2016. Dckt. 84. The Trustee states that the original date noticed for hearing is not a hearing date, Jody Silva and Joy Silva’s (“Debtor”) declaration does not provide sufficient evidence to support confirmation, the Plan does not call for a November payment for an unknown reason, and the Debtor may not be able to make plan payments.

DISCUSSION

First, the Trustee notes that December 13, 2016, was originally set as the hearing date for this Motion. That date was not one of the court's hearing dates, and Debtor corrected that problem by filing an Amended Notice of Hearing, setting the hearing for January 10, 2017. This portion of the Trustee's Opposition has been resolved.

The Trustee also objects to Debtor's declaration in support of this Motion. The Trustee notes that Debtor has not provided any evidence in support of confirmation and has only recited some of the components of 11 U.S.C. § 1325(a). The Trustee cites to *In re Wolff* for the proposition that a debtor bears the burden of proof in meeting the requirements for confirmation. 22 B.R. 510, 512 (B.A.P. 9th Cir. 1982).

Here, Debtor filed an incomplete declaration. Three lines are left blank, only filled in by either "XXX," "YYY," or "ZZZ." Though the Trustee is correct to point this out and it is appropriate for the court to address, this appears to be a clerical error in using a declaration form. At the hearing, counsel for Debtor explained, **XXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

Additionally, Debtor did not state a date for when the declaration was signed. Local Bankruptcy Rule 9014-1(d)(7) requires that every motion "be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested." The rule also requires compliance with Federal Rule of Civil Procedure 56(c)(4), which states that a declaration "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated."

The declaration contains the signature of Debtor, not merely the "/s/ 'name'" electronic filing convention. While the date box may be an oversight, when added to signing a declaration stating "XXX," "YYY," and "ZZZ" under penalty of perjury, it causes the court to wonder whether Debtor bothered to read the declaration and whether Debtor is able to provide the competent, credible personal knowledge testimony required of a witness. Fed. R. Evid. 601, 602.

The proposed plan may not be Debtor's best effort under 11 U.S.C. § 1325(b) because the Plan does provide for a plan payment on November 25, 2016. The Plan does not explain this oversight, and Debtor's have sufficient disposable income to make the payment. The Trustee has requested that any order confirming amend the proposed payments to include the November payment. At the hearing, the Debtor proposed **XXXXXXXXXXXXXXXXXXXX**.

The Debtor may not be able to make plan payments or comply with the Plan under 11 U.S.C. § 1325(a)(6). Debtor proposes increasing plan payments from \$2,720.00 per month to \$5,597.00 per month for the remaining fifty-four months of the Plan, but Debtor has not provided recent income statements or other admissible evidence to support such an increase. Without an accurate picture of the Debtor's financial reality, the court cannot determine whether the Plan is confirmable. Therefore, the Objection is sustained.

The Amended Plan does not comply with 11 U.S.C. §§ 1322, 1323, and 1325(a) and is not confirmed.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on December 27, 2016. Dckt. 24. The Trustee does not oppose the Motion.

DISCUSSION

The Motion is supported by the Declaration of Walter Allen, Jr.. Dckt. 21. The Declaration affirms Debtor's desire to obtain the post-petition financing and provides evidence of Debtor's ability to pay this claim on the modified terms. Debtor testifies that the modification will allow him to modify his Chapter 13 Plan to provide for unanticipated claims.

This post-petition financing is consistent with the Chapter 13 Plan in this case and with Debtor's ability to fund that Plan. There being no objection from the Trustee or other parties in interest, and the Motion complying with the provisions of 11 U.S.C. § 364(d), the Motion to Approve the Loan Modification is granted.

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 Approve Loan Modification filed by Walter Allen, Jr. 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 court authorizes Walter Allen, Jr. ("Debtor") to amend the terms of the loan with Wells Fargo Bank, N.A. ("Creditor"), which is secured by the real property commonly known as 404 Arlington Circle, Fairfield, California, on such terms as stated in the Modification Agreement filed as Exhibit 1 in support of the Motion (Dckt. 22).

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on December 7, 2016. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

- A. Jennifer Rianda (“Debtor”) failed to provide a tax return;
- B. Debtor failed to provide pay advices;
- C. The Plan will not complete within sixty months;
- D. Debtor fails the liquidation analysis; and
- E. The Plan may have been filed in bad faith.

The Trustee’s objections are well-taken. The Debtor has not provided the Trustee with employer payment advices for the sixty-day period preceding the filing of the petition as required by 11 U.S.C.

§ 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. *See* 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. Those are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in 67 months due to specifying a 100% dividend to unsecured claims. The Plan would be able to pay a 26.3% dividend within sixty months. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d). Therefore, the Objection is sustained.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. § 1325(a)(4). While Debtor has reported non-exempt equity in the amount of \$205,297.28, and the Debtor is proposing a 26.3% dividend to unsecured creditors (within sixty months), additional equity exists. The Debtor has not explained how, under the proposed plan and the schedules filed under penalty of perjury, the unsecured claimants are entitled to a 26.3% dividend for \$11,337.00 when there may be upward of \$205,297.28 in non-exempt equity.

The Trustee also raises a concern that the Plan may have been filed in bad faith after the court denied Debtor's motion to extend the automatic stay on November 22, 2016. *See* Dckt. 31. The court stated at the November 22, 2016 hearing that Debtor has not rebutted "by clear and convincing evidence the presumption of bad faith" in the case because "Debtor and her non-debtor spouse show a pattern of filing a bankruptcy case, having it dismissed, and then filing a new bankruptcy case within a year (which new bankruptcy case will ultimately be dismissed)." *Id.* For the present Motion, Debtor has not shown compliance with the good faith filing requirement of 11 U.S.C. § 1325(a)(7).

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on November 11, 2016. By the court’s calculation, 60 days’ notice was provided. 42 days’ notice is required.

The Motion to Confirm the Amended Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on February 14, 2017, to allow the Trustee and Debtor to conclude the continued First Meeting of Creditors.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 21, 2016. Dckt. 68. The Trustee states that Stephanie Ruscigno (“Debtor”) failed to appear at the first Meeting of Creditors—which has been continued to January 26, 2017, at 1:30 p.m.—and that Debtor is delinquent under the proposed plan by \$200.00.

DEBTOR’S REPLY

Debtor filed a Reply on January 2, 2017. Dckt. 73. Debtor states that the Meeting of Creditors was continued at the request of Debtor’s counsel to deal with a family loss. Additionally, Debtor states that plan payments will be current on or before the hearing.

DISCUSSION

Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1). Debtor appears to have been absent because Debtor's counsel informed the Trustee that he would be absent to deal with the loss of a family member. Debtor's decision is understandable, and the Meeting has been continued to January 26, 2017, at 1:30 p.m.

The Trustee asserts that Debtor is \$200.00 delinquent in plan payments, which represents one month of the \$200.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6). Unfortunately for the Debtor, a promise to become current on plan payments is not evidence of such. The Motion is denied on the ground of Debtor's delinquency under the proposed plan.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Confirm the Amended Plan is continued to 3:00 p.m. on February 14, 2017.

27. [16-26070-E-13](#) **STEPHANIE RUSCIGNO**
PGM-4 **Peter Macaluso**

**MOTION TO APPROVE STIPULATION
FOR ADEQUATE PROTECTION AND
TREATMENT OF SECURED CLAIM IN
PLAN
12-13-16 [62]**

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on December 13, 2016. By the court’s calculation, 28 days’ notice was provided. 28 days’ notice is required.

The Motion to Approve Stipulation for Adequate Protection and Treatment of Secured Claim in Chapter 13 Plan has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Approve Stipulation for Adequate Protection and Treatment of Secured Claim in Chapter 13 Plan is granted.

Stephanie Ruscigno (“Debtor”) moves for the court to approve a stipulation for adequate protection and treatment of DFI Funding, Inc.’s (“Creditor”) claim in the Chapter 13 Plan.

On October 19, 2016, Creditor and Debtor filed a pleading titled “Stipulation for Adequate Protection and Treatment of Secured Claim in Chapter 13 Plan.” Dckt. 33. Creditor and Debtor have lodged with the court a proposed order that states and orders, “The Stipulation for Adequate Protection and Treatment of Secured Claim in Chapter 13 Plan filed with the Court on October 19, 2016 is approved and shall be made an Order of this Court.” The proposed “order” does not grant any specific relief, but merely says that the “Stipulation” is “approved,” and the “stipulation” is “made an order of the court.”

The “Stipulation” is a six-page document and purports to accomplish all of the following:

- A. Allows Creditor a secured claim in the amount of \$407,249.09.

- B. Mandates the terms of the Chapter 13 Plan as to Creditor's Claim.
- C. In the event of a default in any payments to Creditor, Debtor will be assessed a \$75.00 late fee.
- D. In the event of a default and a failure to cure within ten days, Creditor is entitled to *ex parte* relief from the automatic stay.
- E. If Creditor seeks relief from the stay, the notice requirements of Federal Rule of Bankruptcy Procedure 3002.1 are waived.
- F. If Creditor seeks relief from the automatic stay, the fourteen-day stay of enforcement pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived.
- G. Debtor represents and warrants that Debtor has no claims against Creditor.
- H. Debtor waives, releases, and discharges any claims it, or any successors or assigns, could have against Creditor.
- I. Debtor grants Creditor a general release, of all claims, known and unknown.
- J. Debtor is required to file an amended Plan on the terms dictated in the Stipulation.

Stipulation, Dckt. 33.

The filing of an *ex parte* stipulation and lodging an order with the court that granted such extensive relief cause the court to issue an order for a Status Conference to address the issues. Order, Dckt. 38. The Status Conference was conducted and concluded on December 6, 2016. Civil Minutes, Dckt. 59; Order, Dckt. 61.

MOTION TO APPROVE STIPULATION

On December 13, 2016, Debtor filed the current Motion to Approve Stipulation for Adequate Protection. Dckt. 62. That Motion states with particularity (Fed. R. Bankr. P. 9013) the following grounds and relief requested:

- A. "Debtor owns real property located at 1660 Sharon Drive, 26 Yuba City, CA 95993."
- B. "At the time of filing, the Debtor's loan to DFI Funding, 28 Inc. was due and payable. This Chapter 13 was filed in order to stop a pending foreclosure sale."
- C. "The stipulation provides adequate protection payments to the creditor, while giving the Debtor time to secure a loan modification, refinance, or make arrangements to sell or surrender the property."

- D. “The agreement will not have any direct impact on the estate, the Trustee, or any other secured creditor in this case, and/or any Discharge that the Debtor may receive in this case.”

This contention is intriguing, stating the conclusion that there will not be any “direct impact” on the Trustee, creditor holding a secured claim, or the Debtor’s discharge. Does this indicate that there is an “indirect,” unstated impact. Additionally, it appears that there may be an impact on creditors holding priority unsecured claims or general unsecured claims.

- E. The stipulated adequate protection is stated in the Motion to be:

1. “The stipulation, as filed with this Court on October 19, 2016, provides for one payment of \$1,390.00, ten (10) payments of \$1,600.00 commencing November 12, 2017, and a single balloon payment of \$175,000.00 on or before September 12, 2017. See stipulation attached hereto as Exhibit A.”

Motion, Dckt. 62.

Thus, it appears that the adequate protection is in the form of payments which will be required. The Motion does not state any other relief to be granted.

The Notice of Hearing merely states that Debtor’s counsel will “move the Court for an Order on this Motion to Approve Stipulation.” Dckt. 63. No description of the adequate protection or relief sought is stated in the Notice. It does appear that the Motion and all the supporting pleadings were served on the parties in interest in this case (not merely the notice). Cert. of Serv., Dckt. 65.

TRUSTEE’S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 27, 2016. Dckt. 71. The Trustee objects both for procedural reasons and also as to specific terms in the stipulation.

The Trustee objects to the term that the Creditor shall be deemed to have an allowed claim because all Creditor needs to do is file a Proof of Claim to have an allowed claim. The Trustee also objects to the “due by the twelfth” due date without proof that such date is when payments are due, which objection could be cured by Creditor filing a Proof of Claim.

The Trustee objects to *ex parte* relief from the stay for Creditor unless the court approves that term.

The Trustee believes that the ninth term allows Creditor to accept late payment, continue to collect, and then years later obtain *ex parte* relief based on the years-old late payment. While the Trustee does not oppose the term as to an accepted partial payment not acting as a waiver because a default would continue to exist, the Trustee opposes the term as contrary to the interest of the Debtor and the Estate to allow the Creditor both relief and full payment.

The Trustee objects to a payment change term because it appears contrary to Federal Rule of Bankruptcy Procedure 3002.1. That rule requires notice be given prior to payment changes, but the Trustee admits that his objection is probably irrelevant because the stipulation itself may serve as notice.

The Trustee objects to the eleventh term waiving notice under Federal Rule of Bankruptcy Procedure 3002.1 after relief from stay is granted because that Rule was amended on December 1, 2016, to include:

Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating and annulling the automatic stay becomes effective with respect to the residence that secures the claim.

The Trustee objects to a general release because it purports to waive any action the Debtor may have had, even if that action would be property of the Estate, without notice of any action to the Estate or to creditors. While the Trustee is not aware of any cause of action that exists, waiver of unknown actions that would be property of the Estate is not justified. The Trustee does not oppose Debtor waiving any personal right to pursue an action, unless it is property of the Estate and pursued while in bankruptcy.

The Trustee did not sign the proposed stipulation and objects to the fifteenth term that attempts to stipulate as to a party who has not signed the stipulation.

The Trustee objects to the sixteenth term of the stipulation that calls for an amended plan to be filed only after an order approving the stipulation, and it gives the Creditor no specified time in which to file a Proof of Claim. One amended plan was filed on November 11, 2016, and if the stipulation requires another one to be filed after the stipulation is approved, then the Trustee believes that it is a waste of time and resources. Additionally, if no claim is timely filed by January 11, 2017, the Trustee may object to any claim as untimely.

On procedural grounds, the Trustee first objects that no motion for relief is pending on which to grant a stipulation. The Trustee notes, though, that the court may deem the current Motion as a stipulation for court approval of an agreement for relief from stay.

The Trustee argues that insufficient evidence has been provided in support of the Motion because there is no Proof of Claim and no supporting declaration for the Motion.

Finally, the Trustee argues that the Motion is inadequate because it does not comply with Local Bankruptcy Rule 9014-1(d) by citing applicable law per Federal Rule of Bankruptcy Procedure 9019 or pleading grounds with particularity per Federal Rule of Bankruptcy Procedure 9013. Additionally, the Motion does not address the court's concerns from the prior status conference.

DEBTOR'S REPLY

Debtor filed a Reply on January 3, 2017. Dckt. 75. Debtor addresses the Trustee's substantive objections to the stipulation.

First, Debtor requests that Creditor file a Proof of Claim.

Second, Debtor states that she has agreed to the twelfth as a due date.

Third, Debtor states that she has reviewed the *ex parte* relief term with her counsel and has agreed to the relief.

Fourth, the Debtor's reply to the Trustee's concern that Creditor could accept a late payment and seek relief years later is to state that "[t]he entire term of the Stipulation is 11 months."

Debtor agrees with the Trustees analyses for objections to unnoticed payment changes, the application of Federal Rule of Bankruptcy Procedure 3002.1 after relief from stay is granted, and as to the general release.

Regarding the stipulated relief as to the Trustee, Debtor argues that upon confirmation of the Amended Plan, Creditor's claim will be in Class 4 and will no longer be property of the Estate.

Finally, the Debtor states that the stipulation was not meant to alter Creditor's deadlines or requirement to file a Proof of Claim. Debtor asserts that the stipulation and Amended Plan are in accordance, and while the Trustee's objections are noted, they are "not paramount to the approval of the signed stipulation." Debtor requests that the stipulation be approved.

DISCUSSION

On its face, the Motion is quite simple—Debtor agreeing to make specified payments as adequate protection to Creditor. The Motion does not state any consequences of a default in payment, but it could be reasonably inferred that such would be grounds for relief from the automatic stay.

The Motion does not purport to be one to compromise any rights of the estate or settle any disputes. Just one to merely provide for agreed adequate protection payments to Creditor who is willing to afford Debtor some time to either refinance or sell the Property so as to preserve her equity therein. As Creditor noted at a prior hearing, even though when the case was filed there was not an automatic stay in effect (11 U.S.C. § 362(c)(4)), Creditor elected to voluntarily not conduct a non-judicial foreclosure sale, allowing Debtor time to get the stay imposed in this case.

Upon review of the Motion, Stipulation, and the efforts of the parties in this case, the court grants the Motion and orders the following adequate protection terms pursuant to the Stipulation of the Parties:

- A. Debtor shall make the following Adequate Protection Payments to Creditor:
 1. One payment of \$1,390.00 on October 19, 2016;
 2. Ten monthly payments of \$1,600.00 each, commencing on November 12, 2016, and continuing for each month thereafter through August 2017.

- a. The monthly payments for November 2016 through January 2017 are authorized to be made directly by the Debtor to Creditor, and to be made by the 12th day of each month.
 - b. Commencing in February 2017, the \$1,600.00 monthly payment shall be made through the Chapter 13 Trustee, who shall then disburse the monthly payment for February 2017 and each succeeding month at the end of the month when making the normal monthly disbursements to creditors.
3. Debtor shall make a final payment of \$175,000.00 to Creditor on or before September 12, 2017, to pay Creditor's claim in full. The final payment may be made directly by Debtor or at the direction of (such as a loan or sale escrow distribution).
- B. In the event that Debtor defaults in any of the required adequate protection payments specified above, and thereafter fails to cure said default within ten days of written notice thereof sent to Debtor and Debtor's Counsel of Record in this case, Creditor may request relief from the automatic stay by *ex parte* motion filed with the court.
1. The *ex parte* motion shall be based on the grounds of the default in the adequate protection payments, and be served on the Debtor, Debtor's Counsel, Chapter 13 Trustee and U.S. Trustee. When the *ex parte* motion is filed Creditor shall also lodge with the court a proposed order granting such relief.
 2. The court shall issue the order on the *ex motion* if no opposition to the motion is filed within ten (10) days of service of the *ex parte* motion and the opposition party has set a hearing on the opposition to the *ex parte* motion for the first regularly schedule law and motion hearing date of this court not less than seven days from the filing of the opposition. The only grounds for the opposition to the *ex parte* motion shall be that the Debtor made the adequate protection payment asserted to be in default or timely cured after notice of default.
 3. The authorization to seek *ex parte* relief is without prejudice to Creditor seeking relief from the automatic stay for any other grounds as permitted using the procedures provided in Local Bankruptcy Rule 9014-1(f).

No other relief is granted.

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 Status Conference for the Stipulation to determine secured claim, waive and release rights and interests of the bankruptcy estate, Debtor, and all other parties in interest, and predetermine and confirm terms for treatment of Creditors' secured claim having been conducted by the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Approve Adequate Protection Stipulation is granted on the terms provided herein:

- A. Debtor shall make the following Adequate Protection Payments to Creditor:
1. One payment of \$1,390.00 on October 19, 2016;
 2. Ten monthly payments of \$1,600.00 each, commencing on November 12, 2016, and continuing for each month thereafter through August 2017.
 - a. The monthly payments for November 2016 through January 2017 are authorized to be made directly by the Debtor to Creditor, and to be made by the 12th day of each month.
 - b. Commencing in February 2017, the \$1,600.00 monthly payment shall be made through the Chapter 13 Trustee, who shall then disburse the monthly payment for February 2017 and each succeeding month at the end of the month when making the normal monthly disbursements to creditors.
 3. Debtor shall make a final payment of \$175,000.00 to Creditor on or before September 12, 2017, to pay Creditor's claim in full. The final payment may be made directly by Debtor or at the direction of (such as a loan or sale escrow distribution).
- B. In the even that Debtor defaults in any of the required adequate protection payments specified above, and thereafter fails to cure said default within ten days of written notice thereof sent to Debtor and Debtor's Counsel of Record in this case, Creditor may request relief from the automatic stay by *ex parte* motion filed with the court.
1. The *ex parte* motion shall be based on the grounds of the default in the adequate protection payments, and be served on the Debtor, Debtor's Counsel, Chapter 13 Trustee and U.S. Trustee. When the *ex parte* motion is filed Creditor shall also lodge with the court a proposed order granting such relief.
 2. The court shall issue the order on the *ex motion* if no opposition to the motion is filed within ten (10) days of service of the *ex parte* motion and the

opposition party has set a hearing on the opposition to the ex parte motion for the first regularly schedule law and motion hearing date of this court not less than seven days from the filing of the opposition. The only grounds for the opposition to the ex parte motion shall be that the Debtor made the adequate protection payment asserted to be in default or timely cured after notice of default.

- 3. The authorization to seek *ex parte* relief is without prejudice to Creditor seeking relief from the automatic stay for any other grounds as permitted using the procedures provided in Local Bankruptcy Rule 9014-1(f).

No other relief is granted.

28. [16-26771-E-13](#) **JOHN MOORE** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Matthew DeCaminada** **PLAN BY DAVID P. CUSICK**
12-7-16 [[33](#)]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney, on December 7, 2016. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

- A. John Moore (“Debtor”) failed to appear at the first Meeting of Creditors, and
- B. Debtor is delinquent \$3,290.00 in plan payments.

The Trustee’s objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee asserts that Debtor is \$3,290.00 delinquent in plan payments, which represents one month of the \$3,290.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.

29. [11-48177-E-13](#)
SNM-1

JOYCE LEE
Stephen Murphy

MOTION BY STEPHEN N. MURPHY TO
WITHDRAW AS ATTORNEY
12-8-16 [79]

Final Ruling: No appearance at the January 10, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor Chapter 13 Trustee, creditors, and Office of the United States Trustee on December 8, 2016. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion to Withdraw as Attorney has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The hearing on the Motion to Withdraw as Attorney is continued to 3:00 p.m. on January 31, 2017.

Stephen Murphy, attorney of record for Joyce Lee ("Debtor"), filed a Motion to Withdraw as Attorney as Debtor's counsel in the bankruptcy case. Dckt. 79. Movant states the following:

1. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct 3-700(C)(1).
2. Counsel cannot effectively represent Debtor due to inconsistency of and lack of communication.
3. Counsel communicated extensively with Debtor's daughter, Charlita Anderson, and attended one hearing. Working with Ms. Anderson, Counsel made critical determinations about the arrears due on the Chapter 13 Plan and arrears due on Wells Fargo's mortgage loan secured by Debtor's residence, which is to be cured and reinstated by the Plan.

4. Debtor has not signed required documents prepared by Counsel, nor has she returned communications since Counsel's determinations were made.

APPLICABLE LAW

District Court Rule 182(d) governs the withdrawal of counsel. Local Bankr. R. 1001-1(C). The District Court Rule prohibits the withdrawal of counsel leaving a party *in propria persona* unless by motion noticed upon the client and all other parties who have appeared in the case. E.D. Cal. L.R. 182(d). The attorney must provide an affidavit stating the current or last known address or addresses of the client and efforts made to notify the client of the motion to withdraw. *Id.* Leave to withdraw may be granted subject to such appropriate conditions as the Court deems fit. *Id.*

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the 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. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

FN.1. While the decision in *Williams v. Troehler* is a District Court case and concerns Eastern District Court Local Rule 182(d), the language in 182(d) is identical to Local Bankruptcy Rule 2017-1.

It is unethical for an attorney to abandon a client or withdraw at a critical point and thereby prejudice the client's case. *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904 (Cal. App. 1st Dist. 1994). An attorney is prohibited from withdrawing until appropriate steps have been taken to avoid reasonably foreseeable prejudice to the rights of the client. *Id.* at 915.

The District Court Rules incorporate the relevant provisions of the Rules of Professional Conduct of the State Bar of California ("Rules of Professional Conduct"). E.D. Cal. L.R. 180(e).

The termination of the attorney-client relationship under the Rules of Professional Conduct is governed by Rule 3-700. Counsel may not seek to withdrawal from employment until Counsel takes steps reasonably foreseeable to avoid prejudice to the rights of the client. Cal. R. Prof'l. Conduct 3- 700(A)(2). The Rules of Professional Conduct establish two categories for withdrawal of Counsel: either Mandatory Withdrawal or Permissive Withdrawal.

Mandatory Withdrawal is limited to situations where Counsel (1) knows or should know that the client's behavior is taken without probable cause and for the purpose of harassing or maliciously injuring any person and (2) knows or should know that continued employment will result in violation of the Rules of Professional Conduct or the California State Bar Act. Cal. R. Prof'l. Conduct 3-700(B).

Permissive withdrawal is limited to certain situations, including the one relevant for this Motion:

- (1) The client

(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively.

Cal. R. Prof'l. Conduct 3-700(C)(1)(d).

DISCUSSION

As a ground for the Motion to Withdraw as Attorney, Movant states that Debtor has not communicated with him or signed necessary documents. Movant states in his declaration:

Unfortunately, the attorney-client relationship between me and the debtor is at a point where I feel I can no longer properly represent debtor in this matter due to inconsistency and lack of communication.

Dckt. 81.

Movant does not discuss any prejudice his withdrawal as a counsel will or will not cause or harm it might or might not have on administration of justice. Neither the Trustee, Debtor, nor any other relevant party has filed an opposition to this Motion, however, which was filed according to Local Bankruptcy Rule 9014-1(f)(1).

Furthermore, under the California Rules of Professional Conduct 3-700(C)(1)(d), Debtor's conduct, such as the lack of response to correspondence from the Movant is hindering Movant's ability to carry out her employment and duties effectively. These are sufficient reasons for permissive withdrawal.

The Trustee identifies there being an \$8,331.26 shortfall in payments to the class 1 secured claim. Motion to Dismiss, Dckt. 83. The Trustee states in the Motion to Dismiss that Debtor has funded the plan with \$113,449.90. What occurred appears to be that the Plan underestimated the arrearage on the secured claim, with no adjustment having been made once the proofs of claim were filed.

In reviewing the Plan, the claim of Wells Fargo Bank, N.A. secured by the Fredricksburg Way Property is provided for in class 1, having a \$995.63 pre-petition arrearage to be cured. Dckt. 38. That amount is consistent with the arrearage stated by Wells Fargo Bank, N.A. in Proof of Claim No. 11, filed April 11, 2012.

While counsel has provided the court with evidence of a client failing to communicate, given that this plan has completed its term, before granting the Motion, the court will order both the Debtor and Debtor's daughter, Charlita Anderson, to appear at the continued hearing and explain the failure to communicate and putting at peril Debtor's Chapter 13 Plan after five years. It may be that Debtor has passed away or is suffering from a cognitive impairment and she and her daughter by frozen, unable to act.

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 Withdraw as Attorney filed by Debtor's Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion to Withdraw as Attorney is continued to 3:00 p.m. on January 31, 2017.

IT IS FURTHER ORDERED that Joyce Yvonne Lee, the Debtor, and Charlita Anderson, who has been identified as Debtor's daughter, and each of them, shall appear at the continued hearing in person, no telephonic appearances permitted. At they hearing they shall address the failure to communicate with counsel, whether a personal representative for Debtor (Fed. R. Civ. P. 25) is necessary, and why Debtor should not complete this case and obtain a discharge.

30. [14-30877](#)-E-13 **TROY HARDIN** **MOTION TO MODIFY PLAN**
PGM-3 **Peter Macaluso** **11-4-16 [97]**

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.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, and Office of the United States Trustee on November 4, 2016. By the court's calculation, 67 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(2), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 3015(g). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The Motion to Confirm the Modified Plan is denied.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation.

TRUSTEE'S OPPOSITION

David Cusick, the Chapter 13 Trustee, filed an Opposition on December 21, 2016. Dckt. 102. The Trustee states that the Plan will complete in more than sixty months due to higher than anticipated mortgage arrears of \$46,038.07, instead of Troy Hardin's ("Debtor") projection of \$5,000.00, and due to increases in mortgage payments throughout the plan term where Debtor did not increase plan payments. Delay will also be caused by Debtor's delinquency under the Plan.

Debtor may not be able to make increased plan payments in month twenty-eight because Debtor has not provided updated financial information to support an increase.

The Trustee is unsure how Sacramento County Utilities is treated under the Plan because he cannot determine if its debt is secured, priority, both, or whether Debtor wants the secured portion paid through the Plan. Debtor filed a priority claim for a utility lien to the City of Sacramento in the amount of \$1,315.46 that was later amended to add the name Sacramento County Utilities as well as to list \$400.04 for each of secured and priority portions of the claim. The proposed Modified Plan provides for Sacramento County Utilities in Class 5 for \$400.04 as priority, but it does not mention the secured portion of the claim that Debtor filed. The Trustee has no objection to this discrepancy being resolved in the order confirming.

DISCUSSION

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in 65 months due to mortgage arrears being higher than anticipated, Debtor not adjusting plan payments for higher mortgage payments, and Debtor being delinquent under the confirmed plan. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d). Therefore, the Objection is sustained.

The Debtor's Schedule J—unamended—lists a \$2,180.00 monthly net income, while the Plan provides for a \$3,500.00 monthly payment beginning in month twenty-eight. Taken together, they suggest that the Plan is not feasible. *See* 11 U.S.C. § 1325(a)(6).

Finally, the discrepancy as to the treatment of Sacramento County Utilities has not been addressed by the Debtor. At the hearing, the Debtor explained that the claim is to be treated as follows:
xxxx.

The Modified Plan does not comply with 11 U.S.C. §§ 1322, 1325(a), and 1329 and is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

A. David Gonzales's ("Debtor") Plan exceeds sixty months.

DEBTOR'S REPLY

Debtor filed a Reply on December 27, 2016. Dckt. 26. Debtor states that he intends to file an objection to the Internal Revenue Service's claim of \$51,477.88. Debtor requests a continuance of this Objection if he is able to file the objection the Internal Revenue Service's claim before the hearing.

DISCUSSION

The Trustee's objection is well-taken. Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, the Plan will complete in 76 months due to the Internal Revenue Service filing a priority claim on November 10, 2016, for \$51,477.88. Debtor's Plan account for a priority claim in the amount of \$39,157.00. With the larger claimed amount, the Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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 Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on **xxxxxxxxxxx**, 2017. Debtor shall file and serve opposition pleadings on or before **xxxxxxxxx**, 2017, and Replies, if any, shall be filed and served on or before **xxxxxxxxxxx**, 2017.

Final Ruling: No appearance at the January 10, 2017 hearing is required.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Debtor’s Attorney on December 7, 2016. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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 hearing on the Objection to Confirmation of Plan is continued to 3:00 p.m. on January 24, 2017.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

A. Danny Clarke (“Debtor”) has not been examined at the Meeting of Creditors yet.

The Trustee’s objection is well-taken. The Trustee explains that he did not receive Debtor’s business documents and tax returns in time for review prior to the first Meeting of Creditors on December 1, 2016. Accordingly, Debtor was not examined by the Trustee, even though both the Debtor and his counsel appeared at the meeting. The Trustee requests a continuance on this Objection to a time after the continued Meeting of Creditors that is scheduled for January 12, 2017.

The Trustee having requested a continuance and having provided a valid reason for it, the court continues this hearing.

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 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 Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection is overruled, and Debtor's Chapter 13 Plan filed on November 3, 2016, is confirmed. Counsel for the Debtor shall prepare an appropriate order confirming the Chapter 13 Plan, transmit the proposed order to the Chapter 13 Trustee for approval as to form, and if so approved, the Chapter 13 Trustee will submit the proposed order to the court.

34.

16-27893-E-13
JKF-1

KRISTI MCNANIE
Joseph Feist

MOTION TO VALUE COLLATERAL OF
CHRYSLER CAPITAL
12-16-16 [13]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, Creditor, and Office of the United States Trustee on December 16, 2016. By the court's calculation, 25 days' notice was provided. 14 days' notice is required.

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

The Motion to Value Secured Claim of Chrysler Capital ("Creditor") is granted, and Creditor's secured claim is determined to have a value of \$8,910.00.

The Motion filed by Kristi Mcnanie ("Debtor") to value the secured claim of Chrysler Capital ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2013 Toyota Prius c Four Hatchback 4D ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of \$8,910.00 as of the petition filing date. As the owner, the Debtor's opinion of value is evidence of the asset's value. *See Fed. R. Evid. 701; see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

TRUSTEE'S NON-OPPOSITION

David Cusick, the Chapter 13 Trustee, filed a Non-Opposition on December 21, 2016. Dckt. 20.

DISCUSSION

Debtor has not provided the court with evidence the date that the purchase money security interest for the Vehicle was acquired. Nevertheless, Schedule D states that the debt was incurred in February

2013, which is more than 910 days prior to the filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$18,286.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The Creditor's secured claim is determined to be in the amount of \$8,910.00. *See* 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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 for Valuation of Collateral filed by Kristie Mcnanie ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion pursuant to 11 U.S.C. § 506(a) is granted, and the claim of Chrysler Capital ("Creditor") secured by an asset described as 2013 Toyota Prius c Four Hatchback 4D ("Vehicle") is determined to be a secured claim in the amount of \$8,910.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$8,910.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor’s Attorney on December 7, 2016. By the court’s calculation, 34 days’ notice was provided. 14 days’ notice is required.

The Objection to Confirmation of Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). 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. At the hearing -----.

The Objection to Confirmation of Plan is sustained.

David Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that:

- A. Lewis Walker and Sheila Walker (“Debtor”) failed to appear at the first Meeting of Creditors.
- B. Debtor is delinquent \$2,960.00 in plan payments.

The Trustee’s objections are well-taken. Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Appearance is mandatory. *See* 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the Trustee and any creditors who appear represents a failure to cooperate. *See* 11 U.S.C. § 521(a)(3). That is cause to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee asserts that Debtor is \$2,960.00 delinquent in plan payments, which represents one month of the \$2,960.00 plan payment. According to the Trustee, the Plan in § 1.01 calls for payments to

be received by the Trustee not later than the twenty-fifth day of each month beginning the month after the order for relief under Chapter 13. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee notes also that Debtor has proposed to value a secured claim of Santander Consumer USA for a 2009 Toyota Corolla at \$8,500.00 and has not yet filed a Motion to Value Secured Claim. Such a motion does not appear necessary, though, because Santander Consumer USA filed a Proof of Claim in which it lists a secured claim of \$7,550.00 and an unsecured claim of \$9,618.15.

The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The Objection is sustained, and the Plan is not confirmed.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Objection to the Chapter 13 Plan filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Objection to Confirmation of the Plan is sustained, and the proposed Chapter 13 Plan is not confirmed.