UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 24, 2017, at 3:00 p.m.

1.	**16-27603-E-13** **PGM-2**	**CHRISTINE MCKAY** **Peter Macaluso**	**MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A.** **12-14-16 [26]**

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, and Office of the United States Trustee on December 14, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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 Bank of America, N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $21,000.00.

The Motion filed by Christine McKay ("Debtor") to value the secured claim of Bank of America, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 GMC Yukon ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $21,000.00 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 January 4, 2017. Dckt. 36. The Trustee notes that Creditor is provided for in Class 2B of the Plan, and Creditor has not filed a Proof of Claim. Debtor's Schedule A/B lists the Vehicle as having 38,754 miles, but Debtor's Declaration states that the Vehicle has 89,000 miles.

The Trustee found the Vehicle's VIN ending in 2734 on the Certificate of Title filed with Creditor's claim in Debtor's prior bankruptcy case. The Trustee used that VIN to identify the Vehicle as a 2012 GMC Yukon XL 1500 Denali, with a value listed through Kelley Blue Book of between $22,731.00 and $26,096.00.

DEBTOR'S REPLY

Debtor filed a Reply on January 17, 2017. Dckt. 43. Debtor objects to the Trustee's statements about the Vehicle's value on the ground that the statements are based on a commercial publication and are not an actual appraisal of the Vehicle. Debtor asserts that her valuation of the Vehicle is based upon her own personal knowledge of the Vehicle, and she states that there is no material disputed fact in this matter because the Creditor has not opposed the Motion.

DISCUSSION

The lien on the Vehicle's title secures a purchase-money loan incurred on June 28, 2012, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $38,012.94. 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 $21,000.00. *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 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 Christine McKay ("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 Bank of America, N.A. ("Creditor") secured by an asset described as 2012 GMC Yukon ("Vehicle") is determined to be a secured claim in the amount of $21,000.00, 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 $21,000.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

2. **15-29404-E-13** **TAEVONA MONTGOMERY** **MOTION TO MODIFY PLAN**
RJ-6 **Richard Jare** **12-16-16 [123]**

Final Ruling: No appearance at the January 24, 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 20, 2017. By the court's calculation, 35 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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 January 4, 2017. Dckt. 143. The Trustee states that Taevona Montgomery ("Debtor") is $300.00 delinquent in plan payments, which represents one month of the $300.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

TRUSTEE'S AMENDED RESPONSE

Trustee filed an Amended Response to Debtor's Motion to Modify to on January 5, 2017. Dckt. 147. The Trustee reports that Debtor is now current under the proposed modified plan where a $300.00 payment was posted on January 4, 2017.

RULING

The delinquency having been cured, the Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and 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 December 16, 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.

3. **16-20005-E-13** **BEVERLY BAUER** **MOTION TO DISBURSE ATTORNEY FEES**
DPC-1 **Mary Ellen Terranella**
12-27-16 [92]

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, parties requesting special notice, and Office of the United States Trustee on December 27, 2016. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Motion to Disburse Attorney Fees 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 Disburse Attorney Fees is granted.

David Cusick, the Chapter 13 Trustee, seeks a court order authorizing the Trustee to disburse $2,475.00 to creditors under the confirmed plan, which funds had been withheld by order of the court. *See* Dckt. 79.

That order provided that the Trustee is to hold funds for disbursement to George H. Bye, successor attorney for Beverly Joe Bauer. The order provided that the Trustee shall hold the funds, and if fees are not approved, then pay the funds out according to the Plan, but the order does not state when the funds should be paid. Neither the Debtor's current counsel, Mary Ellen Terranella, nor any prior attorney, has filed any motion seeking to approve any attorney fees, and more than six months have elapsed.

The Trustee has served Mr. Bye at the address (Post Office Box) that Mr. Bye used on his pleadings. The court extensively discusses the facts and circumstances by which Debtor was represented by the former counsel and then purportedly by Mr. Bye when the former counsel's license to practice law was suspended.

The court has afforded Mr. Bye time to file a motion for allowance of attorneys' fees. No motion has been filed.

Debtor subsequently obtained the services of her current counsel, Mary Ellen Terranella, and with the assistance of Ms. Terranella Debtor has now confirmed a plan.

The court grants the Motion and authorizes the Trustee to disburse the $2,475.00 of monies held by the Trustee pursuant to the prior order of this court, Dckt. 79, through the Chapter 13 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 Disburse Attorney Fees filed by David Cusick, the Chapter 13 Trustee, having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the court authorizes the Chapter 13 Trustee to disburse the $2,475.00 of monies held by the Trustee pursuant to the prior order of this court, Dckt. 79, to pay authorized administrative expenses and claims as provided in the confirmed Chapter 13 Plan in this case.

4. 16-21305-E-13 RODERICK/ROSEMARIE TAPNIO CONTINUED MOTION TO CONFIRM PLAN
PGM-3 Peter Macaluso 10-4-16 [107]

Final Ruling: No appearance at the November 22, 2016 hearing is required.

Local Rule 9014-1(f)(1) Motion—No 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 October 4, 2016. By the court's calculation, 49 days' notice was provided. 42 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)(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.

JANUARY 24, 2016 HEARING

Trustee's Opposition

David Cusick, Chapter 13 Trustee, filed an opposition on November 2, 2016. Dckt. 120. Trustee asserts that the Plan exceeds sixty months. That is caused by the FCI Lender's second deed of trust in the amount of $150,000.00. An adversary proceeding has been filed against the second deed of trust to void the sale and determine the extent and validity of the lien. FCI Lenders failed to file a claim, and the bar date has passed. Further, the plan proposes a payment of $450.00 for two months, then $270.00 for fifty-eight months with a 100% dividend to unsecured creditors for a total of $16,560.00. The Trustee requests that the Motion be denied.

Debtor's Reply

Roderick Tapnio and Rosemarie Tapnio ("Debtor") filed a Reply on November 15, 2016. Dckt. 123. Debtor appears to argue two contradictory points, but the court interprets the Reply to state that the Plan will be over-extended only if property that is the subject of an adversary proceeding against FCI Lenders (No. 16-02155) is reconveyed. Even then, though, Debtor states that there will not be a problem because Debtor will pursue a Motion to Value Lien.

Debtor requests that the Plan be confirmed, or alternatively, that the confirmation hearing be continued ninety days to trail the adversary proceeding.

Continuance From November 22, 2016 Hearing and Order For Supplemental Pleadings

At the hearing, the court continued the matter to 3:00 p.m. on January 24, 2017. Debtor was ordered to file and serve a supplemental pleading with any proposed plan amendments on or before December 23, 2016, and Responses, if any, to the proposed amendments filed and served on or before January 14, 2017.

Debtor's Amended Status Statement

Debtor filed an Amended Status Statement—which was amended only to reflect the correct hearing date—on December 22, 2016. Dckt. 131. Debtor states that a hearing on a Motion to Dismiss Counts One Through Five of Plaintiff's First Amended Complaint in Adversary Proceeding No. 15-03063 is scheduled for January 12, 2017.

Debtor has no new information to present. Debtor requests additional time to allow for the hearing on that Motion to Dismiss to be heard. Debtor states that counsel for both parties have been in contact to discuss a possible settlement.

Trustee's Response

The Trustee filed a Response on January 4, 2017. Dckt. 133. The Trustee states that his grounds for opposition have not been resolved. The Trustee is not opposed to continuing the matter to allow for time to resolve the Adversary Proceeding.

DISCUSSION

At the January 12, 2017 hearing in Adversary Proceeding No. 16-02155, the court denied Defendants' Motion to Dismiss, and the Adversary Proceeding is pending still. No. 16-02155, Dckt. 60.

Debtor has pending an Adversary Proceeding in which Debtor asserts that a nonjudicial foreclosure sale conducted during the period after this case was dismissed and before the order vacating the dismissal is voidable. As summarized by the court in the Civil Minutes for the November 16, 2016 Status Conference in the Adversary Proceeding:

> "Roderick Tapnio and Rosemarie Tapnio, the Plaintiff-Debtors, filed their Amended Complaint on October 20, 2016. It was served on October 25, 2016. Certificate of Service, Dckt. 31. The Amended Complaint recounts the travails of the Plaintiff-Debtor in their Chapter 13 case that was filed on March 2, 2016. The case was dismissed on March 31, 2016, for failure to file documents. On April 4, 2016, a Trustees Deed Upon Sale was conducted on the Plaintiff-Debtors residence, and on April 5, 2016, the court vacated the order dismissing the bankruptcy case.
>
> The Amended Complaint states that on April 5, 2016, the proper was sold in foreclosure. It appears that this allegation is that the trustees deed under the deed of trust was delivered on April 5, 2016, the sale having been conducted on April 4, 2016. It is asserted that the issuance, delivery, and acceptance of the trustees deed on April 5, 2016, violated the automatic stay in the Plaintiff-Debtors bankruptcy case once the dismissal order was vacated on April 5, 2016."

Adv. 16-2155; Civil Minutes, Dckt. 34.

The Plan provides in the Additional Provisions for the asserted ownership rights of the buyer at the foreclosure sale to be adjudicated in the adversary proceeding, with the Debtor intending to then treat the secured claim as having $0.00 value. No order determining the value of such secured claim has been entered.

The court has granted relief from the automatic stay to allow the person claiming to have purchased the property at the alleged void foreclosure sale to proceed to exercise its rights to obtain possession thereof. Order, Dckt. 96. That order does not constitute a determination of whether the foreclosure sale was valid, only that the purported purchaser had presented a colorable right to be enforced in state court. FN.1.

FN.1. The bankruptcy judge acknowledges that when filing bankruptcy becomes a viable option for many debtors, they will not have sufficient assets to obtain a bond to support an injunction in state or federal court. Debtors turn to the bankruptcy court and automatic stay in place of an injunction. As in the Plaintiffs' bankruptcy case, this court allows debtors to self-fund a bond with what would be the monthly mortgage payment, with such monies held by the Chapter 13 Trustee. If the debtor is correct and the foreclosure sale is invalid, then a fund exists to make the post-petition mortgage payments. If the debtor fails and the foreclosing creditor or third party purchaser at the foreclosure sale has been wrongly detained by the injunction (the automatic stay), then this fund constitutes a bond from which the Rule 65(c) damages may be compensated.

Though the Adversary Proceeding was filed in August 2016, an Amended Complaint was filed and served on October 25, 2016. The Status Conference in that Adversary is set for February 22, 2017.

In the Status Report, Debtor states that the parties are attempting to resolve the Adversary Proceeding, so the hearing on the current Motion should be continued.

Though Debtor believes that the foreclosure should be set aside and they be allowed to make their mortgage payments, the proposed Chapter 13 Plan ignores the foreclosure and purports that Debtor has been making a $1,675.89 monthly mortgage payment. In the months of March 2016 through January 2017, those payments total $18,434.79 (11 months x $1,675.89). But Debtor is not making a monthly mortgage payment, the former creditor (Wells Fargo Bank, N.A.) has purported to have foreclosed on the property, and Partners for Payment Relief DE II, LLC purports to have purchased the property at the foreclosure sale.

As this court has done regularly when a debtor disputes that the creditor holds an enforceable note and deed of trust, or asserts that a foreclosure sale is invalid, rather than requiring the posting of a bond for an injunction, the court allows the debtor to use the automatic stay in place of a preliminary injunction. But, the debtor self-funds a bond, depositing payments with the Chapter 13 trustee in the amount of the monthly mortgage payment (or other amount as necessary to protect the interests of the person being "enjoined" by the automatic stay if the court determines that the stay ("injunction") was improperly imposed).

Here, Debtor's plan does not so provide, it appears that Debtor has retained $18,434.79 which has not been paid to a "creditor" and is unaccounted for.

Debtor can propose and diligently prosecute a Chapter 13 Plan which properly provides for the claim or the interests of the asserted creditor, if the foreclosure sale is set aside, or the purchaser, if Debtor is incorrect and the purchaser has been improperly prevented from taking possession of the property purchased. Debtor can deposit the $18,434.79 with the Chapter 13 Trustee and then $1,675.89 each month until the litigation is concluded.

The proposed Chapter 13 Plan does not comply with the requirements of 11 U.S.C. § 1325 and § 1322. The Motion is denied.

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 Confirmation of the Chapter 13 Plan Roderick and Rosemarie Tapnio, the Debtors, 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 denied.

5. **12-21207-E-13** **JIM LEDESMA** **CONTINUED MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY**
PGM-3 **Peter Macaluso** **8-26-16 [155]**

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, parties requesting special notice, and Office of the United States Trustee on August 26, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay 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 for Sanctions for Violation of the Automatic Stay is denied without prejudice.

The present Motion for Sanctions for Violation of the Automatic Stay provided by 11 U.S.C. § 362(a) and for damages pursuant to 11 U.S.C. § 362(k) and the inherent power of this court has been filed by Debtor Jim Ledesma ("Movant"). The Claims are asserted against Capital One, N.A. ("Respondent").

LEGAL STANDARD

A request for an order of contempt by the Debtor, United States Trustee, or another party in interest is made by motion governed by Federal Rule of Bankruptcy Procedure 9014. Fed. R. Bankr. P. 9020. A bankruptcy judge has the authority to issue a civil contempt order. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283–85 (9th Cir. 1996). The statutory basis for recovery of damages by an individual debtor is limited to willful violations of the stay, and then typically to actual damages, including attorneys' fees; punitive damages may be awarded in "appropriate circumstances." 11 U.S.C. § 362(k)(1). The court may also award damages for violation of the automatic stay (a Congressionally created injunction) pursuant to its inherent power as a federal court. *Sternberg v. Johnston*, 595 F.3d 937, 946 (9th Cir. 2009). FN.1.

FN.1. Bankruptcy courts have jurisdiction and authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 631 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a). A bankruptcy judge is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F. 3d at 1058.

Attorneys' fees may be recovered for work involved in bringing about an end to the stay violation and for pursuing an award of damages. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1101 (9th Cir. 2015). A monetary penalty may not be imposed on a creditor unless the conduct occurred after the creditor receives notice of the order for relief as provided by § 342. 11 U.S.C. § 342(g)(2).

The automatic stay imposes an affirmative duty of compliance on the nondebtor. *State of Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151–52 (9th Cir. 1996). A party who takes an action in violation of the stay has an affirmative duty to remedy the violation. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191–92 (9th Cir. 2003).

In addition Congress provides in 11 U.S.C. § 362(k) additional relief for violation of the automatic stay, which may be requested by an individual debtor.

In asserting this claim pursuant to 11 U.S.C. § 362(a) & (k), Movant states with particularity (Fed. R. Bankr. P. 9013) the following grounds for relief:

A. "After the Debtor made the payments, Capital One did send a denial letter claiming the application was incomplete, and has kept the trial loan modification payments, and not returned, nor accounted for them in the bankruptcy case."

B. "That on 4/11/16, Capital One did send a loan modification instructing the debtor to 'Act by April 28, 2016' which the Debtor did."

C. "After making said payments, the Debtor was informed the application was 'incomplete'."

D. "Thereafter, Capital One did not honor the loan modification, nor has it accounted for, nor returned the post-petition collection of $2,767.92."

E. "On 1/22/12, the Debtor filed a Chapter 13 to reorganize his debts."

F. "On 2/29/12, Capital One did file Proof of Claim #3."

G. "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

H. "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

I. "Here, Capital One has actual knowledge of Debtor's Chapter 13 case, the actions as described above have been done with actual knowledge of the bankruptcy, the actions as described above have been done intentionally, and the actions as described above have been done willfully in violation of 11 U.S.C. § 362."

J. "These intentional acts continue after repeated notice by Plaintiff's counsel to cease and desist, and as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

K. "Here, the trial loan modification payments paid directly to lender are vital to the completion of the plan, to prevent the motion to dismiss that is now pending."

L. "Here, the Debtor has sustained emotional distress and attorney fees, as a proximate cause of Defendants' intentional actions in violation of the automatic stay."

M. "Here, the Debtor continues to sustain damages and will continue to incur attorney fees to pursue resolution of this issue, including but not limited to this motion and continued motions to modify this plan."

Movant has provided the Declaration of Debtor Jim Ledesma in support of the Motion. Dckt. 157. The Declaration affirms that Movant had been paying $2,675.00 per month to the Trustee, but when Respondent offered a trial loan modification to Movant, Movant accepted and made the payments as required by May 1, 2016; June 1, 2016; and July 1, 2016. Movant paid the difference of $1,752.36 per month to the Trustee. On August 4, 2016, Movant received a letter from Respondent that denied his loan modification because the "application was incomplete." Exhibit B, Dckt. 158.

TRUSTEE'S RESPONSE

The Trustee filed a response on September 13, 2016. Dckt. 163. The Trustee notes that Movant's motion is based on the denial of an offered post-petition loan modification, the receipt of voluntary payments made by Movant pursuant to the offer, and the retention of those payments without accounting for them in the bankruptcy case by Respondent. The Trustee states that the automatic stay may have been violated.

Respondent's Letters to Movant

The Trustee states that all parties, including Movant and Respondent, are bound by the terms of the confirmed Plan (Dckt. 40) according to 11 U.S.C. § 1327, and presently, no motion has been filed seeking to approve a loan modification. In Respondent's first letter (Exhibit A, Dckt. 158), the Trustee notes that the letter's purpose may have been to propose a trial loan modification, but the letter includes other language, such as:

A. "Act by April 8, 2016"

B. "Option 1: Stay in Your Home"

C. "Option 2: Leave Your Home"

The Trustee believes that such above language may be a violation of the automatic stay—in addition to ignoring the binding effect of a confirmed plan—because the letter attempts to force Movant to pay Respondent directly or surrender the property. FN.2.

FN.2. As an aside, the Trustee states that he is not aware whether Respondent sends letters like Exhibit A (Dckt. 158) to Chapter 13 debtors regularly, and the Trustee requests that Respondent's counsel advise the Trustee and the U.S. Trustee.

The Trustee notes that the actual terms of the proposed trial loan modification allow Movant to accept by either contacting Respondent by April 28, 2016, or by making the first trial period payment by April 28, 2016. The trial period requires three payments, and Respondent can revoke the offer if:

A. The first payment is not made by the due date,

B. There are liens on the property that cannot be corrected timely,

C. There are insurance issues,

D. Any trial period payment is late, or

E. Movant does not fulfill "all other terms." FN.3.

FN.3. The Trustee notes that "all other terms" are not specified in the proposal.

The Trustee states that according to the offer, if the offer is not revoked, and if Movant makes all trial period payments on time, then a loan modification would be sent by Respondent to Movant.

Regarding Exhibit B (Dckt. 158), the Trustee emphasizes that the "rejection" letter actually states that the "request for loss mitigation assistance for your Home Loan was closed because: Your application

was incomplete." The Trustee notes that an incomplete application (unclear from Movant's Motion whether one was submitted) was not a basis to revoke the offer and that a trial loan modification seems to be pending still despite the request being closed. Alternatively, the Trustee believes that Movant may be able to sue Respondent for breach of contract.

Payments Under the Confirmed Plan

The Trustee notes that Movant paid $79,945.61 in total through month forty-five (45) of the Plan. After that point, monthly payments owed have been $2,675.00 for the balance of the Plan. Through month fifty-five (55), Movant has paid $103,927.69 in plan payments and is delinquent by $2,767.92, which represents Movant's reductions for the trial period payment months of May, June, and July of 2016. During those three (3) months, Movant paid $1,752.36 per month. The Trustee believes that Movant paid $922.64 to Respondent directly during those months.

The Trustee was unaware of a trial loan modification and continued to disburse payments to Respondent during the trial period months. Respondent holds a Class 1 secured claim under the confirmed Plan and receives $1,237.43 per month. The Trustee has disbursed $67,301.72 to Respondent, including $23,526.70 for pre-petition arrears and $154.04 in post-petition arrears. The Trustee's records show that mortgage payments to Respondent are current under the Plan.

The Trustee notes that Movant has not explained how accepting payments from Movant is a violation of the automatic stay.

Return of Funds

The Trustee points to the Frequently Asked Questions section of Respondent's first letter (Exhibit A, Dckt. 158) and emphasizes that Respondent is supposed to maintain a "suspense account" whose provisions appear to provide that the balance of the account will be deducted from amounts that would otherwise be added to the modified principal balance if a loan modification is approved. That implies that the funds would remain in the suspense account if a loan modification were to be denied.

Accordingly, the Trustee requests that Respondent provide the current balance of the suspense account and the balance that creditor has been paid.

OPPOSITION TO THE MOTION

Respondent filed an Opposition on September 21, 2016. Dckt. 166. FN.4

FN.4. Due to an e-filing system error, the Opposition and supporting documents were filed twice. The court refers to the documents submitted as Docket Nos. 166–173.

Respondent counters, opposing the Motion on the following grounds:

A. Movant's Plan was modified twice, most recently on October 30, 2015 (Dckt. 92).

B. "The Second Modified Chapter 13 Plan provides in relevant part that post-petition monthly payments on the Loan would be made in the amount of $1,752.96, when due, in accordance with the terms of the Loan. The post-petition payments would be made by the Chapter 13 trustee."

C. "Additionally, the Second Modified Chapter 13 Plan provides that Property of the estate revested in Debtor upon confirmation of the plan."

D. "On March 23, 2016, the Court entered an order confirming the Second Modified Chapter 13 plan" (Dckt. 140).

E. "Subsequently, Capital One sent the Debtor a letter, dated April 11, 2016, offering a loan modification . . . ."

F. "Pursuant to the terms of the Modification Letter, the Debtor, among other required actions, was to (I) make three trial payments in the amount of $922.64; (ii) if all of the trial payments were made, complete the Modification Agreement and any additional requirements Capital One sends to the Debtor; and (iii) obtain court approval of the terms of the Loan Modification."

G. "The Debtor made the three required trial payments."

H. "Based upon Capital One's preliminary investigation, the Debtor was required to provide additional documentation to complete the application for the loan modification, and Capital One provided these documents to the Debtor. . . . However, the Debtor did not provide all of the requisite documentation. . . . As a result, Capital One terminated the modification as incomplete and sent the Debtor a letter dated August 4, 2016, informing him that his application for the loan modification was denied because his application was incomplete."

I. "The Debtor's loan modification request was properly denied by Capital One. Because the Debtor did not provide all of the requisite documentation."

The Opposition also addresses that Trustee filed a Response. The Opposition states that Respondent "continues to investigate" the facts and legal issues raised by the Trustee.

The Opposition states that before filing opposition, Respondent's counsel contacted counsel for both the Chapter 13 Trustee and for Movant and asked them to consent to a continuance to allow Respondent time to investigate issues by the Trustee in his Response. The Opposition states that counsel for the Chapter 13 Trustee agreed, but Movant's counsel refused to agree unless and until Respondent filed an opposition.

Respondent requests a continuance to November 22, 2016, to provide additional time to investigate the issues raised in the Trustee's Response.

REPLY TO THE OPPOSITION

Movant filed a Reply on September 27, 2016. Dckt. 182. Movant asserts the following points in the Reply:

A. "CAPITAL ONE HAD KNOWLEDGE OF BANKRUPTCY"

1. "The Creditor, Capital One, N.A. . . . filed it's proof of claim #3, on 2/29/12, and has noticed no less than (8) eight Notice of Mortgage Payment Changes; 5/24/12, 11/28/12, 1/4/13, 5/16/13, 6/17/13, 6/1/15, 11/24/15, and 6/1/16)."

2. "Capital One has been denied a Motion for Relief from Automatic Stay on 4/8/14, docket #71."

3. "The bankruptcy docket reflects that the a Motion to Substitute Attorney from C. Anthony Hughes to Peter G. Macaluso on 8/10/15, AND GRANTED 12/15/15."

4. "On 1/22/16, Capital One filed a Request for Special notice, docket #122."

B. "Knowledge of the Bankruptcy is Non-disputed."

C. "CAPITAL ONE ACTED WILLFULLY"

1. "On 4/11/16, Capital One mailed directly to debtor, and former counsel, what is listed as Capital One's Exhibit B, which states **'ACT BY APRIL 28, 2016 . . . OPTION 1 STAY IN YOUR HOME . . . . OPTION 2 LEAVE YOUR HOME' . . . IF YOU'RE UNABLE OR UNWILLING TO PAY THE MONTHLY PAYMENTS, YOU HAVE TWO OPTIONS (A SHORT SALE OR A DEED-IN-LIEU) BUT YOU MUST CONTACT US NOW . . . REMEMBER, YOU MUST RESPOND BY APRIL 28, 2016.**"

2. "On 8/4/16, Capital One acknowledges the bankruptcy proceeding and mailed directly to debtor, and not counsel a denial letter as incomplete, as Capital One's Exhibit C states."

D. "Capital One intentionally sent these communications to debtor, did not communicate it to the debtor's counsel, nor the Trustee, and did not seek relief from the automatic stay, nor amend the Notice of Mortgage Payment Change"

E. "Capital One's actions are deemed willful."

F. "CAPITAL ONE WILLFULLY VIOLATED PLAN TERMS"

1. "Capital One received disbursement via the Trustee."

2. "Capital One received disbursement directly from the debtor."

G. "Whether Capital One believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded."

H. "DEBTOR HAS SUFFERED DAMAGES AS A RESULT VIOLATION"

1. "The debtor's plan was confirmed."

2. "The debtor's Trustee made payments to Capital One."

3. "The debtor made payments to Capital One."

4. "No payments have been returned either to debtor nor Trustee."

I. "Capital One is liable for violation of 11 U.S.C. 362(k)."

J. "FUNDS USED TO MAKE TRIAL PAYMENTS ARE ESTATE PROPERTY"

1. "The debtor paid said payments with funds authorized to be paid to the Trustee, and Capital One received duel payments additionally pursuant to the proof of claim filed in this case" (citations omitted).

Movant requests that the hearing be continued.

OCTOBER 4, 2016 HEARING

At the hearing, the parties stated that they were reviewing the matter, and they requested a continuance. Dckt. 193. The court noted that the parties were acting diligently and continued the hearing to 3:00 p.m. on November 22, 2016.

SUPPLEMENTAL DECLARATION

On November 10, 2016, Lori Yonkovich, who is employed by the Trustee, filed a Supplemental Declaration and supporting Exhibits. Dckts. 197 & 198. On October 14, 2016, the Trustee received a settlement letter and a check for $2,767.92 in full reimbursement of the trial loan payments. The Trustee has placed a permanent hold on those funds pending resolution of the Motion for Sanctions.

DISCUSSION

Debtor has raised an interesting, and heretofore undisclosed, conduct of a creditor in connection with a secured claim that was the subject of a confirmed Chapter 13 Plan. The first part of Debtor's Motion seeks damages for "violation" of the automatic stay for the failure to process the final loan modification. Debtor states,

> "Here, an actual controversy now exists between the Debtor and Capital One in that the loan modification was arbitrarily denied and Capital One remains in the possession of the post-petition trial loan modification payments."

Motion, p. 2:22–25; Dckt. 155.

Initially, it appears that Debtor's contention sounds in breach of contract—an offer to modify, completion of modification terms, and then Respondent breaching the contract by failing to complete the modification. If so, Debtor fails to "connect the dots" how that failure would be a violation of the automatic stay. But Debtor hints at the more significant, and insidious, conduct upon which relief is sought, stating, "[a]nd Capital One remains in possession of the post-petition trial loan modification payments." In the next paragraph of the Motion, Debtor begins fleshing out the alleged violation:

> "The Debtor seeks to cease of harassment by Capital One and a return of the funds paid to complete the Chapter 13 plan, the stopping of this continued unlawful conduct, which is causing, and does continue to cause harm, and separate injuries each and every day that Capital One refuses to return the funds, and as it engages in false, unfair, deceptive and unconscionable conduct to perpetrate or conceal their unlawful conduct."

Id., p.2:26, 3:1–6.

The ground stated in the Motion is that Respondent, knowing that a confirmed Chapter 13 Plan was in place and Respondent's debt the subject of the Plan, acted in violation of the Plan. Further, Respondent made demand, and threatened Debtor, with either capitulating to the terms dictated by Respondent or lose the house to foreclosure. Respondent ignored the confirmed Plan, which worked to cure any default and block any foreclosure by Respondent.

The Chapter 13 Trustee punctuates the conduct of Respondent by directing the court to two of the exhibits filed by Debtor. Exhibit 1, Dckt. 158, is a letter from Respondent to Debtor dated April 11, 2016. This letter makes the following affirmative statements by Respondent:

A. "As a result of a bankruptcy proceeding, you may not be personally liable for the unpaid balance of this loan...."

In the confirmed Chapter 13 Plan, Debtor did not seek to discharge the debt, but has provided for curing any arrearage thereon. What bona fide, good faith reason might exist for this sophisticated creditor taking the step of advising a least-sophisticated consumer debtor that he or she may not be "liable" (whatever that term may mean to a least-sophisticated consumer) is unclear.

B. The property is "subject to foreclosure in accordance with the laws of the state where located..."

How the property, which is the subject of the confirmed plan that provides for curing the arrearage and all current payments being made under the plan, is "subject to foreclosure" is unclear. It appears to be a clear misstatement of California and Federal law.

C. "[t]his is not an attempt to collect a debt, but is intended for informational purposes."

By this statement, it appears that Respondent admits that the communication would appear to these consumer debtors as an attempt to collect a debt. Further, the substance of the letter, as noted below, telling the Debtor to either do the loan modification or lose the property to foreclosure is an attempt to collect the debt—either by the modification payments from Debtor or by taking the property to pay the debt.

D. "Your Home Loan is seriously delinquent. We've tried to contact you to discuss options available to you, but your time to act is running out."

Debtor is in the fifth year of the Chapter 13 Plan, nearing completion. There is no indication that the payments as required under the Plan to Respondent are delinquent. To the contrary, as confirmed by the Chapter 13 Trustee, by this loan modification demand, Respondent has doubled up on the payments, taking the plan payments from the trustee (current monthly payment and arrearage payment), pocketing more money than it is entitled to receive under the confirmed Chapter 13 Plan (as a matter of federal law).

E. Respondent tells Debtor, who is performing a confirmed Chapter 13 Plan pursuant to the applicable federal law, that Debtor has only two alternatives:

1. Stay in the home by making the trial loan modification payments. Even if made, Debtor has to submit a "Borrower Assistance Package" so that Respondent can evaluate Debtor's eligibility for the modification.

or

2. **Leave Your Home** (emphasis in original). For this only other option, Debtor is told if Debtor is unable or unwilling to make the payments demanded by Respondent, Debtor must either agree to a "Short Sale or a Deed-in-Lieu."

As is obvious, this statement demanding action and threatening foreclosure misses another obvious alternative—just continue to perform your confirmed Chapter 13 Plan, finish curing the arrearage, and keep the existing financial arrangement in place.

Respondent's Opposition ignores these letters, but merely argues that the loan modification was properly denied. It does admit that Respondent did receive the direct payments from the Debtor of the Trial Loan Modification Payments (which were in addition to the payments Respondent was receiving from the Chapter 13 Trustee under the confirmed Chapter 13 Plan that bound Respondent).

Disgorgement of Payments Received From Debtor
In Excess of Plan Distributions

It is undisputed that the confirmed Second Modified Chapter 13 Plan requires that Capital One, N.A. be paid $1,752.96 per month through the Chapter 13 Trustee. Statement of Undisputed Facts, Opposition ¶ 7; Dckt. 174. In addition, Capital One, N.A. has obtained three additional payments of $922.64 each from the Debtor pursuant to the Trial Loan Modification. *Id.* ¶ ¶ 11, 12.

The Second Modified Plan actually provides for Capital One, N.A. to receive payments of $1,752.96 for the current monthly installment, plus an additional $638.93 for the arrearage cure. The Chapter 13 Trustee continued to make the $2,391.89 plan payment to Capital One, N.A. Trustee's Response, Dckt. 163; Declaration of Lori Yonkovich, Dckt. 164. The Trustee was unaware that Capital One, N.A. was also receiving an additional payment of $922.64 per month directly from the Debtor pursuant to the unauthorized Trial Loan Modification.

The effect of the undisclosed, unauthorized Trial Loan Modification implemented by Capital One, N.A. was to improperly boost the monthly payments made on the Class One Claim under the confirmed Second Modified Plan to $3,214.63, a monthly overpayment of more than 34% of the amount authorized under the confirmed Plan.

Capital One, N.A. received unauthorized payments of $2,767.92 directly from the Debtor for payment on its pre-petition claim for which payment is provided for, and authorized to be made, only through the Chapter 13 Plan. Capital One, N.A. improperly obtained such payment and continues to improperly hold such monies in continuing violation of the automatic stay. 11 U.S.C. § 362(a)(1), (3) [until the plan is completed, the bankruptcy estate retains an interest in the property, including conversion of this case to one under Chapter 7], (4), and (6).

On October 10, 2016, Capital One, N.A., through its attorney, paid back the full $2,767.92 to the Trustee. The Chapter 13 Trustee shall disburse the monies as otherwise provided under the Chapter 13 Plan.

ORAL ARGUMENT AT THE NOVEMBER 22, 2016 HEARING

At the November 22, 2016 hearing, the parties reported that this matter has been resolved, a loan modification granted, and a hearing for authorization to enter into the loan modification set for December 20, 2016. Dckt. 207.

DECISION

The court granted the relevant Motion to Approve Loan Modification on December 20, 2016. Dckt. 215. The Trustee having received a settlement letter and check for $2,767.92, and the court having granted a loan modification between the parties, the Motion for Sanctions 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 for Sanctions for Violation of the Automatic Stay filed by Jim Ledesma ("Movant") 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 for Sanctions for Violation of the Automatic Stay is denied without prejudice.

6.	**15-23008-E-13** **PGM-3**	**JUAN LOPEZ** **Peter Macaluso**	**OBJECTION TO CLAIM OF LVNV FUNDING, LLC, CLAIM NUMBER 8-1** **12-9-16 [49]**

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 3007-1 Objection to Claim—Hearing Required.

Correct Notice Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Creditor, Debtor, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 9, 2016. By the court's calculation, 46 days' notice was provided. 44 days' notice is required. Fed. R. Bankr. P. 3007(a) (thirty-day notice); L.B.R. 3007-1(b)(1) (fourteen-day opposition filing requirement).

The Objection to Claim has been set for hearing on the notice required by Local Bankruptcy Rule 3007-1(b)(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 Objection to Proof of Claim Number 8-1 of LVNV Funding, LLC is sustained, and the claim is disallowed in its entirety.

Juan Lopez ("Objector") requests that the court disallow the claim of LVNV Funding, LLC ("Creditor"), Proof of Claim No. 8-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be unsecured in the amount of $9,798.98. Objector asserts that the Statute of Limitations on the collection of contract claims in California is four years from the date the balance was due under the contract or four years from the date the last payment was made under the contract. The Objector states that according

to the Proof of Claim, the last transaction date and charge off date was January 11, 2010. The dates of last payment and charge off on the Account Detail attached to the Proof of Claim are January 11, 2010, and June 30, 2010, respectively.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on January 10, 2017. Dckt. 53. FN.1. Creditor asserts two arguments: (1) the Objection is barred by res judicata, and (2) Objector is not entitled to attorneys' fees. Creditor argues that it filed its Proof of Claim on July 8, 2015, and on September 17, 2015, an Order Confirming Objector's First Amended Plan was filed. Dckt. 39. Creditor states that it was and is entitled to be paid on its Proof of Claim because no objection was raised to the claim before the confirmation of the First Amended Plan.

FN.1. Creditor filed the Opposition and Proof of Service in this matter as one document. That is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." Revised Guidelines for the Preparation of Documents § (III)(A). Counsel is reminded of the court's expectation that documents filed with this court comply with the Revised Guidelines for the Preparation of Documents in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9004(a). Failure to comply is grounds for sanctions. Local Bankr. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

The first opposition asserted by creditor is that any objection to its claim is barred by the doctrine of *res judicata*. The substance of this argument is that Creditor filed Proof of Claim No. 8-1 on July 8, 2015, and Debtor confirmed the Chapter 13 Plan on September 17, 2015. After stating these two facts, Creditor's legal arguments and authorities for the proposition that confirmation of a Chapter 13 Plan is an adjudication of all proofs of claim and thereafter all objections thereto are barred consists of the following:

> "Based upon the fact that Claimant had filed a timely Proof of Claim, and Debtor failed to object prior to the confirmation of the Plan, Claimant was and is entitled to be paid according to the Proof of Claim. As such, Debtor's argument that Claimant's claim is barred by the applicable Statute of Limitations should be barred by the doctrine of *res judicata*, as the confirmed Order amounts to a final adjudication on the merits."

Opposition, p. 1:27.5, 2:.5-4; Dckt. 53.

Other than this proclamation by Creditor and Creditor's counsel, no legal authority is cited for this proposition. No Supreme Court decision. No Ninth Circuit Court of Appeals or any other Circuit Court of Appeals decision. No Ninth Circuit Bankruptcy Appellate Panel decision or decision of any other bankruptcy appellate panel. No district court decision. No bankruptcy court decision. No legislative history. No treatise or any other secondary or tertiary source. Nothing but the proclamation of Creditor and Creditor's counsel.

As to attorneys' fees, Creditor argues that courts have ruled that "the only redress for stale proofs of claim is the disallowance of the claim." Dckt. 53 (citing *In re Keller*, 440 B.R. 354 (E.D. Pa. 2009) (internal citations omitted)). Creditor argues, therefore, that attorneys' fees are not included in the disallowance of a claim.

Creditor has string cited a number of bankruptcy court cases for the proposition that the correct response to a claim that debtor, the trustee, or other creditors believe to be invalid, unenforceable, or not stated in a correct amount, is to file an objection to claim. Before considering the case law, one only needs to read the Bankruptcy Code itself. 11 U.S.C. § 501 provides the statutory basis for a creditor to file a proof of claim. Congress then provides in 11 U.S.C. § 502(a) that the proof of claim filed shall be deemed allowed unless a party in interest objects. In 11 U.S.C. § 502(b) Congress provides that the court shall determine the objection and disallow the claim for a number of reasons, including:

> "(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured; . . . ."

11 U.S.C. § 502(b)(1).

Thus, it appears that Debtor has done exactly what Creditor has demanded—objected to Proof of Claim No. 8 and shown the court why it is unenforceable.

In reviewing the various cases listed in the string citation by Creditor, it discloses that the holdings in those cases do not stand for the proposition asserted by Creditor—Debtor may not, ever, recover attorneys' fees when prevailing on an objection to claim. The court summarizes the cases cited by Creditor as follows:

A. *Keeler v. PRA Receivables Management, LLC et al.*, 440 B.R. 354 (E.D. Penn. 2009).

1. In *Keeler* the debtor commenced an adversary proceeding against the creditor, asserting that because the statute of limitation had expired on the debt listed in the proof of claim, debtor could assert claims pursuant to 11 U.S.C. § 105(a) and violation of the discharge injunction, sought a permanent injunction, and sought attorneys fees for prosecuting the claim under 11 U.S.C. § 105(a) and in seeking the injunction.

2. The debtor in *Keeler* went further, stating additional claims based on the statute of limitations having expired for the debt that was the basis for the proof of claim for:

   a. Violation of the Federal Fair Debt Collection Practices Act;
   b. Violation of "Pennsylvania's Fair Trade Extension Uniformity as Act"
   c. Violation of Pennsylvania's Unfair Trade and Consumer Protection Law; and
   d. Violation of 28 U.S.C. § 1927(counsel who multiples proceedings unreasonably and vexatiously liability for excessive costs).

3. The bankruptcy court concluded that creditor could file a claim and debtor could object. That was the statutory structure created by Congress.

4. Since the creditor had voluntarily withdrawn the claim, the court concluded that no relief under the various theories espoused.

B. *In re McGregor*, 398 B.R. 561, 564 (Bankr. N.D. Miss. 2008)

1. In *McGregor*, creditor filed a proof of claim. Debtor filed an adversary proceeding asserting that because the statute of limitations had expired on the debt upon which the proof of claim was based: (1) the claim should be disallowed, (2) creditor violated Federal Rule of Bankruptcy Procedure 3001 (proof of claim), (3) creditor violated the statute of limitations, and creditor violated the automatic stay.

2. Though the proof of claim did not have supporting documentation, such was not a "violation" of Rule 3001. Further, creditor had amended the proof of claim to include the supporting documentation.

3. The third claim, violation of statute of limitations, is not a claim against the creditor but the defense raised in the objection to claim.

4. As to the fourth claim, the provisions of 11 U.S.C. § 362(a) do not prevent a creditor from filing a claim (as Congress has directed), even if the statute of limitations has run.

5. The complaint was treated as an objection to claim. The Bankruptcy Code does not create a separate cause of action against a creditor merely because the statute of limitations had expired.

C. *In re Andrews*, 394 B.R. 384, 388 (Bankr. E.D. N.C. 2008);

1. The debtor in *Andrews* sought to have sanctions imposed pursuant to Federal Rule of Bankruptcy Procedure 9011.

2. The court denied debtor's request for an order to show cause why creditor should not be sanctioned by the court for filing the proofs of claim and that debtor be awarded attorneys' fees as part of the sanctions.

D. *In re Simpson*, 2008 WL 4216317, at 2, 3 (Bankr. N.D. Ala. 2008)

1. In *Simpson*, the debtor filed an adversary proceeding asserting claims against the creditor for filing a "false proof of claim," for contempt of court, and for violation of the Federal Fair Debt Collection Practices Act. The debtor sought actual, compensatory and punitive damages, and fees and costs for the claims asserted in the adversary proceeding.

2. The basis for the various claims asserted in the adversary proceeding was that the statute of limitations had expired for the debt upon which the proof of claim was based.

3. The court rejected the claims for contempt (11 U.S.C. § 105(a)), violation of the Fair Debt Collection Practices Act, and the requests for attorneys' fees and costs for prosecuting such claims. The court concluded that instead of the adversary proceeding, the debt should properly address the issue of an expired statute of limitations through an objection to claim.

E. *In re Varona*, 388 B.R. 705, 723–24 (Bankr. E.D. Va. 2008)

1. In *Varona*, the debtor sought to have the court sanction (11 U.S.C. § 105(a)) the creditor who filed a proof of claim. The basis of requesting the sanctions was that the statute of limitations had expired for the debt upon which the proof of claim was based. The debtor also asserted a claim under the Federal Fair Debt Collection Practices Act for filing a time-barred claim.

2. The court denied the request for sanctions or a claim under the Federal Fair Debt Collection Practices Act, concluding that a time-barred claim was not a false or fraudulent claim.

The above cases, concluding that filing a proof of claim based on a time-barred debt cannot be the basis for other claims against the creditor are not universal. The Eleventh Circuit Court of Appeals concluded in *Crawford v. LVNV Funding*, LLC 758 F.3d 1254 (11th Cir. 2014), *cert. den.* 135 S. Ct. 1844 (2015), that the filing of a proof of claim for a time-barred debt could be stated as the basis for a claim for violation of the Federal Fair Debt Collection Practices Act. This Circuit decision appears to be in conflict with the holding of the Ninth Circuit Court of Appeals in *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502

(9th Cir. 2002) holding that violation of a Bankruptcy Code Provision (11 U.S.C. § 524 discharge injunction) could not be the basis for non-bankruptcy law claims against the creditor.

The issue of whether claims beyond filing an objection to the proof of claim based on a time-barred debt may be asserted by a debtor are now before the Supreme Court in the appeal of *Johnson v. Midland Funding*, LLC, 823 F.3d 1334 11th Cir. 2016), for which oral argument was conducted in January 2017.

DEBTOR'S REPLY

Debtor filed a Reply on January 17, 2017. Dckt. 54. Debtor states that the doctrine of *res judicata* is inapplicable here because there is no prior claim, just the same claim. Debtor states that while he may have waived any previous disbursement, future disbursement is not appropriate. Debtor re-asserts that Creditor's claim is beyond the statute of limitations.

DISCUSSION

Section 502(a) provides that a claim supported by a Proof of Claim is allowed unless a party in interest objects. Once an objection has been filed, the court may determine the amount of the claim after a noticed hearing. 11 U.S.C. § 502(b). It is settled law in the Ninth Circuit that the party objecting to a proof of claim has the burden of presenting substantial factual basis to overcome the prima facie validity of a proof of claim, and the evidence must be of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The filing of a proof of claim is not something which is taken lightly. Once a bankruptcy case is filed, the proof of claim takes the place of the creditor having to file a lawsuit and have the creditor's rights determined. Though the creditor has the ultimate burden of proof, by filing a proof of claim creditor is presumed to have a valid, enforceable claim, and the debtor must overcome that presumption.

Here, the basic grounds for the Objection are:

A. Creditor file Proof of Claim No. 8-1 in the amount of $9,798.98.

B. The Chapter 13 Trustee's office sent Creditor a notice that the statute of limitations had expired on the debt, giving creditor the opportunity to withdraw Proof of Claim No. 8-1.

C. The four year statute of limitations for the debt upon which Proof of Claim No. 8-1 expired in January 2014.

D. The bankruptcy case was filed in April 2015. The statute of limitations expired on the debt prior to the commencement of the filing of Debtor's bankruptcy case.

E. The prayer to the Objection requests the court: (1) disallow Proof of Claim No. 8-1 and (2) award $525.00 to Debtor for attorneys' fees in prosecuting the Objection.

Though the Objection does not state the basis for an award of attorneys' fees, prevailing party attorneys' fees are requested in post-judgment (order) motions. Fed. R. Bankr. P. 7054, 9014(c), Fed. R. Civ. P. 54.

Applicable Statute of Limitations

California Code of Civil Procedure § 337 states in relevant part:

> 2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

The Bankruptcy Code provides certain extensions of time for actions a creditor may take when a debtor files for bankruptcy. Specifically, 11 U.S.C. § 108(c) provides:

> Except as provided in section 524 of this title, if **applicable nonbankruptcy law**, an order entered in a nonbankruptcy proceeding, or an agreement **fixes a period for commencing or continuing a civil action** in a court other than a bankruptcy court **on a claim against the debtor**, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then **such period does not expire until the later of**--
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > **(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.**

A review of Proof of Claim No. 8-1 lists the charge off date as June 30, 2010. The court takes judicial notice that a creditor does not "charge off" an account if payments are being made or further credit is being extended. (This basic fundamental point of credit transactions is commonly known by both creditors and consumers alike.)

No payment or other transaction occurred after January 11, 2010. Thus, the four-year statute of limitations expired on January 11, 2014.

This bankruptcy case was filed on April 14, 2015—458 days after the statute of limitations expired. There was no period of time for 11 U.S.C. § 108 to preserve and extend for Creditor.

As to the unsupported proclamation that the doctrine of *res judicata* applies, the court rejects this contention. When the actual law is considered, this contention by Creditor and Creditor's counsel may well violate the certifications made under Federal Rule of Bankruptcy Procedure 9011 when the Opposition was filed:

> "(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is **not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, **defenses**, and other legal contentions therein are **warranted by existing law** or by a **nonfrivolous argument for the extension, modification, or reversal** of existing law or the establishment of new law; . . . ."

Fed. R. Bankr. P. 9011(b).

The doctrine of *res judicata* "gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." *People v. Barragan*, 32 Cal. 4th 236, 252 (Cal. 2004) (internal citation omitted). Courts do not try and re-try what has already been determined in prior proceedings. The Ninth Circuit Court of Appeals addressed the modern application of the doctrine of *res judicata* in *Robertson v. Isomedix, Inc. (In re International Nutronics)*, 28 F.3d 965 (9th Cir. 1994). It describes the doctrine as follows:

> "As generally understood, "[t]he doctrine of *res judicata* gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) The doctrine "has a double aspect." (*Todhunter v. Smith* (1934) 219 Cal. 690, 695.) "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" (*Clark v. Lesher* (1956) 46 Cal.2d 874, 880" "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment … 'operates' " in "a second suit … based on a different cause of action … 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" (*Ibid*.)

Id., 252–53.

In addition to the prior ligation having been between the same parties as in the second suit, the court considers four factors, which are stated in *Robertson* as:

> "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Id. at 970 (citing *Clark v. Bear Sterns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

The prior "judgment" (order) purported to determine Creditor's claim, Creditor directs the court to the order confirming the Chapter 13 Plan in this case. No attempt is made by Creditor to show that the court determining whether the plan should be confirmed:

> (1) What or interests regarding Creditor's Claim and the allowability of such claim in this bankruptcy case was established in order confirming the Chapter 13 Plan or the court's findings in making that order. As discussed below, determining that a plan should be confirmed as provided in 11 U.S.C. § 1325 does not include determining the claims in the bankruptcy case. No rights or interests of Creditor would be "destroyed" or "impaired" by the court ruling whether the claim should be disallowed due to the statute of limitations having expired prior to the commencement of this case.
>
> (2) What evidence is presented in connection with confirmation of the Chapter 13 Plan is the same as, similar to, or have been presented in this Objection to Claim.
>
> (3) What right of Creditor and the issue of the allowability was determined in the prior order that would be infringed by the court ruling on the Objection to Claim.
>
> (4) How the nucleus of facts relating to confirmation of the Chapter 13 Plan are the same nucleus of facts in this Objection to Claim based on creditor being time-barred due to the expiration of the statute of limitations prior to the commencement of this bankruptcy case.

As mentioned above, the court determines whether a Chapter 13 Plan should be confirmed considering the elements specified by Congress in 11 U.S.C. § 1325 (or 11 U.S.C. § 1329 for a modified plan). None of the elements specified in 11 U.S.C. § 1325 are to determine the allowability of each of the creditor's claims.

The doctrine of res judicata does not apply. This Objection to Claim is not something that was litigated in the confirmation of the Chapter 13 Plan. The rights and interests addressed were not those of Creditor under Proof of Claim No. 8-1.

The Objection to Confirmation is sustained.

Debtor has requested attorneys' fees for the Objection to Claim. An award of $525.00 was suggested. Presumably this was for a couple hours time in investigating the claim, basis for objection, and filing the Objection. Creditor apparently has rejected that amount, and argues that no attorneys' fees should be ordered. Presumably, the amount of attorneys' fees in addressing the Opposition and this hearing has caused the attorneys' fees to increase.

The Opposition also misses the Ninth Circuit ruling addressing the recovery of attorneys' fees in Contested Matters. In *Penrod v. AmeriCredit Financial Services, Inc. (In re Penrod)*, 802 F.3d 1084 (9th Cir. 2015) ("Penrod II"). In that decision, the Ninth Circuit applied California law relating to an "action on a contract" and the statutory reciprocality of contractual attorneys' fees provision pursuant to California Civil Code § 1717 to determine that the debtor prevailing in a dispute concerning the amount of a creditor's secured claim in litigation arising under 11 U.S.C. § 506(a) and further litigation over the proposed treatment of the secured portion of the claim pursuant to 11 U.S.C. § 1325(a) was entitled to recover contractual attorneys' fees. The attorneys' fees to be recovered by the debtor relating to the asserted $26,000 claim are in excess of $250,000 (with the attorneys' fees from the last round of appeals yet to be determined).

Proof of Claim No. 8-1 states that the debt originated with Chase Bank USA, N.A. Further, that this was a credit card account. It is commonly known that credit card accounts are based on written contracts. Additionally, the credit card account contracts presented in this court are contracts with attorneys' fees provisions.

Debtor shall file and serve a motion for attorneys' fees in connection with the Contested Matter, the Objection to Claim, on or before February 10, 2017. Such motion shall clearly identify the contractual, statutory, or other basis for Debtor to be awarded attorneys' fees in this Contested Matter.

Based on the evidence before the court, the creditor's claim is disallowed in its entirety due to the statute of limitations expiring prior to the filing of the case. The Objection to the Proof of Claim is sustained.

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 Claim of LVNV Funding, LLC, Creditor filed in this case by Juan Lopez, 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 the Objection to Proof of Claim Number 8-1 of LVNV Funding, LLC is sustained, and the claim is disallowed in its entirety.
>
> **IT IS FURTHER ORDERED** that Debtor shall file and serve a motion for attorneys' fees and costs relating to this Contested Matter on or before February 10, 2017. Such Motion shall clearly identify the contractual, statutory, or other basis for such fees.

7. 15-28908-E-13 WILLIAM/SARAH MCGARVEY MOTION TO MODIFY PLAN
MJD-2 Matthew DeCaminada 12-15-16 [43]

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

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 December 15, 2016. By the court's calculation, 40 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified 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 January 4, 2017. Dckt. 49. The Trustee states that 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 63 months due to the increase in the percentage to unsecured creditors from 44% to 49.43%. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d). Therefore, the Objection is sustained.

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 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 Motion to Confirm the Modified Plan is denied, and the proposed Chapter 13 Plan is not confirmed.

8. 16-27508-E-13 DPC-1 | **TARILYN ELLIOTT** **Marc Carpenter** | **AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-21-16 [34]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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 21, 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 xxxx.

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

A. Tarilyn Elliott ("Debtor") has not filed tax returns for 2014 and 2015;

B. Debtor cannot make plan payments or comply with the Plan because she listed gross income of $35,263.57 for 2016 on the Statement of Financial Affairs, but she did not list any income for 2014 and 2015; and

C. Form 122C-1 was completed with incorrect information. Line 16c on the Statement of Current Monthly Income is listed as $50,579.00 for a household size of one. According to the Census Bureau, Median Family Income by Family Size for cases filed on or after November 1, 2016, should be $51,763.00.

The Trustee's objections are well-taken. Debtor admitted at the Meeting of Creditors that the federal income tax returns for the 2014 and 2015 tax years have not been filed still. Filing of the return is required. 11 U.S.C. § 1308. Failure to file a tax return is grounds to dismiss the case. 11 U.S.C. § 1307(e).

The Internal Revenue Service filed an amended claim on January 11, 2017, which would indicate that Debtor filed the missing tax returns, but the court has not been provided with any admissible evidence that the returns have in fact been filed.

At the hearing, it was reported that the tax returns for 2014 and 2015 have / have not been filed.

Debtor filed an Amended Statement of Financial Affairs on January 13, 2017. Dckt. 43. Debtor reports the following amounts of gross income:

A. $35,263.57 in 2016,

B. $32,147.00 in 2015, and

C. $43,631.00 in 2014.

Dckt. 43. By reporting the missing gross income amounts for 2014 and 2015, Debtor has resolved the Trustee's second grounds for objecting to confirmation. The Internal Revenue Service filed an amended claim on January 11, 2017, for the 2014 and 2015 tax years in a total amount of $3,538.12 as unsecured priority claims and $51.00 as unsecured general claims for penalty on those tax years. Claim No. 3-3.

The Trustee's final ground for objecting has been addressed by Debtor as well. Debtor filed an Amended Form 122C-1 on January 13, 2017, on which line 16c states $51,763.00 for median family income of a household size of one like the Trustee asserted it should.

The Objection is xxxx, and the Plan is xxxx.

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 xxxx, and the proposed Chapter 13 Plan is xxxx.

9.	**13-24610-E-13** **PGM-4**	**DAX/TINA CHAVEZ** **Peter Macaluso**	**MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEBTORS' ATTORNEY** **12-21-16 [130]**

Final Ruling: No appearance at the January 24, 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 21, 2016. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Professional Fees 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 for Allowance of Professional Fees is continued to 3:00 p.m on February 14, 2017.

Peter Macaluso, the Attorney ("Applicant") for Dax Chavez and Tina Chavez, the Chapter 13 Debtor ("Client"), makes a Request for the Additional Allowance of Fees and Expenses in this case.

Fees are requested for the period December 15, 2015, through December 8, 2016. Applicant requests fees in the amount of $3,000.00.

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 relating to a Motion to Reconsider, Motion to Modify Plan, and subsequent related correspondence and meetings with Client. 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 Order Confirming the Chapter 13 Plan expressly provides that Client's former counsel (now deceased) was allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 110. 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.

TASK BILLING NOT PROVIDED

The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the

U.S. Trustee, and it is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The simpler the services provided, the easier it is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, and U.S. Trustee with fair and proper disclosure of the services provided and fees being requested.

Included in the Motion is Applicant's raw time and billing records, which have not been organized into categories. Rather than organizing the activities that are best known to Applicant, it is left for the court, U.S. Trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than twenty years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number, the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report that separates the activities into the different tasks.

The court continues the hearing, rather than denying the Application without prejudice, to afford Applicant the opportunity to provide the court, U.S. Trustee, and other parties in interest requesting the information with the necessary task billing analysis. FN.2.

FN.2. The court reviewed the motion to see if the lack of this basic requirement arose because there is only one task area (such as motion to confirm modified plan). That review shows that counsel has provided services in a number of task areas, including: (1) Motion to Dismiss, (2) Motion to Reconsider, (3) Modified Plan, (4) Motion to Confirm Modified Plan, (5) Business Examination Documents, and (6) Homeowner's Insurance Claim. The court declines the opportunity to provide such drafting services for a party or their counsel.

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 hearing on the Motion for Allowance of Professional Fees is continued to 3:00 p.m. on February 14, 2017. Applicant shall file and serve on the Chapter 13 Trustee and U.S. Trustee, a supplemental pleading to provide a task billing analysis that specifically groups the time and charges by the various task areas for such services.

10. 16-25419-E-13 DBL-1 — ANTHONY/AMALIA AITKEN — Bruce Dwiggins — MOTION TO CONFIRM PLAN — 12-12-16 [32]

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, and Office of the United States Trustee on December 12, 2016. By the court's calculation, 43 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 29, 2016. Dckt. 41. The Trustee asserts that Debtor is $1,625.00 delinquent in plan payments, which represents one month of the $1,625.00 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also objects to the title of the Motion to Confirm stating that the Plan is dated August 17, 2016. The Plan is actually dated August 23, 2016. The Trustee does not oppose language in an order confirming that would resolve the date discrepancy.

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.

11. 16-27420-E-13 JUDITH DARNOLD
DPC-1 Steele Lanphier

OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
12-21-16 [18]

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 21, 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. Debtor failed to appear at the First Meeting of Creditors.

B. The Plan relies on filing a Motion to Value Secured Claim of Financial Freedom and Heritage Credit Union, for which no motion had been filed.

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

A review of the Debtor's Plan shows that it relies on the court valuing the secured claim of Financial Freedom and Heritage Credit Union, listed in Class 2B. Debtor has failed to file a Motion to Value the Secured Claim of Financial Freedom and Heritage Credit Union, however. Without the court valuing the claim, the Plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Objection is sustained.

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.

12. **16-26225-E-13** **MARIE GARY** **CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-1 **Eric Vandermey** **10-24-16 [24]**

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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 October 24, 2016. By the court's calculation, 29 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 overruled/sustained.

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

A. The Plan will complete in more than the permitted sixty months.

B. The Plan is inconsistent with regard to curing a mortgage arrears of $14,300.00 listed in Class 1 of the plan. In Class 1, the arrearages are to be paid $405.00 per month, but in Section 6.01, $238.33 per month is provided until paid in full.

C. Marie Gary ("Debtor") has failed to provide documents including:

1. Business questionnaire,

2. Tax returns,

3. Profit and loss statements,

4. Bank account statements,

5. Proof of license and insurance or written statement of no such documentation exists, and

6. Business budget.

D. The Plan relies on the court valuing two secured claims of Green Tree Servicing.

NOVEMBER 22, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on December 20, 2016, to allow Debtor time to address the remaining issues. Dckt. 38.

TRUSTEE'S STATUS UPDATE

The Trustee filed a Status Update in Support of Objection to Confirmation on December 2, 2016. Dckt. 41. The Trustee states that Debtor has resolved all issues, except to clarify the monthly dividend that the Trustee is to pay on Class 1 mortgage arrears owed to Ocwen Servicing. The Trustee requests that Debtor clarify the monthly dividend to mortgage arrears in the order confirming plan. The Trustee moves for the court to sustain the Objection unless Debtor addresses the Class 1 mortgage arrears monthly dividend.

DECEMBER 20, 2016 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on January 24, 2017, to allow Debtor to provide additional documents that the Trustee anticipates will resolve the Objection. Dckt. 43.

TRUSTEE'S STATUS UPDATE

The Trustee filed a Status Update on January 4, 2017. Dckt. 44. The Trustee reports that Debtor has resolved all concerns, except to clarify what amount the Trustee is to pay as a monthly dividend to Class 1 mortgage arrears owed to Ocwen Servicing. The Trustee references two options: $405.00 in Section 2.08(c) or $238.33 in Section 6.01. Either amount will allow Debtor to complete the Plan on time.

The Trustee requests that Debtor clarify the monthly dividend to mortgage arrears in the order confirming.

DISCUSSION

The Trustee's objections are well-taken, all but one of which has been cured.

The Trustee asserts that the Plan is inconsistent with regard to curing the mortgage arrears of $14,300.00 listed in Class 1 of the Plan. In Class 1, the arrearages are to be paid $405.00 per month, but in Section 6.01, the Debtor provides that the creditor will receive $238.33 per month until paid in full. The Trustee is uncertain what dividend the Debtor intends for the arrears. The Plan must provide for payment in full of the arrearage as well as maintenance of the ongoing note installments. *See* 11 U.S.C. §§ 1322(b)(2), (b)(5), and 1325(a)(5)(B). Because it is unclear whether the Plan will provide for the full payment of arrearages, the Plan cannot be confirmed.

At the hearing, Debtor reported that the Class 1 monthly dividend to Ocwen Servicing is to $xxxx.xx.

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 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 to confirmation the Plan is overruled/sustained, and the proposed Chapter 13 Plan is not confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

13. **12-39728-E-13** **MARK/TIFFANY WOLFGRAM** **MOTION TO MODIFY PLAN**
WSS-9 **W. Steven Shumway** **12-1-16 [139]**

Final Ruling: No appearance at the January 24, 2017 hearing is required.

The Motion to Confirm Modified Plan is dismissed without prejudice, and the bankruptcy case shall proceed in this court.

Debtor having filed a "Withdrawal of Motion", which the court construes to be an Ex Parte Motion to Dismiss the pending Motion on January 13, 2017, Dckt. 153; no prejudice to the responding party appearing by the dismissal of the Motion; 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 opposition filed by the Trustee; the Ex Parte Motion is granted, 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 to Confirm Modified Plan filed by Debtor having been presented to the court, 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. 153, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Debtor's Motion to Confirm Modified Plan is dismissed without prejudice, and the bankruptcy case shall proceed in this court.

14. **16-27334-E-13** **ANNA RICE** **OBJECTION TO CONFIRMATION OF**
JHW-1 **Michael Benavides** **PLAN BY AMERICREDIT FINANCIAL SERVICES, INC.**
12-19-16 [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, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on December 19, 2016. By the court's calculation, 36 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.

Americredit Financial Services, Inc. dba GM Financial, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. Anna Rice's ("Debtor") proposed plan fails to provide for the present value of Creditor's secured claim by failing to provide the proper "formula" discount rate in conformance with 11 U.S.C. § 1325(a)(5)(B)(ii).

The Creditor's objections are well-taken. Creditor objects to the confirmation of the Plan on the basis that the Plan calls for adjusting the interest rate on its loan with the Debtor to 2.9%. Creditor's claim is secured by a 2015 Chevrolet Malibu, ending in VIN 9926. Creditor argues that this interest rate is outside the limits authorized by the Supreme Court in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004). In *Till*, a plurality of the Court supported the "formula approach" for fixing post-petition interest rates. *Id.* Courts in this district have interpreted *Till* to require the use of the formula approach. *See In re Cachu*, 321 B.R. 716

(Bankr. E.D. Cal. 2005); *see also Bank of Montreal v. Official Comm. of Unsecured Creditors (In re American Homepatient, Inc.)*, 420 F.3d 559, 566 (6th Cir. 2005) (*Till* treated as a decision of the Court). Even before *Till*, the Ninth Circuit had a preference for the formula approach. *See Cachu*, 321 B.R. at 719 (citing *In re Fowler*, 903 F.2d 694 (9th Cir. 1990)).

The court agrees with the court in *Cachu* that the correct valuation of the interest rate is the prime rate in effect at the commencement of this case plus a risk adjustment. Because the creditor has only identified risk factors common to every bankruptcy case, the court fixes the interest rate as the prime rate in effect at the commencement of the case, 3.50%, plus a 1.25% risk adjustment, for a 4.75% interest rate. The objection to confirmation of the Plan on this basis is sustained. *See* 11 U.S.C. § 1325(a)(5)(B)(ii).

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.

15. **16-27534-E-13** **PHILLIP/REHEMA PETE** **OBJECTION TO CONFIRMATION OF**
DPC-1 **Pro Se** **PLAN BY DAVID P. CUSICK**
12-21-16 [13]

Final Ruling: No appearance at the January 24, 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 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.

16. 16-27135-E-13 MARY HAWTHORNE MOTION TO CONFIRM PLAN
HLG-2 Kristy Hernandez 12-5-16 [22]

Final Ruling: No appearance at the January 24, 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 5, 2016. By the court's calculation, 50 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 Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Amended Plan is granted.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtor has provided evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on January 10, 2017. Dckt. 34. The Amended Plan complies with 11 U.S.C. §§ 1322 and 1325(a) and 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 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 Motion is granted, Debtor's Amended Chapter 13 Plan filed on December 5, 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.

17. 16-27235-E-13 DPC-1 | **CAROLYN HEUSTESS** **Pro Se** | **OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK** **12-21-16 [22]**

Final Ruling: No appearance at the January 24, 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 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. 16-27442-E-13 DPC-1 — KORIE MARTINEZ, Aubrey Jacobsen — OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK, 12-21-16 [20]

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 21, 2016. By the court's calculation, 34 days' notice was provided. 42 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 is overruled as moot, Debtor having filed an amended plan that supersedes the plan at issue.

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. Subsequent to the filing of this Motion, Korie Martinez ("Debtor") filed a First Amended Plan and corresponding Motion to Confirm on December 27, 2016. Dckts 31 & 35. Filing a new plan is a de facto withdrawal of the pending plan.

The Objection to Confirmation is overruled as moot, 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 is overruled as moot, Debtor having filed an amended Chapter 13 plan. The proposed Chapter 13 Plan, Dckt. 5, is not confirmed.

19. 16-26043-E-13 SUSAN GEDNEY
TAG-4 Aubrey Jacobsen

MOTION FOR DECLARATORY JUDGMENT HOLDING REAL ESTATE LISTING AGREEMENT VOID
1-9-17 [56]

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.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on January 9, 2017. By the court's calculation, 15 days' notice was provided. 14 days' notice is required for a motion.

The Motion for Declaratory Judgment 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 for Declaratory Judgment is denied without prejudice.

Susan Gedney ("Debtor") moves the court for a declaratory judgment holding that the Real Estate Listing Agreement with Realtor Sarah Wright and Broker Gabriel Witkin is void. Debtor's underlying arguments revolve around 11 U.S.C. §§ 327(a), 328, and 330. Debtor argues against the employment and compensation of a realtor and broker in this case.

The Motion seeks declaratory relief in its prayer. Under paragraphs one and two of the prayer, Debtor requests:

> That the Court grant her Motion for Declaratory Judgment Holding Real Estate Listing Agreement Void; [and]
>
> Offer declaratory relief denying approval of compensation to Realtor SARAH M. WRIGHT and Broker GABRIEL WITKIN . . . .

Dckt. 56.

Federal Rule of Bankruptcy Procedure 7001(9) states that an adversary proceeding includes "a proceeding to obtain a declaratory judgment . . . ." Here, Debtor did not file an adversary proceeding, but instead is relying on the motion practice outlined in Federal Rule of Bankruptcy Procedure 9014 and Local Bankruptcy Rule 9014-1 to seek relief. Declaratory relief is not permitted, nor is it proper, when seeking relief under such motion practice.

GROUNDS STATED IN THE MOTION

Debtor pleads the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013 in the Motion:

A. On the morning of September 9, 2016, the same day Debtor filed this case, Debtor signed a Real Estate Listing Agreement with realtor Sarah Wright and broker Gabriel Witkin for the sale of Debtor's real property commonly known as 16560 Leafwood Court, Meadow Vista, California.

B. The Listing Agreement was for a period of one year.

C. Neither the realtor nor the broker appeared at Debtor's open house.

D. Debtor received complaints from other realtors and buyers' agents that Sarah Wright was not responding to phone calls or communicating in any way with potential buyers.

E. On October 26, 2016, Debtor received from her counsel a Declaration in Support of Application to Employ Realtor Sarah Wright.

F. A Declaration for Sarah Wright was also provided for signature.

G. Debtor e-mailed the additional Declaration to Sarah Wright for her signature.

H. On October 27, 2016, the realtor asked if she could sign the Declaration electronically.

I. Debtor conferred with her counsel and informed the realtor that the Declaration need to be signed physically.

J. The realtor did not return the Declaration with a physical signature and was unresponsive to requests for it.

K. Debtor believed that the realtor and the broker had failed to provide services and communication, and she sought to terminate the Listing Agreement by requesting that the realtor and broker sign a Cancellation of Listing Agreement.

L. Neither the realtor nor the broker have signed the Cancellation of Listing Agreement, and Debtor asserts that they both have indicated that they expect to be paid their full commissions upon sale of Debtor's property.

M. Debtor's property has not been sold.

Debtor asserts a number of grounds in support the requested relief, including breach of fiduciary duties, rejection of executory contracts, and violations of the automatic stay, to name a few. The failure of the Debtor and Debtor's counsel to properly plead under the Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules are grounds to deny the Motion.

Therefore, due to the Debtor improperly pleading multiple forms of relief as well as attempting to obtain declaratory judgment without initiating an adversary proceeding, the Motion is denied without prejudice.

The court's review of the file discloses that there is no order authorizing the employment of a real estate professional. Such employment is required pursuant to 11 U.S.C. § 327. Failure to obtain such an order precludes payment on any compensation to such professional.

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 Declaratory Judgment 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 for Declaratory Judgment is denied without prejudice.

20. 16-26447-E-13 DOUGLAS TOOLEY MOTION TO CONFIRM PLAN
CK-1 Catherine King 12-7-16 [20]

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 December 13, 2016. By the court's calculation, 42 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 29, 2016. Dckt. 36. The Trustee states that Section 6 of the proposed plan calls for additional provisions to be appended to the plan, but none exist.

The Trustee alleges that the Plan is not feasible. 11 U.S.C. § 1325(a)(6). The proposed payments of $2,178.00 are insufficient to pay the $3,680.60 Class 1 dividend distribution. Thus, the Plan may not be confirmed.

The Trustee asserts that Debtor is $2,178.00 delinquent in plan payments, which represents one month of the $2,178.00 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 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.

21. 12-34858-E-13 MELINA LEWIS MOTION TO MODIFY PLAN
BLG-4 Chad Johnson 12-19-16 [76]

Final Ruling: No appearance at the January 24, 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, parties requesting special notice, and Office of the United States Trustee on December 19, 2016. By the court's calculation, 36 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified Plan has been set for hearing on the notice required by Local Bankruptcy Rule 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Confirm the Modified Plan is granted.

11 U.S.C. § 1329 permits a debtor to modify a plan after confirmation. The Debtor has filed evidence in support of confirmation. The Chapter 13 Trustee filed a statement of non-opposition on January 4, 2017. Dckt. 83. The Modified Plan complies with 11 U.S.C. §§ 1322, 1325(a), and 1329 and 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 December 19, 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.

22. 16-27559-E-13 DPC-1 | **FRANK FERREIRA** / **Marc Caraska** | **MOTION FOR DENIAL OF DISCHARGE OF DEBTOR UNDER 11 U.S.C. SECTION 727(A)** / **12-1-16 [14]**

Final Ruling: No appearance at the January 24, 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 and Debtor's Attorney on December 1, 2016. By the court's calculation, 54 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Discharge is sustained.

David Cusick, the Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on December 1, 2016. Dckt. 14.

The Objector argues that Frank Ferreira, III ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on November 21, 2012. Case No. 12-40384. The Debtor received a discharge on March 12, 2013. Case No. 12-40384, Dckt. 22.

The instant case was filed under Chapter 13 on November 15, 2016.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, the Debtor received a discharge under 11 U.S.C. § 727 on March 12, 2013, which is less than four years preceding the date of the filing of the instant case. Case No. 12-40384, Dckt. 22. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 16-27559), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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 Discharge filed by David Cusick, 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 to Discharge is sustained.
>
> **IT IS FURTHER ORDERED** that, upon successful completion of the instant case, Case No. 16-27559, the case shall be closed without the entry of a discharge.

23. **16-27559-E-13** **FRANK FERREIRA** **AMENDED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK**
DPC-2 **Marc Caraska** **12-21-16 [23]**

Final Ruling: No appearance at the January 24, 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 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.

24. 16-27761-E-13 CYB-2 | **DORIAN BELLAN** **Candace Brooks** | **MOTION TO VALUE COLLATERAL OF AMERICREDIT FINANCIAL SERVICES, INC.** **12-13-16 [27]**

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

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, Creditor, and Office of the United States Trustee on December 13, 2016. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

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 AmeriCredit Financial Services, Inc. dba GM Financial ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $8,250.00.

The Motion filed by Dorian Bellan ("Debtor") to value the secured claim of AmeriCredit Financial Services, Inc. dba GM Financial ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2008 Volkswagen Touareg 2, VIN ending in 9433 ("Vehicle"). Debtor seeks to value the Vehicle at a replacement value of $6,000.00 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).

CREDITOR'S OPPOSITION

Creditor filed an Opposition on January 9, 2017. Dckt. 37. Creditor states that the Vehicle should be valued at no less than $10,050.00 (assuming a Vehicle value of $10,250.00 minus a dealer's $200.00 cost to clean and detail the Vehicle for presentation), claiming that the correct standard of valuation is the price a retail merchant would charge for that property considering its age and condition at that time. Creditor asserts that the price a retail merchant would charge is most accurately measured by the retail value of the

Vehicle. Using a NADA Valuation Report, the Creditor points out that at clean retail adjusted value, Vehicle with 129,000 miles in good condition is worth $10,250.00.

Creditor argues that Debtor did not provide any evidence with respect to condition of the Vehicle, other than the mileage and that Vehicle needs body work estimated around $2,000.00 due to a hit and run accident. Creditor asserts that Debtor's lay opinion regarding repair costs is questionable. Creditor believes that a more appropriate starting point would be the Kelley Blue Book or NADA Valuation Report.

Creditor cites to *In re Morales* for the proposition that "the retail value for vehicles under [section] 506(a)(2) should be calculated by adjusting either the Kelley Blue Book retail value or the National Automobile Dealers Association . . . Guide retail value by a reasonable amount in light of evidence presented regarding condition, the retail market, and other relevant factors." 387 B.R. 36, 37 (Bankr. C.D. Cal. 2008). Furthermore, Creditor relies upon *Morales* because "the Kelley Blue Book and NADA Guide retail values represent the appropriate starting point in determining retail value under the second sentence of § 506(a)(2) because the plain language of the statute contemplates 'the price a retail merchant would charge' instead of the price a private party would charge." 384 B.R. at 46.

Creditor requests that Debtor provide more information about the condition of the Vehicle to support the claim that the Vehicle is worth $6,000.00.

DISCUSSION

Creditor states that according to a NADA Valuation Report, the Vehicle is worth $10,250.00 at clean retail adjusted value. In Debtor's Declaration, Debtor states that the Vehicle needed $2,000.00 of body work due to a hit and run accident. Dckt. 29. Based on the NADA Valuation Report and Creditor's supporting caselaw, the Vehicle's retail value would begin at $10,250.00. Debtor has stated under penalty of perjury, however, that $2,000.00 of repairs are needed, which amount is not reflected by the NADA Valuation Report. Therefore, the court adjusts the NADA valuation down to $8,250.00 to reflect the repairs needed.

The lien on the Vehicle's title secures a purchase-money loan incurred on October 20, 2011, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $19,258.53. 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 $8,250.00. *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 Dorian Bellan ("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 AmeriCredit Financial Services, Inc. dba GM Financial ("Creditor") secured by an asset described as 2008 Volkswagen Touareg 2, VIN ending in 9433 ("Vehicle") is determined to be a secured claim in the amount of $8,250.00, 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 $8,250.00 and is encumbered by a lien securing a claim that exceeds the value of the asset.

25. 16-27761-E-13 CYB-3 | **DORIAN BELLAN** / **Candace Brooks** | **MOTION TO VALUE COLLATERAL OF RC WILLEY HOME FURNISHING, INC.** **12-14-16 [32]**

Final Ruling: No appearance at the January 24, 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 Chapter 13 Trustee, Creditor, and Office of the United States Trustee on December 14, 2016. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

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). 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 Value Secured Claim of RC Willey Home Furnishings, Inc., dba RC Willey Financial Services ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $800.00.

The Motion to Value filed by Dorian Bellan ("Debtor") to value the secured claim of RC Willey Home Furnishings, Inc., dba RC Willey Financial Services ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a sofa, chair, and Sony television ("Assets"). The Debtor seeks to value the Assets at a replacement value of $800.00 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 January 10, 2017. Dckt. 44. The Trustee notes that Creditor is provided for in Class 2 of the Plan, but Creditor has not filed a Proof of Claim so far.

PROOF OF CLAIM FILED

The court has reviewed the Claims Registry for this bankruptcy case. Proof of Claim No. 3-1 filed by Creditor appears to be the claim that may be the subject of the present Motion. Creditor asserts a claim for $2,216.76.

DISCUSSION

The lien on the Assets secures a purchase-money loan incurred on August 30, 2014, which is more than one year prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately $2,638.53. *See* 11 U.S.C. § 1325(a)(9) (stating the one-year period for personal property other than a motor vehicle). Therefore, the Creditor's claim secured by a lien on the assets is under-collateralized. The Creditor's secured claim is determined to be in the amount of $800.00. *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 Dorian Bellan ("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 RC Willey Home Furnishings, Inc., dba RC Willey Financial Services ("Creditor") secured by assets described as a dual recliner sofa and a dual recliner love seat ("Assets") is determined to be a secured claim in the amount of $800.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Assets is $800.00 and is encumbered by Creditor's lien securing a claim that exceeds the value of the Assets.

26. 11-22562-E-13 JOSEPH/SABRINA MADDOCKS MOTION FOR CONTEMPT
PGM-1 Peter Macaluso 12-14-16 [167]

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, Creditor, and Office of the United States Trustee on December 19, 2016. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Contempt 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 hearing on the Motion for Contempt is continued to 3:00 p.m. on February 28, 2017.

Joseph Maddocks and Sabrina Maddocks ("Debtor") move for an order to show cause concerning violation of discharge under 11 U.S.C. § 1328 against California Coastal Rural Development Corporation ("Creditor"). Debtor seeks (1) declaratory and injunctive relief by the court to determine whether Debtor should be liable for the pre-petition liability arising from a demand for pre-petition claims in the amount of $59,248.14 and (2) a determination of whether Creditor is in violation of 11 U.S.C. § 1328. FN.1.

FN.1. The court notes that among the problems with the filing of this Motion is a request for declaratory and injunctive relief. Federal Rule of Bankruptcy Procedure 7001(9) states that an adversary proceeding includes "a proceeding to obtain a declaratory judgment . . . ." Here, Debtor did not file an adversary proceeding, but instead is relying on the motion practice outlined in Federal Rule of Bankruptcy Procedure 9014 and Local Bankruptcy Rule 9014-1 to seek relief. Declaratory relief is not permitted, nor is it proper, when seeking relief under such motion practice.

Debtor filed the instant bankruptcy case on January 31, 2011. Dckt. 1. Creditor filed Proofs of Claim 4-1 for $17,652.10 and 5-1 for $30,205.63 on February 16, 2011, each secured by a deed of trust. Debtor moved to value those two claims individually, which the court granted and valued them at $0.00 each. Dckts. 102 & 104.

Debtor proceeded to complete the Plan and was discharged on May 9, 2016. Dckt. 160. According to Debtor's allegations in the Motion, Debtor attempted to refinance around August 20, 2016, and had Old Republic Title Company contact Creditor about releasing an abstract of judgment. On October 19, 2016, Creditor responded that it was owed $59,248.14 by Debtor, and by October 28, 2016, Debtor's refinancing loan was cancelled, and the interest rate increased.

CREDITOR'S OPPOSITION

Creditor filed an Opposition on January 10, 2017. Dckt. 176. Creditor asserts that it obtained a pre-petition judgment against Debtor in the amount of $48,241.72 and then filed an Abstract of Judgment to perfect the judgment lien against Debtor's real property. Creditor states that the judgment lien was not avoided during the course of the bankruptcy, although Creditor admits that two other of its liens against Debtor were avoided.

Creditor states that it was contacted by an escrow officer in October 2016, and a request for payoff was made. Creditor confirmed with its counsel that the judgment lien had not been avoided before making the request for payoff in the amount of $59,248.14. Creditor sent a letter to Debtor's attorney on December 9, 2016, stating that while two claims had been valued at $0.00 secured by the property, the judgment lien was valid.

Creditor states that a calculation error was made, and the amount owed to it presently should actually be $70,507.54, but Creditor originally calculated the amount owed to it based on the underlying documents instead of the amount stated in the judgment lien.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 17, 2017. Dckt. 183. The Trustee seeks to clarify issues raised by this Motion. The Trustee states that Creditor's Claim 4-1 was listed in Class 2 of the Plan, and Claim 5-1 was listed in Class 3 of Plan. Claim 5-1 was listed as secured in the Trustee's Final Report because it was listed in Class 3. The Trustee is not certain which claim, if either, represented the collateral to be surrendered.

The Trustee also mentions that two Motions to Value Secured Claim relating to Creditor's claims were heard and granted on May 24, 2011. *See* Dckts. 101 & 103.

APPLICABLE LAW

"Civil contempt is the normal sanction for violation of the discharge injunction." *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). 11 U.S.C. § 105 does not itself create a private right of action, but it does provide a bankruptcy court with statutory contempt powers in addition to whatever inherent contempt powers the court may have. Because these powers inherently include the ability to sanction a party, a bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction and order damages for the debtor if appropriate on the merits. *Id.* at 506–07.

Bankruptcy courts have jurisdiction and the authority to impose sanctions, even when the bankruptcy case itself has been dismissed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 548–49 (9th Cir. 2004). The bankruptcy court judge also has the inherent civil contempt power to enforce compliance with its lawful judicial orders. *Price v. Lehtinen (In re Lehtinen)*, 564 F.3d 1052, 1058 (9th Cir. 2009); *see* 11 U.S.C. § 105(a).

A bankruptcy court is also empowered to regulate the practice of law in the bankruptcy court. *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (B.A.P. 9th Cir. 1996). The authority to regulate the practice of law includes the right and power to discipline attorneys who appear before the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see In re Lehtinen*, 564 F.3d at 1058.

A contempt proceeding by the United States Trustee or a party in interest in bankruptcy is a contested matter. *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1189 (9th Cir. 2011). Contempt proceedings are not listed under Bankruptcy Rule 7001 and are therefore contested matters not qualifying as adversary proceedings. *Id.* Contempt proceedings for a violation of § 524 must be initiated by motion in the bankruptcy case under Rule 9014 and not by adversary proceeding. *Id.*

A creditor who attempts to collect a pre-petition discharged debt in violation of the discharge injunction is in contempt of the bankruptcy court that issued the order of discharge. *Eady v. Bankr. Receivables Mgmt. (In re Eady)*, No. SC-08-1112-MoJuKw, 2008 Bankr. LEXIS 4696 (B.A.P. 9th Cir. 2008). In addition to the bankruptcy court's inherent power to impose an order for contempt only upon a showing of "bad faith," section 105 grants statutory contempt powers and a creditor may be liable under section 105 if it willfully violated the permanent injunction of section 524. *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002); *Walls*, 276 F.3d at 509.

The primary purpose of a civil contempt sanction is to compensate losses sustained by another's disobedience of a court order and to compel future compliance with court orders. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1192 (9th Cir. 2003). The contemnor must have an opportunity to reduce or avoid the fine through compliance. *Id.* The federal court's authority to regulate the practice of law is broader, allowing the court to punish bad faith or willful misconduct. *In re Lehtinen*, 564 F.3d at 1058; *see also* 11 U.S.C. § 105(a).

The party seeking contempt sanctions has the burden of proving by clear and convincing evidence that the contemnors violated a specific and definite order of the court. *Bennett*, 298 F.3d at 1069. The burden then shifts to the contemnors to demonstrate why they were unable to comply. *Id.* The movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions that violated the injunction. *Id.* For the second prong, the court employs an objective test, and the focus of the inquiry is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact the conduct complied with the order at issue. *Bassett v. Am. Gen. Fin., Inc. (In re Bassett)*, 255 B.R. 747, 758 (9th Cir. B.A.P. 2000), *rev'd on other grounds*, 285 F.3d 882 (9th Cir. 2002).

STIPULATION

The parties filed a Stipulation on January 17, 2017, to continue the hearing on this matter to 3:00 p.m. on February 28, 2017. Dckt. 185.

DISCUSSION

The parties having agreed to continue the hearing on this matter, the court continues this hearing to 3:00 p.m. on February 28, 2017. It appears to the court that the parties are actively seeking to resolve this dispute, and they should be able to do so by focusing on common ground. If the parties are not able to resolve this matter by the February 28, 2017, then the court anticipates holding a Status Conference to discuss the pleadings and the proper way to present this Motion to the 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 for Contempt 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 for Contempt is continued to 3:00 p.m. on February 28, 2017. If the matter has not been resolved, the court shall conduct a status conference at the continued hearing to determine what matters are being presented to the court by this Motion and whether an adversary proceeding will be filed.

27. 16-26966-E-13 DPC-3 | **JENNIFER RIANDA** / **Lucas Garcia** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** / **12-16-16 [42]**

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 16, 2017. By the court's calculation, 39 days' notice was provided. 14 days' notice is required.

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is sustained, and the exemption is disallowed in its entirety.

The Trustee objects to Jennifer Rianda's ("Debtor") use of California Code of Civil Procedure § 704.060 exemption in the amount of $300.00 for tools of the trade. The Trustee asserts that Debtor's claimed exemption for feed, supplies, and fertilizer is unwarranted because Debtor is not engaged in any business in which those items are reasonably used for business purposes.

On Schedule B, Debtor has listed that she has a $300.00 interest in feed, supplies, and fertilizer. Schedule B, Line 50, Dckt. 10. Debtor states that she has been employed for five years as a "Technical Writer/Support" for Simi Group, Inc. on Schedule I. Dckt. 10.

California Code of Civil Procedure § 704.060 provides an exemption for "tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial motor vehicle, one vessel, and other personal property . . . of the trade, business, or profession" in which the Debtor is employed. Debtor has provided no explanation as to how feed, supplies, and fertilizer are used in work as a Technical Writer/Support, and the court will not create an explanation for Debtor.

The Trustee's Objection is sustained, and the claimed exemption is 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 exemption is disallowed in its entirety.

28. 16-27480-E-13 DPC-1 | **CANDISE KIRKPATRICK** **Steven Alpert** | **OBJECTION TO DISCHARGE BY DAVID CUSICK** **12-2-16 [12]**

Final Ruling: No appearance at the January 24, 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, and Office of the United States Trustee on December 2, 2016. By the court's calculation, 53 days' notice was provided. 28 days' notice is required.

The Objection to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). 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 Discharge is sustained.

David Cusick, the Chapter 13 Trustee ("Objector"), filed the instant Objection to Debtor's Discharge on December 2, 2016. Dckt. 12.

The Objector argues that Candise Kirkpatrick ("Debtor") is not entitled to a discharge in the instant bankruptcy case because the Debtor previously received a discharge in a Chapter 7 case.

The Debtor filed a Chapter 7 bankruptcy case on February 28, 2013. Case No. 13-22741. The Debtor received a discharge on June 17, 2013. Case No. 13-22741, Dckt. 12.

The instant case was filed under Chapter 13 on November 10, 2016.

11 U.S.C. § 1328(f) provides that a court shall not grant a discharge if a debtor has received a discharge "in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter." 11 U.S.C. § 1328(f)(1).

Here, the Debtor received a discharge under 11 U.S.C. § 727 on June 17, 2013, which is less than four years preceding the date of the filing of the instant case. Case No. 13-22741, Dckt. 12. Therefore, pursuant to 11 U.S.C. § 1328(f)(1), the Debtor is not eligible for a discharge in the instant case.

Therefore, the Objection is sustained. Upon successful completion of the instant case (Case No. 16-27480), the case shall be closed without the entry of a discharge, and Debtor shall receive no discharge in the instant case.

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 Discharge filed by David Cusick, the Chapter 13Trustee 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 to Discharge is sustained.
>
> **IT IS FURTHER ORDERED** that, upon successful completion of the instant case, Case No. 16-27480, the case shall be closed without the entry of a discharge.

29. 16-24481-E-13 MARCO/MONICA ROMO MOTION TO CONFIRM PLAN
WSS-1 W. Steven Shumway 11-29-16 [50]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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, and Office of the United States Trustee on November 29, 2016. By the court's calculation, 56 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 xxxxxxxxxxxxxxxxx.

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 29, 2016. Dckt. 57. The Trustee states that while the proposed plan includes language from a stipulation with Ally Financial (Dckt. 28), the Trustee will continue to pay the claim as filed by Ally Financial until (and if) the court approves a stipulation that Ally Financial be paid no more than $18,000.00.

DEBTOR'S REPLY

Marco Romo and Monica Romo ("Debtor") filed a Reply on January 12, 2017. Dckt. 60. Debtor states that a proposed order relating to the stipulation between Debtor and Ally Financial was uploaded to the court on January 12, 2017. Debtor states that if the stipulation is not approved, then Debtor will seek to value the secured claim (secured by a 2012 Honda Crosstour) at $18,000.00.

DISCUSSION

Debtor is correct that a stipulation with Ally Financial has been filed. Dckt. 28. The Stipulation relates to the present Motion to Confirm. No motion to approve a compromise or settlement was filed . Fed. R. Bankr. P. 9019. There is no proceeding for the rogue order lodged with the court to be entered. *See* Fed. R. Civ. P. 9014 (requiring that relief in the form of an order must be sought by motion or application (when so provided for by the Federal Rules of Bankruptcy Procedure)).

If the terms provided in the Stipulation to provide for paying the creditor's claim are to be amended into the plan to be confirmed, Debtor may do so. If the terms go beyond that and compromise, waive, or give up possible rights, then Debtor and Ally Financial will need to file a separate motion to have such compromise approved.

At the hearing Debtor's counsel explained xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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 without prejudice, and the proposed Chapter 13 Plan is not confirmed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

30. 16-27083-E-13 DANNY CLARKE
DPC-1 Peter Cianchetta

CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY DAVID P. CUSICK
12-7-16 [35]

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

The Chapter 13 Trustee having filed a Notice of Dismissal of the Objection to Confirmation on January 19, 2017, Dckt. 44, no prejudice to the responding party appearing by the dismissal of the Objection, having the right to dismiss the motion pursuant to Fed. R. Civ. P. 41(a)(2) and Fed. R. Bankr. P. 9014 and 7041, the dismissal consistent with the prosecution of this case by Debtor, the ex parte motion is granted, the Trustee's motion is dismissed without prejudice, and the court removes this Motion from the calendar.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Objection to Confirmation filed by Trustee having been presented to the court, the Trustee having requested that the Motion itself be dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2) and Federal Rules of Bankruptcy Procedure 7041 and 9014, Dckt. 44, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Trustee's Objection to Confirmation is dismissed. Counsel for the Debtor shall prepare and forward to the Chapter 13 Trustee a proposed order confirming the Plan, which upon approval by the Trustee shall be lodged with the court.

31. 12-36688-E-13 HLG-3 — DONALD TO AND KAREN CAO — Kristy Hernandez — MOTION TO APPROVE LOAN MODIFICATION — 1-6-17 [150]

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, parties requesting special notice, and Office of the United States Trustee on January 7, 2017. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

The Motion to Approve Loan Modification 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 Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Donald To and Karen Cao ("Debtor") seeks court approval for Debtor to incur post-petition credit. Nationstar Mortgage, LLC ("Creditor"), whose claim the Plan provides for in Class 1 has agreed to a loan modification that will reduce Debtor's mortgage payment from the current $1,859.26 to $1,844.08 per month. The modification will capitalize the pre-petition arrears and set the interest rate at 3.00% over the next 40 years.

The Motion is supported by Debtor's Declaration. Dckt. 152. 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.

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 Donald To and Karen Cao 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 Donald To and Karen Cao ("Debtor") to amend the terms of the loan with Nationstar Mortgage, LLC ("Creditor"), which is secured by the real property commonly known as 1896 Broadford Drive, Folsom, California, on such terms as stated in the Modification Agreement filed as Exhibit C in support of the Motion (Dckt. 153).

32. 12-36688-E-13 HLG-2 — DONALD TO AND KAREN CAO — MOTION TO MODIFY PLAN
Kristy Hernandez — 11-18-16 [139]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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, 67 days' notice was provided. 35 days' notice is required.

The Motion to Confirm the Modified 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 xxxxx.

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 January 6, 2017. Dckt. 147. The Trustee asserts that Debtor is $2,693.96 delinquent in plan payments under the proposed plan, which represents less than one month of the $6,313.98 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also objects to the treatment of Nationstar Mortgage, LLC, listed in Class 1. The additional provisions in Section 6 propose removing arrears (Claim 14-1 for $54,072.98 in arrears) according to a loan modification (Motion set at HLG-3). The Trustee has paid $32,892.79 on the arrears claim, which leaves $21,180.19. The Trustee objects to the proposed treatment if the loan modification is not granted. This portion of the Trustee's opposition has been resolved with the court granting the Motion to Approve Loan Modification (HLG-3).

Finally, the Trustee notes that Supplemental Schedules I and J were submitted on forms that are no longer in use. The Trustee does not oppose the information contained with them, however, merely their form.

DISCUSSION

Debtor filed new Supplemental Schedules I and J on January 9, 2017. Dckt. 155. They are in the form used currently by the court, thus resolving the Trustee's opposition. Further, the court has approved the proposed loan modification that capitalizes pre-petition arrears. The only remaining ground from the Trustee's Opposition is the asserted delinquency.

At the hearing, the Trustee reported that the delinquency has / has not been cured.

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

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 Motion to Confirm the Modified Plan is xxxxx.

33. **14-30097-E-13** **IRVIN/THERESA WHITE** **MOTION TO APPROVE LOAN MODIFICATION**
TLA-6 **Thomas Amberg** **1-3-17 [101]**

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, parties requesting special notice, and Office of the United States Trustee on January 3, 2017. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

The Motion to Approve Loan Modification 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 Approve Loan Modification is granted.

The Motion to Approve Loan Modification filed by Irvin White and Theresa White ("Debtor") seeks court approval for Debtor to incur post-petition credit. Ocwen Loan Servicing, LLC, as loan servicer and authorized agent for creditor Deutsche Bank National Trust Company ("Creditor"), whose claim the Plan provides for in Class 4, has agreed to a loan modification that will increase Debtor's mortgage payment from the current $1,805.00 per month to $2,068.31 per month. The modification will capitalize the pre-petition arrears and fix the interest rate at 4.12499% over the next twenty-two years (measured from March 1, 2015, the beginning of the loan modification term).

TRUSTEE'S RESPONSE

David Cusick , the Chapter 13 Trustee, filed a Response on January 10, 2017. Dckt. 114. The Trustee notes that the plan confirmed on March 12, 2015, includes Creditor in Class 4 with a monthly payment of $2,068.31. Additionally, Deutsche Bank National Trust Company filed Claim 10-1 on March 6, 2015, for $256,794.98, with $14,016.61 in arrears.

The Trustee notes that the proposed loan modification was effective on April 1, 2015, and was signed by Creditor on April 7, 2015.

DISCUSSION

The Motion is supported by Debtor's Declaration. Dckt. 103. 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 states that the modification allows them to become current on mortgage payments while providing a lower interest rate.

This post-petition financing is consistent with the Chapter 13 Plan in this case because it is provided for already in Class 4 (where it is also listed in the proposed Modified Plan of January 3, 2017) 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 Irvin White and Theresa White 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 Irvin White and Theresa White ("Debtor") to amend the terms of the loan with Ocwen Loan Servicing, LLC, as loan servicer and authorized agent for creditor Deutsche Bank National Trust Company ("Creditor"), which is secured by the real property commonly known as 10261 Nevers Way, Elk Grove, California, on such terms as stated in the Modification Agreement filed as Exhibit A in support of the Motion (Dckt. 104).

34. 16-21099-E-13 KWAJHALIEN DORN-DAVIS MOTION TO CONFIRM PLAN
MAC-5 Marc Carpenter 12-19-16 [80]

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 December 19, 2016. By the court's calculation, 36 days' notice was provided. 42 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)(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 without prejudice.

INSUFFICIENT NOTICE PROVIDED

Thirty-six days' notice was provided, instead of the required forty-two days' minimum notice. *See* L.B.R. 3015-1(d)(1) & 9014-1(f)(1); Fed. R. Bankr. P. 2002(b). 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.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR MAKES, AND THE COURT GRANTS, A MOTION TO SHORTEN TIME

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 January 3, 2017. Dckt. 91. The Trustee asserts that Kwajhalien Dorn-Davis ("Debtor") is $763.00 delinquent in plan payments, which represents multiple months of the $204.36 plan payment. Delinquency indicates that the Plan is not feasible and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(6).

The Trustee also objects that the Motion was not set on the proper amount of notice. Federal Rule of Bankruptcy Procedure 2002(b) and Local Bankruptcy Rule 9014-1(f)(1) require forty-two days' notice for a motion to confirm. Debtor provided 36 days' notice.

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.

35. 17-20052-E-13 DSW-2 | **MARIA DE LA CRUZ** **Daniel Weiss** | **MOTION TO EXTEND AUTOMATIC STAY O.S.T. 1-16-17 [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.

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)(3) Motion—Hearing Required.

Correct Notice Not Provided. No Proof of Service has been filed with the court. The court required service to be completed on or before January 18, 2017. Dckt. 17.

The Motion to Extend the Automatic Stay was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 denied without prejudice.

NO PROOF OF SERVICE FILED

In ruling on the Motion to Shorten Time, the court ordered that service was to be completed for this Motion according to Federal Rule of Bankruptcy Procedure 2002 on or before January 18, 2017. Dckt. 17. A review of the docket shows that no Proof of Service for the Motion has been filed. Therefore, Debtor having failed to comply with the court's order, 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 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 denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR FILES A PROOF OF SERVICE DEMONSTRATING COMPLIANCE WITH THE COURT'S ORDER

Maria De La Cruz ("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. 16-26755) was dismissed on November 9, 2016, after Debtor failed to timely file documents. *See* Order, Bankr. E.D. Cal. No. 16-26755, Dckt. 21, November 9, 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—through her attorney-in-fact, Jamie De La Cruz—states that the instant case was filed in good faith and explains that the previous case was dismissed because Debtor suffers from physical and mental disabilities that "sometimes impair her ability to function under stressful circumstances," which is alleged to have happened in the prior case. Debtor's alleged inability to function in the prior case is presented as the reason that she did not file all necessary documents in her bankruptcy case. Debtor states that the current case was filed to prevent a foreclosure on Debtor's residence.

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.

The Debtor has not 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. Debtor's prior case was dismissed for failure to timely file documents, and a review of the docket in the current case

reveals that a Notice of Intent to Dismiss Case if Documents Are Not Timely Filed was entered on January 9, 2017. Dckt. 11. Regardless of whether a disability caused Debtor to fail to perform in the prior case (and perhaps in the current case, too), Debtor has failed to file documents once again. For a party to seek the extraordinary relief provided by the Bankruptcy Code for a second time, the court expects Debtor to be very serious about correcting the deficiencies in the previous case. Debtor has not shown the court that her circumstances and mindset have changed since November 2016.

The Motion is denied, and the automatic stay is not extended.

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 denied, and the automatic stay is not extended.