UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

January 31, 2017, at 3:00 p.m.

1.	**16-27603-E-13** **DPC-1**	**CHRISTINE MCKAY** **Peter Macaluso**	**OBJECTION TO DEBTOR'S DISCHARGE UNDER 11 U.S.C. § 1328(F)** **12-28-16 [31]**

Final Ruling: No appearance at the January 31, 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 28, 2016. By the court's calculation, 34 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 28, 2016. Dckt. 31.

The Objector argues that Christine McKay ("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 24, 2014. Case No. 14-31511. The Debtor received a discharge on February 26, 2015. Case No. 14-31511, Dckt. 17.

The instant case was filed under Chapter 13 on November 16, 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 February 26, 2015, which is less than four years preceding the date of the filing of the instant case. Case No. 14-31511, Dckt. 17. 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. 16-27603), 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 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 Objection to Discharge is sustained.
>
> **IT IS ORDERED** that, upon successful completion of the instant case, Case No. 16-27603, the case shall be closed without the entry of a discharge.

2. **16-24111-E-13** **ABBIGAIL CLYMER** **MOTION TO CONFIRM PLAN**
DRE-1 **D. Randall Ensminger** **12-5-16 [79]**

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 December 5, 2016. By the court's calculation, 52 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 January 5, 2017. Dckt. 94. The Trustee argues that Abbigail Clymer ("Debtor") cannot comply with the Plan under 11 U.S.C. § 1325(a)(4) for two reasons. First, the Trustee asserts that the adequate protection payment amount is too low. Debtor proposes adequate protection payments of $150.00 per month while a reverse mortgage application is process, but the Trustee calculates that the monthly amount should be $399.93 based on Bosco Credit LLC's ("Creditor") Claim 1-2 for $68,561.79 with an interest rate of 8.75%.

Second, the Trustee opposes confirmation because he is not aware of any reverse loan application in process. The Trustee has not received any documents relating to such a loan, and there are no relevant documents on the court's docket.

The Trustee's objections are well-taken. Debtor has not proposed an adequate protection payment amount that satisfies 11 U.S.C. § 1325(a)(4). Additionally, Debtor has not filed any pleadings

relating to a proposed motion to approve a reverse mortgage. 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.

3. **16-24111-E-13** **ABBIGAIL CLYMER** **CONTINUED MOTION FOR RELIEF**
NLG-1 **D. Randall Ensminger** **FROM AUTOMATIC STAY**
8-24-16 [25]

BOSCO CREDIT, LLC VS.

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

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

Below is the court's tentative ruling.

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

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditor Wells Fargo Bank, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties are entered.

The Motion for Relief from the Automatic Stay is granted.

Abbigail Clymer ("Debtor") filed the instant bankruptcy case on June 24, 2016. Dckt. 1. Bosco Credit LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6059 Kingwood Circle, Rocklin, California (the "Property"). Movant has provided the Declaration of Gina D'Elia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Gina D'Elia Declaration states that there are two (2) post-petition defaults in the payments on the obligation secured by the Property, with a total of $594.58 in post-petition payments past due. The Declaration also provides evidence that there are ninety-seven (97) pre-petition payments in default, with a pre-petition arrearage of $26,811.99. Dckt. 27.

Movant's Motion for Relief from Automatic Stay lists two (2) bankruptcy cases–including the current one–commenced by Debtor, since September 4, 2009, that affect Movant's interest in the Property. Those cases are:

A. Case No. 09-39133

1. Filed: September 4, 2009

2. Type: Chapter 7

3. Date of Discharge: December 9, 2009.

4. This case was reopened on March 28, 2016. Movant requested relief from the automatic stay, which was denied as moot. Debtor also requested the court to convert the case to a Chapter 13, which was denied, and the case was closed once again on July 21, 2016.

B. Case No. 16-24111

1. Filed: June 24, 2016

2. Type: Chapter 13

3. Instant Case

4. This case was filed while the prior bankruptcy action and Debtor's Motion to Convert the prior action were pending still.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a response on September 6, 2016. Dckt. 38. The Trustee states that Debtor is current on plan payments under the proposed plan filed on June 24, 2016 (Dckt. 5). The Trustee notes that no confirmed plan exists, and a proposed plan was denied confirmation on August 30, 2016 (Dckt. 34).

The Trustee supplies the following information:

A. Debtor has paid a total of $813.94 to date.

B. One disbursement of $300.00 has been made to Franklin Credit Management Corp., which represents two adequate protection payments of $150.00 for the months of July and August 2016.

DEBTOR'S OPPOSITION

Debtor filed opposition on September 7, 2016. Dckt. 44. Debtor asserts that she is currently in the process of seeking a loan modification of Movant's note and second deed of trust. Debtor believes the Chapter 13 plan will give her a "platform" from which to negotiate a restructuring with Movant over the note and second deed of trust ($68,887.35) and to protect the equity in her home ($81,312.65).

Debtor intends to file an amended plan with all necessary pages to replace the current plan that misses pages 3, 4, and 7.

Debtor states that she will continue to make plan payments of $406.97 per month, and $150.00 of that amount will be paid to Movant.

SEPTEMBER 20, 2016 HEARING

At the hearing, the court denied the requested relief from stay based on 11 U.S.C. § 362(d)(4), and the court continued the matter on the requested relief from stay under 11 U.S.C. § 362(d)(1) because Debtor stated that she was attempting to find a roommate to increase her income, which was why Debtor had not filed an amended plan reflecting her current finances. Dckt. 59.

OCTOBER 25, 2016 HEARING

At the hearing, the court continued the matter to 1:30 p.m. on December 6, 2016. Dckt. 70.

DECEMBER 6, 2016 HEARING

At the hearing, Debtor continued to profess an intention to diligently prosecute the sale of this Property. Additionally, Debtor asserts that she is diligently prosecuting a reverse mortgage that would pay Movant's claim. Creditor agreed to further continue the hearing for Debtor to try to get this Property marketed and sold. The court continued the matter to 3:00 p.m. on January 31, 2017. Dckt. 93.

TRUSTEE'S STATUS REPORT

The Trustee filed a Status Report on January 13, 2017. Dckt. 99. The Trustee reports that Debtor is current under the proposed plan, having paid a total of $2,441.82 (of which $900.00 has been disbursed to Creditor). The Trustee notes that he opposes Debtor's pending plan. *See* Dckt. 94.

DISCUSSION

At the November 16, 2016 hearing, the court continued the Chapter 13 Trustee's Motion to Dismiss to 10:00 a.m. on January 18, 2017. Dckt. 78. At that hearing on November 16, 2016, Debtor and Debtor's counsel assured the court that Debtor's plan is to sell her residence and protect what she computes to be $100,000.00 in equity.

However, a review of the Docket does not show any motion to approve the employment of a real estate broker or that Debtor is actively, in good faith, attempting to promptly sell the property.

Debtor filed an Amended Plan and corresponding Motion to Confirm on December 5, 2016. Dckts. 79 & 81. That plan's additional provisions call for Movant to receive adequate protection payments of $150.00 per month while Debtor seeks a reverse mortgage. The provisions call for a motion to approve the reverse mortgage to be filed with the court within fourteen days of its final approval, but before closing. If Debtor is denied the reverse mortgage, then the plan affords her seven days to sign a listing agreement with Granite Equities to list the Property for sale. If Debtor fails to list the Property for sale within seven days, though, then the Plan allows Creditor to file an ex parte motion for relief from the automatic stay.

A review of the docket shows that no motion to approve the terms of a reverse mortgage has been filed. Additionally, no motion to sell the Property has been filed.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $242,687.35 (including $68,887.35 secured by Movant's second deed of trust), as stated in Schedule D filed by Debtor. The value of the Property is determined to be $320,000.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay as cause under 11 U.S.C. § 361(d)(1).

While Debtor professes to be prosecuting a Chapter 13 Plan, there is no proposed plan before the court. Confirmation was originally delayed due to what appears to have been a clerical error when the plan was filed (pages missing from Plan filed).

However, it was made clear to Debtor as early as August 4, 2016, that the Plan filed with the court was defective. Trustee's Objection to Confirmation, Dckt. 17. In the more than one hundred seventy (1702) days that have passed since that time, no action has been taken by Debtor to file an amended plan and motion to confirm an amended plan. Rather, Debtor is living in the no-plan limbo. That is not consistent with prosecuting this case in good faith.

On Schedule I, Debtor states that her monthly gross income is $2,512.00. Dckt. 1 at 28. On Schedule J, excluding secured debt payment on her residence, Debtor states under penalty of perjury that her reasonable and necessary monthly expenses are $1,167.00. *Id.* at 30. No provision is made for property taxes or property insurance. No provision is made for any income taxes. Debtor purports to have monthly food and housekeeping supplies expenses of only $200.00 per month. Allowing $50.00 per month for household supplies, Debtor purports to pay only $1.66 per meal (assuming a 30 day month). This does not appear to be reasonable.

Additionally, Debtor lists no expenses for home maintenance, repair, or upkeep. This too appears unreasonable.

Debtor's real property is stated to have a value of $320,000.00. Schedules A/B and D, Dckt. 1. Wells Fargo Bank, N.A. is listed as having a claim in the amount of $169,000.00 and Movant is listed as

having a Claim in the amount of $70,000.00. By Debtor's calculation there is approximately a $90,000.00 equity cushion for both creditors.

Debtor purports to make $406.97 in monthly payments, of which $150.00 would be paid to Movant. There is no indication as to why or how this is a reasonable payment.

Wells Fargo Bank, N.A. has filed its proof of claim, stating a secured claim in the amount of $169,008.61. Proof of Claim No. 5. The monthly payment on this claim is stated to be $917.70. *Id.* Debtor has listed $938.00 on Schedule J as the payment for her home.

Movant has sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1). The court having denied the proposed amended plan, no motion to sell the Property having been presented to the court, and cause being shown by Movant, the Motion for Relief from the Automatic Stay is granted.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue an 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 Relief From the Automatic Stay filed by Bosco Credit LLC ("Movant") 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 automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow Bosco Credit LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 6059 Kingwood Circle, Rocklin, California.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause shown by Movant.
>
> No other or additional relief is granted.

4. **14-20512-E-13** **VIRAB/EVA ABRAMYAN** **MOTION FOR COMPENSATION FOR**
PGM-7 **Peter Macaluso** **PETER G. MACALUSO, DEBTORS' ATTORNEY**
12-30-16 [140]

Final Ruling: No appearance at the January 31, 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 30, 2016. By the court's calculation, 32 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 Motion for Allowance of Professional Fees is granted.

Peter Macaluso, the Attorney ("Applicant") for Virab Abramyan and Eva Abramyan, 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 August 11, 2015, through October 27, 2015. Applicant requests fees in the amount of $1,500.00.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 13, 2017. Dckt. 145. The Trustee states that he has no opposition. Client's confirmed plan proposes a total of $38,370.00 in plan payments and a one hundred percent dividend to the unsecured creditors, of which Client has paid a total of $20,870.00. The remaining disbursements to the unsecured creditor claims total $14,924.92 and the Trustee compensation totals $15,911.43. The Trustee asserts that there will not be sufficient monies to pay the $1,500.00 additional attorney fees without a slight increase in the plan payment or an additional payment by Client. The Trustee claims approximately $1,490.00 will be available as attorney fees.

STATUTORY BASIS FOR PROFESSIONAL FEES

Pursuant to 11 U.S.C. § 330(a)(3),

> In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–
>
> (A) the time spent on such services;
>
> (B) the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

> (i) unnecessary duplication of services; or
> (ii) services that were not—
> (I) reasonably likely to benefit the debtor's estate;
> (II) necessary to the administration of the case.

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

Benefit to the Estate

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

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

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

Id. at 959.

A review of the application shows that the services provided by Applicant related to the estate enforcing rights and obtaining benefits including reviewing Motion to Dismiss by the Trustee. Applicant also prepared and filed a Response to Motion to Dismiss, three Objections to Claim, and an Objection to Motion to Dismiss. 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 Applicant is allowed $4,000.00 in attorneys' fees, the maximum set fee amount under Local Bankruptcy Rule 2016-1 at the time of confirmation. Dckt. 82. Applicant prepared the order confirming the Plan.

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

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

FEES REQUESTED

Applicant has not provided a task billing analysis describing the categories of services provided, the time, and the charges for each such category.

The fees gross requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Peter Macaluso, attorney	6.45	$300.00	$1,935.00
Total Fees for Period of Application			$1,935.00

The Motion requests the reduced amount of $1,500.00 in fees be allowed.

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.

In another recent Motion filed by Applicant (the hearing for which was conducted after the present Motion was filed), the court addressed this issue and continued that hearing for Applicant to file supplemental pleadings.

In reviewing the present Motion, the court notes that the services relate to a motion to dismiss by the Chapter 13 Trustee and then objections to claims (presumably to address the grounds for the motion to dismiss). The Motion does not so state and does not state (generally or with particularity) why the services were necessary, reasonable, or unexpected. The Motion says little more than Applicant wants fees and the court should just sign an order approving such fees—merely because Applicant directs the court to do such.

In reading Applicant's declaration, it provides no information about what legal services were provided, why they were provided, why they are reasonable, why they were necessary, and why they were unexpected. Dckt. 142. It reads as if it is a generic declaration to be used, without regard to the case or the services provided. It does not appear to be testimony by the declarant, but a document prepared by an entry-level paralegal or non-lawyer staff member just to "have something filed."

Applicant and his office appear to have a fee application practice which they view as merely perfunctory, to be given fees using canned documents. The "Itemized Billing Statement" is merely a raw data printout of Applicant's billing in this case, not for the specific fees requested. The specific fees that should be at issue are placed among irrelevant data.

On its face, the court would be well warranted in denying the Motion. Such denial would be with prejudice, there being no fees allowed.

Though warranted, the court will give Applicant and his staff a final opportunity to correct these shortcomings. To the extent that this legal work has been shunted to paralegals and clerical staff because it does not "warrant the time of the attorney," then when the future motions are denied, Applicant will not be disappointed because the motions did not really "warrant the time and effort to be granted."

Though the court could deny to the person who prepared the Motion and declaration (who appears to be a non-lawyer employee) that these services were "substantial" and "unanticipated," Congress has not granted them with such authority.

In doing Applicant's work for him, the court notes that the Chapter 13 Trustee filed a motion to dismiss based on the plan term having to exceed 60 months due to the amount of claims filed. Dckt. 85. In response, Debtor filed three objections to claims. Dckts. 91, 96, 101. In the opposition to the motion to dismiss Debtor argued that objections to claims would be filed sufficient to address the grounds of the motion to dismiss. Dckt. 89. The court sustained the three objections to claims; Dckt. 133, 134, 135; and dismissed the motion to dismiss; Dckt. 136.

The fees requested are based on an hourly rate of $300.00 and for five hours of time which total $1,500.00. The actual time shown on the time sheet is 6.45 hours, with fees at a $300.00 hourly rate totaling $1,935.00. See raw time sheet data, Motion p. 6–7; Dckt. 143. In light of the pleadings and their sufficient

deficiencies, a $300.00 hourly rate is not appropriate. Rather, an hourly rate of $225 to $250 an hour is more than sufficient if an attorney actually prepared the pleadings, or $125 to $150 if prepared by a paralegal.

Guessing that it was an attorney and an hourly rate of $225, then five hours of time equals $1,125.00 as total reasonable fees. If the court were to conclude that these inadequate documents were put together by a non-lawyer paralegal or clerical person, then the total reasonable fees would be $625.00.

It does appear that Debtor and counsel needed to act to address the three proofs of claim. It is not clear that the claims and the required objections were "unanticipated." That level of work provided gratis to Applicant is not warranted. The court will "assume" that it was "unanticipated." The court will also "assume" that an attorney prepared the inadequate pleadings.

The court allows Applicant $1,125.00 in additional fees in this case, and authorizes the Chapter 13 Trustee to pay such fees 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 for Allowance of Professional Fees filed by Peter Macaluso ("Applicant"), Attorney for the Chapter 13 Debtor having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Allowance of Professional Fees is granted, and Peter Macaluso, counsel for Debtor, is allowed additional fees in the amount of $1,125.00, which the Chapter 13 Trustee is authorized to pay through the Chapter 13 Plan.

5. **16-24224-E-13 MMM-1** | **JONATHAN/MARITES SUSAS** **Mohammad Mokarram** | **MOTION TO CONFIRM PLAN** **12-20-16 [35]**

Final Ruling: No appearance at the January 31, 2017 hearing is required.

The case having previously been dismissed upon Debtor's qualifying request under 11 U.S.C. § 1307(b), the Motion is dismissed 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 Motion to Confirm Amended Plan having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

6. **16-28326-E-13** **RODRIGO/CECILIA JIMENEZ** **MOTION TO VALUE COLLATERAL OF**
DBJ-1 **Douglas Jacobs** **BANK OF AMERICA, N.A.**
12-22-16 [8]

Final Ruling: No appearance at the January 31, 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 22, 2016. By the court's calculation, 40 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 Bank of America N.A. ("Creditor") is granted, and Creditor's secured claim is determined to have a value of $0.00.

The Motion to Value filed by Rodrigo Jimenez and Cecelia Jimenez ("Debtor") to value the secured claim of Bank of America N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 303 Lassen Street, Orland, California ("Property"). Debtor seeks to value the Property at a fair market value of $99,000.00 as of the petition filing date. As the owner, 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 13, 2017. Dckt. 20.

The valuation of property that secures a claim is the first step, not the end result of this Motion brought pursuant to 11 U.S.C. § 506(a). The ultimate relief is the valuation of a specific creditor's secured claim.

11 U.S.C. § 506(a) instructs the court and parties in the methodology for determining the value of a secured claim.

> (a)(1) An **allowed claim of a creditor** secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (emphasis added). For the court to determine that creditor's secured claim (rights and interest in collateral), that creditor must be a party who has been served and is before the court. U.S. Constitution Article III, Sec. 2 (case or controversy requirement for the parties seeking relief from a federal court).

DISCUSSION

The Ditech first deed of trust secures a claim with a balance of approximately $119,000.00. Creditor's second deed of trust secures a claim with a balance of approximately $37,000.00. Therefore, Creditor's claim secured by a junior deed of trust is completely under-collateralized. Creditor's secured claim is determined to be in the amount of $0.00, and therefore no payments shall be made on the secured claim under the terms of any confirmed Plan. *See* 11 U.S.C. § 506(a); *Zimmer v. PSB Lending Corp. (In re Zimmer)*, 313 F.3d 1220 (9th Cir. 2002); *Lam v. Investors Thrift (In re Lam)*, 211 B.R. 36 (B.A.P. 9th Cir. 1997). 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 to Value Secured Claim filed by Rodrigo Jimenez and Cecelia Jimenez ("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. secured by a second in priority deed of trust recorded against the real property commonly known as 303 Lassen Street, Orland, California, is determined to be a secured claim in the amount of $0.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Property is $99,000.00 and is

encumbered by a senior lien securing a claim in the amount of $119,000.00, which exceeds the value of the Property that is subject to Creditor's lien.

7.	**15-28741-E-13**	**PAMELA MCGAUGHY**	**MOTION TO MODIFY PLAN**
	TLA-1	**Thomas Amberg**	**12-23-16 [45]**

Final Ruling: No appearance at the January 31, 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, and Office of the United States Trustee on December 23, 2016. By the court's calculation, 39 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 13, 2017. Dckt. 55. 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 23, 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.

8. **16-26043-E-13 TAG-3** | **SUSAN GEDNEY** **Aubrey Jacobsen** | **MOTION TO CONFIRM PLAN** **12-13-16 [47]**

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

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

Correct Notice Not Provided. The Proofs of Service state that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, some creditors, and Office of the United States Trustee on December 13, 2016, 49 days' notice. Two more creditors were served on December 16, 2016 (one of whom was served at another address on January 4, 2017), 46 days' notice. 42 days' notice is required. Nevertheless, Debtor has not served the Internal Revenue Service in conformity with Local Bankruptcy Rule 2002-1(b) & (c); Debtor has not served Direct TV and City of San Bernardino despite listing them on her schedules; and Debtor has not served Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, despite having requested special notice in this case.

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

Debtor filed three proofs of service in this case, but they do not indicate the full proper service has been provided in this case. Debtor has not served the Internal Revenue Service in conformity with Local Bankruptcy Rule 2002-1(b) & (c); Debtor has not served Direct TV and City of San Bernardino despite

listing them on her schedules; and Debtor has not served Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, despite having requested special notice in this case. Accordingly the Motion is denied without prejudice.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Confirm the Amended Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion to Confirm the Amended Plan is denied without prejudice, and the proposed Chapter 13 Plan is not confirmed.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR PROVIDES PROPER NOTICE TO ALL REQUIRED PARTIES

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 13, 2017. Dckt. 62. First, the Trustee objects that the Motion was not set on proper 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. The Trustee notes that three proofs of service were filed respectively on the following dates: December 13, 2016; December 16, 2016; and January 4, 2017.

The December 13, 2016 proof of service shows service on the Chapter 13 Trustee, U.S. Trustee, and most creditors. The December 16, 2016 proof of service indicates that service was provided to creditors added to Amended Schedules. *See* Dckt. 51. The January 4, 2017 proof of service adds counsel for the mortgage and a creditor with a different address.

Additionally, there are two master mailing lists in this case. One was filed on September 9, 2016, and lists three creditors (AT&T, Carrington, and FTB). Dckt. 4. The other list was filed on September 23, 2016, and lists six creditors (AT&T, Carrington, City of San Bernardino, Direct TV, FTB, and IRS).

When Debtor filed Amended Schedules on December 13, 2016, she added Gabriel Witkins and Sarah Wright, each of Keller Williams Realty, but those parties have not been added to the master list. Also, EDD filed a proof of claim (No. 2), but it is not listed on Debtor's Schedules or the master mailing list.

Procedurally, the Trustee also objects that not all creditors have been served with notice of this Motion. Even though listed on the master mailing list and Schedule G, neither Direct TV nor City of San Bernardino have been served. The Franchise Tax Board, Internal Revenue Service, and Employment Development Department have not been served as required by Federal Rule of Bankruptcy Procedure 2002(b) either.

The Trustee's second main ground for opposing confirmation is that the proposed plan does not indicate what month the Trustee is to begin making adequate protection payments to Class 1. The first three proposed payments of $460.00 are insufficient to pay even the monthly contract installment on the Class 1 claim. Thus, the Plan is not feasible. 11 U.S.C. § 1325(a)(6).

The Trustee's third ground is that the proposed plan is not Debtor's best efforts under 11 U.S.C. § 1325(b) because the plan does not appear to provide all of Debtor's projected disposable income. The Trustee notes that Debtor is above median income.

This case was filed on September 9, 2016, and by November 23, 2016, Debtor had made two payments of $460.00. If Debtor has fifty-eight months remaining (including January), then the plan term is sixty-one months. The proposed plan does not call for a payment in December 2016, and neither the plan nor the Motion indicate why Debtor is not required to make a December 2016 plan payment. Debtor's disposable income is reported to be $1,960.54. Schedule J, Dckt. 51. The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d).

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

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

The Plan proposes to pay a zero percent dividend to unsecured claims, which total $4,419.00, though the Debtor's projected disposable income under 11 U.S.C. § 1325(b)(2) totals $1,960.54. Thus, the court may not approve the Plan.

The Trustee notes that on Schedule I, Debtor reports tax withholding of $2,973.25, but his review of her paystubs reveals that the withholding is approximately $1,905.00. Debtor's net disposable income could be up to $1,000.00 more than listed.

Debtor's paystubs include a deduction for "advance repay" of $285.20 per pay period, or $617.94 per month. That deduction is not listed on Schedule I, and the Trustee is uncertain about the details of the apparent loan, especially because Debtor fails to propose any increase in plan payments upon payoff of the loan.

The Trustee objects to Debtor's living expenses listed on Schedule J. Debtor, in a family of one, deducts $890.00 for food and housekeeping supplies, $100.00 for clothing and laundry, $100.00 for personal care products and services for a total of $1,090.00. The IRS National Standards for Allowable Living Expenses for one person for food, clothing, and other items totals $570.00. The Trustee notes that Debtor has not provided any explanation why she needs expense allowances in excess of the national standards.

Finally, the Trustee requests that future tax refunds be paid into the plan. On Schedule I, Debtor lists withholding 35% of her income for tax deductions, which the Trustee again notes is excessive when compared to current paystubs. Therefore, the Trustee requests that Debtor be required to pay in all future tax refunds as additional payments to the plan.

Debtor has not noticed all parties as required by Federal Rule of Bankruptcy Procedure 2002(b), has not proposed plan payments that are adequate to pay Class 1, has proposed a plan that exceeds sixty months, and has listed various questionable amounts (e.g., tax withholdings, employer loan repayment, family of one expenses) on her schedules that indicate the proposed plan is not Debtor's best efforts. 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.

9. **16-26043-E-13** **SUSAN GEDNEY**
PPR-1 **Aubrey Jacobsen**

OBJECTION TO CONFIRMATION OF PLAN BY DEUTSCHE BANK NATIONAL TRUST COMPANY
1-17-17 [66]

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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 13 Trustee on January 17, 2017. By the court's calculation, 14 days' notice was provided to those parties. 14 days' notice is required. The Office of the United States Trustee has not been served.

The Objection to Confirmation of Plan was not 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 without prejudice.

INSUFFICIENT NOTICE PROVIDED

Creditor has not served the Office of the United States Trustee. Federal Rule of Bankruptcy Procedure 9034(i) states the following:

> Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, **any entity that files** a pleading, motion, **objection**, or similar paper relating **to any of the following matters shall transmit a copy thereof to the United States trustee** within the time required by these rules for service of the paper:
>
> (i) the **confirmation of a plan**; . . .

Fed. R. Bankr. P. 9034(i) (emphasis added).

The Office of the United States Trustee having not been filed, the Objection is overruled 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 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 overruled without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF CREDITOR PROVIDES PROPER NOTICE TO THE OFFICE OF THE UNITED STATES TRUSTEE

Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust Series 2005-FRE1 Asset Backed Pass-Through Certificates, Creditor with a secured claim, opposes confirmation of the Plan on the basis that:

A. The Plan is not feasible under 11 U.S.C. § 1325(a)(6) because it calls for curing Creditor's claim with a speculative sale of property at an unidentified time in the future, and

B. The Plan does not provide ongoing post-petition payments to Creditor.

The Creditor's objections are well-taken. 11 U.S.C. § 1325(a)(6) requires that a debtor be able to make all plan payments or comply with the plan. Creditor argues that such ability and compliance is not possible because the Plan calls for selling Debtor's residence that secures Creditor's claim by means of a short sale. The court notes that the Plan actually lists the debt on Debtor's property as owing to Carrington Mortgage Services as a loan servicer.

Creditor cites to *In re Gavia* for the proposition that paying all creditors with any equity from the liquidation of a debtor's residence is not a confirmable plan term because "there is no certainty that any piece of real property can be sold in the foreseeable future with any degree of certainty in a specified period of time for a sum great enough to cover notes and deeds of trust upon the property, taxes, insurance and costs." *In re Gavia*, 24 B.R. 216, 218 (Bankr. E.D. Cal. 1982), *aff'd*, 24 B.R. 573 (B.A.P. 9th Cir. 1982). The court said additionally that "curing of a default might be allowed if done within a reasonable time and **while making ongoing payments**." *Id.*

Creditor also opposes confirmation of the Plan because it does not provide ongoing post-petition payments to Creditor. Creditor filed Proof of Claim 3-1 on January 18, 2017, listing a debt secured in the amount of $496,546.69 with $121,553.52 owed in arrears. The Plan specifically says in Additional Provision 3(a), however, that the "debt owed to Carrington [or Creditor] has been listed in the Plan as a Class 1 debt . . . with ongoing monthly payments provided for until the sale of the house is completed as adequate protection of the lender's interest." Dckt. 52. Creditor has failed to demonstrate how it is not provided for through ongoing payments.

Creditor also offers a speculative objection. If Debtor intends to keep her property for more than one year, then Creditor opposes the Plan as it does not provide for full payment of pre-petition arrears under 11 U.S.C. § 1322(b)(5). The Plan states in Additional Provision 3(a) that it "does not provide for payments on the mortgage arrears." Dckt. 52. A timeframe is not stated specifically in the Plan, though. The court notes that Debtor has filed an adversary proceeding against two former real estate brokers and under the Plan has proposed hiring a third realtor on 3.5% commission to sell the property within a year.

If the sale of property does not occur within one year, then the Plan states that Creditor's claim shall be moved to Class 3. Creditor does not discuss any opposition to that plan term specifically, but Creditor does oppose there being nothing in the Plan to prevent Debtor from converting to Chapter 7 if the sale does not occur. 11 U.S.C. § 1307(a) states:

> The debtor may covert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

Any effort on Creditor's part to prevent a conversion to Chapter 7 would not be successful because the Code authorizes such a conversion at any time under Chapter 13.

Creditor has demonstrated through supported caselaw that Debtor's proposal to cure the debt owed to Creditor by means of a short sale at an unspecified time in the future is an unconfirmable plan term.

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.

10.	**11-46069-E-13 PLC-3**	**CHRISTOPHER/SARAH ANDREWS Peter Cianchetta**	**MOTION TO SUBSTITUTE PARTY 12-27-16 [66]**

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 December 27, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

The Motion to Substitute 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 Substitute is xxxxx.

Joint Debtor, Chris Andrews, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Sarah Andrews. This motion is being filed pursuant to Federal Rules of Bankruptcy Procedure 1016 and 7025.

The Debtor filed for relief under Chapter 13 on November 1, 2011. On May 3, 2013, the Debtor's Chapter 13 Plan was confirmed. Dckt. 57. On March 1, 2016, Debtor Sarah Andrews passed away. The Joint Debtor asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rules of Bankruptcy Procedure 1016 and 7025, the Joint Debtor requests authorization to be substituted in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing his own obligations and duties. A Notice of Death was filed with the Motion on December 27, 2016. Dckt. 66. Joint Debtor is the husband of the deceased party and is the successor's heir and lawful representative. *See* Dckt. 68.

TRUSTEE'S RESPONSE

David Cusick, the Chapter 13 Trustee, filed a Response on January 11, 2017. Dckt. 73. The Trustee reports that the case completed on November 19, 2016, but his Final Report and Account has not been filed yet.

The Trustee is not certain if any life insurance was received. No life insurance was listed on Schedules B and C, and there is no life insurance expense on Schedules I and J. The Trustee reports being told through a phone call on December 19, 2016, that there was no life insurance.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event a debtor passes away in a case "pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Consideration of dismissal and its alternatives requires notice and opportunity for a hearing. *Hawkins v. Eads*, 135 B.R. 380, 383 (Bankr. E.D. Cal. 1991). As a result, a party must take action when a debtor in Chapter 13 dies. *Id*.

Federal Rule of Bankruptcy Procedure 7025 incorporates Federal Rule of Civil Procedure 25, which provides that "[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed." *Hawkins v. Eads*, 135 B.R. at 384.

The application of Rule 25 and Rule 7025 is discussed in COLLIER ON BANKRUPTCY, 16th Edition, § 7025.02, which states:

> Subdivision (a) of Rule 25 of the Federal Rules of Civil Procedure deals with the situation of death of one of the parties. If a party dies and the claim is not extinguished, then the court may order substitution. **A motion for substitution may be made by a party to the action or by the successors or representatives of the deceased party.** There is no time limitation for making the motion for substitution originally. Such time limitation is keyed into the period following the time when the fact of death is suggested on the record. In other words, procedurally, **a statement of the fact of death is to be served on the parties in accordance with Bankruptcy Rule 7004 and upon nonparties as provided in Bankruptcy Rule 7005** and suggested on the record. The suggestion of death may be filed only by a party or the representative of such a party. The suggestion of death should substantially conform to Form 30, contained in the Appendix of Forms to the Federal Rules of Civil Procedure.
>
> The motion for substitution must be made not later than 90 days following the service of the suggestion of death. Until the suggestion is served and filed, the 90 day period

> does not begin to run. In the absence of making the motion for substitution within that 90 day period, paragraph (1) of subdivision (a) requires the action to be dismissed as to the deceased party. However, the 90 day period is subject to enlargement by the court pursuant to the provisions of Bankruptcy Rule 9006(b). Bankruptcy Rule 9006(b) does not incorporate by reference Civil Rule 6(b) but rather speaks in terms of the bankruptcy rules and the bankruptcy case context. Since Rule 7025 is not one of the rules which is excepted from the provisions of Rule 9006(b), the court has discretion to enlarge the time which is set forth in Rule 25(a)(1) and which is incorporated in adversary proceedings by Bankruptcy Rule 7025. Under the terms of Rule 9006(b), a motion made after the 90 day period must be denied unless the movant can show that the failure to move within that time was the result of excusable neglect. The suggestion of the fact of death, while it begins the 90 day period running, is not a prerequisite to the filing of a motion for substitution. The motion for substitution can be made by a party or by a successor at any time before the statement of fact of death is suggested on the record. **However, the court may not act upon the motion until a suggestion of death is actually served and filed.**
>
> The **motion for substitution together with notice of the hearing is to be served on the parties in accordance with Bankruptcy Rule 7005 and upon persons not parties in accordance with Bankruptcy Rule 7004 . . . .**

(emphasis added); *see also Hawkins v. Eads*, *supra*. While the death of a debtor in a Chapter 13 case does not automatically abate due to the death of a debtor, the court must make a determination of whether "[f]urther administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred." Fed. R. Bank. P. 1016. The court cannot make this adjudication until it has a substituted real party in interest for the deceased debtor.

Local Bankruptcy Rule 5009-1(b) requires the filing with the court of Form EDC3-190 Debtor's 11 U.S.C. § 1328 Certificate. Local Bankr. R. 1016-1 permits a movant, in a single motion, to request for the substitution for a representative, the authority to continue the administration of a case, and waiver of post-petition education requirement for entry of discharge. The court notes that 11 U.S.C. § 1328 Certificates for the Joint Debtors have been filed on the docket. *See* Dckts. 71 & 72.

At the hearing, Chris Andrews testified that ~~**life insurance does/does not exist and that proceeds have/have not been received**~~. The court confirms that no interest in a life insurance policy has been disclosed on Schedules B, C, I, and J.

Joint Debtor has provided sufficient evidence to show that administration of the Chapter 13 case (completed on November 19, 2016) is possible and in the best interest of creditors after the passing of the debtor. The Motion was filed within the 90 day period specified in Federal Rule of Bankruptcy Procedure 1016, following the filing of the Suggestion of Death. Dckt. 66. Based on the evidence provided, the court determines that further administration of this Chapter 13 case is in the best interests of all parties, and that Joint Debtor, Chris Andrews, as the husband of the deceased party and as the successor's heir and lawful

representative, may continue to administer the case on behalf of the deceased debtor, Sarah Andrews. The court grants the Motion to Substitute Party.

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 Substitute After Death filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and Chris Andrews ~~**is/is not**~~ substituted as the successor-in-interest to Sarah Andrews ~~**and is allowed to continue the administration of this Chapter 13 case pursuant to Federal Rule of Bankruptcy Procedure 1016.**~~

11. **11-48177-E-13** **JOYCE LEE**
SNM-1 **Stephen Murphy**

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

APPEARANCE OF JOYCE LEE AND CHARLITA ANDERSON REQUIRED AT THE HEARING

NO TELEPHONIC APPEARANCES PERMITTED

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—No Opposition Filed.

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

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

The Motion to Withdraw as Attorney is xxxxx.

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

1. The Motion is brought pursuant to Local Bankruptcy Rule 2017-1(e) and California Rule of Professional Conduct 3-700(C)(1).

2. Counsel cannot effectively represent Debtor due to inconsistency of and lack of communication.

3. Counsel communicated extensively with Debtor's daughter, Charlita Anderson, and attended one hearing. Working with Ms. Anderson, Counsel made critical determinations about the arrears due on the Chapter 13 Plan and arrears due on Wells Fargo's mortgage loan secured by Debtor's residence, which is to be cured and reinstated by the Plan.

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

JANUARY 10, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on January 31, 2017. Dckt. 89. The court ordered Joyce Yvonne Lee, the Debtor, and Charlita Anderson, who has been identified as Debtor's daughter, and each of them, to appear at the continued hearing in person, no telephonic appearances permitted. They were ordered to address the failure to communicate with counsel, whether a personal representative for Debtor (Fed. R. Civ. P. 25) is necessary, and why Debtor should not complete this case and obtain a discharge.

APPLICABLE LAW

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

Withdrawal is only proper if the client's interest will not be unduly prejudiced or delayed. The court may consider the following factors to determine if withdrawal is appropriate: (1) the reasons why the withdrawal is sought; (2) the prejudice withdrawal may cause to other litigants; (3) the harm withdrawal might cause to the administration of justice; and (4) the degree to which withdrawal will delay the resolution of the case. *Williams v. Troehler*, 2010 U.S. Dist. LEXIS 69757 (E.D. Cal. 2010). FN.1.

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

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

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

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

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

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

(1) The client

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

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

DISCUSSION

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

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

Dckt. 81.

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

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

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

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

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

At the hearing, Debtor reported xxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Withdraw as Attorney filed by Debtor's Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Withdraw as Attorney is xxxx.

12. **11-48177-E-13** **JOYCE LEE** **CONTINUED MOTION TO DISMISS CASE**
DPC-4 **Stephen Murphy** **12-21-16 [83]**

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—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 21, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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 Dismiss is granted, and the case is dismissed.

Debtor is in material default under the Plan because the Plan will complete in more than the permitted sixty months. According to the Trustee, December 2016 was the sixtieth month, but the Plan is not complete due to Debtor not adjusting the plan payment under § 2.08(b)(4)(I).

JANUARY 18, 2017 HEARING

At the hearing, the court continued the matter to 3:00 p.m. on January 31, 2017. Dckt. 91.

RULING

The Plan exceeds the maximum sixty months allowed under 11 U.S.C. § 1322(d). Cause exists to dismiss this case. The Motion is granted, and the case is dismissed.

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

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

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

IT IS ORDERED that the Motion to Dismiss is granted, and the case is dismissed.

13. 16-26686-E-13 AMJ-3 | **BENJAMIN SANTOS** **Alberto Montefalcon** | **MOTION TO CONFIRM PLAN 12-1-16 [33]**

Tentative Ruling: No appearance at the January 31, 2017 hearing is required.

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

Correct Notice Not Provided. An incomplete Proof of Service was filed on December 2, 2016. Dckt. 35.

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 denied without prejudice.

INCOMPLETE PROOF OF SERVICE FILED

A review of the docket shows that an incomplete Proof of Service for the Motion has been filed. Dckt. 35. Debtor has failed to list any served parties in the Proof of Service. Therefore, Debtor having failed to serve all necessary parties, 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 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 denied without prejudice.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF DEBTOR FILES A COMPLETE PROOF OF SERVICE.

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 December 6, 2016. 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 1, 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.

14.	**12-36688-E-13** **HLG-4**	**DONALD TO AND KAREN CAO** **Kristy Hernandez**	**OBJECTION TO CLAIM OF THE BANK OF NEW YORK MELLON, CLAIM NUMBER 14** **1-16-17 [156]**

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—No Opposition Filed.

Correct Notice Not Provided. The Proof of Service states that the Objection to Claim and supporting pleadings were served on Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 17, 2017. By the court's calculation, 14 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 not been properly 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). 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 Proof of Claim Number 14-1 of The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4 is overruled without prejudice.

Donald To and Karen Cao, the Chapter 13 Debtor, ("Objector") requests that the court disallow $54,072.98 in pre-petition arrears from the claim of The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4 ("Creditor"), Proof of Claim No. 14-1 ("Claim"), Official Registry of Claims in this case. The Claim is asserted to be secured in the amount of $380,969.06. Objector asserts that the pre-petition arrears should not be allowed because Nationstar Mortgage, LLC ("Nationstar") approved Objector for a home loan modification that cures the pre-petition arrears.

INSUFFICIENT NOTICE PROVIDED

Objector filed this Objection according to Local Bankruptcy Rule 9014-1(f)(1). That Rule and Federal Rule of Bankruptcy Procedure 3007(a) require a total of forty-four days' notice to be provided for the Objection. Objector provided fourteen days' notice, which is insufficient. Accordingly, the Objection is overruled without prejudice.

On January 24, 2017, the court granted Debtor's Motion to Approve a Loan Modification, which cures the arrearages in dispute and makes them part of the reamoritzed principal in the restructured loan. The court also granted Debtor's Motion to Confirm Chapter 13 Plan, which is based on the approved loan modification.

The court overrules the Objection to Claim without prejudice, the issues having been addressed by the loan modification and the confirmed 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 Objection to Claim of The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4, Creditor filed in this case by Donald To and Karen Cao, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 14-1 of The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4 ("Creditor") is overruled without prejudice. The court has approved a loan modification that restructures the debt that is the subject of the Proof of Claim and confirmed a Chapter 13 Plan that provides for payments consistent with Creditor's claim as modified.

THE COURT HAS PREPARED THE FOLLOWING ALTERNATIVE RULING IF OBJECTOR PROVIDES SUFFICIENT NOTICE TO THE NECESSARY PARTIES

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).

Objector asserts that Nationstar approved a loan modification that cures the pre-petition arrears listed with Claim No. 14-1. The court notes that the Claim was transferred from Creditor to Nationstar on January 14, 2014. Dckt. 92.

As to the asserted loan modification, Objector proposed a Motion for Approval of Loan Modification, which was granted on January 24, 2017. The court's minutes from that hearing note that the loan modification capitalizes the pre-petition arrears owed to Nationstar. *Id.*

By approval of the loan modification that capitalized pre-petition arrears, there are no longer pre-petition arrears in the amount of $54,072.98 to be paid to Nationstar on the Claim. Based on the evidence before the court, Creditor's claim is disallowed as to $54,072.98 claimed in pre-petition arrears. 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 The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4, Creditor filed in this case by Donald To and Karen Cao, the Chapter 13 Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Objection to Proof of Claim Number 14-1 of The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWABS, Inc., Asset-Backed Certificates, Series 2003-4 ("Creditor") is overruled without prejudice. The court has approved a loan modification that restructures the debt that is the subject of the Proof of Claim and confirmed a Chapter 13 Plan that provides for payments consistent with Creditor's claim as modified.