

UNITED STATES BANKRUPTCY COURT

Eastern District of California

**Honorable Ronald H. Sargis**

Chief Bankruptcy Judge

Sacramento, California

February 9, 2016 at 3:00 p.m.

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1. [15-29002](#)-E-13 ROBERT CLIFF OBJECTION TO CONFIRMATION OF  
BRL-1 Benjamin Levinson PLAN BY PENSICO TRUST COMPANY  
12-29-15 [[20](#)]

**Final Ruling:** No appearance at the February 9, 2016 hearing is required.  
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on December 29, 2015. By the court's calculation, 42 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

**The court's decision is to sustain the Objection.**

Pensico Trust Company, the Creditor, opposes confirmation of the Plan on the basis that the Debtor's plan understates the arrearage due to the Creditor and the arrearage due in property taxes.

On January 20, 2016, the Debtor filed an amended plan and accompanying Motion to Confirm Amended Plan. Dckts. 33 and 36. The hearing on the Motion is set for March 15, 2016 at 3:00 p.m.

The Creditor's objections are well-taken. Additionally, the Debtor filing a new plan acts as a de facto withdrawal of the original plan filed on August 4, 2015. Therefore, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the December 3, 2015 Plan is not confirmed.

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

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

The Objection to the Chapter 13 Plan filed by the

February 9, 2016 at 3:00 p.m.



David P. Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the plan fails liquidation analysis because the Debtor has non-exempt assets totaling \$7,850.00 and Debtor proposes to pay 0% to unsecured creditors.

On January 20, 2016, the Debtor filed an amended plan and accompanying Motion to Confirm Amended Plan. Dckts. 33 and 36. The hearing on the Motion is set for March 15, 2016 at 3:00 p.m.

The Trustee's objections are well-taken. Additionally, the Debtor filing a new plan acts as a de facto withdrawal of the original plan filed on August 4, 2015. Therefore, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the December 3, 2015 Plan is not confirmed.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan filed on December 3, 2015 is not confirmed.

3. [15-21707-E-13](#) JUDITH LAYUGAN  
TLA-1 Thomas Amberg

MOTION TO VACATE DISMISSAL OF  
CASE  
1-26-16 [[112](#)]

**Tentative Ruling:** The Motion to Vacate Dismissal was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**  
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on January 26, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Vacate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
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**The Motion to Vacate is granted and the order dismissing the case (Dckt. 107) is vacated.**

Judith Layugan ("Debtor") filed the instant Motion to Vacate Dismissal on January 26, 2016. Dckt. 112.

The instant case was filed on March 3, 2015. Dckt. 1. The Debtor states at the time, she was represented by Richard Strudevant III. A modified plan was confirmed on October 20, 2015, and an order confirming the plan was entered on

November 9, 2015. Dckt. 98 and 100.

On December 10, 2015, the Chapter 13 Trustee filed a Motion to Dismiss the Case due to Debtor's delinquency in plan payments in the amount of \$3,546.96. Dckt. 101.

The Debtor asserts that, prior to the Motion, there was a breakdown in communication between the Debtor and her prior counsel as how to address with attempts to short sell Debtor's real property as well as attempting to secure a loan modification. The Debtor admits that she was having difficulty making plan payments.

The Debtor states that the Debtor became current under the plan on January 19, 2016 according to the Trustee's records. However, the Debtor does admit that no response was filed by Debtor's prior counsel.

In light of the lack of response, the Motion to Dismiss was granted on January 20, 2016 as a final ruling pursuant to Local Bankr. R. 9014-1(f)(1). Dckt. 105 and 107.

On January 22, 2016, the Debtor filed a Substitution of Attorney, seeking to substitute Thomas Amberg in as the Debtor's counsel. Dckt. 109. The court granted the order substituting counsel on January 24, 2016. Dckt. 111.

The Debtor seeks to have the order dismissing the case vacated on the following grounds:

1. To file a Motion to approve the short sale of the La Riviera property.
2. To file a Motion to approve the loan modification Debtor has been working on with her lender.
3. To file a Motion to modify the plan to correctly re-categorize and address the short sale and loan modification.

#### **TRUSTEE'S NON-OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed a non-opposition on January 28, 2016. Dckt. 118. The Trustee states that the Debtor brought her case current by a payment of \$3,547.00 posted by the Trustee on January 19, 2015, the day before the hearing on the Motion to Dismiss and the day after the legal holiday on January 18, 2016.

The Trustee states that, based on the Debtor's response regarding a communication breakdown with the Debtor's prior counsel and the Debtor having brought the plan payments current before the hearing, the Trustee do not oppose the instant Motion.

#### **APPLICABLE LAW**

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default" *Falk*, 739 F.2d at 463.

## DISCUSSION

The crux of the Debtor's argument is that due to the Debtor's breakdown in communication with prior counsel and the fact she has substituted in new counsel and has pending plans as to how to proceed in the case, the dismissal should be vacated.

As an initial policy matter, the finality of judgments is an important legal and social interest. The standard for determining whether a 60(b)(1) motion is filed within a reasonable time is a case-by-case analysis. The analysis considers "the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties." *Gravatt v. Paul Revere Life Ins. Co.*, 101 Fed.

Appx. 194, 196-197 (9th Cir. 2004); *Sallie Mae Servicing, LP v. Williams (In re Williams)*, 287 B.R. 787, 792 (B.A.P. 9th Cir. 2002).

The sole ground for the Motion to Dismiss was the Debtor's delinquency. As a Local Bankr. R. 9014-1(f)(1) motion, the Debtor and Debtor's counsel were required to oppose the Motion in writing 14-days prior to the hearing. However, the Debtor nor Debtor's counsel failed to file a response stating that the Debtor has brought the plan payments current nor appeared at the hearing, as evidenced by the court's civil minutes on the Motion. Dckt. 105. The court, the day prior to the hearing, the court posted its pre-hearing tentative decisions, in which the Debtor and Debtor's counsel had the opportunity to review. Even in light of all the notice provided concerning the Motion to Dismiss, the Debtor did not respond nor did the Debtor or Debtor's counsel appear at the hearing.

The court has made it abundantly clear in the past that it is imperative for parties to respond to motions, especially motions to dismiss, either through written opposition if an Local Bankr. R. 9014-1(f)(1) motion or in person if an Local Bankr. R. 9014-1(f)(2) motion.

However, even in light of these concerns, the Debtor has presented a legitimate and legally basis for the court to consider the instant Motion. As stated by the Debtor and confirmed by the Trustee, the Debtor was able to bring her plan current prior to the hearing. While the Debtor should not have relied on the Trustee to present her opposition for her, the breakdown in communication in conjunction with the Debtor seeking new counsel provides justification under Fed. R. Civ. P. 60(b)(1) for excusable neglect.

Additionally, the Debtor would be prejudiced by the dismissal standing because the Debtor has made over \$21,000.00 into plan payments already which would essentially be vitiated if the dismissal stood. The Debtor would have to start from square one if the Motion is not granted. The Debtor has acted quickly in finding new counsel and filing the instant Motion to Vacate. The Debtor quickly brought her plan current. The Debtor has also presented a colorable "plan of attack" for her bankruptcy case and testifies that she intends to prosecute the case in good faith.

Therefore, in light of the foregoing, the Motion is granted and the order dismissing the case (Dckt. 107) is vacated.

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 Vacate Dismissal of Case 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 the order dismissing the case (Dckt. 107) is vacated.

4. 16-20219-E-13 MAUREEN CLINE  
SDH-1 Scott Hughes

MOTION TO EXTEND AUTOMATIC STAY  
1-19-16 [9]

**Tentative Ruling:** The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

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 January 20, 2016. By the court's calculation, 20 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

**The Motion to Extend the Automatic Stay is granted.**

Maureen Cline ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-22781) was dismissed on November 9, 2015, after Debtor failed to make plan payments. See Order, Bankr. E.D. Cal. No. 15-22781-C-13C, Dckt. 27, November 9, 2015. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The

subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors – including those used to determine good faith under §§ 1307(c) and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

*Elliot-Cook*, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and claims a change in employment, the addition of rental income, reduction of commuting expenses and adjustment of her plan will allow her to make monthly payments. Debtor provides an explanation for why the previous case was dismissed for missing payments, stating that the change in employment caused her to temporarily lose income resulting in missing payments. Additionally, Debtor notes that she made payments for six months before missing one.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

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

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

5. [16-20335-E-13](#) ROBERT/BELINDA BOUGHTON MOTION TO EXTEND AUTOMATIC STAY  
TLA-1 Thomas Amberg 1-26-16 [[10](#)]

**Tentative Ruling:** The Motion to Extend Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

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 January 26, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Extend the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

**The Motion to Extend the Automatic Stay is granted.**

Robert and Belinda Boughton, ("Debtor") seeks to have the provisions of the automatic stay provided by 11 U.S.C. § 362(c) extended beyond 30 days in this case. This is the Debtor's second bankruptcy petition pending in the past year. The Debtor's prior bankruptcy case (No. 15-22957-B-13) was dismissed on January 21, 2016, after Debtor filed Motion to Dismiss. See Order, Bankr. E.D. Cal. No. 15-22957-B-13, Dckt. 76, January 21, 2016. Therefore, pursuant to 11 U.S.C. § 362(c)(3)(A), the provisions of the automatic stay end as to the Debtor thirty days after filing of the petition.

Upon motion of a party in interest and after notice and hearing, the court may order the provisions extended beyond thirty days if the filing of the

subsequent petition was filed in good faith. 11 U.S.C. § 362(c)(3)(B). The subsequently filed case is presumed to be filed in bad faith if the Debtor failed to perform under the terms of a confirmed plan. *Id.* at § 362(c)(3)(C)(i)(II)(cc). The presumption of bad faith may be rebutted by clear and convincing evidence. *Id.* at § 362(c)(3)(C).

In determining if good faith exists, the court considers the totality of the circumstances. *In re Elliot-Cook*, 357 B.R. 811, 814 (Bankr. N.D. Cal. 2006); see also Laura B. Bartell, *Staying the Serial Filer - Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 Am. Bankr. L.J. 201, 209-210 (2008). Courts consider many factors – including those used to determine good faith under §§ 1307(c) and 1325(a) – but the two basic issues to determine good faith under § 362(c)(3) are:

1. Why was the previous plan filed?
2. What has changed so that the present plan is likely to succeed?

*Elliot-Cook*, 357 B.R. at 814-815.

Here, Debtor states that the instant case was filed in good faith and provides an explanation for why the previous case was dismissed. Debtor's previous case was not filed jointly with his Co-Debtor. It became evident that filing jointly would be in the best interest of the parties. Debtor then filed a Motion for Dismissal and upon that Motion being granted, immediately re-filed jointly with his Co-Debtor.

The Debtor has sufficiently rebutted the presumption of bad faith under the facts of this case and the prior case for the court to extend the automatic stay.

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

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

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

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

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



confirmed.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan filed on December 4, 2015 is not confirmed.

8. [15-21839-E-13](#) ROBERT REED AND MARIA MOTION TO CONFIRM PLAN  
PGM-3 BARTLOW-REED 12-29-15 [[91](#)]  
Peter Macaluso

**Final Ruling:** No appearance at the February 9, 2016 hearing is required.  
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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 Debtors, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on December 29, 2015. By the court's calculation, 42 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Confirm the Amended Plan is granted.**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. 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 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 Chapter 13 Plan filed on December 29, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order



amount of money which is purported to be owed counsel's client. The attorney merely argues that some note was signed in 2005. If attorneys' client was actually a creditor, the court expects that a proof of claim would be filed or that at least an employee or officer of the purported client provide a simple declaration so testifying. None exists in this case.

Finally, it appears that counsel's client does not exist in California or is not authorized to do business in California. The court has reviewed the California Secretary of State website for corporations, limited liability companies, and limited partnerships authorized to do business in California. It is reported on that website that there is no entity named Bank of America Mortgage authorized to do business in California. The court must have the real parties in interest before it who have an actual case or controversy for an exercise of federal judicial power. U.S. Const. Art. III, Section 2; *Southern Pacific Company v. McAdoo*, 82 F.2d 121, 121-122 (9th Cir. 1936).

A review of the Docket reflects that the well known bank, Bank of America, N.A. has filed a Notice of Mortgage Payment Change in this case. Clearly Bank of America, N.A. is an entity authorized to do business in California. But the court believes that if Bank of American, N.A. was counsel's client, then he could have so clearly stated.

The objection of Bank of America Mortgage is overruled. FN.1.

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FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtor. If an actual creditor exists and has a claim which is not provided for arrearage exists, the court can envision shortly seeing a motion for relief from the stay.  
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The court shall issue a minute order substantially in the following form holding that:

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is overruled.

10. [15-28843-E-13](#) MARIA ANDRICHUK  
DPC-1 Pro Se

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[28](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) on January 13, 2016. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
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**The court's decision is to sustain the Objection.**

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

1. The Debtor failed to list her prior Chapter 13 filings on the petition, Case Nos. 12-20590 and 14-23405.
2. The Debtor cannot make the payments under the plan and the documents are incomplete:
  - a. Schedule J lists Debtor's net income as \$1,083.00. Section 1.01 lists the plan payments in the amount of \$75.00 per month.

- b. Schedule I states the Debtor has been employed with SKYVA Construction Inc for five years and in addition to her gross wages, she receives \$750.00 per month from and undisclosed source. In the Debtor's prior case, the Debtor listed her income was derived from babysitting and family support. The Debtor admitted at the Meeting of Creditors that the sources of her income is from the following three sources:
    - i. SKYVA Construction where she is an Assistant Project Manager, her gross monthly income is approximately \$1,400.00.
    - ii. Part-time babysitting. Average income \$800.00; she admitted this income varies month to month.
    - iii. Her non-filing spouse receives a Pension income in the amount of \$894.00 per month.
  - c. The Debtor failed to list a dividend to the unsecured creditors.
  - d. The Debtor lists her residence as 5781 Old Antelope North Road, Antelope, California. The value and secured claim amount are listed as \$225,000.00. Schedule J does not list an ongoing mortgage payment. The plan does not list Nationstar Mortgage. The treatment to and of Nationstar Mortgage is not clear.
  - e. It is not clear if the Debtor has listed all real property. In the Debtor's prior case lists real property located at 1757 Park Oak Dr., Roseville, CA.
  - f. It is not clear if the Debtor completed Schedule F.
  - g. The Statement of Financial Affairs is incomplete. Debtor lists 1400 SKYVA Construction Inc and 750 other in Question #1 and provides no other information in the entire document.
- 3. Debtor has failed to provide the Trustee with her Employer Payment Advices received 60 days prior to filing.
  - 4. Debtor has failed to provide the Trustee with a tax transcript or copy of her Federal Income Tax Return with attachments for the most recent pre-petition year.
  - 5. The Debtor's plan fails the liquidation analysis of 11 U.S.C. § 1325(a)(4).

The Trustee's objections are well-taken.

Trustee alerts the court that the Debtor filed previous Chapter 13 petition, Case Nos. 12-20590 and 14-23405. The Debtor's recent bankruptcy case

has implications for the duration of the automatic stay, see 11 U.S.C. § 362(c)(3), but is not by itself reason to deny confirmation.

The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The Trustee further asserts that the Debtor has failed to properly fill out the plan and the Debtor's schedules. The Trustee highlights that the Debtor failed to list a dividend for unsecured creditors, failed to list prior bankruptcies, failed to completely disclose creditors, and failed to complete the Statement of Financial Affairs. The court cannot and will not confirm a plan when the Debtor has failed to fully and completely disclose all necessary information. As the court currently reviews the filings by the Debtor, the schedules and plan are not complete, and, therefore, the objection is sustained.

The Trustee opposes confirmation of the Plan on the basis that the Debtor's plan may fail the Chapter 7 Liquidation Analysis under 11 U.S.C. §1325(a)(4). Trustee states that Debtor has non-exempt equity in the amount of \$3,050.00 by the Debtor fails to propose a dividend to unsecured creditors. Additionally, the Debtor has failed to file a Spousal Waiver for use of the California State Exemptions. The objection is sustained.

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

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

11. [15-28843-E-13](#) MARIA ANDRICHUK  
EAT-1 Pro Se

OBJECTION TO CONFIRMATION OF  
PLAN BY NATIONSTAR MORTGAGE,  
LLC  
1-12-16 [[21](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

-----  
Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee and Office of the United States Trustee on January 12, 2016. By the court's calculation, 28 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
-----.

**The court's decision is to sustain the Objection.**

Nationstar Mortgage LLC, the Creditor, opposes confirmation of the Plan on the basis that the plan fails to list the Creditor's claim and does not propose to cure the default of the Debtor. Proof of Claim No. 2 has been filed asserting Creditor's secured claim, which is *prima facie* evidence of such claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The Creditor's objections are well-taken.

11 U.S.C. § 1322(a) is the section of the Bankruptcy Code that

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

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

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

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

However, these three possibilities are relevant only if the plan provides for the secured claim.

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

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

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

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

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

The Objection to the Chapter 13 Plan filed by the

Creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

12. [11-20146-E-13](#) **TIMOTHY GAINES** **MOTION TO AVOID LIEN OF**  
**MOH-2** **Michael O'Dowd Hays** **DISCOVER BANK**  
**1-22-16 [81]**

**Tentative Ruling:** The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

Correct Notice NOT Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, and Office of the United States Trustee on January 27, 2016. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

**The Motion to Avoid Judicial Lien is denied without prejudice.**

This Motion requests an order avoiding the judicial lien of Discover Bank ("Creditor") against property of Timothy L. Gaines ("Debtor") commonly known as 3443 Charlene Avenue, Oroville, California (the "Property").

Unfortunately, the Debtor failed to provide sufficient notice to necessary parties. Pursuant to Local Bankr. R. 9014-1(f)(2), the Motion required a minimum of 14-days notice. Here, the Debtor only provided 13-days notice.

In light of the Debtor failing to provide sufficient notice, 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED  
RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

#### **ALTERNATIVE RULING**

This Motion requests an order avoiding the judicial lien of Discover Bank ("Creditor") against property of Timothy L. Gaines ("Debtor") commonly known as 3443 Charlene Avenue, Oroville, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$12,309.44. An abstract of judgment was recorded with **Butte** County on February 5, 2008, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$90,000 as of the date of the petition. The unavoidable consensual liens total \$58,715.06 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$31,284.94 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

#### **ISSUANCE OF A COURT DRAFTED ORDER**

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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



required to file a written response or opposition to the motion. At the hearing -----.

**The Motion to Avoid Judicial Lien is denied without prejudice.**

This Motion requests an order avoiding the judicial lien of Dodeka, LLC and or Sunlan LDP, LLC ("Creditor") against property of Timothy L. Gaines ("Debtor") commonly known as 3443 Charlene Avenue, Oroville, California (the "Property").

Unfortunately, the Debtor failed to provide sufficient notice to necessary parties. Pursuant to Local Bankr. R. 9014-1(f)(2), the Motion required a minimum of 14-days notice. Here, the Debtor only provided 13-days notice.

In light of the Debtor failing to provide sufficient notice, 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 Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 MOVANT CAN SHOW PROPER GROUNDS FOR WHICH THE REQUESTED RELIEF MAY BE ENTERED IN LIGHT OF THE FORGOING ISSUES**

**ALTERNATIVE RULING**

This Motion requests an order avoiding the judicial lien of Dodeka, LLC and or Sunlan LDP, LLC ("Creditor") against property of Timothy L. Gaines ("Debtor") commonly known as 3443 Charlene Avenue, Oroville, California (the "Property").

A judgment was entered against Debtor in favor of Creditor in the amount of \$8,591.60. An abstract of judgment was recorded with Butte County on May 12, 2010, which encumbers the Property.

Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$90,000 as of the date of the petition. The unavoidable consensual liens total \$58,715.06 as of the commencement of this case are stated on Debtor's Schedule D. Debtor has claimed an exemption pursuant to Cal. Civ. Proc. Code § 704.730 in the amount of \$31,284.94 on Schedule C.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

### **ISSUANCE OF A COURT DRAFTED ORDER**

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

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

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtor(s) 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 judgment lien of Dodeka, LLC and or Sunlan LDP, LLC, California Superior Court for Butte County Case No. 143825, recorded on May 12, 2008, Document No. 2010-0015503 with the Butte County Recorder, against the real property commonly known as 3443 Charlene Avenue, Oroville, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

14. [15-29147-E-13](#) JOHN QUIROZ  
DPC-1 Richard Kwun

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[23](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

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

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
-----.

**The court's decision is to sustain the Objection.**

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

1. The Debtor failed to provide the Trustee with copies of Employer Payment Advices.
2. The Debtor failed to provide the Trustee with a tax transcript or a copy of his Federal Income Tax Return with attachments for the most recent pre-petition tax year.

3. The Debtor amended Schedules B, C, I, and J, the day before the meeting of creditors.
4. The Debtor is delinquent \$100.00 in plan payments and the Trustee has not received any plan payments from the Debtor.

The Trustee's objections are well-taken.

The Debtor has not provided the Trustee with employer payment advices for the 60-day period preceding the filing of the petition as required by 11 U.S.C. § 521(a)(1)(B)(iv). Also, the Trustee argues that the Debtor did not provide either a tax transcript or a federal income tax return with attachments for the most recent pre-petition tax year for which a return was required. See 11 U.S.C. § 521(e)(2)(A); 11 U.S.C. § 1325(a)(9); Fed. R. Bankr. P. 4002(b)(3). The Debtor has failed to provide all necessary pay stubs and has failed to provide the tax transcript. These are independent grounds to deny confirmation. 11 U.S.C. § 1325(a)(1).

The basis for the Trustee's objection is that the Debtor is \$100.00 delinquent in plan payments and has failed to make any plan payments to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

As to the Trustee's third objection, while not an independent ground to deny confirmation, the Trustee's inability to review all the information prior to the Meeting of Creditors makes it difficult for the Debtor and the court to determine the viability and feasibility of any plan.

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

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

15. [13-23153](#)-E-13 PATRICIA PETERSON  
SAC-1 Mikalah Liviakis

MOTION TO VALUE COLLATERAL OF  
THE BANK OF NEW YORK MELLON  
TRUST COMPANY, N.A.  
1-25-16 [[38](#)]

**Tentative Ruling:** The Motion to Value was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).

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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on January 25, 2016. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion to Value was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
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**The Motion to Value secured claim of The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. successor to JPMorgan Chase Bank N.A., as Indentured Trustee for GMACM HOME EQUITY TRUST 2006-HE2 ("Creditor") is granted and Creditor's secured claim is determined to have a value of \$00.00.**

The Motion to Value filed by Patricia Peterson ("Debtor") to value the secured claim of The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. successor to JPMorgan

Chase Bank N.A., as Indenture Trustee for GMACM HOME EQUITY LOAN TRUST 2006-HE2 ("Creditor") is accompanied by Debtor's declaration. FN.1. Debtor is the owner of the subject real property commonly known as 11404 Melea Road, Wilton, California ("Property"). Debtor seeks to value the Property at a fair market value of \$195,000.00 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).

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FN.1. The court and Motion recognize that on April 30, 2013, an order valuing the Property at \$195,000 was granted. However, in that Motion, Debtor named the Creditor as Ocwen Loan Servicing, LLC. This Motion serves to ensure that the proper creditor is named in the order issued by the court.  
-----

The valuation of property which 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 senior in priority first deed of trust secures a claim with a balance of approximately \$220,398.94. Creditor's second deed of trust secures a claim with a balance of approximately \$64,000.00. 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 in the secured amount of the claim 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 for Valuation of Collateral filed by Patricia Peterson ("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 The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. successor to JPMorgan Chase Bank N.A., as Indenture Trustee for GMACM HOME EQUITY LOAN TRUST 2006-HE2 secured by a second in priority deed of trust recorded against the real property commonly known as 11404 Melea Road, Wilton, 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 \$195,000.00 and is encumbered by senior liens securing claims in the amount of \$220,398.94 which exceed the value of the Property which is subject to Creditor's lien.

16. [15-27953-E-13](#) SHARON PHELPS MOTION TO CONFIRM PLAN  
JLB-1 James Brunello 1-11-16 [[40](#)]

**Final Ruling: No appearance at the February 9, 2016 hearing is required.**  
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Debtor's counsel appearing to have accidentally set the Motion for February 9, 2016 and sending an Amended Notice stating the hearing date and time for 3:00 p.m. on February 23, 2016, **this duplicate calendar entry is removed from calendar.**

17. [15-28959-E-13](#) ANTHONY/ANGEL GUTIERREZ OBJECTION TO CONFIRMATION OF  
PPR-1 Thomas Gillis PLAN BY BANK OF AMERICA, N.A.  
12-8-15 [[18](#)]

**Final Ruling: No appearance at the February 9, 2016 hearing is required.**  
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 13 Trustee and Office of the United States Trustee on December 8, 2015. By the court's calculation, 63 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion. The defaults of the non-responding parties in interest are entered.

**The court's decision is to overrule the Objection.**

Bank of America N.A., the Creditor, opposes confirmation of the Plan on the basis that:

1. The plan does not provide for the payment of the Creditor's pre-petition arrearages.
2. Debtor's plan improperly attempts to modify the Creditor's interest.

No evidence is presented in opposing confirmation. No proof of claim has been filed by Creditor. No simple declaration has been filed by a Bank officer or employee testifying under penalty of perjury that such debt exists. The court is only presented with counsel's arguments of "facts" for which no evidence is provided.

The objection also fails on the law. It appears that Creditor contends that since Debtor listed a different amount for an arrearage than Creditor's counsel argues, the Debtor can modify creditor's claim.

The clear, plain language of the Chapter 13 Plan provides that it is (or will be if ever filed) Creditor's proof of claim or an order of the court determining the amount of the claim which controls as to the amount of Creditor's claim. Chapter 13 Plan ¶ 2.04, Dckt. 7.

Finally, the Plan as presented, if confirmed would grant Bank of America, N.A. relief from the automatic stay. Chapter 13 Plan Class 4 treatment for Bank of America, N.A. secured claim, ¶ 2.11; *Id.* FN.1.

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FN.1. The rejection of this objection may be but a Pyrrhic victory for the Debtors. If this asserted creditor is correct and an unprovided for arrearage exists, Debtors and counsel would have to prepare a modified plan, motion to confirm modified plan, evidence to support the modified plan, notice a hearing, and conduct a hearing on the proposed modified plan. Any such proceedings because of the unprovided for cure of the arrearage would be clearly anticipated work to be covered by the no-look fee and likely not be reasonable additional costs and expenses if counsel has chosen to opt out of the no-look fee.  
-----

The Objection is overruled.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is overruled.

18. [15-28961](#)-E-13 JOSE GODINEZ  
APN-1 Mark Wolff

OBJECTION TO CONFIRMATION OF  
PLAN BY WELLS FARGO BANK, N.A.  
12-17-15 [[21](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

-----  
Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee and Office of the United States Trustee on December 17, 2015. By the court's calculation, 54 days' notice was provided. 14 days' notice is required.

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
-----.

**The court's decision is to sustain the Objection.**

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

1. The Debtor's plan does not provide sufficient adequate protection payments and fails to indicate that the interest is a purchase money security interest for personal property.

The Creditor's objections are well-taken. Creditor has filed Proof of Claim No. 2, which is prima facie evidence of the obligation. *Wright v. Holm*

(*In re Holm*), 931 F.2d 620, 623 (9th Cir. 1991); see also *United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

The objecting creditor, who holds a security interest in personal property, also alleges that the plan violates 11 U.S.C. § 1325(a)(5)(B)(iii)(II) because the amount of the periodic payments it proposes to pay the creditor are insufficient to provide it with adequate protection during the period of the plan. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988), stands for the proposition that "[a]dequate protection is intended to protect creditors from the diminution in value of their collateral during the pendency of a bankruptcy petition."

*Timbers*, however, interprets the meaning of the phrase "adequate protection" for purposes of 11 U.S.C. § 362. *Timbers*, 484 U.S. at 369-70. 11 U.S.C. § 361 provides that:

[w]hen adequate protection is required under section 362, 363, or 364 ... of this title of an interest of an entity in property, such adequate protection may be provided by (1) requiring the trustee to make a cash payment or periodic cash payments, to the extent that the stay under section 362 of this title ... results in a decrease in the value of such entity's interest in such property.

11 U.S.C. § 361 says nothing about "adequate protection" for purposes of 11 U.S.C. § 1325(a)(5)(B)(iii)(II), and the court will not lightly assume such silence to be unintentional. See, e.g., *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1233 (9th Cir. 2008) ("Accordingly, we cannot find in Congress' silence [in one section of an Act] an intent to create a private right of action where it was not silent in creating such a right to similar equitable remedies in other sections of the same Act.").

Neither the Ninth Circuit nor any of its sister circuits has considered the meaning of the phrase "adequate protection" as it is used in 11 U.S.C. § 1325 (perhaps unsurprisingly, since the phrase was only added to the section by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). However, several bankruptcy courts that have considered the issue have found that payments to creditors with secured claims under § 1325 must always at least equal the amount of depreciation of the collateral. See, e.g., *In re Sanchez*, 384 B.R. 574, 576 (Bankr. D. Or. 2008); *In re Denton*, 370 B.R. 441, 448 (Bankr. S.D. Ga. 2007). The court will apply this rule.

The objecting creditor alleges that its collateral declines in value every month. Since the creditor estimates the value of its collateral at \$19,925.40, it asserts it is entitled to a \$495.09 monthly payment. The plan provides only for a \$367.00 monthly payment. While the Creditor's argument is based in part due to the low interest rate, the crux of the Creditor's opposition is the lack of sufficient adequate protection payments. In the absence of any countervailing evidence, the court accepts the objecting creditor's argument under 11 U.S.C. § 1325(a)(5)(B)(iii)(II), and sustains the objection on this basis.

As to the Creditor's objection that the plan does not indicate that the Creditor's interest is a purchase money security interest, the court agrees

that the plan does not indicate such. While this may be a scrivener's error, the failure to provide sufficient adequate protection payments along with the failure to indicate that the Creditor's interest is that of a purchase money security interest, the plan cannot be confirmed.

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

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

19. [15-28961](#)-E-13 JOSE GODINEZ  
DPC-1 Mark Wolff

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[28](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

-----  
Local Rule 9014-1(f)(2) Motion.

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

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
-----.

**The court's decision is to sustain the Objection.**

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

1. The Debtor is \$4,300.00 delinquent in plan payments and has failed to make any plan payments to date.
2. Debtor's plan relies on a Motion to Value Collateral of Franklin Credit Management.

3. The Debtor has failed to file a Spousal Waiver for use of the California State Exemptions under the California Code of Civil Procedure § 703.140.

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$4,300.00 delinquent in plan payments and has failed to start making plan payments to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

A review of the Debtor's plan shows that it relies on the court valuing the secured claim of Franklin Credit Management. However, the Debtor has failed to file a Motion to Value the Collateral of Franklin Credit Management. Without the court valuing the claim, the plan is not feasible. 11 U.S.C. § 1325(a)(6). Therefore, the Trustee's objection is sustained.

As to the Trustee's third objection, the Trustee filed an Objection to Debtor's Exemptions based on the same grounds. Dckt. 32. While the failure to file the waiver is not, in and of itself, grounds to deny confirmation, the failure to provide all necessary documentation to claim certain exemptions does raise concerns over whether the plan and the filing itself is Debtor's best efforts.

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

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan is not confirmed.

20. [13-25371-E-13](#) ROY/MICHELLE MARIANO  
WW-2 Mark Wolff

MOTION TO VALUE COLLATERAL OF  
WELLS FARGO BANK, N.A.  
1-12-16 [[56](#)]

**Tentative Ruling:** The Motion to Value 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 by the court.

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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, and Creditors on January 12, 2016. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion to Value 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 and other parties in interest are entered.

**The Motion to Value secured claim of Wells Fargo Bank, N.A. ("Creditor") is denied without prejudice.**

The Motion to Value filed by Roy and Michelle Mariano ("Debtors") to value the secured claim of Wells Fargo Bank, N.A. ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of the subject real property commonly known as 8709 Elfin Court, Elk Grove, California ("Property"). Debtor seeks to value the Property at a fair market value of \$245,000.00 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).

However, the Debtor failed to properly serve the Creditor.

The Motion on its face identifies the Creditor as being Wells Fargo Bank, N.A., which is a federally insured financial institution. Congress

created a specific rule to provide for service of pleadings, including this contested matter, on federally insured financial institution, Federal Rule of Bankruptcy Procedure 7004(h), which provides

(h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless-

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Here, Debtors served Wells Fargo Bank, N.A. at several locations, including at the address stated on the FDIC and California Secretary of State for the Bank, but neglected to serve any of the addresses by certified mail to an officer as required by the Federal Rules of Bankruptcy Procedure. None of the exceptions in Federal Rule of Bankruptcy Procedure 7004(h) apply.

Therefore, because the Debtor failed to properly serve the Motion pursuant to Fed. R. Bankr. P. 7004(h), 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 for Valuation of Collateral filed by Roy and Michelle Mariano ("Debtors") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

21. [11-20572-E-13](#) JOHANNES GIORGISE MOTION TO MODIFY PLAN  
DPC-6 Mark Wolff 12-29-15 [[289](#)]

**Final Ruling:** No appearance at the hearing is required.  
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The Chapter 13 Trustee having filed a Withdrawal of the Motion to Confirm, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) and Federal Rules of Bankruptcy Procedure 9014 and 7041 **the Motion to Confirm was dismissed without prejudice, and the matter is removed from the calendar.**

22. [12-25574-E-13](#) JASON/MARGARET KHAN CONTINUED MOTION FOR OMNIBUS  
PGM-1 Peter Macaluso RELIEF UPON DEATH OF DEBTOR  
10-29-15 [[52](#)]

**Tentative Ruling:** The Motion to Substitute 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 Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on October 29, 2015. By the court's calculation, 40 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). 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 and other parties in interest are entered.

**The Motion to Substitute is denied without prejudice.**

Joint Debtor, Jason Khan, seeks an order approving the motion to substitute the Joint Debtor for the deceased Debtor, Margaret Khan. This motion is being filed pursuant to Federal Rule Of Bankruptcy Procedure 1004.1.

The Debtor filed for relief under Chapter 13 on March 22, 2012. On August 31, 2012, the Debtor's Chapter 13 Plan was confirmed. Dckt. 36. On September 1, 2015, Debtor Margaret Khan passed away. The Joint Debtor asserts that he is the lawful successor and representative of the Debtor.

Pursuant to Federal Rule of Bankruptcy Procedure 1004.1, the Joint Debtor requests authorization to be substituting in for the deceased debtor and to perform the obligations and duties of the deceased party in addition to performing her own obligations and duties. The Suggestion of Death was filed on October 29, 2015. Dckt. 52. Joint Debtor is the husband of the deceased party and is the successor's heir and lawful representative.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an opposition to the instant Motion on November 18, 2015. Dckt. 58. The Trustee objects on the following grounds:

1. The Debtor does not cite the legal authority of continued administration of the case.
2. It is not clear if the deceased Debtor had any life insurance as no policies were listed in the most recent Schedules B and C. a life insurance expense in the amount of \$28.46 was listed on Schedule J. Dckt. 22.
3. The Motion does not address any survivor benefits. A pension through Operating Engineers retirement fund with a value of \$9,207.95 and a 401(k) through Teichert with a value of \$8,626.45 were listed on Schedule B. Both Assets were listed on Schedule C and exempted in those amounts. It is not clear which Debtor these assets belonged to.
4. The Surviving Debtor has offered no explanation as to how he will be able to pay th expenses and fund the plan after losing the deceased Debtor's income. The Surviving Debtor also failed to file supplemental Schedules I and J.

**DEBTOR'S REPLY**

The Surviving Debtor filed a reply on November 23, 2015. Dckt. 61. The surviving Debtor responds as follows:

1. Further administration of the case is possible because the Surviving Debtor is the deceased Debtor's husband and successor in interest. The Surviving Debtor states that he intends to complete the plan. Dckt. 55. Additionally, the Surviving Debtor

asserts that it is in the best interest of the parties to continue the case because there is a confirmed plan.

2. The Surviving Debtor did not receive anything more than a social security death benefit of \$255.00 which was used for the funeral of the deceased Debtor.
3. The pension belongs to the Surviving Debtor and Operating Engineers.
4. The Debtor's income was based on the surviving Debtor's employment and a contribution from his deceased wife of approximately \$1,600.00 per month, less \$200.00 for taxes for 1099 work. The Debtor states that while the income from the deceased Debtor has been eliminated, the Surviving Debtor does have fewer expenses as his daughters are now 19 and 26 years of age and no longer require food and other expenses originally contemplated in the 2012 budget. The Debtor acknowledges the need to amend Schedules I and J to ensure the ongoing feasibility of the plan.

**DECEMBER 8, 2015 HEARING**

At the hearing, the court continued the instant Motion to 3:00 p.m. on January 12, 2015. Dckt. 65. The court ordered that the Debtor shall file and serve on or before December 22, 2015 supplemental Schedules I and J. Any opposition or reply was ordered to be filed and served on or before January 5, 2016. The court contemplated that this would allow the Surviving Debtor to address all of the issues in one omnibus motion, rather than granting only partial relief and requiring one or more additional motions.

**TRUSTEE'S RESPONSE**

The Trustee filed a response to the instant Motion on January 5, 2016. Dckt. 66. The Trustee states that the Debtor failed to file supplemental Schedules by the December 22, 2015 deadline. Additionally, the Trustee has not been advised if a life insurance exists.

**SUPPLEMENTAL SCHEDULE I AND J**

On January 29, 2016, over a month after the court's original deadline and seven days after the extended deadline (Order, Dckt. 71), the Debtor filed Supplemental Schedule I and J. Dckt. 75. The following chart provides the amendments to the schedules:

<u>Schedule I</u>	<u>May 1, 2012</u>	<u>January 29, 2016</u>	<u>Difference</u>
Employment:	Grade Setter at Top Grade Construction (8 months)	Labor at Kdw Construction (2 years and 8 months)	
Gross Wages	\$6,988.28	\$3,917.33	<\$3,070.95>

Payroll Deductions	\$1,686.79	\$1,089.92	<\$596.87>
Monthly Income (including deceased spouse)	\$6,717.74	\$2,827.14	<\$3,890.60>

<b>Schedule J</b>	<b>May 1, 2012</b>	<b>January 29, 2016</b>	<b>Difference</b>
Rent/Mortgage	\$1,312.26	\$1,305.69	<\$6.57>
Electricity, heat, natural gas	\$250.00	\$280.00	\$30.00
Water and sewer	\$82.00	\$83.26	\$1.36
Telephone, cable, cell phone, internet	\$395.00	\$152.00	<\$243.00>
Pest Control	\$26.00	\$0.00	<\$26.00>
Clothing, Laundry, Dry Cleaning	\$260.00	\$10.00	<\$250.00>
Transportation	\$550.00	\$125.00	<\$425.00>
Recreation, clubs, and entertainment	\$0.00	\$8.00	\$8.00
Insurance	\$173.46	\$173.46	\$0.00
Tax	Tax Withholdings for 1099 - \$200.00	Vehicle Reg - \$125.00	<\$175.00>
Time Share Installment	\$178.68	\$0.00	<\$178.68>
Maintenance	\$48.46	\$0.00	<\$48.46>
Registration	\$52.88	\$0.00	<\$52.88>
Food	\$1,075.00	\$100.00	<\$975.00>
Home Maintenance	\$250.00	\$0.00	<\$250.00>
Medical and Dental	\$350.00	\$6.00	<\$344.00>
Personal Care	\$210.00	\$0.00	<\$210.00>
Pet Food and Expenses	\$130.00	\$0.00	<\$130.00>
<b>TOTAL</b>	<b>\$6,173.74</b>	<b>\$2,283.41</b>	<b>&lt;\$3,890.33&gt;</b>

## DEBTOR'S REPLY

Debtor filed a reply on February 2, 2016. Dckt. 76. The Debtor apologizes for the delay in filing the supplemental Schedules I and J and states that he is still grieving the death of his spouse.

## DISCUSSION

Federal Rule of Bankruptcy Procedure 1016 provides that, in the event the Debtor passes away, in the 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 provides "[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 representation. 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, 16<sup>TH</sup> EDITION, §7025.02, which states [emphasis added],

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. 5 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...**

*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 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.

Here, the court shares the concerns of the Trustee over the continued feasibility and administration of the case remains.

First, it is worth noting that the Debtor delayed in filing supplemental Schedules as ordered by the court. The Debtor was ordered to file the supplemental Schedules by the extended January 22, 2015 deadline. Dckt. 71. The Debtor did not file the Schedules until January 29, 2016. Dckt. 75. Furthermore, the Debtor does not provide any declaration to substantiate the dramatic changes in Schedules I and J, especially in light of there being three years between the updated information. As discussed supra, the Debtor's Schedules I and J appear dramatically different, with numerous expenses either being dramatically reduced or eliminated. While it is clear this is due to the death of the deceased Debtor and also the fact Debtor's family moved out of the house, the Debtor has still failed to provide a declaration or testimony substantiating this changes.

The instant Motion was filed on October 29, 2015. Dckt. 52. In that time, the Motion has been continued two separate times due to the Debtor and Debtor's counsel failing to provide complete, up-to-date, and accurate budgets to determine if the case, in fact, is better continuing. In that time, though, Debtor and Debtor's counsel have continued to fail to disclose all necessary information or to comply with court ordered deadlines.

Without any declaration to explain the changes in income and expenses, the Debtor has not sufficiently shown grounds that administration of the case is in the best interests of all parties.

Therefore, 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 Substitute 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.

23. [16-20174-E-13](#) KATRINA GOMEZ  
RJ-1 Richard Jare

MOTION TO VALUE COLLATERAL OF  
CAPITAL ONE AUTO FINANCE  
1-26-16 [[15](#)]

Tentative Ruling: The Motion to Value secured claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

-----  
Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 13 Trustee, Creditors, parties requesting special notice, and Office of the United States Trustee on January 26, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Value secured claim was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----.

**The Motion to Value secured claim of Capital One Auto Finance ("Creditor") is granted and the secured claim is determined to have a value of \$13,400.00.**

The Motion filed by Katrina Gomez ("Debtor") to value the secured claim of Capital One Auto Finance ("Creditor") is accompanied by Debtor's declaration. Debtor is the owner of a 2012 Toyota Camry ("Vehicle"). The Debtor seeks to value the Vehicle at a replacement value of \$13,400.00 as of the petition filing date. As the owner, the Debtor's opinion of value is

evidence of the asset's value. See Fed. R. Evid. 701; see also *Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

The lien on the Vehicle's title secures a purchase-money loan incurred in July 14, 2013, which is more than 910 days prior to filing of the petition, to secure a debt owed to Creditor with a balance of approximately \$18,900.00. Therefore, the Creditor's claim secured by a lien on the asset's title is under-collateralized. The creditor's secured claim is determined to be in the amount of \$13,400.00. See 11 U.S.C. § 506(a). The valuation motion pursuant to Federal Rule of Bankruptcy Procedure 3012 and 11 U.S.C. § 506(a) is granted.

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

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

The Motion for Valuation of Collateral filed by Katrina Gomez ("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 [name of creditor] ("Creditor") secured by an asset described as 2012 Toyota Camry ("Vehicle") is determined to be a secured claim in the amount of \$13,400.00, and the balance of the claim is a general unsecured claim to be paid through the confirmed bankruptcy plan. The value of the Vehicle is \$13,400.00 and is encumbered by liens securing claims which exceed the value of the asset.

24. [15-29079-E-13](#) RUTH AUSTIN  
Mark Wolff

HEARING RE: CONFIRMATION OF  
PLAN  
11-23-15 [5]

**Tentative Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). 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.**

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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, creditor Redwood Credit Union on December 28, 2015. By the court's calculation, 43 days' notice was provided. Also served Creditor Chase Automotive Finance on January 19, 2016. By the court's calculation, 21 days notice was provided.

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

**The Motion to Confirm the Amended Plan is granted.**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation. The Debtors have provided evidence in support of confirmation. No opposition to the Motion has been filed by the Chapter 13 Trustee or creditors. 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 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 Chapter 13 Plan filed on November 23, 2015 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.

25. [15-28983-E-13](#) MANUEL/VIRGINIA MADRID  
DPC-1 Matthew Grech

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[14](#)]

**Final Ruling:** No appearance at the February 9, 2016 hearing is required.  
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Local Rule 9014-1(f)(2) Motion.

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

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

**The court's decision is to sustain the Objection.**

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

1. The Debtor has failed to make any plan payments to date.
2. The Debtor's plan is not the Debtor's best efforts because the Debtor is over the median income but does not propose any dividend to unsecured creditors. The Trustee argues that the Debtor's Current Monthly Income takes improper deductions and does not show that some of the expenses are necessary. Additionally, the Debtor's Schedule I contains a voluntary contribution that should be applied to plan payments and fails to report tax refunds received.
3. Failed to list prior bankruptcy cases.
4. The Debtor's plan lists that \$2,500.00 shall be paid through the plan in attorney's fees but does not provide a dividend for administrative expenses to be paid by the Trustee.

On January 29, 2016, the Debtor filed an amended plan and accompanying Motion to Confirm Amended Plan. Dckts. 27 and 31. The hearing on the Motion is set for March 15, 2016 at 3:00 p.m.

The Trustee's objections are well-taken. Additionally, the Debtor filing a new plan acts as a de facto withdrawal of the original plan filed on November 19, 2015. Therefore, the Plan does not comply with 11 U.S.C. §§ 1322

and 1325(a). The objection is sustained and the December 3, 2015 Plan is not confirmed.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan filed on November 19, 2015 is not confirmed.

26. [15-29089](#)-E-13 JORDAN/HANNAH DONAHUE  
DPC-1 Mikalah Liviakis

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[21](#)]

**Final Ruling:** No appearance at the February 9, 2016 hearing is required.  
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Local Rule 9014-1(f)(2) Motion.

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

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. Upon review of the Motion and supporting pleadings, and the files in this case, the court has determined that oral argument will not be of assistance in ruling on the Motion.

**The court's decision is to overrule the Objection.**

David P. Cusick, the Chapter 13 Trustee, opposes confirmation of the Plan on the basis that the Debtor failed to file all pre-petition tax returns required for the four years preceding the filing of the petition.

On February 2, 2016, the Trustee filed a notice of Withdrawal, indicating that the Trustee has received a copy of the Debtor's 2012 federal tax return and the Internal Revenue Service has filed an amended proof of claim.

Therefore, in light of the Trustee's withdrawal, the objection is overruled. Upon independent review of the plan and no objections outstanding, the Plan does comply with 11 U.S.C. §§ 1322 and 1325(a) and the Plan is confirmed.

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

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

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

**IT IS ORDERED** that the Objection is overruled, Debtor's Chapter 13 Plan filed on November 23, 2015 is confirmed. Counsel for the Debtor shall prepare an appropriate order



with counsel, the instant Objection is continued to 3:00 p.m. on February 23, 2016.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is continued to 3:00 p.m. on February 23, 2016 to be heard in conjunction with the Trustee's Objection to Exemptions (Dckt. 36).

28. [15-28894-E-13](#) CASSIUS BELL  
DPC-1 Chinonye Ugorji

OBJECTION TO CONFIRMATION OF  
PLAN BY DAVID P. CUSICK  
1-13-16 [[19](#)]

**Tentative Ruling:** The Objection to Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

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

The Objection to the Plan was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2) and the procedure authorized by Local Bankruptcy Rule 3015-1(c)(4). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. At the hearing -----  
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**The court's decision is to sustain the Objection.**

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

1. The Debtor is delinquent \$159.00 in plan payments and has paid \$0.00 into the plan to date.
2. The Debtor's plan is not the Debtor's best efforts:
  - a. Debtor understates his income on the Current Monthly Income and leaves out the non-filing spouse's income.

According to the Trustee's calculations, the Debtor is an over the median debtor and is required to propose a 60 month plan.

- b. The Debtor fails to provide for tax refunds when the Debtor and Debtor's non-filing spouse both received refunds in 2014.
3. The Debtor indicates in the plan that there are total unsecured debts of \$5,600.00 when Schedule F indicates a total unsecured debts of \$35,878.04

The Trustee's objections are well-taken.

The basis for the Trustee's objection is that the Debtor is \$159.00 delinquent in plan payments and the Debtor has failed to pay anything into the plan to date. The Debtor's delinquency indicates the Plan is not feasible, and is reason to deny confirmation. See 11 U.S.C. § 1325(a)(6).

As to the Trustee's remaining objections, the court concurs that the plan does not appear to be the Debtor's best efforts. The creditor next alleges that the Plan violates 11 U.S.C. § 1325(b)(1), which provides:

[i]f 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--(A) 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 (B) 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 Debtor's current monthly income does not accurately reflect the household income since the Debtor failed to list the non-filing's spouses income. This led to the Debtor improperly proposing a 36 month plan, when the Debtor is, in fact, an over the median income debtor and must propose a 60 month plan. 11 U.S.C. § 1325(b). Furthermore, the failure to provide provisions for the possible tax refunds and to accurately disclose the amount of unsecured debts, the Plan is not confirmable.

Additionally, on January 12, 2016, the Debtor filed an amended plan and accompanying Motion to Confirm Amended Plan. Dckts. 27 and 28. The hearing on the Motion is set for February 23, 2016 at 3:00 p.m. The Debtor filing a new plan acts as a de facto withdrawal of the original plan filed on December 1, 2015.

Therefore, the Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the December 3, 2015 Plan is not confirmed. The Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a). The objection is sustained and the Plan is not confirmed.

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

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

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

**IT IS ORDERED** that Objection to confirmation the Plan is sustained and the proposed Chapter 13 Plan filed on December 1, 2015 is not confirmed.